



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

November 21, 2016

Ann Blakeney Clark  
Superintendent  
Charlotte-Mecklenburg Schools  
P.O. Box 30035  
Charlotte, NC 28230-0035

Re: OCR Complaint No. 11-16-1145  
Letter of Findings

Dear Superintendent Clark:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on January 29, 2016 against Charlotte-Mecklenburg Schools (the District). The Complainant filed the complaint on behalf of a former student (the Student) who attended XXXX School (the School). The Complainant alleged that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleges the following:

1. The District failed to evaluate the Student to determine his eligibility under Section 504 after learning about his disabilities and need for related aids and services.
2. The District failed to conduct a manifestation determination review prior to placing the Student on long-term suspension and sending the Student to an alternative school even though it was aware of his disabilities.
3. The District failed to adequately respond to disability-based harassment of the Student by his peers at the School.
4. The District treated the Student differently than students without disabilities by giving the Student a punishment (180 days long-term suspension) that was harsher than allowed by the student code of conduct as a result of his disability-related behavior.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District, and interviewed the Complainant and District faculty/staff. After carefully considering all of the information obtained during the investigation, OCR identified compliance concerns regarding Allegations 1 and 2, and identified an area of concern in Allegation 3, all of which the District agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support Allegation 4.

OCR’s findings and conclusions are discussed below.

### **Background**

At the beginning of the 2015-2016 school year, the Student attended the School and was a XXXX in the School’s International Baccalaureate (IB) Program. <XXXX PARAGRAPH REDACTED XXXX>

The Student’s school counselor (the Counselor) called the Complainant to discuss the recommendation for a Section 504 plan in XXXX.

<XXXX PARAGRAPH REDACTED XXXX>

On or around XXXX, the School completed a threat assessment concerning the Student and determined the risk level to be XXXX. On XXXX, the District held a “Disciplinary Team Meeting” concerning the Student’s alleged violation of Rule 26(C) because an administrator at the School recommended further disciplinary action such as more days of suspension, assignment to XXXX. <XXXX SENTENCE REDACTED XXXX>. The District assigned the Student to the XXXX School for the remainder of the school year on or around XXXX, and District staff acknowledged that the School did not hold a Manifestation Determination Review (MDR) prior to the reassignment. The Complainant appealed the reassignment of the Student to the District School Board. During that appeal, the Complainant and District staff both stated that the Complainant informed the District of peer bullying.<sup>1</sup> Similarly, both the Complainant and District staff stated that the Complainant also informed the Board of the Student’s disabilities at her appeal hearing. The Board declined to overturn the District’s reassignment and the Student ultimately completed his XXXX year at the XXXX School. The Complainant reported that the Student received a Section 504 plan in XXXX while he attended the XXXX School. <XXXX SENTENCE REDACTED XXXX>

### **Legal Standards**

OCR analyzed the allegations according to the following legal standards:

#### **Free and Appropriate Public Education**

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<sup>1</sup> The Complainant also alleged to OCR that she made the District aware of bullying of the Student by peers earlier in the school year.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation. The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), also requires a school district to reevaluate a student with a disability before any significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities. If a school district finds that the student's disability caused the misconduct, the district may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student's current educational placement.

### Disability Harassment

A District's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the District's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a District must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

### Different Treatment

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

### Analysis

#### Allegation 1

The Complainant alleged that in early XXXX, prior to the Student's XXXX, she spoke to school staff to request a Section 504 plan for the Student. She stated that a school counselor told her that she should provide documentation of the Student's disability. After the Student's XXXX, she said that she spoke to a counselor at the School who was assigned to work with the Student because his assigned counselor was on leave. The Complainant said that she spoke to this counselor after the School received documentation of the Student's disabilities, and the counselor said that she would look into an evaluation for Section 504. After the Student's XXXX, she said that she spoke to the Student's assigned counselor (the Counselor), about obtaining related aids and services for the Student. The Counselor reportedly told the Complainant that she would look into putting a Section 504 plan in place. Despite her repeated requests, the Complainant alleges that the District failed to evaluate the Student for eligibility for Section 504 or ultimately provide supports to the Student under Section 504.

The District acknowledged that School staff received documentation of the Student's disabilities at least by XXXX, before he returned to school after XXXX. The District alleges, however, that the Complainant told the Counselor that she was not ready to make a decision on the Section 504 plan and would get back to the Counselor when she made a decision during a phone conversation in XXXX. Therefore, the District stated that it did not evaluate the Student because the Complainant did not provide consent to evaluate him.

OCR spoke to the Counselor, who stated that she became aware of the Student’s disabilities a few days before he returned to school after his XXXX. She also acknowledged that she received the recommendation from the Student’s XXXX. In response, she told OCR staff that she called the Complainant in late XXXX. She stated that the Complainant told her that she did not want to move forward with the 504 evaluation process at that time. She said that she did not send or ultimately obtain the “typical form” that would have documented the Complainant’s decision regarding moving forward with a Section 504 evaluation or any other documentation from the Complainant. She stated to OCR that she did not provide any document to the Complainant requesting her consent to evaluate. She told OCR that she was unaware of the District’s consent form at the time she spoke to the Complainant about evaluating the Student for Section 504 services. She also said that there is no written documentation that the Complainant did not consent to an evaluation. There is also no documentation that the Complainant stated she did not want to move forward with the evaluation process.<sup>2</sup>

The District provided OCR with <XXXX SENTENCE REDACTED XXXX>. The District also provided OCR with a letter from the Student’s XXXX dated XXXX, in which the writer requested that the School provide the Student with a Section 504 Plan. The letter notes that this request was due to a diagnosis of XXXX, and states that this disability may impact his social and academic success.<sup>3</sup>

The District Section 504 Handbook lists the “Section 504 Process Steps,” and the description of the initial step states that when “[a] concern about a student is presented by a parent or teacher[,] [t]he Referral of Concern is completed with assistance of the school § 504 Coordinator.” It does go on to state, “If referred to §504, parent/guardian must sign Parent/Guardian Consent for Initial Section 504 Evaluation.” The Counselor told OCR staff that she did not complete a Referral of Concern form or a Parent/Guardian Consent for Initial Section 504 Evaluation form.

The Complainant told OCR staff that she never refused to consent to an evaluation for the Student. She said that she spoke to the Student’s XXXX and they both felt that it was in his best interest to be evaluated for a Section 504 plan. She said she later spoke to the Counselor, on XXXX, who told her that the School would move forward with an evaluation through the Section 504 process. She said that she never heard back from the School concerning the Student’s Section 504 plan.

As indicated above, the District had documentation of the Student’s disability at least by XXXX. The District also provided evidence that it had documentation of the Student’s XXXX due to XXXX concerns prior to XXXX. The District also conducted a threat assessment in XXXX of XXXX in which it noted XXXX concerns. There is no dispute that the District had notice of the Student’s disabilities and a written request that it provide Section 504 services to the Student along with recommended accommodations. Although the District states that the Complainant refused to consent to a Section 504 evaluation, it provided no documentation to support its contention. Further, it acknowledges that it did not follow District policies that would have

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<sup>2</sup> There is also no evidence that School staff provided the Complainant with a copy of the District’s procedural safeguards at any point during this process.

<sup>3</sup> The District also provided a XXXX letter that states that the Student is being treated for XXXX

documented and supported any refusal to provide consent by the Complainant. Finally, the District did not contend or provide evidence, such as mailed consent form or *Referral of Concern*, that it moved forward in the Section 504 evaluation process after the Student was reassigned to the XXXX School.<sup>4</sup> This is true even though the Complainant discussed the Student's disability at the Board appeal hearing. Based on all the above, OCR finds that the District had sufficient information that the Student may have needed related aids and services regarding his disability. Of note, the Student was absent from school for a number of days related to his disability and a physician provided information regarding the impact of that disability on his education. For these reasons, OCR finds that there is sufficient evidence that the District denied the Student a FAPE when it failed to evaluate the Student as required by 34 C.F.R. § 104.35(a).

### Allegation 2

The documents submitted by the District indicate that the Student was assigned to the XXXX School due to a XXXX infraction for the remainder of the XXXX school year. This penalty was assessed on or around XXXX, after the Disciplinary Team Meeting (DTM). The Complainant requested an appeal to the District's School Board, and the Student did not enroll in the XXXX School until approximately XXXX. He ultimately completed the school year at the XXXX School. The District acknowledges that it did not hold a manifestation determination review (MDR) meeting prior to this reassignment. However, as stated above, the District contends that the Complainant declined a Section 504 evaluation before the Student was reassigned, and for this reason it did not hold an MDR.

The Complainant stated that the Student was not able to complete the IB program or compete in athletics after his reassignment to the XXXX School. <XXXX SENTENCE REDACTED XXXX> The Student's Counselor stated that the XXXX School does not offer IB courses but that he was provided the courses he needed to XXXX. The Complainant told OCR staff that the Student only needed to complete XXXX, and he took this course at the XXXX School. She said that he took the rest of his courses online in the XXXX School's computer lab.

Because the Student was not able to continue his IB courses at the XXXX School and the reassignment was for more than ten school days, OCR finds that reassignment was a significant change in placement. As stated above, OCR finds that, prior to the Student's reassignment to the XXXX School, the District had sufficient information to believe that the Student may have required related aids and services. Therefore, the District was required to hold an MDR prior to this reassignment. Although the District contends that the Complainant denied a Section 504 evaluation prior to the reassignment, OCR notes the lack of support for this contention as was discussed in the analysis of Allegation 1. For these reasons, OCR finds that the District did not satisfy the procedural requirements of the Section 504 regulation before changing the Student's placement to the XXXX School.

### Allegation 3

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<sup>4</sup> OCR notes that the Complainant stated that the Student was provided with a Section 504 plan while he attended the XXXX School, but that the District did not provide a copy of this plan or any related documentation.

The Complainant alleged that after the Student's XXXX, students at the school began to harass the Student due to his disability. However, when OCR clarified this allegation, the Complainant noted that the peer-based bullying of the Student was based on a number of factors, one of which she alleged was the Student's disability. Specifically, the Complainant stated that the students at the School learned of the Student's XXXX. <XXXX SENTENCE REDACTED XXXX>. The Complainant also told OCR staff that the peer bullying included students saying, "We always XXXX." <XXXX SENTENCE REDACTED XXXX>

<XXXX 2 PARAGRAPHS REDACTED XXXX>

However, when OCR spoke with the Assistant Principal, she denied that the Student expressed concerns about bullying to her. She told OCR staff that neither the Student nor the Complainant informed her or any School staff of bullying until the Student's Board appeal hearing, after which the Student did not attend the School. She further stated that she did not investigate bullying of the Student.

As previously stated, the Complainant reported to OCR that she provided information about the bullying of the Student to School staff. This was confirmed by the Counselor, who also stated that the Student reported concerns about bullying while he attended the School. In addition, the Complainant provided OCR a copy of a student statement in which another student stated that the internet bullying of the Student was reported to the School.<sup>5</sup>

Based on the information discussed in this section, OCR has concerns about the District's response to possible allegations of disability-based harassment of the Student. The evidence shows that the School did have some information about the Student being "bullied" by his peers and the information included some references that could be interpreted as disability-related. However, because the behavior by the other students included conduct that was not disability-related, OCR has not yet determined whether the alleged bullying of the Student constituted disability-based harassment. Further, because the Student was only in the School for a short period before his reassignment, it is not clear how pervasive and persistent the conduct was and whether it rose to the level of harassment. Prior to the conclusion of OCR's investigation, however, the District agreed to resolve this allegation through the enclosed Resolution Agreement.

#### Allegation 4

Lastly, the Complainant alleged that Student was subjected to unlawful different treatment based on his disability when the District issued the Student a XXXX. She alleged that the Student was discriminated against and subjected to unlawful different treatment compared to students without

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<sup>5</sup> The District's 2015-2016 Parent-Student Handbook states that "Students who feel bullied, harassed or intimidated at school by an adult or another student may use the Intimidation, Bullying, and/or Threats form in the handbook to report the incident." The Counselor, the Principal, and the Assistant Principal stated that the Assistant Principal assigned to the Student would have conducted any investigation into bullying. Here, the Assistant Principal stated that the Student was assigned to her but OCR notes that the Complainant did not provide the District's form to OCR and she did not allege that she completed or submitted it.

disabilities because the District’s Code of Conduct does not allow a 180-day suspension for a threat, but only allows for a 30-day assignment to an alternative placement.

The District asserted that the Student was reassigned to the XXXX School for committing infraction 26(C), XXXX To determine whether the Student was treated differently based on his disability, OCR first investigated whether the Student was treated differently than students without disabilities. The District provided a list of District students from the same learning community as the Student.<sup>6</sup> The District reported that six students in the learning community were issued referrals for 26(C) infractions during the XXXX school year, including the Student. One of the five other students referred for this infraction was identified as a student with a disability. This student received a 35-day assignment to the XXXX School. The other students were not classified as students with disabilities. One student without a disability received a 35-day assignment to the XXXX School. Three others received the same disciplinary response as the Student, which included an assignment to the XXXX School for the remainder of the school year. OCR notes that both the Student and students without disabilities received the same consequence for the infraction and both a student with and without a disability received a lower consequence. However, because one student without a disability received a lower consequence, OCR found that the Complainant established a prima facie case of discrimination.

Therefore, OCR analyzed whether the District provided a legitimate, nondiscriminatory reason for the different treatment of the Student. The District denied that it discriminated against the Student due to his disability and stated that the School issued the disciplinary consequence to the Student in accordance with its Code of Conduct due to the concerns it had about the threats made by the Student, as described above. These threats included specific and documented threats to harm other students, which continued after the Student was issued a consequence for threatening students the first time. OCR found that the District articulated a legitimate non-discriminatory reason.

OCR then analyzed whether the District’s legitimate nondiscriminatory reason was pretext or an excuse for unlawful discrimination. First, OCR reviewed documentation provided by the District and confirmed that the Student did engage in the behaviors that were coded as XXXX. OCR also spoke with School staff who were involved in the investigation of the incidents. The Assistant Principal told OCR staff that she investigated both the XXXX She said that the initial threat by the Student occurred in a classroom and that he told students specifically how he would harm them and what he was recently XXXX for, referring to his XXXX. During the Student’s suspension, she stated that she received copies of XXXX. She said that she received reports that these actions scared students at the School. Based on this, the District stated that School staff determined that the threat was serious enough to suspend the Student and consider moving him to an XXXX environment. The School’s Principal also stated that, based on the information the School gathered, they wanted to involve District administration to determine whether additional actions were appropriate. OCR notes that the information provided by School staff was consistent and corroborated by the District’s documentation.

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<sup>6</sup> The District is divided into nine learning communities. Each learning community has a Learning Community Superintendent who issues final disciplinary consequences for students referred for Disciplinary Team Meetings due to a disciplinary infraction. The XXXX school year was the first year the Learning Community Superintendent served the learning community that includes the School.

<XXXX PARAGRAPH REDACTED XXXX>

OCR also considered the information provided by the Complainant, alleging that the District's suspension and reassignment of the Student violated District policy. As for the Complainant's statement that the Student received a harsher penalty than allowed by the Code of Conduct, OCR found that the District's 2015-2016 Code of Conduct states that reassignment to the Alternative School is an available consequence for Level III infractions. The infraction of 26(C) XXXX is a Level III infraction.

In addition, as discussed above, OCR also obtained disciplinary information concerning other students who were referred for 26(C) infractions. This information shows that the Student received the same disciplinary response as three other students without disabilities.

Based on all the above, OCR finds that there is insufficient evidence of a violation concerning Allegation 4. However, OCR notes the related findings concerning Allegation 2, which is the District's failure to hold an MDR prior to the Student's reassignment to the XXXX School.

### **Conclusion**

On November 21, 2016, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance in Allegations 1 and 2 and areas of concern in Allegation 3. The Agreement entered into by the District is designed to resolve the issues of noncompliance and concern. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the District on XXXX, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Timothy Riveria, the OCR attorney assigned to this complaint, at 202-453-6796 or [Timothy.Riveria@ed.gov](mailto:Timothy.Riveria@ed.gov). You may also contact Katie Teigen, assigned OCR attorney, at 202-453-5564 or [Katie.Teigen@ed.gov](mailto:Katie.Teigen@ed.gov).

Sincerely,

/S/

Kristi R. Harris  
Supervisory Attorney, Team IV  
Office for Civil Rights  
District of Columbia Office

Enclosure

cc: Jill Sanchez-Myers, District Attorney