



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

December 21, 2016

Dr. Monica Smith-Woofter
Superintendent
701 N Church Street
Jackson, NC 27845-0158

Re: OCR Complaint No. 11-16-1185
Letter of Findings

Dear Dr. Smith-Woofter:

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 February 20, 2016 against Northampton County Public Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School). The Complainant alleged that the District discriminated against the Student on the basis of disability and retaliated against the Complainant and the Student. Specifically, the complaint alleges that:

1. The District denied the Student access to Free Appropriate Public Education (FAPE) when it:
 - a. Improperly prevented the Student from attending the School from August 24th to August 28th, 2015; and
 - b. Failed to implement provisions in the Student's IEP relating to classroom and academic accommodations and his Behavioral Intervention Plan since September, 2015.
2. Identified School staff harassed the Student based on his disability by making derogatory and demeaning statements to him.
3. The District retaliated against the Complainant and the Student for exercising their rights to seek an IEP for the Student and for the Complainant's advocacy on behalf of the Student when it:
 - a. Falsely disciplined the Student with the purpose of making him ineligible to participate in extracurricular sports activities in November 2015 and February 2016;
 - b. Engaged in retaliatory harassment of the Student as set out in allegation 2; and
 - c. Required the Complainant to prove her guardianship of the Student for the first time on or about August 27, 2015.

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

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

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.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District staff, including: the School principal, the School counselor, the District behavior support liaison (BSL), the District Exceptional Children Director (EC Director), the Student's math and homeroom teacher, the Student's science teacher, the Student's social studies teacher, the Student's 2014-15 Exceptional Children (EC) teacher, the Student's 2015-16 EC teacher, the Student's summer EC teacher, the School custodian, and the School front office manager/administrative assistant. OCR attempted to interview the Student's language arts teacher but she was out sick on the day scheduled for her interview, which the District later informed OCR was her last day of employment with the District.

After carefully considering all of the information obtained during the investigation, OCR identified sufficient evidence of non-compliance as to allegation 1, which the District agreed to resolve through the enclosed resolution agreement. Prior to completing the investigation into allegation 3(c), the District volunteered to resolve the matter through the enclosed resolution agreement. OCR found insufficient evidence to support allegations 2, 3(a) and 3(b).

In addition, OCR identified a violation regarding the District's failure to promptly and thoroughly investigate Complainant's allegations of harassment. OCR also found sufficient evidence the District failed to reevaluate the Student despite numerous discipline referrals suggesting the Student's BIP was not meeting his needs, and that the District failed to reevaluate the Student and conduct a manifestation determination prior to suspending him for more than 10 days. The District agreed to resolve these violations through the enclosed resolution agreement.

OCR's findings and conclusions are discussed below.

Background

The Student was a XXXX student at the School in the 2015-16 school year. The Student also attended the School during the 2014-2015 school year, although he elected to complete that school year at the District's alternative school so that he could catch up on missed work. The Complainant is the Student's grandmother and guardian.

The Student was found eligible for special education services as a student with a serious XXXX in April 2015. At that time, an Individualized Education Plan (IEP) and Behavior Intervention Plan (BIP) were drafted. His placement was in a general education classroom with counseling services, as well as various accommodations in class, including preferential seating, modified assignments, extended time on assignments, and separate testing. The Student's IEP team convened on August 21, 2015, and again on August 28, 2015, to discuss whether he would continue at the alternative school or return to the School for the start of the 2015-2016 school year. On September 24, 2015, the Student's IEP team reconvened to review and revise his IEP and BIP with an effective date of September 28, 2015.

When the Complainant attended the School's open house just before the beginning of the 2015-16 school year, she discovered for the first time the Student was not enrolled there. The first week of school, from August 24th to 28th, 2015, the Student did not attend classes at any school. Thereafter, he was enrolled at and attended the School through the end of the 2015-16 school year.

Allegation 1(a)

The Complainant alleged the District denied the Student access to FAPE when it improperly prevented Student from attending the School from August 24th to August 28th, 2015.

Legal Standard

Denial of FAPE

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. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. 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.

Analysis

Several weeks before the end of the 2014-15 school year, the Student was transferred to the District's alternative school at the Complainant's request to finish out the 2014-15 school year. The Student completed the end of the 2014-15 school year at the District's alternative school. The Complainant stated that the Student's permanent placement was the School but that she elected to have the Student complete the end of the 2014-15 school year at the alternative school so that he could catch up on missed school work. The IEP in place at the time listed the School as the location of the Student's placement. It was the Complainant's understanding that the Student would return to the School for the 2015-16 school year. The first day of class at the School was August 24, 2015. When the Complainant attended an open house at the School just before the 2015-16 school year started, she discovered for the first time that the Student was not assigned to a classroom at the School. The District acknowledges that the Student's IEP team agreed to reconvene before the start of the 2015-16 school year to discuss whether the Student would remain at the alternative school or return to the School for that school year. The District also acknowledges that it failed to schedule a meeting until the Friday before the first day of school.

The Student's IEP records indicate the District agreed at the April 27, 2015 IEP meeting, when the Student was initially determined eligible, that the location of the Student's placement for the 2015-16 school year would be the School. The District EC Director stated that when the Complainant contacted her about the placement issue in late August 2015, the EC Director looked back at the paperwork and realized the IEP documentation did list the Student's school as the School. She also told OCR that her understanding was that the IEP team was required to reconvene in order the change it.

On August 21, 2015, the District convened an IEP meeting at which they discussed whether the Student would return to the School, and contrary to the Complainant and the Student's preference to have the Student return to the School, the team decided the Student should begin the fall semester at the alternative school program. The Complainant strongly disagreed and advocated for the Student to return to the School. The team reconvened on August 28, 2015 and decided the Student could return to the School on August 31, 2015. During this time the Student missed a week of instruction. The District acknowledged that the Student remained officially enrolled at the School even though he attended the alternative school for a brief period at the end of the 2014-15 school year. The District has been unable to provide any evidence the Student was assigned to a classroom at either the School or the alternative school program from August 24th to August 28th, 2015. As such, OCR finds sufficient evidence that the District was responsible for the fact that the Student did not attend the first week of school and, accordingly, denied the Student a FAPE from August 24th to 28th, 2015.

OCR notes that at an IEP meeting on May 25, 2016, the District acknowledged it owed the Student compensatory education services to make up for its failure to hold a transition IEP meeting prior to the first day of school. The District, in a written letter, agreed to the following:

- a) The Student would attend the District's summer school program from June 20 to June 27, 2016 from 8:30 a.m. to 1:00 p.m. daily with transportation and lunch provided;
- b) To supplement the summer school program, one-on-one instruction from a certified special education teacher would be provided for three hours per week during summer school for a total of 15 hours; and
- c) An additional eight hours of one-on-one instruction would be provided between the end of summer school and the beginning of the following school year.

The Complainant reported to OCR on July 15, 2016, that the District failed to provide the Student with one-on-one instruction as agreed per items b and c above. OCR interviewed the special education teacher who was supposed to provide the one-on-one services to the Student during summer school. The teacher stated that the Student received classroom instruction from approximately 8:50 a.m. until 12:10 p.m., which is shorter than the 8:30 a.m. to 1:00 p.m. schedule the District agreed to provide. The teacher admitted she did not provide the Student with one-on-one instruction on a regular basis. The teacher stated she sometimes pulled the Student out for one-on-one in the first fifteen minutes of classroom instruction but that this was inconsistent. The teacher could not say how many hours of one-on-one instruction she completed with the Student, but based on her account of her schedule with the Student, it is more likely than not it was far less than 15 hours. The teacher did not provide any additional services to the Student after the end of summer school. OCR finds sufficient evidence the District did not

provide the Student with the compensatory education services it determined were appropriate in the May 25, 2016 IEP meeting.

Additionally, although not an issue raised in the complaint, OCR is concerned that the District lacks an understanding of when a change in location of services effects a change in placement, as well as when it is required to convene an IEP team meeting. A change in location does not necessarily effect a change in placement if the Student's educational setting and aids and services will remain unchanged at the new school. Alternatively, whenever a change in location does effect a change in placement – that is, the education setting or aids and services will be different at the new school – the District is required to convene an IEP team meeting to consider the change in placement. The District seemed to have an understanding that it was required to convene an IEP meeting prior to moving the Student back to the School at the start of the 2015-16 school year; yet, it did not hold an IEP meeting when it first transferred him to the alternative school in spring 2015. OCR did not investigate whether the transfer to the alternative school effected a change in placement. OCR nonetheless cautions the District to be aware of its procedural responsibilities under Section 504 to convene an IEP team meeting prior to any change in placement.

Allegation 1(b)

The Complainant alleged the District denied the Student access to FAPE when it failed to implement provisions in the Student's IEP relating to classroom and academic accommodations and his Behavioral Intervention Plan (BIP) since September 2015.

Analysis

Failure to Implement IEP

The Complainant spent several full school days at the School observing the Student's classes in December 2015. Based in part on her observations during that time and in part on information she gained from speaking with the Student and School staff, the Complainant alleged that the School was failing to implement most provisions of the Student's IEP since September 2015.

Counseling

The Student's IEP dated September 28, 2015, required that he receive counseling twice per week for twenty minutes. The District states that at the Student's May 25th, 2016, IEP meeting, the team discussed the matter and agreed to remove counseling from the Student's IEP at that time. With respect to the time period between September 28, 2015 and May 25, 2016, the District admits it did not provide counseling as frequently as required in the Student's IEP.¹ OCR examined the counselor's log of services provided. Based on that record and taking into account the Student's absence record as well as School holidays, OCR finds that the District failed to provide approximately 25 counseling sessions.

¹ The District reported to OCR that it has offered the Student compensatory education services in part for this lapse; however, the Complainant refutes this, and OCR has not received any evidence that any compensatory services were provided for this lapse.

Separate testing

The Student's IEP required the District to provide the Student with a separate room for testing for all academic classes with no more than seven (7) students. The School does not document when it pulls students out for testing other than the state assessments. In his interview with OCR, the Student's 2015-16 school year EC teacher stated that he was usually notified when a state assessment test was upcoming, and in those cases the EC teacher would pull the Student out for testing in separate room. The EC teacher stated that those separate rooms had no more than 7 people in them, as that is the District-wide limit. However, the EC teacher stated that the Student likely was not being pulled out for smaller quizzes in all of the Student's classes. The EC teacher stated that in his inclusion classes, he is called on to pull students out for testing much more frequently than he is for the Student who is not part of the inclusion classes.

The District Behavior Support Liaison (BSL) who works with the Student at the School stated the Student is pulled out for some tests but not for others. In an interview with OCR, the social studies teacher stated she asked the Student's EC teacher to pull the Student out for testing. The District produced a contemporaneous email from the social studies teacher to the Student's EC teacher requesting the Student's EC teacher to pull the Student out for testing from her class. However, his math teacher stated in an interview with OCR that the Student is pulled out for state assessments but is not pulled out for classroom quizzes.

OCR finds sufficient evidence to conclude that the District did not fully implement the provision of the Student's IEP requiring he be tested in a separate room for all his academic subjects.

Preferential Seating

The Student's IEP requires preferential seating away from distractions in all of his academic subjects and preferential seating in all other nonacademic services and activities. The Student's math teacher stated that she assigned seats for the Student's homeroom and math class alphabetically, then changed the students' seats based on how they were doing, for example, if a student was chit-chatting with a friend the student was seated next to, the teacher would change the seating. The Student's social studies teacher stated the Student had an assigned seat at the front of the room. The Student's science teacher stated the Student was seated in the front of the classroom and if that seating placement was distracting, the teacher allowed the Student to move to a seat where he would be less distracted. Since some but not all teachers provided the Student preferential seating away from distractions, OCR finds sufficient evidence the School did not fully implement this provision of the Student's IEP.

Modified assignments, extended time, guided notes

The Student's IEP requires modified assignments, extended time for assignments and guided notes in each of his academic subjects. OCR asked each of the Student's classroom teachers whether they provided modified assignments, extended time for assignments and guided notes,. The Student's math teacher responded that she gives most students until the end of the quarter to submit any missing assignments, and that she would grade whatever the Student was able to complete. The math teacher stated she didn't always give guided notes.

The Student's social studies teacher stated she did not provide extended time for assignments formally, but accepted his assignments late without taking off points for late work. The social studies teacher stated that with homework she had an unspoken rule with all students that if they needed more time they could go to see her during their elective period. The social studies teacher stated she provided guided notes.

The Student's science teacher stated she provided the Student modified assignments, accepted assignments whenever the Student turned them in even if they were late, and provided guided notes to all students.

Since the math teacher admitted she did not provide guided notes to the Student, OCR finds sufficient evidence that the School was not fully implementing this provision of the Student's IEP. With respect to modified assignments and extended time for assignments, it appears this was happening, albeit informally. OCR provided the Complainant an opportunity to rebut the teachers' testimony with evidence these provisions were not implemented. Although the Complainant remained steadfast these provisions were not implemented, she was unable to point to supporting evidence. In the absence of evidence to contradict the teachers' testimony, OCR finds insufficient evidence the District failed to implement these provisions.

Failure to Implement BIP

The Student's IEP requires implementation of his BIP by all teachers. OCR finds sufficient evidence the School failed to implement the Student's BIP.

The Student's BIP required weekly communication to the Complainant from the behavior support staff and from his regular education teachers. The District acknowledges it failed to complete weekly communication. Both the BSL and the Student's EC teacher confirmed they did not communicate weekly with the Complainant. The Student's social studies teacher said she contacted the Complainant with updates, but less often than weekly. The Student's science teacher stated that she did contact the Complainant weekly at the beginning of the school year, but then the team decided to have the math teacher contact the Complainant weekly for the team. The Student's math teacher stated she contacted the Complainant when needed, but not weekly. Therefore, OCR finds sufficient evidence the District failed to implement the Student's BIP provision regarding weekly communication.

A section of the BIP entitled "Consequences" outlines how teachers were to respond to the Student's behavior based on whether he committed a "Level One," "Level Two," or "Level Three" offense. OCR asked each regular education teacher OCR interviewed what each of the levels meant. None of the teachers OCR interviewed could explain with any certainty what each level meant or what behavior fell into each level category. Without an understanding of what each antecedent entailed, the teachers would not have been able to assign the appropriate consequence as the BIP provides. OCR finds sufficient evidence the District failed to implement this provision of the Student's BIP.

OCR notes that the September 24, 2015, BIP review document, which the Complainant signed, stated in part “[t]he current plan has been consistently implemented and is working.” OCR asked the Complainant about whether she agreed with this statement when she signed the review document. Complainant explained that it was less than a month into the school year, and that the School was implementing the BIP for the first month, so she signed the statement, but thereafter the BIP was not consistently implemented and was not working. As discussed below, the Student’s discipline records confirm the Student was subject to frequent in-school and out-of-school suspensions during the remainder of the school year.

To determine whether the School’s failure to implement the Student’s IEP and BIP resulted in a denial of a FAPE, OCR looks at the educational impact on the student. The Student’s discipline records, academic performance reports, and interviews with teachers and administrators indicate the Student did not make positive progress throughout the school year. As described in detail below, the Student missed an excessive amount of classroom instruction time due to numerous behavior-related discipline referrals. Therefore, OCR finds sufficient evidence the District denied the Student a FAPE when it failed to fully implement the Student’s IEP and BIP.

Failure to Re-evaluate

Although not raised in the complaint, in the course of the investigation, OCR identified an additional violation of Section 504 regarding the District’s failure to reevaluate the student in response to indicators that his BIP was not meeting his individual behavioral needs in the education setting and prior to suspending him for more than 10 days.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, when there is information suggesting that a student’s educational program is not meeting the student’s individual needs, such as a significant decline in the student’s grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student’s IEP, BIP, or placement are necessary.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), 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. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also 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.

The Student's discipline records indicate the Student was subjected to frequent teacher referrals, in-school suspensions and out-of-school suspensions, missing an excessive amount of classroom instruction due to behavior-related discipline and referrals. The IEP team documented that as of April 2, 2016, the Student had been suspended for XXXX days that school year. The Student was suspended for seven days in a single month - October 2015. Discipline records indicate the Student was suspended for ten days by November 9, 2015. The District did not hold a manifestation determination meeting until May 25, 2016, and did not re-evaluate his BIP or conduct a Functional Behavioral Analysis (FBA) until April 14, 2016.

OCR finds sufficient evidence the District failed to reevaluate the Student despite numerous discipline referrals suggesting the Student's BIP was not meeting his needs. OCR also finds sufficient evidence the District failed to reevaluate the Student and conduct a manifestation determination prior to suspending him for more than 10 days.

Allegation 2

The Complainant alleged that identified School staff harassed the Student based on his disability by making derogatory and demeaning statements to him. Specifically, the Complainant alleged that a custodian with whom the Student spends considerable time at the School overheard an EC teacher (the Student's 2014-15 case manager) at the School call the Student "retarded." The Complainant alleged that the School principal made up a rap song making fun of the Student and sang it in front of office staff and bet front office staff \$50.00 that the Student wouldn't pass. The Complainant alleged that the Student's science teacher insulted the Student's clothing, including making a comment that she made more than the \$7.25 per hour the Student was making and that he was wearing "fake polo."

Legal Standard

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. A District may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the District had notice of the employee's behavior. 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.

Analysis

OCR interviewed the custodian whom the Complainant alleged overheard the EC teacher call the Student “retarded” and shared that with the Student. The custodian denied ever hearing the EC teacher say that, and stated he never heard any school staff call the Student any names or insult the Student in any way. OCR interviewed the EC teacher who allegedly called the Student “retarded.” She denied the allegation, stating that she never uses that word to refer to anybody or anything. The Complainant did not allege anyone else witnessed this incident.

OCR interviewed the principal about the allegations he made up a rap song about the Student and bet other staff the Student wouldn’t pass. The principal denied the allegations. OCR interviewed the administrative assistant/office manager who is a staff person in the front office who may have witnessed the incident. She stated she never heard the principal express any such comments, bets, or songs and that he was strictly professional.

OCR interviewed the Student’s science teacher and asked whether she ever made any comments to the Student about his clothes or how much he earned. The science teacher denied the allegations. The Complainant did not provide any other witnesses to this incident.

OCR asked the Student’s science, social studies, math, and EC teachers, the custodian, principal, administrative assistant, and BSL whether any of them ever heard anyone tease, insult, or say anything disparaging to the Student. Each responded in the negative. The Complainant did not provide OCR any additional 3rd party witnesses with personal knowledge of the incidents. Therefore, OCR finds insufficient evidence of a violation as to allegation 2.

Grievance Procedures and Policies

OCR reviewed the District’s relevant policies regarding prohibition against discrimination, harassment, and bullying to assess compliance with Section 504 and Title II regulations.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires districts that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public Districts that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR examines a number of factors in evaluating whether a District's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

The District's policy requires the Superintendent to provide effective notice of the policy and the procedures for reporting and investigating complaints to students, parents and employees. The policy applies to complaints of discrimination by employees, students, volunteers and third parties. The District's policy requires impartial, prompt and thorough investigation of complaints. The policy states the investigator shall interview the complainant, the alleged perpetrator(s), individuals identified as witnesses by the complainant or alleged perpetrator(s), and any other individuals who may have relevant information, and review all evidence presented by the complainant or perpetrator(s).

The policy requires the investigator to provide written notification to the complainant of the results of the investigation within 15 days of receiving the complaint. The superintendent must provide a response to any appeal within 10 days. The policy requires written notice to the parties of the outcome of the complaint. The policy requires the investigator to specify whether the complaint was substantiated and, if so, corrective action intended to end the discrimination and prevent recurrence; as needed, reasonable steps to address the effects of discrimination; and, as needed, reasonable steps to protect the complainant from retaliation.

OCR finds sufficient evidence the District's policy complies with the Section 504 regulation, at 34 C.F.R. § 104.7(b). However, OCR is concerned the District did not abide by its policy with respect to the Complainant's allegations of harassment.

The EC Director acknowledged the Complainant told her that she felt the Student was being harassed. The EC Director stated the Complainant reported to her that the Principal made up a rap song about the Student. The EC Director stated she responded by speaking with the Principal about it and the Principal responded that wasn't exactly what happened, that it wasn't a rap song and it wasn't directed towards the Student but a group of students and it wasn't meant to single the Student out. Other than this informal conversation with the Principal, the District took no other steps to investigate the Complainant's allegations of harassment. The District did not speak with the Student or any other potential witnesses. The District did not follow up with the Complainant about the issue. It appears the District did not act in accordance with its own policy and likely fell short of its obligation to conduct a prompt and thorough investigation. Therefore, OCR strongly recommends the District provide training to its staff and administrators regarding the policy and how to properly implement it.

Allegation 3(a)

The Complainant alleged the District retaliated against the Complainant and the Student for exercising their rights to seek an IEP for the Student and for the Complainant’s advocacy on behalf of the Student when it falsely disciplined the Student with the purpose of making him ineligible to participate in extracurricular sports activities in November 2015 and February 2016.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, or participates in an OCR proceeding.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the District took a materially adverse action against the Complainant; and 3) whether there is a causal connection between the protected activity and the materially adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District’s reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

Protected Activity

The Complainant was actively advocating for the Student throughout the 2014-15 school year in order to secure an IEP for the Student, which occurred in April, 2015. The Complainant filed a complaint with the North Carolina Department of Public Instruction in March 2015. OCR finds the Complainant was engaged in protected activity when the alleged adverse action took place.

Adverse Action

The Student was ineligible to play basketball in the 2015-16 school year because he was not present during tryouts due to an out-of-school suspension issued on November 16, 2015. OCR finds the Student was subjected to materially adverse action.

Nexus

Next, OCR looks at whether there is a causal connection between the protected activity and the adverse action. Since the Student was suspended in the midst of the Complainant actively advocating for the Student, OCR finds that there is evidence of a nexus between the protected activity and adverse action, thus establishing a prima facie case of retaliation.

Legitimate, non-retaliatory reason

Once a prima facie case of retaliation has been established, OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Here, the District asserted the Student was disciplined with a 2-day out-of-school suspension for engaging in a food fight with another student and refusing to stop when instructed by school staff. The District maintained the Student was unable to qualify to play basketball because he was not present for tryouts, a policy the basketball coach applies to all students.

Pretext

Lastly, OCR examines whether the District's reason for its action is a pretext, or excuse, for unlawful retaliation. The Complainant alleged that the District falsely disciplined the Student so that he would be ineligible to participate in basketball in the winter. The Student was on an out-of-school suspension when basketball tryouts took place on November 17, 2015. The District stated that the Student was suspended because he was involved in a food fight in the School cafeteria on November 16th, in which he threw an entire plate of food at a student and the administrator who attempted to break up the fight. The contemporaneous discipline record in the District's electronic records system indicates the Principal processed the record of a two-day suspension for a food fight for "disorderly conduct" on November 16, 2015, from November 17th to November 18th, 2015. OCR examined the discipline record for the other student involved in the food fight, which OCR found to be identical in severity of punishment and designation of the offense as "disorderly conduct".

The District reported that it no longer has a list of the students who signed up to try out for basketball in the 2015-16 school year so it has no way of knowing if other students signed up to try out but were absent on the day of tryouts. The District reported that the basketball coach recalled that the Student was the only student in the 2015-16 school year who was absent for basketball tryouts and later asked to be allowed to play on the team. The District provided that in the 2016-17 school year there was one student who missed tryouts due to illness. That student's grandmother asked the basketball coach for a separate tryout; the coach denied the request because of his strict rule that students must be present for tryouts in order to play on the basketball team. The District further explained this strict rule is enforced because there are many more students interested in playing basketball than there are positions on the team.

OCR has not uncovered any evidence to contradict or indicate that the District's reason for suspending the Student or denying him the opportunity to try out for basketball was pretextual. Therefore, OCR finds insufficient evidence the District retaliated against the Student by falsely disciplining him to make him ineligible to participate in extracurricular sports.

Allegation 3(b)

The Complainant alleged the District retaliated against the Complainant and the Student for exercising their rights to seek an IEP for the Student and for the Complainant's advocacy on behalf of student when it engaged in retaliatory harassment as set forth in allegation 2.

Analysis

As described above, OCR finds the Complainant was engaged in protected activity. However, as set out in greater detail above, OCR does not find sufficient evidence of harassment. As such, OCR cannot find the District took materially adverse action against the Complainant and the Student in the form of harassment as alleged. Therefore, OCR finds insufficient evidence to support this allegation.

Allegation 3(c)

The Complainant alleged the District retaliated against the Complainant and the Student for exercising their rights to seek an IEP for the Student and for the Complainant's advocacy on behalf of the Student when it required the Complainant to prove her guardianship of the Student for the first time on or about August 27, 2015.

The Complainant alleged that she has been the Student's sole guardian and only School contact since he enrolled in the District as a pre-kindergartener in 2005. The Principal acknowledged that the Complainant had been signing everything for the Student since the Student was in the 3rd grade. At the time of the alleged retaliation, the Student was in 7th grade. The Complainant alleged that School officials already knew that she was the Student's guardian and had treated her as such since the beginning of the school year. The Complainant alleged the School required her to submit a non-parental affidavit for the first time in August, 2015 in retaliation for her advocacy on behalf of the Student and in order to humiliate her. The District required this documentation in the first week of school, the same week the Student was not enrolled in the School and the Complainant was advocating for his return to the School. The non-parental affidavit is a two-page form that required a notarized signature.

The District asserted that in an IEP meeting in August 2015, the Complainant complained that certain school communications were going to the Student's biological parent instead of to her. The Complainant stated she stopped receiving all School-related communications in late March 2015 after she filed a complaint with the North Carolina Department of Public Instruction on March 18, 2015. The EC Director checked the Student's file to see why and noticed that there was no documentation in her file of the Complainant's guardianship of the Student. The District explained that state law requires a non-parental affidavit to overcome the presumption of a student's domicile with his or her birth parents, and since the District did not have one on file, it requested it so that it could update the system to reflect the Complainant as the Student's guardian and contact person. The District claimed the request was made in order to resolve the Complainant's concern about not receiving all school-related communications, not in retaliation for her advocacy.

Analysis

Protected Activity

In the 2014-15 school year, the Complainant engaged in advocacy to secure an IEP for the Student, which occurred in April, 2015. On March 18, 2015, the Complainant filed a complaint

with the North Carolina Department of Public Instruction. In August 2015, the Complainant was advocating for the Student to be able to return to the School for the 2015-16 school year. OCR finds the Complainant engaged in protected activity.

Adverse Action

The adverse action against the Complainant was requiring the Complainant to execute and submit a non-parental affidavit for the first time in August 2015.

Nexus

Next, OCR looks at whether there is a causal connection between the protected activity and the adverse action. Here, the Complainant filed a complaint with the North Carolina Department of Public Instruction in March 2015, and alleged that she stopped receiving communications immediately afterwards. The District required the Complainant to submit a non-parental affidavit in order to receive communications in August 2015. OCR finds there is a causal connection between the Complainant's protected activity and the District's adverse action against her.

Legitimate, non-retaliatory reason

Once a prima facie case of retaliation has been established, OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. As stated above, the District's non-retaliatory reason for requiring the Complaint to prove her guardianship was to resolve her complaint that she was not receiving all school-related communications. To explain why she stopped receiving all school-related communications, the District explained that the school relies on overlapping computer systems to store data, including parent contacts, and that Powerschool, the current system for student enrollment and other data is relatively new to North Carolina. The District stated the transition has been difficult with a steep learning curve for staff and many problems with the software. The District provided OCR a newspaper article that discussed problems with the software². The article documented that North Carolina made the transition to Powerschool in the 2013-14 school year.

The District explained that automated calls are made using Blackboard Connect software, which pulls contact information from Powerschool. The District provided that for certain calls the Blackboard software just pulls one number from the Powerschool account. The District stated that throughout the 2015-16 school year, Blackboard was pulling the Student's biological mother's work number from the Student's account rather than the Complainant's number. The District provided that even if School staff had updated the Student's Powerschool account to reflect the Complainant as his primary contact, which they state they did, that may not cause Blackboard to make certain calls to the Complainant's number because the biological mother's number is also listed in Powerschool. The District was unable to confirm call history prior to August 2015, and could not confirm whether and when any changes were made to the Powerschool account.

² <http://www.charlotteobserver.com/news/local/education/article9101003.html>

The District further provided that it does not possess a list of students asked to provide proof of guardianship, and does not track this data:

“Any student who is enrolled by someone other than a biological parent, or who seeks to have an individual other than a biological parent serve as a “parent” for the purposes of school contact or decision-making, would be asked to provide proof of guardianship or “non-parental affidavit” as required by N.C.G.S. 115C-366. However, there is no system for tracking which students have been asked to provide such documentation, or which families may volunteer it without being asked.” it does not track or have data regarding which students or students’ parents or guardians it required to submit proof of guardianship.”

Pretext

Lastly, OCR examines whether the District’s reason for its action is a pretext, or excuse, for unlawful retaliation.

In response to the District’s demand, the Complainant provided an executed non-parental affidavit in August 2015. Thereafter, the Complainant continued to complain about the same issue of not receiving school communications. In a December 14, 2015 meeting with District officials and School administrators, including a Designee of the Superintendent, the Complainant raised the issue again, specifically that parent notification of student disciplinary referrals were sent to the birth mother and not to her. The Superintendent Designee addressed the issue in her written recommendations dated December 14, 2015. Noting that the Complainant provided the non-parental affidavit in August 2015, the Designee instructed the School Principal to “...make sure that the information provided on the Non Parent Affidavit is in the student demographics in PowerSchool” and “[t]his update should reflect that Guardian . . . is the first point of contact for school business pertaining to [Student].”

On June 21, 2016, OCR asked the Principal about whether he implemented these recommendations. The Principal responded that he did not recall exactly when but he updated the system. OCR asked the Principal whether he tasked anyone else with updating the system. He responded in the negative and explained that he is the only one at the School with access to do so. OCR asked the Principal who was listed as the Student’s guardian in the system. The Principal checked the system while speaking with OCR and responded that the system still had the Student’s biological parents listed. The Principal confirmed the system did have the Complainant’s phone number listed as one of the two phone numbers in the system, but the second phone number was not the Complainant’s number, nor did Complainant recognize it. OCR asked the Principal to randomly select telephone messages that went out from the automated School message system in several different months to check where the messages were being sent. The Principal confirmed that in October and November 2015, and in March, April, May, and June 2016, phone messages were left for the phone number that is not Complainant’s number. The Complainant continues to complain she is not receiving School communications. The Principal acknowledged the Complainant continued to complain to him about not receiving School communications.

The Principal stated he was the only person at the School with access to update the ConnectEd system, which is the electronic system connected with the Powerschool system, and in which contact information can be updated. At no time in his interview with OCR did he mention any difficulty operating the system. To the contrary, he seemed to easily navigate within the system during the interview in order to provide OCR with detailed information about the contact information listed in the system and to which numbers automated calls were made on various dates throughout the year. Further, OCR does not find persuasive the District's explanation about the difficult transition to Powerschool since that transition took place in the 2013-14 school year.

On October 7, 2016, the District provided a screenshot of the Powerschool contact information page for the Student. In addition to the Complainant, Powerschool still listed both of the Student's biological parents and had a contact number listed for the parents that is not the Complainant's number. The Powerschool page included a call sequence. The Complainant was number one in the call sequence. There were two phone numbers listed for her, the one listed as her home telephone number is the correct telephone number but the daytime telephone number is a different number that is not her correct contact number.

Before OCR completed its investigation, the District expressed a willingness to resolve this allegation pursuant to Section 302 of *OCR's Case Processing Manual*, by taking the steps set out in the enclosed Resolution Agreement.

Conclusion

On December 14, 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, under Section 303(b) of OCR's Case Processing Manual, as well as the compliance concerns identified with regard to allegation 3(c) that the District agreed to resolve under Section 302. The Agreement entered into by the District is designed to resolve all issues of non-compliance and compliance concerns identified during the investigation. 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 December 14, 2016, 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 Sheena Wadhawan, the OCR attorney assigned to this complaint, at 202-453-6664 or Sheena.Wadhawan@ed.gov.

Sincerely,
/S/
Michael Hing
Supervisory Attorney, Team 1
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Eva DuBuisson
Tharrington Smith
Via Electronic Mail To: EDubuisson@tharringtonsmith.com