



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

XXXX

Dr. Brian T. Austin
Superintendent
Lee County Public Schools
153 School Board Place
Jonesville, Virginia 24263

RE: OCR Complaint No. 11-16-1256
Resolution Letter

Dear Dr. Austin:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on XXXX against Lee County Public Schools (the Division). The Complainant filed the complaint on behalf of two students (Student A and Student B, to be collectively referred to as "the Students") at XXXX (the School). The Complainant alleged that the School discriminated against Student A and Student B on the bases of disability and race XXXX, as follows:

1. The Division discriminated against Student A on the basis of his disability, by failing to provide him with special education and/or related aids and services after he was evaluated and found eligible for services in XXXX, thereby denying him a free appropriate public education (FAPE).
2. The Division discriminated against Student B on the basis of his disability, by failing to evaluate him to determine whether he required special education and/or related aids and services in XXXX.
3. The Division discriminated against Student A on the basis of his race, when it failed to respond to incidents wherein a white student subjected him to harassment on the basis of his race XXXX.
4. The Division discriminated against Student B on the basis of his race , when Student B's teacher:
 - a. Refused to provide Student B with assistance during instructional time; and
 - b. Refused to allow Student B to XXXX.

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

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

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. In addition, OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504, Title II, and Title VI.

In reaching a determination, OCR reviewed documentation provided by the Complainant and the Division; and interviewed the Complainant, the Students' father (the Father), and Division staff. After carefully considering all of the information obtained during the investigation, OCR determined that there was insufficient evidence to substantiate Allegations 2, 3, and 4. However, OCR identified compliance concerns regarding Allegation 1, which the Division agreed to voluntarily resolve through a Resolution Agreement pursuant to Section 302 of OCR's *Case Processing Manual*. OCR's findings and conclusions are discussed below.

Background

During the XXXX school year, Student A and Student B attended the School. Student A was enrolled in XXXX and Student B enrolled in XXXX.

Legal Standard and Analysis

Allegation 1

With respect to Allegation 1, the Complainant alleged that The Division discriminated against Student A on the basis of his disability, by failing to provide him with special education and/or related aids and services after he was evaluated and found eligible for services in XXXX, thereby denying him a free appropriate public education.

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.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial

placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Virginia state regulations generally require that all evaluations and decisions about eligibility be completed within 65 business days of the receipt of the referral by the special education administrator or designee (8VAC20-81-60(b)(1)(g)).

As a threshold matter, the Division disputed the Complainant's assertion that Student A was evaluated and found eligible for special education related aids and services in XXXX. Instead, the Division indicated that Student A's initial referral for an evaluation did not occur until XXXX. At that time, the Division indicated that the Complainant submitted a written note to School staff, which appeared to request an IEP for Student A; the Complainant's request was based upon Student A's diagnosis of XXXX.

OCR reviewed documentation and corroborated that the Complainant submitted a handwritten note dated XXXX, in which she had requested an IEP, but had received "[n]o response" from School staff. A post-it note affixed to the handwritten note indicated that the XXXX used the Complainant's correspondence to initiate a Child Study Team (CST) referral. On XXXX, documentation indicates that the CST convened to address the Complainant's report of Student A's XXXX difficulties. Specifically, the CST reported that Student A had XXXX. The CST agreed to evaluate Student A and obtained parental consent to conduct a series of evaluations which occurred between XXXX and XXXX. On XXXX, an IEP Team convened and determined that the Student was eligible to receive special education and/or related aids and services. On XXXX, the IEP Team developed an IEP, which provided XXXX.¹

Given the foregoing, the Division asserted to OCR that the Complainant was mistaken in her assertion that the Division evaluated the Student in XXXX. Indeed, OCR did not find any indication that the Division initiated the evaluation process prior to the aforementioned timeframe which began on XXXX.² Therefore, OCR found insufficient evidence to support the Complainant's allegation. However, during the course of the investigation, OCR identified a compliance concern with respect to whether the Division delayed initiating Student A's evaluation following notice of sufficient information to suggest that Student A had a disability, and therefore may require special education and/or related aids and services, in January 2016.

¹ Student A's IEP also required that the Division provide Student A with XXXX; access to XXXX; oral presentation of materials; repeated directions as needed; and reading of test items where applicable.

² Because the Complainant's allegation raised concerns regarding the timeliness of providing special education and/or related aids and services, OCR reviewed the timeframe between the Student's initial referral for an evaluation on XXXX and the development of an IEP on XXXX. With respect to this specific timeframe, OCR concluded that the Division timely proceeded with the Student's evaluation and eligibility process in accordance with applicable federal and state regulations.

Both the Complainant and Division staff acknowledged discussions pertaining to the Student's diagnosis for XXXX in XXXX. Specifically, the Complainant told OCR that at the time, she informed Division staff that Student A had XXXX. Division staff comprised of the Principal, Guidance Counselor, and Student A's Teacher (Teacher 1) also concurred with the Complainant's contention, and each separately told OCR that the Complainant advised staff of Student A's diagnosis during a parent-teacher conference held on XXXX. Furthermore, OCR reviewed documentation in reference to the XXXX parent-teacher conference, which corroborated that the Complainant discussed Student A's XXXX diagnosis with the Guidance Counselor and Teacher 1. OCR also reviewed further documentary evidence predating the parent-teacher conference in which the Guidance Counselor notated Student A's XXXX. Notwithstanding actual notice of the Student's XXXX diagnosis coupled with the Student A's documented XXXX³, Teacher 1 stated that Division staff did not pursue steps to evaluate Student A during this specific timeframe. Rather, Teacher 1 reported that Division staff elected to observe Student A's academic progress in conjunction with XXXX for XXXX.⁴ As explained above, the Division delayed in convening the CST to determine whether to evaluate Student A until XXXX.

Because OCR presumes that a diagnosis of XXXX is evidence that a student may have a disability, and Section 504 requires a school district to identify and evaluate a student suspected of having a disability and in need of special education and/or related aids and services, OCR is concerned that Division staff delayed conducting an evaluation of Student A despite knowledge of Student A's disability and his demonstrated XXXX struggles. OCR requires further information through investigation to determine whether the Division's delay during this specific timeframe amounted to a denial of FAPE. Based on the foregoing, and considering OCR's concerns whether the Division timely referred Student A for an evaluation, the Division expressed interest in resolving Allegation 1 pursuant to Section 302 of OCR's *Case Processing Manual*.

Allegation 2

Regarding Allegation 2, the Complainant alleged that the Division discriminated against Student B on the basis of his disability, by failing to evaluate him to determine whether he required special education and/or related aids and services in XXXX.

The Division denied that it had sufficient information to warrant an evaluation of Student B in XXXX. During that timeframe, the Division cited that the Complainant and Student B's Teacher (Teacher 2) participated in a parent-teacher conference and discussed Student B's performance. Division staff denied that the Complainant requested an evaluation for Student B during this time period. Rather, the Division stated that the Complainant requested an evaluation on XXXX, which triggered a CST referral for Student B.

³ Division documentation indicated that the Student's XXXX difficulties in both XXXX and XXXX triggered the parent-teacher conference held on XXXX.

⁴ OCR cautions the Division that intermediary or intervention strategies must not delay an evaluation for a student suspected of having a disability and because of the disability, needs special education or related aids and services.

OCR reviewed documentation which indicated that the Division received the Complainant's consent to refer Student B to the CST on XXXX.⁵ The CST, which included the Complainant as a participant, convened a meeting on XXXX. Available meeting minutes indicated the CST reviewed Student B's academic performance and denoted that while Student B made progress during the school year, he continued to have difficulty in XXXX. Despite Student B's XXXX challenges, the CST did not proceed with evaluating Student B because he was not suspected of having a disability.⁶

Moreover, because the Complainant also raised concerns about Student B's Speech, the Division's Speech-Language Pathologist screened Student B on XXXX. According to documentation addressed to the Complainant, the Division determined that Student B "demonstrated age-appropriate sound productions and normal fluency," and therefore concluded that a speech evaluation was not warranted at the time.

In addition to reviewing documentation during the relevant time period, OCR also interviewed Teacher 2 and the Guidance Counselor. Both Teacher 2 and the Guidance Counselor, who were participants on the CST, stated that they did not suspect that Student B had a disability. Further, neither Teacher 2 nor the Guidance Counselor recalled the Complainant relaying any suspicion of a disability to Division staff. Instead, Teacher 2 recalled that she often met with the Complainant, including in XXXX, to discuss his difficulties with XXXX; and she implemented intervention strategies such as XXXX. During these discussions, Teacher 2 reiterated that the Complainant did not relay concerns that Student B had a disability. She further explained that while Student B had not reached academic benchmarks, he showed progression throughout the XXXX school year. Because the CST believed that the Student's academic difficulties were attributed to his early age rather than the presence of a disability, Teacher 2 stated that the CST decided to continue to monitor Student B's academic performance. The Guidance Counselor corroborated Teacher 2's statements to OCR and cited that in light of the foregoing, the CST determined not to proceed with an evaluation of Student B.

Based on the foregoing, OCR determined that there was insufficient information to substantiate that the Division discriminated against Student B, by failing to evaluate him to determine whether he required special education and/or related aids in services in XXXX. Specifically, OCR found insufficient information to support that the Division suspected or had reason to suspect that Student B had a disability and was in need of special education and/or related aids and services because of any disability. Further, there is no indication from either the Complainant or the Division that the Complainant provided any information to staff to evidence a disability or relayed concerns that Student B's academic difficulties were attributed to a suspected disability. Moreover, OCR found insufficient evidence to suggest that the Complainant requested an evaluation in XXXX as alleged. Rather, documentary evidence indicated that after receiving consent from the Complainant on XXXX, the Division timely convened a CST meeting on XXXX, to address her concerns with respect to the Student B's performance in XXXX. OCR's review indicated that at the time the CST meeting occurred, the

⁵Specifically, the Guidance Counselor referred Student B to the CST based on the Complainant's concerns about Student B's XXXX.

⁶ At the conclusion of the meeting, the CST decided to continue to monitor Student B's academic progress given his age.

Division did not have reason to suspect that Student B had a disability; and therefore determined that an evaluation of Student B was not warranted.⁷ Accordingly, OCR will take no further action regarding Allegation 2.

Allegation 3

With respect to Allegation 3, the Complainant alleged that the Division discriminated against Student A on the basis of his race, when it failed to respond to incidents wherein a white student subjected him to harassment on the basis of his race XXXX.

During the course of the investigation, the Complainant later clarified that incidents of racial harassment occurred XXXX, and involved multiple students. Specifically, the Complainant and the Father contended that Student A was subjected to racial harassment throughout the XXXX school year. Both the Complainant and the Father reported that the Student was subjected to name-calling, such as “XXXX” on a daily basis.

The Complainant contended she raised concerns about the alleged harassment to the Principal, Teacher 1, and XXXX. Although the Complainant was unable to recall or document the specific dates the alleged incidents occurred or when she specifically notified Division staff, she asserted that the Division failed to effectively address racially-motivated incidents targeting Student A. Specifically, the Complainant stated that the Teacher 1 and the XXXX denied having knowledge of the occurrence of any classroom or XXXX incidents, respectively. She further stated that the Principal failed to honor her request to relocate Student A’s XXXX to avoid harassment. Additionally, the Father told OCR that older students repeatedly engaged in name-calling targeting Student A. In addition to stating that Student A notified the XXXX of harassing incidents on multiple occasions, the Father also alleged that he reported incidents of harassing conduct to the Principal and Teacher 1 to no avail. However, the Father was unable to provide specific information regarding the time, manner, and substance, in which he relayed concerns of racial harassment.

A Division’s failure to respond promptly and effectively to racial 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 Title VI. 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 Division’s programs, activities, or services. When such harassment is based on race, it violates Title VI.

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

⁷ OCR confirmed that the Division provided the Complainant and the Father with a copy of procedural safeguards in compliance with Section 504.

relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a Division 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 Division 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.

The Division, in its narrative response, indicated that the Complainant did not report any incident of alleged harassment or bullying based on race or ethnicity. The Division stated that the only concern brought to Division staff was an assertion made by the Father during a CST meeting held on XXXX, that another student had asked Student A if he was XXXX. The Division reported that the Father could not identify the student who allegedly asked Student A about his race/ethnicity, nor could the Father provide any other details, such as date or location, regarding this assertion. Nevertheless, the Division cited that the Teacher 1 spoke with Student A to ascertain additional information. However, the Division reported that Teacher 1 indicated that Student A denied that another student asked him whether he was XXXX.

Because the Complainant's, the Father's, and Division's characterization of the alleged incidents differed, OCR sought to resolve the discrepancy through witness interviews. Specifically, OCR interviewed Teacher 1, who confirmed that after initially denying that an incident occurred, Student A told her that another student referred to him as "XXXX" on the school bus on an unspecified date.

In responding to the incident, Division staff, including Teacher 1, the Principal, and the XXXX told OCR that neither Student A nor the Father identified the student responsible for the alleged harassing conduct or provided greater specificity such as the date the incident occurred. Notwithstanding the limited information reported, the Division took steps to address the incident immediately following the Father's XXXX report: Teacher 1 discussed the incident with Student A; the Principal inquired about the incident with the XXXX; and the XXXX discussed appropriate behavior with students on the bus. Although the Division did not provide documentation to further evidence the steps taken, OCR confirmed the information reported by the corroborating accounts by Division staff.

Division staff each denied that the Student, the Father, or the Complainant reported any other incident concerning racially-motivated harassment occurring in the classroom or XXXX. Teacher 1 recalled that she routinely spoke with the Complainant and contended that the Complainant did not raise concerns regarding harassment or bullying. The Principal also refuted that the Complainant made complaints of harassment on behalf of Student A and referenced her logbook as evidence. With respect to incidents occurring on the school bus, the Principal stated that she maintains a record of every complaint or report received by the XXXX. In reviewing her logbook for the purposes of OCR's investigation, the Principal reported that she did not have

a record of a complaint or any other information to suggest that Student A had been subjected to harassment. Rather, she identified XXXX incidents in which Student A incurred XXXX. In each incident, the Principal stated that she notified the Complainant of Student A's XXXX and during those discussions, the Complainant did not raise concerns about ongoing incidents of harassment.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate that the Division discriminated against Student A on the basis of his race, when it failed to respond to incidents wherein a white student subjected him to racial harassment XXXX. Although the Complainant alleged that the Division was aware of multiple reports, complaints, or incidents wherein other students harassed Student B on the basis of his race, OCR only found one incident wherein another student referred to the Student's race. With respect to that incident, OCR determined that the District promptly responded to the incident to the extent that it was able. Specifically, despite not having the name of the alleged harasser, or the date of the alleged incident, OCR determined that the Division took appropriate steps to remedy any alleged harassment and prevent its recurrence. Accordingly, OCR will take no further action regarding Allegation 3.

Allegation 4

Regarding Allegation 4, the Complainant alleged that the Division discriminated against Student B on the basis of his race, when Student B's teacher (Teacher 2): (a) refused to provide Student B with assistance during instructional time; and (b) refused to allow Student B XXXX. The Complainant was unable to recall a timeframe in which the incidents occurred during the XXXX school year.

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Division's programs or activities on the basis of race, color, or national origin.

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 Division treated the Student less favorably than similarly situated individuals of a different race. If so, OCR then determines whether the Division had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the Division is a pretext, or excuse, for unlawful discrimination.

Allegation 4(a)

Teacher 2 denied discriminating against the Student on the basis of his race, as alleged. Specifically, with respect to Allegation 4(a), she stated she routinely provided small group instruction and individualized instruction to Student B. She further stated that throughout the school year, she facilitated learning centers in which she floated around the classroom and provided additional support to approximately XXXX students, including Student B. In providing Student B with individualized instruction, Teacher 2 specified that she sought to strengthen areas

in which Student B XXXX.⁸ In addition to Teacher 2's support, the Division also outlined that Student B received XXXX. In those settings, Teacher 2 recalled that Student B also received instructional support. Teacher 2 stated that the Complainant and the Father were apprised of the Division's efforts to provide instructional support to Student B through routine progress reports, as well as report cards which were issued in nine week intervals. Moreover, Teacher 2 stated that she often corresponded with the Complainant through handwritten notes submitted with Student B's classwork and homework assignments.

XXXX 6 SENTENCES REDACTED XXXX. OCR considered the information provided and determined that the Complainant provided insufficient information to rebut the Division's position or to further corroborate her allegation.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that is more likely than not that discrimination occurred.

Based on the foregoing, OCR's investigation did not reveal information to corroborate or support the Complainant's allegation to establish an initial case of discrimination. Specifically, OCR found insufficient evidence to suggest that Teacher 2 failed to provide Student B with instructional time, or treated Student B less favorably than similarly situated students on the account of race. Rather, Teacher 2 credibly stated she, along with remediation instructors, provided Student B with instructional support throughout the XXXX school year. Accordingly, OCR will take no further action regarding Allegation 4(a).

Allegation 4(b)

With respect to Allegation 4(b), the Complainant alleged that Teacher 2 refused to allow Student B to XXXX. As previously stated, the Complainant was unable to recall the specific date in which this incident occurred, and Teacher 2 denied discriminating against Student B, as alleged.

XXXX PARAGRAPH REDACTED XXXX

As stated above, under the preponderance evidence standard requires OCR to establish evidence that is more likely than not that discrimination occurred. With respect to Allegation 4(b), OCR found insufficient evidence to establish an initial claim of discrimination; that is, that discrimination may have occurred. Specifically, OCR found insufficient evidence to suggest that Teacher 2 failed to allow Student B to XXXX, or treated Student B less favorably than similarly situated students on the account of race. Accordingly, OCR will take no further action regarding Allegation 4(b).

Conclusion

⁸ Teacher 2 reported that she, along with a XXXX instructor and XXXX Coordinator, worked with Student B to strengthen his skills in XXXX. Based on these intervention strategies, Student B showed some progression throughout the school year.

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on October 5, 2017 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division'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 Division 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, assists, or participates in a proceeding under a law enforced by OCR. 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 Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact the OCR staff assigned to this complaint, Judy Briggs at 202-453-5902 or Judy.Briggs@ed.gov; or Erika Westry at 202-453-7025 or Erika.Westry@ed.gov.

Sincerely,

/s/

Letisha Morgan
Team Leader, Team II
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Anne Witt, Esq. via email at AWitt@ReedSmith.com
LaRana Owens, Esq. via email at LOwens@ReedSmith.com