



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 10, 2020

By email to superintendent@cabarrus.k12.nc.us

Dr. Chris Lowder
Superintendent
Cabarrus County Schools
4401 Old Airport Road
Concord, North Carolina 28025

Re: OCR Complaint No. 11-16-1292
Resolution Letter

Dear Dr. Lowder:

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 April 14, 2016, against Cabarrus County Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School). The Complainant alleged that the District retaliated against the Student and discriminated against the Student on the basis of disability (XXXXX).

1. Specifically, the complaint alleged the District discriminated against the Student when:
 - a. The District failed to evaluate the Student for eligibility under Section 504 in a timely manner;
 - b. The District failed to reevaluate the Student when the Student had accumulated more than ten days of out-of-school suspensions for disability-related behaviors during the 2015-2016 school year;
 - c. The District failed to develop a Behavior Intervention Plan (BIP) or other plan to meet the Student's behavioral needs;
 - d. The District failed to implement the provision of the Student's Section 504 Plan requiring that the Student XXXXX, when, on XXXXX, thus resulting in a longer out-of-school suspension; and
 - e. The District failed to implement the provision of the Student's Section 504 Plan requiring that the Student XXXXX.
2. The Complainant further alleged the District retaliated against the Student because of the Complainant's advocacy on her behalf as a student with a disability by XXXXX.

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

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

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. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During the investigation, OCR reviewed documents provided by the Complainant and the District; interviewed the Complainant and District faculty/staff; and listened to an audio recording of one of the Student's manifestation determination meeting.

Before OCR completed its investigation, the District expressed a willingness to resolve allegation #1b and 1c pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination if the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement.

OCR completed its investigation of allegations #1a, 1d, 1e, and 2. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's allegations.

OCR's findings and conclusions regarding allegations #1a, 1d, 1e, and 2 are discussed below, as well as a summary of the evidence obtained by OCR to date regarding allegations #1b and 1c.

Facts

The Student was enrolled in XXXXX at the School XXXXX school year. XXXXX, the Student was involved in several disciplinary incidents which involved conflict with other students, and some of which resulted in the Student being suspended out of school for a cumulative total of XXXXX.

On XXXXX, the Complainant contacted the Guidance Counselor by email and requested a meeting to talk about an intervention plan for the Student and her XXXXX needs. On XXXXX, the Complainant, XXXXX met with the Guidance Counselor. At this meeting, the Complainant informed the School that the Student had been diagnosed with XXXXX and asked about a Section 504 Plan for the Student. On XXXXX, the Complainant provided documentation of the Student's diagnosis to the School.

On XXXXX, the Student was suspended out of school for ten days for XXXXX. On XXXXX, the School held an eligibility meeting, at which the 504 Team determined that the Student was eligible for services under Section 504 and developed a Section 504 Plan for the Student.

On the same day, after finding the Student eligible, the team XXXXX. The team determined that the Student’s behavior toward the other student XXXXX.¹

On XXXXX, the Student was disciplined for XXXXX and received a ten-day suspension out of school. On XXXXX the School XXXXX.

On XXXXX, the Student received a three day out of school suspension for XXXXX. On XXXXX.

Allegation 1a: The District discriminated against the Student based on disability when it failed to evaluate the Student for eligibility under Section 504 in a timely manner.

Legal Standard

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.

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. North Carolina state regulations require initial evaluations to be completed and placement determined within 90 days of receipt of a written referral (NC 1503-2.2(c)(1)).

Analysis

On XXXXX, the Complainant requested that the School evaluate the Student under Section 504 in light of recent disciplinary incidents that resulted in the Student being suspended out of school long-term, as well as the Student’s diagnoses of XXXXX. Thus, on XXXXX, the School had reason to believe that the Student might benefit from special education or related aids and services and had an obligation to conduct a reasonably prompt evaluation under Section 504. In

¹ As discussed in more detail below, XXXXX. However, during OCR interviews, members of the Section 504 Team who participated in the XXXXX.

an XXXXX email to the District’s 504 Coordinator, the School Social Worker described her timeline for evaluating the Student under Section 504, and specified that XXXXX, the day after the Complainant requested the evaluation, she began gathering data from the Student’s teachers, Powerschool, and the Student’s cumulative file. On XXXXX,² the School scheduled a Section 504 eligibility meeting to be held on XXXXX. On XXXXX, the District found the Student eligible for services under Section 504 because XXXXX substantially limited her XXXXX and developed a Section 504 Plan. Thus, OCR is unable to find that the timeframe that it took the District to evaluate the Student XXXXX amounted to an unreasonable delay.

Based on the above, OCR finds insufficient evidence that the District failed to promptly evaluate the Student under Section 504.

Allegation 1b: The District failed to reevaluate the Student when the Student had accumulated more than ten days of out-of-school suspensions for disability-related behaviors during the XXXXX school year.

Legal Standard

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.

Summary of Evidence to Date

As stated above, on XXXXX the District found the Student eligible under Section 504 and immediately conducted an MDM because the Student had been suspended for ten days on XXXXX, after the Complainant had requested a Section 504 evaluation and during the period in which the District was evaluating the Student. This suspension was XXXXX.

The Student’s Section 504 Plan states: XXXXX. Members of the team that conducted the MDMs viewed the Student’s XXXXX. The Assistant Principal, the School Social Worker, and the Guidance Counselor each told OCR that XXXXX. The documentation of the XXXXX MDM further stated the team’s belief that the Student XXXXX.

² OCR notes that the District was closed for Spring break from March 25, 2016 until April 4, 2016.

The description of the Student's behavior on both the discipline form and written documentation of the XXXXX MDM for the incident which involved the Student XXXXX also included information indicating that XXXXX. Multiple staff interviewed, including the Principal, told OCR that the team XXXXX. Several staff told OCR that the Team did not consider XXXXX because the Student was not disciplined for that behavior.

In an interview with OCR, the Complainant alleged XXXXX. The Principal told OCR, XXXXX.

Although the form XXXXX MDM indicated that the Student's behavior was a manifestation of her behavior, several staff interviewed told OCR that XXXXX. Also, the form indicated that the behavioral characteristics of the Student's disability included the behaviors exhibited by the Student during the XXXXX incident. The form further indicated that these behaviors had been displayed by the Student in XXXXX with other students and were part of XXXXX. Lastly, the form indicated that the Student's disability impaired the Student's ability to control the behavior at issue.

As discussed above, before OCR completed its investigation, the Division requested to resolve this allegation through a resolution agreement obtained pursuant to Section 302 of OCR's *Case Processing Manual*.

Allegation 1c: The District failed to develop a Behavior Intervention Plan (BIP) or other plan to meet the Student's behavioral needs.

Legal Standard

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, including behavior 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.

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 Section 504 Plan/BIP or placement are necessary.

Summary of Evidence to Date

As discussed above, on XXXXX, the District found the Student eligible for services under Section 504 and developed a Section 504 Plan. One of the Student's three diagnoses was XXXXX.

The District was aware of the Student’s propensity to XXXXX and that it was impacting the Student’s ability to access the education program because of repeated suspensions out of school. From the time the Section 504 team found the Student eligible for a 504 Plan on XXXXX, until the District decided to XXXXX, the Student was long-term suspended out of school two additional times – once for an incident that involved XXXXX with an administrator and once for an incident that involved XXXXX with a teacher. The evidence reviewed to date failed to indicate that the District reconvened a group of knowledgeable people to assess whether any other related aids and services were appropriate for the Student during the time period at issue.

As discussed above, before OCR completed its investigation, the Division requested to resolve this allegation through a resolution agreement obtained pursuant to Section 302 of OCR’s *Case Processing Manual*.

Allegation 1d: The District failed to implement the provision of the Student’s Section 504 Plan requiring that the Student be sent to the counselor when she becomes upset, when, on XXXXX, the student became upset about a disciplinary infraction in which she had been involved and the Assistant Principal XXXXX, thus resulting in a longer out-of-school suspension.

Allegation 1e: The District failed to implement the provision of the Student’s Section 504 Plan requiring that the Student be sent to the counselor and be permitted to call the Complainant when she becomes upset³ when, on XXXXX, she became upset and the Complainant’s XXXXX teacher yelled at the Student, got in her face, and sent her to the office.

Legal Standard

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.

If a school district fails to comply with a student’s Section 504 Plan, OCR determines whether that failure resulted in a denial of FAPE to the student. In doing so, OCR considers whether the failure had a meaningful adverse impact that deprived the student of educational opportunity.

Analysis

The provision of the Student’s Section 504 Plan applicable to allegations 1d and 1e stated: XXXXX.

Allegation 1d

³ After reviewing the Student’s Section 504 Plan, OCR finds that no provision existed that allowed the Student to call the Complainant when she became upset. Thus, OCR will proceed to analyze whether the District failed to implement the provision of the Student’s Section 504 Plan that required XXXXX.

The Complainant told OCR that on XXXXX, the Student was experiencing XXXXX. The Student told the school nurse that she had XXXXX, and the nurse referred her to the Assistant Principal because it was against the code of student conduct. The Complainant said that the Assistant Principal told the Student that she was XXXXX, and the Student XXXXX the Assistant Principal. The Complainant alleged that at this point, the Assistant Principal XXXXX, as per her 504 Plan, but instead had the Student sit in her office XXXXX.

In an interview with OCR, the Assistant Principal said that the Student was initially XXXXX when she came to her office. The Assistant Principal told OCR that when she told the Student that XXXXX, the Student XXXXX. The Assistant Principal said that XXXXX. The Assistant Principal said that she XXXXX. The Assistant Principal said that until she heard back from the Principal, she was unable to tell the Student XXXXX.

Thus, rather than XXXXX, the Assistant Principal XXXXX made her sit while the Assistant Principal XXXXX.

Based on the above, OCR is concerned that the Assistant Principal may have failed to implement the provision of the Student's Section 504 Plan that required School staff XXXXX. However, the behavior that led to the Student being suspended for a longer time, XXXXX. Thus, there is insufficient evidence that the Assistant Principal's failure to implement the provision of the Student's Section 504 Plan that required XXXXX deprived the Student of a FAPE.

Allegation 1e

In an interview with OCR, the Student said that on XXXXX, she was already upset when she arrived at school because XXXXX. According to the Complainant, the Student was having an anxiety attack. The Student said she went directly to the Section 504 Coordinator for the School, who brought her to see another guidance counselor because the Guidance Counselor was not at school. The Student told OCR that the Section 504 Coordinator for the School and the guidance counselor called in the School Resource Officer, XXXXX. The Student said that XXXXX.⁴

The Student told OCR that she went to the computer lab, where the other students in the class were studying for a test, and she texted the Complainant to find out if the Complainant was okay. The Student said that the Teacher then started XXXXX. The Complainant explained that the Student then started to escalate, and the Teacher told the Student to XXXXX. The Complainant told OCR that the Student then went to the office to see if she could XXXXX. The Student said that when she arrived at the office, XXXXX.

OCR interviewed the Teacher, who largely corroborated that Student's version of events. However, the Teacher told OCR that when she noticed the Student using her phone during the test to send text messages, she walked over to the Student's desk, leaned over, and whispered to her to put the phone away. According to the Teacher, the Student XXXXX. The Teacher said that, XXXXX.

⁴ In interviews with OCR, both the Section 504 Coordinator for the School and the SRO recalled that they told the Student that if she needed to talk to her mother, to come back to see one of them and use her phone, rather than using her phone in class, which was against the rules.

Thus, by both the Student’s account and the Teacher’s account, the Teacher told the Student to put the phone away and, when the Student’s behavior XXXXX. While the two differ in describing the Teacher’s tone of voice and the specific words she used, OCR is unable to find, by a preponderance of the evidence, that the Teacher failed to implement the provision of the Student’s Section 504 Plan requiring XXXXX.

Allegation 2: The District retaliated against the Student because of the Complainant’s advocacy on her behalf as a student with a disability by referring the Student to the Glen Center, an alternative school.

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, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

The following three elements must be satisfied to establish an initial, or prima facie, case of retaliation: 1) an individual engaged in a protected activity (e.g., filed a complaint or asserted a right under a law enforced by OCR); 2) an individual experienced an adverse action caused by the District; and 3) there is some evidence of a causal connection between the protected activity and the adverse action. When these elements have been established, OCR then determines whether there is a legitimate, non-retaliatory reason for the adverse action; and if so, whether the reason is a pretext, or excuse, for retaliation.

Analysis

As stated above, the Complainant participated in Section 504 meetings and manifestation determination meetings on behalf of the Student. OCR finds that this participation constitutes a protected activity for purposes of a retaliation analysis.

OCR reviewed a copy of the disciplinary referral form dated XXXXX, regarding the incident for which the Principal referred the Student to the alternative school. The referral form indicated that the Student was being disciplined for XXXXX and that the consequence was three days out of school suspension and referral to an alternative learning program. OCR finds that referring the Student to an alternative school constitutes an adverse action because a reasonable person could be deterred from continuing to advocate on behalf of their child if the principal of the child’s school recommends that the child be involuntarily transferred to another school.

Finally, OCR finds there is some evidence of a causal connection between the protected activity and the adverse action due to the closeness in time between the Complainant’s last protected activity before the District took adverse action against her (the Student’s manifestation determination meeting on XXXXX) and the Principal’s XXXXX recommendation that the Student should be transferred to the alternative school. Thus, a prima facie case of retaliation

exists, and OCR must consider whether the District had a legitimate, nonretaliatory reason for taking adverse action against the Student.

The Principal explained that referring the Student to the alternative school was consistent with District policy and in line with consequences given to the Student for previous disciplinary offenses during the 2015-2016 school year. He told OCR that XXXXX, had warned the Student after a ten-day suspension XXXXX, that any further offenses could result in her being referred to the alternative school. However, the Principal told OCR that when he disciplined the Student after this warning, for two offenses XXXXX, he used his discretion to give her a lesser consequence than a referral to the alternative school. He said he did this because, with regard to the XXXXX offense, the Student had attempted, but had not actually assaulted, another student, and because with regard to the XXXXX offense, the Student was not XXXXX. The Principal, told OCR that the reason he referred the Student to the alternative school XXXXX was because her XXXXX. OCR finds that the reason the Principal gave for referring the Student to the alternative school, i.e. XXXXX as well as her history of disciplinary incidents during the XXXXX school year, is a legitimate non-retaliatory reason.

OCR next scrutinized the Principal's given reason for referring the Student to the alternative school to determine whether it was really a pretext, or excuse, for retaliation. OCR reviewed a copy of the Letter of Disciplinary Action from the Assistant Principal to the Student, XXXXX, when the XXXXX was still at the School and confirmed that the Student had been suspended for assaulting another student and warned that "the next incident could result in 10 day OSS and referral to the [alternative school]." Additionally, the Notice of Disciplinary Action XXXXX confirms that, while the Principal decided not to refer the Student to the alternative school for this altercation, the Student was warned again that any further altercation would result in a referral to the alternative school. OCR also reviewed the Principal's referral to the alternative school completed XXXXX and a subsequent referral XXXXX. Both confirm that the Principal was referred to the alternative school because of the disciplinary incidents the Student had throughout XXXXX school year.

In addition, OCR reviewed a copy of the District's Student Code of Conduct (Code) to determine whether the Principal's decision to refer the Student to the alternative school was consistent with District policy. As described above, the Principal referred the Student to the alternative school after she was suspended XXXXX. According to the Code, XXXXX may be either a Level 1 offense or a Level 2 offense, depending on the severity XXXXX. Moreover, repeated or severe Level 1 offenses may be treated as Level 2 offenses, and according to the Code, a principal may recommend transfer to an alternative learning program for a Level 2 offense based upon the presence of aggravating factors. Since the beginning of XXXXX school year, the Student had been disciplined a total of XXXXX, many of which involved XXXXX, and she had been suspended out of school XXXXX. Given the number and type of offenses for which the Student was disciplined and the multiple warnings the Student received about being referred to the alternative school, OCR finds that the consequences assigned to the Student for the offense XXXXX were consistent with the Code of Student Conduct.

OCR further reviewed a list of students who had been referred from the School to the alternative school XXXXX school year. XXXXX, were referred to an alternative school. Most of the

students, like the Student, had committed multiple violations of the Student Code of Conduct prior to being referred, for offenses XXXXX. According to the District, it was unable to locate any indication that any of the other students had filed any complaints of discrimination or otherwise asserted rights under anti-discrimination laws prior to being referred to an alternative school.

Thus, OCR finds insufficient evidence to conclude that the Principal's reason for referring the Student to the alternative school was a pretext for retaliation. Evidence shows that the Principal's reason for referring the Student to the alternative school, documented contemporaneously, was consistent with the District's discipline policy, and that the Principal applied the discipline policy consistently among students, regardless of whether they had asserted rights under one of the anti-discrimination laws enforced by OCR.

Based on the above, OCR finds insufficient evidence that the District retaliated against the Student when the Principal referred her to the alternative school.

Conclusion

On November 6, 2020, the District signed the enclosed Resolution Agreement which, when fully implemented, will address allegations 1b and 1c. The provisions of the Agreement are aligned with the allegations and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the District to provide training to all instructional staff, school counselors, school social workers and administrators at the School regarding the District's obligations to students with mental health and behavioral disabilities under Section 504. Please review the enclosed Agreement for further details. OCR will monitor the District's implementation of the Agreement until the District has fulfilled the terms of the Agreement.

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.

The Complainant has a right to appeal OCR's determination regarding allegation(s) #1a, 1d, 1e, and 2 within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>) or a written statement of no more than 10 pages (double-spaced, if typed) by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; by email to OCR@ed.gov; or by fax to 202-453-6012. The filing date of an appeal is the date that the appeal is submitted online, postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why she or he believes the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied, and how the correction of any error(s) would change the outcome. Failure to provide this

information may result in denial of the appeal. OCR will forward a copy of the appeal to the District. The District has the option to submit a response to the appeal to OCR within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

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, 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 District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact XXXXX, the OCR attorney assigned to this complaint, at XXXXX.

Sincerely,

Jennifer Barmon
Team Leader, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Rachel Hitch, Esquire