



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

September 29, 2017

Dr. Clayton M. Wilcox
Superintendent
Charlotte-Mecklenburg Schools
P.O. Box 30035
Charlotte, North Carolina 28230-0035

Re: OCR Complaint No. 11-16-1835
Resolution Letter

Dear Dr. Wilcox:

This letter advises 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 Charlotte-Mecklenburg Schools (the District). The Complainant filed the complaint on behalf of XXXX students (Student 1 and Student 2, together the XXXX (School 1) and XXXX(School 2) during the XXXX school year. The complaint alleged that the District discriminated against the Students on the basis of disability and subjected the Complainant to retaliation. Specifically, the complaint alleged that:

1. The District failed to implement Student 1's Section 504 plan while he attended School 2 from XXXX until the end of the XXXX school year when it failed to XXXX, failed to provide him a work space that allowed him to stand and move, and failed to allow him legitimate movement when needed during long work periods;
2. The District failed to provide Student 2 with a Free and Appropriate Public Education (FAPE) when it failed to evaluate him under Section 504 during the XXXX school year; and
3. On or about XXXX, the District retaliated against the Complainant for her advocacy on behalf of the Students when the School 2 counselor emailed the Complainant stating 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 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. 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.

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

During the investigation, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District faculty and staff. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 1. Prior to the conclusion of OCR’s investigation, the District expressed a willingness to resolve Allegations 2 and 3 by taking the steps set out in the enclosed Resolution Agreement. OCR’s analysis and conclusions on each of the allegations are discussed below.

Background

Student 1 XXXX. Student 1 was found eligible for accommodations as a student with XXXX. Student 1 had a Section 504 Accommodation Plan (Section 504 Plan) in place dated XXXX.

Student 2 XXXX. Student 2 was found eligible for special education services as a student diagnosed with XXXX. There, he had an Individual Education Program (IEP).

The Complainant is the Students’ mother. Both Students attended School 1 through XXXX, when they transferred to School 2 for the remainder of the XXXX school year.¹

Allegation 1

The Complainant alleged the District failed to implement Student 1’s Section 504 plan while he attended School 2 from XXXX until the end of the XXXX school year when it failed to provide him XXXX, failed to provide him a work space that allowed him to stand and move, and failed to allow him legitimate movement when needed during long work periods.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

Analysis

XXXX 4 PARAGRAPHS REDACTED XXXX

Work Space and Legitimate Movement

Student 1’s Section 504 plan provided him an accommodation to “have a work space that allows him to stand/move a little” and “[a]llow legitimate movement when needed during long work periods.” The Complainant alleged the District failed to allow Student 1 a work space that would allow movement, and instead XXXX.

Student 1’s XXXX teacher said her students usually worked at longer tables rather than desks and the students moved around a lot because of the nature of the class. The XXXX teacher said Student

¹ The Students were not enrolled in the District for the XXXX school year because they attended XXXX.

1 was allowed legitimate movement when needed, and that he often sat up on his knees in his chair or stood at the counters that ran along the sides of the classroom. The XXXX teacher said she never asked Student 1 to leave the classroom.

Student 1's XXXX teacher said Student 1 was allowed legitimate movement when needed. Student 1 did not have a different workspace than other students, but he often sat up on his knees on his chair rather than on his seat. The XXXX teacher said she allowed Student 1 to sit as he wanted and to get up when he wanted. The teacher said Student 1 started XXXX, which was permitted. However, there was one incident in which Student 1 was redirected because he was XXXX. The teacher said she did send Student 1 out of the classroom to another classroom in that instance. On XXXX, the XXXX teacher emailed the Complainant saying: "[Student 1] was removed from class yesterday because he was XXXX." The teacher said there were no other instances where she asked Student 1 to leave the classroom for moving or fidgeting. OCR did not uncover evidence of any additional instances when the XXXX teacher asked Student 1 to leave the classroom.

Student 1's XXXX teacher said his students could choose where they sat. While there was nothing different about Student 1's workspace as compared with those of other students, Student 1 often chose to sit off on his own or near the back, and he usually had space to spread out to five or six desks. The teacher said Student 1 was allowed legitimate movement when needed and that Student 1 never got into trouble for standing up or moving around. The teacher recalled a couple of occasions on which he asked Student 1 to leave the room to discuss XXXX that was unrelated to fidgeting. The teacher said Student 1 could stand up and move behind his desk during class.

While the loss of instructional time for punishment caused by the failure to provide an accommodation could be concerning regardless of where a student is sent after being asked to leave class, OCR sought to confirm the Complainant's assertion that Student 1 was often sent out of class to the school counselor as support for Student 1's frequent removal for issues resulting from the failure to provide his accommodation. Contrary to the Complainant's claim that Student 1 was often sent out of the classroom to the school counselor, the School 2 counselor stated that she did not recall ever counseling Student 1. And, as noted above, in the one confirmed instance in which Student 1 was removed from class, Student 1 was sent to another classroom.

The Complainant did not provide additional evidence or witnesses to support these allegations and each of Student 1's teachers offered support for a finding that the teachers provided Student 1 a work space permitting movement and allowed legitimate movement as provided for in his Section 504 plan. Therefore, OCR finds insufficient evidence to support a finding that the District failed to implement the movement provisions of Student 1's Section 504 plan.

Allegation 2

The Complainant alleged the District failed to provide Student 2 with a FAPE when it failed to evaluate Student 2 under Section 504 during the XXXX school year.

As referenced above, 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. In addition, the Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement. In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests,

teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

XXXX PARAGRAPH REDACTED XXXX

Prior to the conclusion of OCR’s investigation of this allegation, the District expressed a willingness to resolve this allegation voluntarily.

Allegation 3

The Complainant alleged that on or about XXXX, the District retaliated against her for her advocacy on behalf of the Students when the School 2 counselor emailed the Complainant stating XXXX.

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 adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the 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.

XXXX PARAGRAPH REDACTED XXXX

Prior to the conclusion of OCR’s investigation of this allegation, the District expressed a willingness to resolve this allegation voluntarily.

Conclusion

Pursuant to Section 302 of OCR’s *Case Processing Manual*, the District signed the enclosed Resolution Agreement, which, when fully implemented, will resolve Allegations 2 and 3. 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 laws and regulations. OCR will monitor the District’s implementation of the Agreement until the District 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 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. Complainants 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 Kristi Bleyer, Senior Attorney, at 202-453-5901 or kristi.bleyer@ed.gov.

Sincerely,

/s/

Michael Hing
Team Leader, Team 1
Office for Civil Rights
District of Columbia Office

cc: Andre Mayes, Deputy General Counsel (*via email to: andre.mayes@cms.k12.nc.us*)