



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

May 5, 2017

Dr. David Stegall  
Superintendent  
Newton-Conover City Schools  
605 North Ashe Avenue  
Newton, North Carolina 28658

RE: OCR Complaint No. 11-17-1195  
Resolution Letter

Dear Dr. Stegall:

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 the Newton-Conover City Schools (the District). The Complainant alleges that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleges that:

1. At a meeting on XXXX, the Student's Individualized Education Program (IEP) team refused to consider whether the augmentative communication device provided by the District could be used both at home and at school in order for the Student to receive a Free Appropriate Public Education (FAPE), when the Complainant raised the issue at the meeting.
2. The District retaliated against the Complainant for advocating on behalf of the Student's disability-related needs when, during a XXXX conversation on or around XXXX, the Superintendent told the Complainant that if he did not sign a document stating that the Student's IEP team determined that FAPE did not require the augmentative communication device to be sent home, he would have to "XXXX" and the Student would not get the device to use at home.

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

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

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

With regard to Allegation 2, OCR found insufficient evidence that the District retaliated against the Complainant as alleged. However, before OCR completed its investigation on Allegation 1, the District expressed a willingness to resolve the allegation by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed our decision and the development of the Resolution Agreement.

### **Factual Background**

The Student has an IEP and was placed in a general education XXXX classroom at the School. She was re-evaluated and her eligibility classification was changed from XXXX to XXXX in XXXX. Per her IEP, she uses an augmentative communication device XXXX.

### **Legal Standards and Analysis**

#### *Allegation 1*

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.

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.

The Complainant alleged that at a meeting on XXXX, the Student's Individualized Education Program (IEP) team refused to consider whether the augmentative communication device provided by the District could be used both at home and at school in order for the Student to receive a Free Appropriate Public Education (FAPE), after the Complainant raised the issue at the meeting.

OCR determined that on XXXX, the Student’s IEP team met to re-evaluate the Student and changed her eligibility category from XXXX to XXXX. The IEP team determined that the implementation of an augmentative device would be used during the Student’s speech-language services, occupational services, and throughout her daily school routines. At that meeting, the Complainant requested that the Student be allowed to take home the augmentative communication device. The LEA representative at the meeting informed the Complainant that the Exceptional Children’s Director told her before the meeting that the communication device would not be allowed to be taken home and is to be used in the school setting only. When the Complainant stated that the decision as to whether a device may be taken home should be made by the IEP team on a case-by-case basis and could not be a blanket rule, the LEA representative called the EC director for clarification. The EC director responded, XXXX

XXXX PARAGRAPH REDACTED XXXX

At various times after the XXXX, IEP meeting, the Complainant expressed his disagreement with the Superintendent and the School Board regarding the process used for making this decision. On XXXX, the District told the Complainant that the Student could take the augmentative device home and asked the Complainant to sign a release form stating, in part, that “the IEP determined FAPE did not require the device to be sent home.” The Complainant declined to sign the release.

At an IEP meeting on XXXX, the District again considered the parents’ request to take home the device. The Prior Written Notice for this meeting states:

“Per [the Director], it was determined that [the Student] will be able to take the communication device home to practice the skills that she learns at school. The Team discussed the device and feel that [the Student] would benefit from the use at home to generalize these skills across all environments.”

In another part of the Prior Written notice, it is noted, “The school system offered the use of the device at home therefore there was no determination from the team whether she required the device at home to access her education.”

Based on the above, OCR finds that at both the XXXX and XXXX IEP meetings, the Student’s parents raised the issue of whether the Student could take the augmentative communication device home. The Student’s XXXX IEP says that the Local Education Agency (LEA) representative on the IEP team told the parents that the Exceptional Children’s Director told her in advance of the meeting that the augmentative device could not be taken home and that if the Student needed a device for home and school, the parents would have to pay for it. The Prior Written Notice for the XXXX IEP meeting, states that “per the [Director]” the Student would be able to take the device home. The Prior Written Notice further stated that “the team discussed the device and feel that [the Student] would benefit for the use at home” but later noted “there was no determination from the team whether she required the device at home to access her education.”

The written records of both the XXXX and XXXX meetings raise concerns for OCR that the Director may have made the determination as to whether the device could be taken home alone, without a group of individuals knowledgeable about the Student and her disability, as required by Section 504. With regard to the XXXX meeting, the documentation indicates that the Director told the parents that if the Student needed the device at home, the parents would have to pay for the device, which is *contra* to the requirement of a *free*, appropriate, public education. With regard to the XXXX meeting, the Prior Written Notice indicates that the IEP team did not determine whether the Student needs the device at home and is, therefore, entitled to take the device home. Rather, it “offered the use of the device at home” without conducting such a determination. To resolve these concerns, the District has agreed to the enclosed Resolution Agreement.

### *Allegation 2*

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.

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 an 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.

An individual engages in a protected activity if she asserts a right or privilege or opposes an act or policy that she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under one of the laws OCR enforces. An adverse action is something that could deter a reasonable person from engaging in further protected activity.

The Complainant alleged that the District retaliated against the Complainant for advocating on behalf of the Student’s disability-related needs when, during a XXXX conversation on or around XXXX, the Superintendent told the Complainant that if he did not sign a document stating that the Student’s IEP team determined that FAPE did not require the augmentative communication device to be sent home, he would have to “XXXX” and the Student would not get the device to use at home.

In order to assess this allegation, OCR must first consider whether the Complainant had engaged in a protected activity. OCR found that the Complainant had done so because he participated in an IEP meeting for the Student on XXXX. Participation in an IEP meeting is considered a

protected activity because, by participating, the Complainant is asserting the Student's rights under Section 504.

Next, OCR considered whether the District took an adverse action against the Complainant. The Complainant alleged the District retaliated against him for advocating on behalf of the Student's disability-related needs when, during a XXXX conversation on or around XXXX, the Superintendent told the Complainant that if he did not sign a document stating that the Student's IEP team determined that FAPE did not require the augmentative communication device to be sent home, he would have to "XXXX" and the Student would not get the device to use at home.

OCR interviewed the Superintendent, who denied that he said anything threatening or retaliatory toward the Complainant. He confirmed that he had a XXXX conversation with the Complainant, XXXX. XXXX 7 SENTENCES REDACTED XXXX.

OCR found that during the XXXX with the Complainant, the Superintendent was providing information to him about the temporary parameters under which the District was willing to provide the device to the Student to take home immediately until the IEP team could meet again and explicitly consider whether the Student needed to take the device home as part of a FAPE. OCR determined that this information, without more, does not rise to the level of an adverse action, as it would not reasonably deter a person from engaging in further protected activity. Moreover, although the Complainant alleged that the Superintendent threatened that he would have to "XXXX" if he did not sign the document, the Complainant was unable to provide, nor could OCR find, any additional information to support his allegation or refute the Superintendent's denial that this occurred.

Based on the information above, OCR found insufficient evidence that the Superintendent took adverse action against the Complainant and consequently, that the District retaliated against the Complainant as alleged. Thus, OCR is closing this allegation as of the date of this letter and will take no further action.

### **Conclusion**

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on May 4, 2017 which, when fully implemented, will resolve Allegation. The provisions of the Agreement are aligned with Allegation 1 and issues with respect to Allegation 1 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 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. 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, 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, please contact Samantha Shofar, the OCR attorney assigned to this complaint, at 202-453-5929 or [samantha.shofar@ed.gov](mailto:samantha.shofar@ed.gov).

Sincerely,

/s/

David Hensel  
Team Leader, Team III  
District of Columbia Office  
Office for Civil Rights

Enclosure

cc: Dean Shatley, Esq.