



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

August 15, 2017

Jeffrey Booker, Superintendent
Gaston County Schools
943 Osceola Street
P.O. Box 1397
Gastonia, North Carolina 28053

Re: OCR Complaint No. 11-17-1216
Resolution Letter/Letter of Findings

Dear Superintendent Booker:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on XXXX against Gaston County Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX (the School). The Complainant alleged that the District discriminated against the Student on the basis of disability and retaliated against the Complainant. Specifically, the complaint alleged that:

1. The District treated the Student differently on the basis of disability by
 - a. Asking the Complainant or the Student's father to attend a XXXX and not asking any other parents to attend;
 - b. Seating the Student with a teacher on the bus for the XXXX, when other students were seated with students; and
 - c. Failing to give the Student his snack when other students received snacks and then modifying his communication notebook to imply that the Student did receive his snack on at least two occasions during the XXXX school year.
2. The District failed to ensure that the Student received a free appropriate public education (FAPE) during the XXXX school year by
 - a. Failing to adequately implement an accommodation for a communication notebook;
 - b. Failing to hold an Individualized Education Program (IEP) meeting or review the Student's IEP, which was developed at XXXX during the XXXX school year, after he transferred to the School at the beginning of the XXXX school year;
 - c. Failing to meet the Student's individual needs on a number of occasions, including XXXX.
3. The District retaliated against the Complainant for voicing her concern in an XXXX letter and phone call with the School Principal regarding the expectation that she or her husband attend the XXXX by refusing to respond to her XXXX, request for the Student to be XXXX.
4. The School retaliated against the Complainant for documenting her communications with the School regarding the Student's educational services by

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- a. Communicating with the Complainant about any concerns or issues verbally rather than in writing so that the concerns or issues were not appropriately documented.
- b. Inviting School staff whom the Complainant had not previously met and who had pre-determined what to discuss to a XXXX, meeting without explaining how the School determined who to include in the meeting.

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.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District faculty/staff. After carefully considering all of the information obtained during the investigation, OCR was concerned that there may be a violation of Section 504 or Title II regarding allegations 1(a), 2(b), 2(c), and 3. Before OCR completed its investigation of these allegations, the District expressed a willingness to resolve the concerns by taking the steps set out in the enclosed Resolution Agreement. OCR found insufficient evidence to support allegations 1(b), 1(c), 2(a), and 4. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement with regards to those allegations for which OCR had concerns and findings with regards to those allegations for which OCR found insufficient evidence of a violation of Section 504 or Title II.

OCR's analysis is structured chronologically, rather than in the order that the allegations are listed above.

Failure to Hold an IEP Meeting or Review the Student's IEP (Allegation 2(b))

The Student was a XXXX at the School during the XXXX school year. XXXX SENTENCE REDACTED XXXX. The Complainant alleged that the District failed to ensure that the Student received a FAPE during the XXXX school year by failing to hold an IEP meeting or review the Student's IEP, which was developed at XXXX during the XXXX school year, after he transferred to the School at the beginning of the XXXX school year.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual

educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

Analysis

An IEP meeting was held at XXXX, where the Student attended XXXX for the XXXX school year, on XXXX. The implementation dates listed in the IEP were from XXXX, to XXXX. The IEP had goals related to XXXX. XXXX 3 SENTENCES REDACTED XXXX.

Documentation submitted by the District and interviews with School staff confirm that a transition meeting was not held when the Student began at the School for the XXXX school year. The IEP team met for the first time on XXXX, for a reevaluation meeting, then again on XXXX, to update the Student’s IEP. OCR is concerned that the failure to hold a transition meeting at the beginning of the XXXX school year could have led to a failure to provide FAPE due to School staff being unfamiliar with the Student’s disability-related needs.

Comment [DN1]: Ex. 6.1 p. 45

Comment [DN2]: Ex. 6.1 p. 1

In addition, before the XXXX IEP meeting, in XXXX, the School assigned a one-on-one aide to work with the Student. The IEP in place at the time did not provide for a one-on-one aide for the Student. Without making a determination as to whether the provision of the one-on-one aide constituted a change in placement, OCR is concerned that the decision to provide the one-on-one aide was made without first having a group of persons familiar with the Student draw upon information from a variety of sources and determine together whether having a one-on-one aide was tailored to meet the Student’s individual needs and ensured that he was educated with peers without disabilities to the maximum extent appropriate.

Before OCR was able to complete its investigation into whether these concerns led to the Student being denied a FAPE, the District indicated an interest in voluntarily resolving OCR’s concerns by taking the steps set out in the enclosed Resolution Agreement.

XXXX (Allegation 1(a) and (b))

The Complainant alleged that the District treated the Student differently on the basis of disability XXXX by (a) asking the Complainant or the Student’s father to attend a XXXX and not asking any other parents to attend and (b) seating the Student with a teacher on the bus for the XXXX, when other students were seated with students.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the

District’s programs or activities on the basis of disability. 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 District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Analysis

XXXX PARAGRAPH REDACTED XXXX.

The XXXX teacher and her teaching assistant told OCR that although all parents were informed that they were welcome to attend XXXX, the Complainant was the only parent who was proactively contacted with the information that only one School staff person would be accompanying the Student’s class XXXX and asked if she could attend. The teacher and assistant said that they invited the Complainant to attend XXXX because they wanted to ensure that the Student was safe XXXX. XXXX 2 SENTENCES REDACTED XXXX. They also emphasized that the Complainant was not required to attend the trip.

The Division’s actions provide further support to OCR’s concern above about the Division staff who worked directly with the Student not having reviewed his IEP paperwork at the beginning of the XXXX school year. Staff participation in an IEP meeting at the beginning of the school year could have led to staff having been more well-informed as to the level of Staff support needed to ensure the Student’s safety during the XXXX without needing to contact the Complainant. Before OCR completed its investigation into these concerns, the District indicated an interest in voluntarily resolving OCR’s concerns by taking the steps set out in the enclosed Resolution Agreement.

OCR asked the general education teacher and assistant how bus seating was determined for the XXXX. The teacher told OCR that she assigned all of the students, including the Student, as they are seated in the classroom, with each assigned to sit with another student. She said that when the Student got on the bus, he requested to sit with the staff person assisting with the teacher’s class that day, who she said was one of the Student’s favorite adults at the School. The assistant could not remember who the Student sat with. OCR finds insufficient evidence to conclude that the Student was treated less favorably than students without disabilities, since there were directly conflicting reports from the Complainant and from School staff as to why the Student sat with the staff person instead of another student, and OCR did not receive any contemporaneous documentation regarding why the Student sat with the staff person. In addition, there is insufficient evidence for OCR to conclude that the Student was treated less favorably than other students when he sat with the staff person. OCR did not receive any evidence indicating that student-student pairings were preferential to student-staff pairings on the bus.

XXXX Request (Allegation 3)

The Complainant alleged that the District retaliated against her for voicing her concern in an XXXX, letter and phone call with the School Principal regarding the expectation that she or her husband attend the XXXX by refusing to respond to her XXXX, request for the Student to be XXXX.

Legal Standards

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.

Analysis

Protected Activity

An individual engages in a protected activity if he/she asserts a right or privilege or opposes an act or policy that he/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. On XXXX, the Complainant gave a letter to the Student’s general education teacher “expressing concern that the expectation is for [her or her husband] to attend XXXX with [the Student]” and requesting that the Student be given a “XXXX.” The teacher immediately shared the letter with the School principal. OCR finds that raising these concerns is a protected activity.

Comment [DN3]: Ex. 4.2

Comment [DN4]: DM 1520343 p. 5

Adverse Action

On XXXX, the Complainant submitted an application for the Student to XXXX. She noted on the form that she spoke with the District’s student assignment coordinator (the coordinator) “regarding issues” at the School. XXXX SENTENCE REDACTED XXXX.

On XXXX, the Complainant emailed the coordinator asking for the “status on XXXX.” She wrote again on XXXX, asking for a status XXXX. She wrote the coordinator a third time on XXXX, providing that she had left three messages for the coordinator and again asking for a status update. The coordinator told OCR that she did not respond to these emails.

Comment [DN5]: Complaint

OCR finds sufficient evidence to conclude that this failure to respond to the Complainant’s emails was an adverse action. An adverse action is something that could deter a reasonable person from engaging in further protected activity. A District’s failure to respond to a parent’s requests for information could have a substantial chilling effect on that parent’s future protected activity.

Nexus

The protected activity took place on XXXX. The alleged refusal to respond began on XXXX two days after the Complainant submitted her letter to the School. The coordinator told OCR that she spoke with the School’s principal on XXXX, after meeting with the Complainant, to tell the principal about concerns the Complainant had about the Student XXXX. XXXX 2 SENTENCES REDACTED XXXX.

Comment [DN6]:

The temporal proximity of the protected activity and adverse action is a sufficient causal connection to establish an initial, or prima facie, case of retaliation. That, combined with the fact that the coordinator spoke with the principal on XXXX, causes OCR to be concerned that the coordinator’s action was connected to the Complainant’s concerns about the XXXX. Before OCR was able to complete its investigation into the relationship between the adverse action and protected activity, the District indicated an interest in voluntarily resolving OCR’s concerns by taking the steps set out in the enclosed Resolution Agreement.

Failure to Provide the Student with a Snack (Allegation 1(c))

The Complainant alleged that the District treated the Student differently on the basis of disability by failing to give the Student his snack when other students received snacks and then modifying his communication notebook to imply that the Student did receive his snack on at least two occasions during the XXXX school year. She provided in her complaint that the Student came home on two occasions with his snack still in his book bag.

XXXX PARAGRAPH REDACTED XXXX

In interviews with OCR, the Student’s XXXX teacher and XXXX teacher told OCR that the Student generally received snack when the other students received snack, but there was a slight mix-up at the beginning of the school year due to scheduling. The Student was pulled out for services with the XXXX teacher at the time that the other students in the XXXX teacher’s classroom received their snack. The XXXX teacher on one or two occasions was unaware that the Student had his own snack in his book bag, so she gave him a snack from her own supply of snacks.

Comment [DN7]: DM 1520343, p. 2,

OCR finds insufficient evidence to conclude that the Student was treated differently than students without disabilities. Although the communication log shows that the Student did not receive the snack that he brought to school on one or two occasions, the communication log and staff interviews provide evidence that the Student received a school-supplied snack on those occasions. OCR did not review any evidence indicating that the communication log was modified to imply that the Student received a snack when he did not.

Provision of FAPE (Allegations 2(a), 2(c))

Communication Notebook

XXXX 3 PARAGRAPHS REDACTED XXXX

OCR finds insufficient evidence to conclude that the Student was denied a FAPE. First, there is insufficient evidence to conclude that the communication notebook was a XXXX accommodation, as it was not included in the Student’s IEP, but rather agreed upon at an informal meeting where the original purpose was not to discuss the IEP. Even if OCR assumes that the District agreed to provide the communication notebook as a special education accommodation, there is insufficient evidence to conclude that the District failed to implement the accommodation or that the specific use of the notebook resulted in a denial of FAPE. School staff began using the communication notebook the day after the team decided to begin using it. It was used through the end of the school year. The notebook was generally used to describe accomplishments as requested by the Complainant. Further, OCR was unable to establish that the instance described by the Complainant in which a School staff person stated that the Student was not listening during morning duty, even if considered a failure to implement, was a violation of the District’s obligation to provide FAPE. One statement in the communication notebook that did not describe an accomplishment would not prevent the Student from receiving appropriate education services. OCR therefore finds insufficient evidence to conclude that the Student was denied a FAPE.

XXXX 4 PARAGRAPHS REDACTED XXXX

Before OCR was able to complete its investigation into whether this concern led to the Student being denied a FAPE, the District indicated an interest in voluntarily resolving OCR’s concern by taking the steps set out in the enclosed Resolution Agreement.

XXXX PARAGRAPH REDACTED XXXX

OCR finds insufficient evidence to conclude that the Student was denied a FAPE with regards to XXXX. First, there is insufficient evidence to conclude that the Student had an accommodation for help with XXXX as part of his IEP, as it was not included in the Student’s IEP. Moreover, the principal’s notes from the XXXX meeting make no reference to an oral agreement requiring District staff to help the Student with XXXX. The District therefore had no obligation to provide the Student with help with XXXX. Even if OCR assumes that the District verbally agreed to provide help with the Student’s XXXX as an accommodation, there is insufficient evidence to conclude that the District failed to sufficiently help the Student XXXX. School staff reported helping the Student with XXXX as necessary, and that the Student was not allowed to move about the School without XXXX. Although School staff acknowledged that XXXX were discussed at the XXXX, meeting, they reported that no member of the School suggested that they wanted to avoid teaching the Student XXXX, but rather raised the option of XXXX as an option available for the Student. OCR therefore finds insufficient evidence to conclude that the Student was denied a FAPE.

Retaliation for the Complainant’s Documentation of Communications (Allegation 4)

Verbal Communication

The Complainant alleged that the School retaliated against her for documenting her communications with the School regarding the Student’s educational services by communicating with the Complainant about any concerns or issues verbally rather than in writing so that the concerns or issues were not appropriately documented.

Protected Activity

The Complainant alleged her protected activity to be documenting her concerns regarding the Student’s educational services in great detail. The Complainant did frequently write notes regarding the Student and questions for the Student’s teachers in the Parent & Teacher Comment/Response Log. OCR finds these notes sufficient to conclude that the Complainant engaged in protected activity.

Adverse Action

The Complainant alleged that the Principal told her at the meeting on XXXX that she did not want to document complaints or concerns in the communication notebook, preferring a phone call. The District confirmed in its narrative response that the principal has a clear preference for verbal communication, and the principal confirmed in an interview with OCR that she expressed her preference for verbal communication at the XXXX, meeting because she believes that sometimes email does not sufficiently express someone’s thinking. The principal further told OCR that the team agreed to communicate more in general, and that it did not always have to be verbal. After the meeting, as discussed above, staff members communicated with the Complainant in writing regarding the Student’s accomplishments in the communication notebook.

Comment [DN8]: DM 1520343 p. 19

OCR finds insufficient evidence that the principal’s preference for communicating concerns verbally was an adverse action. There is insufficient evidence to conclude that any School staff person refused to reduce communications to writing. In fact, School staff in attendance at the XXXX meeting who worked directly with the Student agreed to communicate more in writing, via the communication notebook, in addition to the Parent & Teacher Comment/Response Log that had already been in use. Although the principal stated a preference for verbal communication at that meeting, it did not discourage the staff members who worked directly with the Student from communicating with the Complainant in writing. Most of the substantive communications with the Complainant happened between the Complainant and School staff who worked directly with the Student. OCR reviewed the District’s records of communications between the Complainant and principal, who communicated by phone at least once before the XXXX meeting to discuss the scheduling of the meeting, demonstrating the principal’s use of verbal communication with the Complainant. Because OCR finds insufficient evidence of an

Comment [DN9]: Ex. 4.4, 1/30/17 conversation

adverse action, a prima facie case of retaliation has not been established and OCR need not consider whether the District had a legitimate non-retaliatory reason for its action.

Meeting Participants

The Complainant alleged that the School retaliated against her for documenting her communications with the School regarding the Student’s educational services by inviting School staff whom the Complainant had not previously met and who had pre-determined what to discuss to a XXXX, meeting without explaining how the School determined who to include in the meeting.

Protected Activity

As explained above, the Complainant frequently wrote notes regarding the Student and questions for the Student’s teachers in the Parent & Teacher Comment/Response Log. OCR finds these notes sufficient to conclude that the Complainant engaged in protected activity.

Adverse Action

The Complainant told OCR that the School-based members of the team that met XXXX, had prepared what to say to her before she arrived and did not tell her who would be included in the meeting. She said that she was surprised when two people who she did not know arrived at the meeting.

The only contemporaneous notes from the XXXX, meeting, taken by the principal, provide that she met with the Complainant and “team” in order to build their relationship through use of the communication log and calling if there is a need for XXXX. The District provides in its narrative response that the Student’s XXXX teacher, the Student’s XXXX teacher, the teaching assistant, the one-on-one aide for the Student, and the Student’s XXXX attended the meeting.

Comment [DN10]: Charlotte Stacey,
Comment [DN11]: Ex. 2.1

The School staff in attendance at the meeting confirmed in interviews that there were XXXX staff members who attended the meeting who had not yet met the Complainant: the Student’s one-on-one aide and the Student’s XXXX. The one-on-one aide, who began working with the Student in XXXX, told OCR that she believed she was invited to the XXXX meeting so that she could meet the Complainant. The XXXX said that she was not originally invited to the meeting, but when she heard that other staff members would be meeting with the Complainant, she decided to attend since she also worked with the Student. The principal, who organized the meeting, said that she invited those staff members because they worked with the Student on a daily basis. The principal did not believe that she informed the Complainant in advance of who specifically would attend the meeting.

Comment [DN12]: DM 1520343 p. 15

All School staff members in attendance at the meeting told OCR that they did not discuss the content of the meeting before the meeting and did not prepare what to say before the Complainant arrived. The principal said that she told the staff members before the meeting only that they were meeting to discuss the Complainant’s concerns.

Comment [DN13]: DM 1520343

OCR finds insufficient evidence that the District took an adverse action against the Complainant. An adverse action is something that could deter a reasonable person from engaging in further protected activity. School staff directly contradicted the Complainant's assertion that they predetermined what would be discussed at the meeting. In the absence of written documentation of pre-meeting discussions, there is insufficient evidence for OCR to conclude that School staff held pre-meeting discussions. Although the District confirmed that there were School staff who had not yet met the Complainant who attended the meeting without notice, OCR does not find their inclusion in the meeting to be adverse. Inclusion of staff members who work with a student on a daily or near-daily basis and therefore have relevant information to share about the student in a meeting to discuss concerns regarding that student, including a staff member who had not yet had a chance to meet the parent because she just started working with the student, would not deter a reasonable person from engaging in further protected activity. Furthermore, OCR received no information indicating that the inclusion of the staff members derailed the meeting or prevented the Complainant from advocating for the Student. Because OCR finds insufficient evidence of an adverse action, a prima facie case of retaliation has not been established and OCR need not consider whether the District had a legitimate non-retaliatory reason for its action.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on August 7, 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 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.

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We appreciate the District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Nicole Dooley, the OCR attorney assigned to this complaint, at 202-453-5675 or nicole.dooley@ed.gov.

Sincerely,

/s/

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

Enclosure

cc: Deborah Stagner, District Attorney