



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

October 7, 2020

Via Email: [Lewis.Ferebee@dc.gov](mailto:Lewis.Ferebee@dc.gov)

Dr. Lewis D. Ferebee  
Chancellor  
District of Columbia Public Schools  
1200 First Street NE  
Washington, DC 20002

Re: OCR Complaint No. 11-17-1559  
Resolution Letter

Dear Dr. Ferebee:

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 XXXXX against District of Columbia Public Schools (the District). The Complainant<sup>1</sup> filed the complaint on behalf of a former student (the Student) at XXXXX XXXXX School (the School)<sup>2</sup>, and the Student's XXXXX (the Parent). The Complainant alleged that the District discriminated against the Student on the basis of disability<sup>3</sup> and engaged in retaliation. Specifically, the complaint alleged the following:

1. The District discriminated against the Student on the basis of his disability, by failing to reevaluate the Student following the School's repeated use of restraint and/or seclusion for incidents that transpired during the XXXXX-XXXXX school year.<sup>4</sup>
2. The District discriminated against the Student on the basis of his disability, by failing to timely conduct a triennial review of the Student's Individualized Education Program (IEP), and thus failing to periodically reevaluate the Student as required by Section 504, in XXXXX.

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<sup>1</sup> In XXXXX, the Complainant notified OCR that he no longer provides legal representation on behalf of the Parent and the Student. Nevertheless, OCR continued its investigation because the Complainant and the Parent informed OCR that they remained interested in resolving the complaint.

<sup>2</sup> The School is a non-public elementary day school based in XXXXX serving students with disabilities in the XXXXX XXXXX area. The Student attended the School from XXXXX through XXXXX. The Student remains enrolled in the District and is placed in a setting outside of the District.

<sup>3</sup> The Complainant stated that the Student has multiple XXXXX, including XXXXX, and XXXXX. The Student is also diagnosed with XXXXX, and XXXXX, XXXXX, and XXXXX.

<sup>4</sup> By notification letters dated XXXXX, OCR informed the Complainant and the District that it was opening an investigation into whether the District: inappropriately subjected the Student to restraint and/or seclusion during incidents that transpired during the XXXXX school year (Allegation 1); and failed to conduct a reevaluation of the Student following said incidents of restraint and seclusion (Allegation 2). OCR subsequently consolidated Allegation 1 and Allegation 2, as reflected in Allegation 1 above.

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

3. In retaliation for the Parent’s disability-related advocacy on behalf of the Student, the District:
  - a. Failed to timely conduct a triennial review of the Student’s IEP; and
  - b. Failed to consider all evaluative data prior to revising the Student’s IEP in XXXXX.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, 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), 42 U.S.C. §§ 12131 et seq., 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 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. Before OCR completed its investigation, the District expressed a willingness to resolve the complaint on September 11, 2020. OCR determined that it is appropriate to resolve the complaint pursuant to Section 302 of its *Case Processing Manual* because the investigation has identified concerns that can be addressed through a resolution agreement.

### **Allegation 1**

Regarding Allegation 1, the Complainant alleged that the District discriminated against the Student on the basis of his disability, by failing to reevaluate the Student following the School’s repeated use of restraint and/or seclusion for incidents that transpired during the XXXX-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. If a school district fails to comply with the procedural requirements of Section 504, 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.

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. For a student already identified as having a disability, the student’s behaviors that lead to restraint and seclusion may be evidence that the student’s current array of regular or special education and related aids and services is not addressing the student’s needs. Additionally, restraint and seclusion may impact students with disabilities in ways that result in new academic or behavioral needs (e.g., new types of misbehavior, impaired concentration, increased absences, or social withdrawal). If there

is reason to believe that the provision of FAPE services to the student has been adversely affected by the use of restraint or seclusion, such that the student’s needs are not being met, a school has an obligation under Section 504 to: (1) determine if current interventions and supports are being properly implemented; (2) determine whether and to what extent additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies, may be needed, and, if necessary, reevaluate the student; (3) ensure that any needed changes are made promptly; and (4) remedy the denial of FAPE. If a school district does not take steps to properly address these behaviors, the school district may be found to have denied that student a FAPE. Finally, the repeated use of restraint or seclusion could impact FAPE if the student misses out on significant educational instructional time or services as a result of being restrained or secluded.

### Findings of Fact

The Student has been enrolled in the District since XXXX. Because the District identified the Student as a student with a disability eligible to receive special education services under the classification of XXXXX, the District developed an IEP for the Student and placed him in Grade X at the School for the XXXX-XXXX school year. IEP documentation submitted<sup>5</sup> to OCR stipulated that “XXXXX XXXXX XXXXX.”

The Complainant initially stated that the Student was restrained and/or secluded on approximately XXXXX occasions between XXXXX and XXXXX. In its review of data submitted by the Complainant, OCR identified additional incidents whereby the School subjected the Student to restraint and/or seclusion during the XXXX-XXXX school year. Specifically, OCR reviewed the School’s standardized forms entitled “XXXXX XXXXX XXXXX” (the Form), which were completed following each incident of restraint and/or seclusion. The forms reported the following:

- XXXXX: XXXXX XXXXX XXXXX XXXXX.
- XXXXX:
  - XXXXX: XXXXX XXXXX XXXXXXX
  - XXXXX: XXXXX XXXXX XXXXX
- XXXXX:
  - XXXXX XXXXX XXXXX

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<sup>5</sup> At the onset of this investigation, OCR requested the Student’s complete special education file for the XXXXX, XXXXX, and XXXXX school years, including but not limited to any and all IEPs and Behavioral Intervention Plans in effect for the Student. However, the District provided an incomplete data response. In particular, the District did not provide the Student’s BIP in effect during the timeframe at issue. Nevertheless, the Complainant reported that the Student’s BIP contained a provision that permitted restraint and seclusion; however, the Complainant contends that the Parent did not consent to the BIP or the functional behavior assessment. Moreover, special education documentation, such as the Student’s IEP and related addenda and meeting notes, submitted for the XXXX-XXXX school year did not contain dates or signatures; therefore, OCR found that the submitted documentation difficult to ascertain.

- XXXXX XXXXX XXXXX
- XXXXX: XXXXX XXXXX XXXXX

OCR reviewed the District’s policy with respect to the use of restraint and seclusion which states, in part, that “[f]or individuals who are eligible for special education services or may be suspected of having a disability, the IEP team must meet to discuss the restraint or seclusion and how to prevent it in the future.” However, in response to the Complainant’s allegation, the District informed OCR that “[b]ecause the student’s level of need and disability classification [was] never in question[,] there was no need to consider reevaluation.”

OCR also reviewed limited special education records that the District submitted, which indicated that, after the Complainant and the Parent requested an IEP meeting to discuss the seclusion and restraint of the Student and the implications for his IEP and Behavioral Intervention Plan (BIP) on XXXXX, the District convened an IEP meeting on XXXXX<sup>6</sup>, after the School restrained the Student on XXXXX. OCR reviewed correspondence between the Complainant and the District, which verified that the Complainant and the Parent relayed their concerns to the IEP team; however, the correspondence does not indicate whether the IEP team responded to such concerns and what, if any, action the IEP team took to address the School’s repeated use of restraint and seclusion.<sup>7</sup> Moreover, OCR did not find any further documentation to evidence that the District initiated any other IEP team meeting to discuss instances of restraint or seclusion in accordance with District policy or to determine whether the Student should be reevaluated.

### Analysis

As stated previously, the repeated use of restraint and seclusion is suggestive that a student’s current array of regular or special education and related aids and services is not sufficient to provide FAPE. Therefore, in compliance with Section 504, a school district should reconvene a student’s IEP team to determine if current interventions and supports are being properly implemented; whether and to what extent additional or different interventions or supports and services are needed; and, if necessary, the school district must reevaluate the student.

Here, based on the evidence obtained to date, OCR found that the School subjected the student to restraint and/or seclusion on at least XXXXX occasions throughout the XXXX-XXXX school year. However, the District did not provide documentation to support that the Student’s IEP team

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<sup>6</sup> OCR could not determine if the District provided sufficient information regarding the Student’s IEP meeting on XXXXX, because the IEP documentation provided is undated, unsigned, and appears to be incomplete and unfinalized.

<sup>7</sup> The Complainant contended that the District denied the Parent’s request to modify the Student’s BIP to make accommodations to address the Student’s behaviors without restraint or seclusion.

reconvened to discuss the School's repeated use of restraint and seclusion; determine if current interventions and supports are being properly implemented; and, whether and to what extent additional or different interventions and services are needed, including a reevaluation for the Student. Rather, the District contended that a reevaluation of the Student was unwarranted because the Student's behavioral interventions and placement at the School were never in question, which is potentially inconsistent with its own policy and its obligations under Section 504 and Title II. Further, although OCR found that the Complainant and the Parent requested an IEP meeting on XXXXX to discuss concerns related to multiple incidents of restraint and seclusion, the District did not provide sufficient information to support that the IEP team adequately addressed its responsibilities as stated herein.

However, as previously stated, the District expressed a willingness to resolve Allegation 1 pursuant to Section 302 of OCR's *Case Processing Manual*.

### **Allegations 2 and 3**

With respect to Allegation 2, the District discriminated against the Student on the basis of his disability, by failing to timely conduct a triennial review of the Student's IEP, and thus failed to periodically reevaluate the Student as required by Section 504, in XXXXX.

Regarding Allegation 3, the Complainant alleged that in retaliation for the Parent's disability-related advocacy on behalf of the Student, the District (a) failed to timely conduct a triennial review of the Student's IEP; and (b) failed to consider all evaluative data prior to revising the Student's IEP in XXXXX.

### **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. If a school district fails to comply with the procedural requirements of Section 504, 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.

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 IEP or placement are necessary.

In addition, 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 recipient; 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.

### Findings of Fact

Based on the limited information and documentation provided by the District, OCR could not ascertain when, prior to XXXXX, the District previously evaluated the Student consistent with Section 504 and Title II, although documentation notes that the Student’s most recent eligibility determination took place on XXXXX. OCR reviewed email correspondence between the District and the Complainant, and found that the District approved and funded a request by the Complainant to have several Independent Educational Evaluations (IEEs)<sup>8</sup> conducted in or around XXXXX. Between XXXXX and XXXXX, the Student participated in behavioral, occupational therapy, and psychoeducational evaluations, as well as educational and speech assessments. Contemporaneous email correspondence indicates that the District agreed to use and review the evaluative data derived from IEEs for the Student’s triennial reevaluation process and amend the Student’s IEP as needed. However, the Complainant contended that the IEP team failed to timely convene to review the evaluative data, such that the District failed to comply with Section 504 procedural requirements for periodic reevaluations.

Email correspondence indicates that the Complainant made several inquiries with the District regarding scheduling the Student’s triennial reevaluation process beginning in XXXXX to no avail. Specifically, the Complainant/Parent inquired about scheduling an IEP meeting for the triennial reevaluation on XXXXX, XXXXX, XXXXX, and XXXXX.

The Complainant reported that the District held an IEP meeting in XXXXX, but he asserted that the meeting was substantially insignificant and did not constitute a triennial reevaluation. Specifically, the Complainant reported that none of the evaluators were present and the District did not update the Student’s IEP. Moreover, the Complainant stated that “XXXXX XXXXX XXXXX” and “XXXXX XXXXX XXXXX” Notably, neither the Complainant nor the District provided documentation regarding the referenced XXXXX IEP meeting.

Thereafter, the Complainant reported that on XXXXX, the District revised and finalized the Student’s IEP without convening a meeting or including data from the IEE reports. As stated previously, the documentation that the District provided pertaining to the Student’s special education records appear to be incomplete; therefore, OCR does not have any documentation from the District to support or refute the Complainant’s account. However, the District acknowledged

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<sup>8</sup> An IEE is an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

scheduling difficulties in convening an IEP team meeting and acknowledged that the triennial reevaluation did not occur prior to the end of the XXXX-XXXX school year. OCR reviewed the Student's special education records and determined that the District did not initiate the Student's triennial eligibility determination or review the Student's IEEs until a meeting scheduled for XXXXX.<sup>9</sup>

### Analysis: Allegation 2

With respect to Allegation 2, OCR obtained evidence indicating that the District granted the Complainant's request to have IEEs conducted for the Student, which would be used to reevaluate the Student. OCR reviewed documents indicating that the IEEs were conducted during the second half of the XXXX-XXXX school year and were finalized in XXXXX. Thus far, however, OCR has concerns that the District did not review and consider the IEEs and other evaluative data so as to constitute a triennial reevaluation. Although the Complainant stated that the District held an IEP meeting in XXXXX, OCR has concerns whether an IEP meeting had, in fact, occurred or that the meeting satisfied Section 504 requirements to constitute a periodic reevaluation. Moreover, OCR reviewed IEP documentation dated XXXXX indicating that the IEEs, which were purposed to provided evaluative data for the reevaluation, were not scheduled to be reviewed until XXXXX.

In light of the timeliness concerns presented and whether the District fulfilled its obligation to conduct a periodic reevaluation in compliance with Section 504, the District expressed a willingness to resolve Allegation 2 pursuant to Section 302 of OCR's *Case Processing Manual*.

### Analysis: Allegation 3

Regarding Allegation 3, OCR found that the Parent engaged in protected activities when she: requested an IEP meeting on XXXXX regarding the Student's receipt of FAPE; relayed concerns regarding the repeated use of restraint and seclusion during an IEP meeting on XXXXX; and, requested a triennial reevaluation on XXXXX, XXXXX, XXXXX, and XXXXX to no avail. Additionally, OCR determined that the District's failure to timely reconvene a triennial reevaluation in XXXXX and failure to consider evaluative data during a XXXXX IEP meeting would constitute adverse actions that, given the proximity in time, had a causal connection to the protected activities, such that an initial claim of retaliation has been established.

The District did not provide OCR with any information specific to the Complainant's retaliation allegation, as stated in Allegation 3, such that OCR could continue with the retaliation analysis and assess 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. However, OCR notes that the underlying facts for Allegation 2 also pertain to Allegation 3, and to the extent that OCR has concerns regarding both allegations, the District has also expressed a willingness to resolve Allegation 3 pursuant to Section 302 of OCR's *Case Processing Manual*.

### Conclusion

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<sup>9</sup> For the XXXXX school year, the Student attended another School outside of the District, the XXXXX in XXXXX, XXXXX.

On October 2, 2020, the District agreed to implement the enclosed Resolution Agreement (the Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the recipient deemed compliant when the recipient enters into and fulfills the terms of a resolution agreement. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct visits and may request information as necessary to determine whether the District has fulfilled the terms of the Agreement. If the District fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR will give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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 regarding this letter, please contact Erika Westry, the OCR attorney assigned to this complaint, at 202-453-7025 or [Erika.Westry@ed.gov](mailto:Erika.Westry@ed.gov).

Sincerely,

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

Enclosure

cc (Via Email):       XXXXXX

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