



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 13, 2018

Via Email: superintendent@gaston.k12.nc.us

W. Jeffrey Booker
Superintendent
Gaston County Schools
943 Osceola Street
Gastonia, NC 28054

RE: OCR Complaint No. 11-18-1229
Resolution Letter

Dear Mr. Booker:

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 March 13, 2018 against Gaston County Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX (the School). The Complainant alleges that the District discriminated against the Student on the basis of disability (XXXX) and race (African American). Specifically, the complaint alleges the following:

1. At the beginning of the 2017-2018 school year, the District denied the Student a free appropriate public education (FAPE) when the School failed to timely evaluate the Student for special education and related aids and services.
2. From January 29 to February 27, 2018, the District discriminated against the Student on the basis of disability, including, but not limited to, denying him a FAPE, when the School developed and implemented the Student's "School Day Restrictions and Transition Plans."
3. In February 2018, the School retaliated against the Student because the Complainant filed a grievance alleging disability discrimination with the District when the School refused to stop implementing the Student's "School Day Restrictions and Transition Plans."
4. On September 8, October 9, and November 15, 2017 and on January 22, 2018, the District discriminated against the Student on the basis of race when the School disciplined the Student harsher than similarly situated White students.

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

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. 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 receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504, Title II, and Title VI.

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. Following is a summary of the relevant legal standards and information obtained by OCR during the investigation.

OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant, a community advocate, and District staff. During the investigation, OCR requested to interview additional District administrators and School staff. In response, the District expressed interest in resolving the investigation voluntarily.

BACKGROUND

The Student enrolled as a XXXX at the School during the 2017-2018 school year. From August 2017 to January 2018, the Student received multiple disciplinary referrals for his behavior, the School developed and implemented multiple intervention plans to address the Student's behavior, and the School offered the Complainant support for grief counseling for the Student, due to XXXX. In January 2018, the School referred the Student to be evaluated under Section 504 after the Student's private therapist informed the Assistant Principal that the Student had "XXXX" and she inquired about a Section 504 plan for the Student. In January 2018, the School developed a School Day Restrictions and Transitions Plans (Restrictions and Transitions Plan) for the Student (discussed in greater detail in Allegation 2). The Restrictions and Transitions Plan was implemented from January 29, 2018 to February 2018. On February 16, 2018, the Section 504 team convened and determined that the Student was a student with a disability and the Section 504 team developed the Student's Section 504 plan.

ALLEGATION 1

1. Background

On August 29, 2017, the Student received an office referral for inappropriate language/disrespect. Subsequently, the Assistant Principal spoke to the Complainant and the Complainant informed her that “XXXX.” The School then provided the Complainant information about XXXX.

On September 6, 2017, the Student received one period of in-school (ISS) suspension during art class for bullying behavior. On September 13, 2017, the Student received a referral for bullying behavior. On September 15, 2017, the Student received lunch detention for forging the Complainant and his father’s signatures. On September 18, 2017, the Complainant met with the Assistant Principal and the Student’s teachers to discuss “the [S]tudent’s behavior and how to help him be successful.” Subsequently, the School assigned the Student a mentor and mentoring began on September 29, 2017.

On October 9, 2017, the Student “was restricted from walking the track for the remainder of the month” for pulling another student’s hair. On November 3, 2017, the School’s social worker spoke to the Student’s father and visited the Student’s home to discuss the Student’s bullying behavior towards other students and the School social worker offered the Student school-based therapy (SBT). On November 15, 2017, the Student received a one day out-of-school (OSS) suspension for an incident involving another student. On November 28, 2017, the Complainant provided consent for the Student to participate in SBT. The referral form noted that the concerns were “XXXX.”

On December 1, 2017, the Student received a three day out-of-school suspension (OSS) for bullying behavior. On December 4, 2017, the Complainant met with the Assistant Principal to discuss the Student’s grades, behavior, anger, and “supports that have been offered and/or provided, such as mentor, school-based therapy, and access to the guidance counselor.” The Complainant mentioned to the School that the Student was receiving services from a private therapist, and, subsequently, the Complainant signed an authorization form on December 7, 2017 allowing the Student’s therapist to share information with the School. At this time, the Assistant Principal introduced the Tier II plan to track the Student’s behavior upon his return to the School and referred the Student to the District Behavior Support Team for recommendations.

On January 16, 2018, the Student received a five day OSS for bullying behavior. The Assistant Principal contacted the Complainant to discuss the Student’s repeated suspensions for bullying behavior and informed the Complainant that the Student would be placed on “a plan for transitions and unstructured time.” On January 22, 2018, the Assistant Principal spoke to the Complainant and the Student’s private therapist and the private

therapist informed the Assistant Principal that she was working with the Student “on anxiety associated with PTSD” and she inquired about a Section 504 Plan for the Student. On January 29, 2018, the Student returned to the School after serving his five day OSS and was placed on the Restrictions and Transition Plan.

On February 1, 2018, the Principal met with the Complainant, the Student’s father, a community advocate, and the Student’s therapist to discuss the Complainant’s concerns “about the Student’s most recent suspension and the ‘restrictions’ that had been put in place.” The Student’s therapist explained to the Principal that the Student may have “complex PTSD and that “isolation” was not good for him. The Principal provided everyone information about the Section 504 process and also discussed the possibility of a “referral for an evaluation for special education serves, but [the Complainant] rejected [the referral].”

On February 16, 2018, the Section 504 team convened and determined that the Student was eligible under Section 504 and the Section 504 team discussed the “Student’s behavior in elementary school, [] the restrictions, [and] the need to protected other students from bullying.” The Section 504 team developed the Section 504 plan.

2. Legal Standard

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. South Carolina state regulations, like the federal IDEA regulation, require that school districts conduct initial evaluations within 60 days of receiving parental consent (SC State Board of Education Regulation 43-243(IV)(B)(1)(c)(1)).

3. Analysis

The Complainant alleges that the School should have evaluated the Student at the beginning of the school year when she notified School staff that XXXX. The District contends that it “did not fail to timely evaluate the Student, and [that] the Student [was] not denied FAPE.” The District explained that the Complainant “did not make a request to evaluate the

Student for special education and related aids and serves, and that the District did not have any reason to suspect that the Student had a disability” during the fall semester of the 2017-2018 academic year.

Here, the issue is whether the District had sufficient information that the Student needed special education or related services during the Fall 2018 semester of the 2017-2018 academic year. OCR interviewed the Complainant, School staff, and other individuals referred by the Complainant. OCR reviewed all documentation provided by the Complainant and the District.

There is no dispute that the Complainant told School staff about XXXX in August 2017 and that School staff offered the Student XXXX in response. There is also no dispute that the Student received numerous disciplinary referrals for exhibiting bullying behavior from August 2017 to January 2018. The School explained that it “addressed the Student’s repeated misbehavior with a variety of interventions and progressive discipline consistent with School and District rules and procedures.”

OCR reviewed documentation pertaining to the Student and notes that the Complainant submitted to the School the Student’s Student Information Sheet at the beginning of the 2017-2018 school year noting that the Student’s XXXX. OCR also reviewed documentation pertaining to the Student’s behavior and disciplinary record, including disciplinary referrals, behavior redirect referrals, and lunch detention referrals; teacher meeting notes; the Section 504 Coordinator notes; the Principal’s notes; and internal correspondence between School and District staff.

The Student received sixteen office referrals during the 2017-2018 school year. The Student received redirect referrals¹ on October 3rd for classroom disruption that impedes learning of others, talking back to staff members, and defiance; on November 13th for two separate incidents for defiance and classroom disruption that impedes learning of others; on November 15th for abusive language, classroom disruption that impedes learning of others, and defiance; on December 1st for bullying; and on December 7th for talking back to staff. On December 1, 2017, the Student met with a School counselor to discuss his ongoing bullying behavior. The Student complied with the redirect process and was sent to his next class for each redirect referral. Additionally, the Student received eleven lunch detention referrals between September 14, 2017 and December 15, 2017.

The District’s documentation indicates that the School put into place an “Intervention Plan” for the Student on December 7, 2017 because “data indicat[ed] a need for additional

¹ According to the School’s Teacher Handbook, a redirect referral is when a student reports to ISS.

support . . . Student demonstrates bullying behaviors and had multiple office referrals for bullying behaviors. Despite if classroom interventions the behaviors persist.” The “Intervention Plan” requires that the “Student and teachers will rate and monitor target behaviors daily. The School started tracking the Student’s behavior on a daily basis on December 12, 2017 on the “Teacher Daily Behavior Report Card” and on a weekly basis on January 2, 2018 on a “Weekly Behavior Report Card.” Furthermore, the Student tracked his own behavior on a daily basis starting on December 11, 2017 on the “Student Daily Behavior Report Card.”

OCR reviewed the Student’s teachers’ “Team Meeting Notes.” The team meeting notes indicate that the team discussed the Student’s behavior several times throughout the Fall 2017 semester. On October 24, 2017, the team discussed the Student’s behavior plan. On October 31, 2017, the team noted that the Student was on a Tier Plan. On November 7, 2017, the team noted that the Student’s behavior plan was being implemented and the team “will examine [] lunchroom seating and walking the track [] if problems persist.”

The Section 504 Coordinator notes indicate that she spoke to the Complainant on August 29, 2017, provided her information for XXXX, and noted that she would alert the Student’s teachers about XXXX. On September 16, 2017, the Section 504 Coordinator noted that the Complainant shared with the team that XXXX During the meeting, the team discussed the Student’s bullying behavior and also described him “as very defensive and confrontational at times when aggravated with a peer.” In response, the Complainant shared with the team that the Student continued to have “issues surrounding XXXX.” On January 22, 2018, the Section 504 Coordinator noted that she spoke with the Assistant Principal and that the Student’s private therapist informed the Assistant Principal that the Student has “XXXX and would like him to have a 504 plan.” The Section 504 Coordinator stated in her notes that she scheduled the Section 504 team to convene on February 8, 2018 but that it was rescheduled by the Student’s family for February 13, 2018 and later rescheduled again for February 16, 2018.

OCR reviewed the District’s internal correspondence and notes that the District discussed the possibility of considering a Section 504 Plan at the September 2017 meeting with the Complainant if the Complainant “mention[ed] a diagnosis of some kind.” School staff noted that the School could “do a [Section 504] plan for ‘regarded as having an impairment’ if needed and no official diagnosis” on September 18, 2017. The internal correspondence also indicates that on October 12, 2017, School staff discussed the Student being placed “on a Tier 2 behavior plan that will be monitored for data.” The Assistant Principal in her email to the Student’s teachers stated that “[t]he other thing to consider is whether [the Student] should be ‘regarded as’ having a disability that interferes with his learning- if XXXX has mentioned ADD or medicine, we can get him on a 504 with accommodations to modify

behavior.” Moreover, on November 3, 2017, internal correspondence notes that the School Counselor explained to the School’s Social Worker that she had “no diagnosis so [the School] did not offer a 504 plan.”

OCR reviewed the District’s policies and procedures. The District follows North Carolina Policies Governing Services for Children with Disabilities from the North Carolina department of Public Instruction, Exceptional Children Division. Additionally, OCR reviewed the District’s internal procedures for referrals of students with disabilities and the District’s internal process describes referral procedures when it is a MTSS referral, Parent Request for Evaluation, Referrals from doctor or outside agency, and Steps for a Referral for Speech Concerns. OCR notes that there is no specific procedure outline for when Staff should refer a student who is suspected to have a disability. Furthermore, OCR reviewed the District’s Multi-Tiered System of Support (MTSS). The District follows the procedures outlined by the NC Department of Public Instruction. Under MTSS, all students begin on Tier 1 and they move to Tier II and Tier III if the student’s behavior is not improving. The District also uses a Behavior Support Team that reviews information about students, makes recommendations, and provides support to schools.

OCR interviewed the School’s Principal and Assistant Principal and the District’s Director of Compliance ADA. The interviewees confirmed that anyone can refer a student who is suspected of having a disability, including teachers, staff, and administrators and that that the referral can be done verbally or written. The Assistant Principal was responsible for grade level discipline, special education and related aids and services, etc. She also worked with the MTSS leadership team and she is the designated Section 504 administrator. The Assistant Principal told OCR that she was not sure what the factors at that the District considers when identifying a student who is suspected of a disability and she noted that, in general, parents are the ones that bring the information to the School’s attention. The Assistant Principal explained that she spoke to the Complainant in August due to the Student’s disciplinary referral and that the Complainant told her about the Student’s mother being murdered and that she shared with the Complainant about school-based therapy and XXXX. The Assistant Principal then explained that she and others at the School continued to work with the Complainant and the Student trying to address his behavior. She noted that the School provided the Student a mentor at the end of September 2017 and offered school based therapy and grief counseling in September and November 2017. The Assistant Principal noted that the Student was placed on a Tier II plan to address his behavior in December 2017 and that she also reached out to the District’s Behavior Support Team. The Assistant Principal indicated that she did not suspect that the Student had a disability until January 2018 when she spoke to the Student’s private therapist.

Based on the above information, OCR has concerns that the District may have discriminated against the Student by failing to timely evaluate the Student. The documentation indicates that the Complainant had informed the School of XXXX prior to the start of the school year. The documentation notes that the Complainant met with School staff on September 18, 2017, and they discussed the Student's bullying behavior and also described him "as very defensive and confrontational at times when aggravated with a peer." In response, the Complainant shared with School staff that the Student continued to have "issues surrounding XXXX." Also, internal correspondence indicates that School staff discussed and considered a Section 504 Plan for the Student, but ultimately determined not to refer the Student because there was no indication of a diagnosis. First, on September 18, 2017, the School's internal correspondence indicates that School staff was prepared to discuss a Section 504 Plan at the September 18, 2017 meeting with the Complainant if the Complainant either raised the issue or provided a diagnosis during the meeting. Second, internal correspondence shows that a Section 504 Plan was discussed again on October 12, 2017 and School staff mentioned the possibility of considering a Section 504 Plan as an option to address the Student's behavior if there was information that the Student had ADD or was taking medicine. Third, on November 3, 2017, the School Counselor informed the School's Social Worker that a Section 504 Plan had not been offered to the Student because the Student did not have a diagnosis. OCR notes that Section 504 does not require a specific diagnosis or the submission of medical documentation to the school prior to evaluation; it only requires the Division to determine whether a student may need special education or related aids and services due to a substantial limitation of a major life activity and that the limitation is caused by a mental or physical impairment. Prior to OCR continuing its investigation by interviewing the Student's teachers, the social worker, and the Schools 504 Coordinator and guidance counselor, the District requested to resolve this allegation voluntarily.

ALLEGATION 2

1. 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.

2. Analysis

On January 29, 2018, the Student returned to School after serving his five day OSS and was placed on the Restrictions and Transition Plan. The Restrictions and Transition Plan put the following restrictions in place for the Student:

- 1.Lines-walk with the teacher
- 2.Arrival and Dismissal- wait in the office
- 3.Locker-last in the morning, 1st in the afternoon

4. Bathroom-1st and alone when on class break, with an escort when on an individual break
5. Hallway transitions-transition when hallways are clear
6. Lunch-through the line with Brown, eat at table on stage (may join friends on Fridays IF he has a good week)
7. Break-outside with teachers
8. Classroom-no group work, no movement without permission

The Complainant alleges that the Restrictions and Transition Plan” stayed in place from January 29, 2018 to February 27, 2018, despite the Student being referred to be evaluated under Section 504 and the Student being identified as a Student with disability who needs special education and related aids and services. The District contends that School staff “implemented progressive and targeted consequences to address the Student’s misbehavior, which included a plan for additional supervision and limited movement during transitions and unstructured periods” and that the Restrictions and Transition Plan was implemented from January 29, 2018 until February 16, 2018, the date the Section 504 team developed the Section 504 Plan.

OCR reviewed internal email correspondence between School staff and email correspondence between School staff and the Complainant. On January 30, 2018, the Complainant inquired about the expiration of the Restrictions and Transition Plan and the Assistant Principal responded noting that the “restrictions do not have an expiration date.” She explained that she would be “willing to review the plan every 30 days and consider adjusting one restriction at a time.” The Complainant immediately responded to the Assistant Principal expressing her concerns about the “Restrictions and Transition Plan” and the time period. Subsequently, the Complainant reached out to District administrators to express her concerns and on February 6, 2018, the District’s Director of Compliance ADA/Section 504 reached out to the School to inquire about the Restrictions and Transition Plan. The District’s Director of Compliance ADA/Section 504 noted in an email to the Principal that the District “cannot restrict a student with disabilities to protect them from bullying. The law states the perpetrators or bullies would be the ones to have the restrictions.” The School Principal responded clarifying that the Student was the bully, not the victim.

OCR reviewed the Principal’s contemporaneous notes. On February 1, 2018, the School Principal met with the Complainant and the Student’s private therapist to discuss the restrictions. The Principal’s notes indicate that the Complainant’s main concerns were the restrictions while the Student was at lunch that the curtains were closed and while walking outside that the Student was being told to stand by the pole. During the meeting the Student’s private therapist indicated that the Student was feeling isolated and the private

therapist told the Principal that she believed the restrictions would “cause more damage.” The therapist explained to the Principal that the Student needed “help with skills to deal with anxiety.

OCR reviewed the Student’s teachers’ “Team Meeting Notes.” The team meeting on January 26, 2018 stated that the Student was moved to Tier 3 plan indicating that the Student has XXXX. The team meeting notes mentioned the restrictions stating “No exposure to other children; office in the morning; lockers separate locker time: last in morning, first in the afternoon; bathroom class break- 1st and alone than everyone else; escort for individual break; Lunch: eating alone on stage, lunch line: [staff] will take and walk [the Student] through the line[;] Walking: stays by pole and walks with an adult[;] No group work, same material but does it alone[;] Hall way transition: transition when hallways are clear either before or after.” On February 23, 2018, the team meeting notes indicates that staff is “establishing [the Student’s] 504 and working to ensure his Tier 3 plan is being followed.”

OCR reviewed the District’s Director of Community Relations and the District’s Associate Superintendent’s notes concerning communication with the Complainant. On February 2, 2018, the Complainant contacted District administrators to express concerns regarding the Restrictions and Transitions Plan. On February 21, 2018, the Complainant met with District administrators to express her continuing concerns regarding the School and the Student’s treatment. The Director of Community Relations’ notes indicate that the Complainant told him that the Restrictions and Transitions Plan was not removed and she provided him specific examples of the continuing restrictions. Subsequent to the meeting, the notes indicate that the Director of Community Relations visited the Student several times to ensure that the restrictions were not in place. The notes also indicate that February 27, 2018 was the last date the Complainant expressed concerns about the Restrictions and Transitions Plan being in place.

OCR reviewed the District’s internal correspondence. Internal correspondence shows that on January 26, 2018, the Assistant Principal notified School staff about the restrictions and noted that the Restrictions and Transitions Plan will be put in the Student’s Section 504 Plan, “so it is imperative that all teachers observe them with fidelity and communicate these expectations to substitutes.” The internal correspondence between District and School staff and the internal correspondence indicates that School staff implemented the Restrictions and Transitions Plan until February 27, 2018.

OCR interviewed the School Principal and Assistant Principal and the District Director of Compliance. The Assistant Principal explained that she spoke with the Complainant on January 16, 2018 and informed her that she was going to change the Student’s access to other students to limit the Student’s bullying behavior. She noted that she mentioned the

transition plan to the Student's private therapist during the call and that the private therapist expressed interest in the transition plan. The Assistant Principal told OCR that the plan was intended to address the bullying concerns and that she had received complaints from other students in all of the separate settings where the transition plan covered. The Assistant Principal explained to OCR, in detail, each of the provisions in the Restrictions and Transitions Plans. She stated during arrival each day, the Student would wait in the office, by himself, while the other students were in the gym for approximately thirty minutes, and that during dismissal, the Student would wait for approximately five minutes in the office before being dismissed. She further explained that when the Student was scheduled to go to his locker, needed to go to the restroom, and transitioned to another class, the Student would go only when no other student was around - meaning he would go before or after the other students. During lunch, she explained that the Student would eat at a desk/chair on the stage (located in the cafeteria) by himself. She noted that she had never observed the Student behind the curtains, near the gym mats, but noted that the chair/desk could have been facing any direction, including towards the wall-away from the other students. During the walking break, she stated that the whole class generally goes outside during the break and walks around the track but that the Student would go outside and stand in close proximity to the teacher. She noted that he "was encouraged to run in place, stretch, and wiggle." Finally, regarding classroom instruction, the Student was only permitted to work independently rather than with others, meaning that he could not participate in any group work and could not move without permission. The Assistant Principal indicated XXXX and was not involved with the ongoing discussion concerning the Restriction and Transition Plan.

The Principal noted that he became involved with the Restrictions and Transitions Plans in February 2018 when he met with the Complainant, the Student's private therapist, the Student's father, and two additional individuals associated with the Student to discuss the intervention strategies. The Principal stated that the Complainant expressed to him that they felt the Restrictions and Transitions Plan was excessive. The Principal stated that the Restrictions and Transitions Plans was implemented for approximately two weeks, from January 29, 2018 to February 16, 2018, the date the Section 504 team developed the Section 504 Plan. The Principal reviewed the Restrictions and Transitions Plan with OCR and noted that the lunch restrictions was "a point of contention with" the Complainant. He noted that the Student would have been facing the back of the stage, away from other students because "[p]art of the point of [the intervention] was for him not [to] interact[] with people." The Principal noted that he has put into place restriction plans for other students but that no other student has engaged in similar behavior as the Student that would warrant the development of a Restrictions and Transitions Plan similar to the Student's.

The District confirmed that there “is no separate policy regarding restrictions/transition plans for discipline.” The District cites to Policy 4300: Student Behavior policies noting that “minor violations may result in short-term suspension and other disciplinary measures including but not limited to isolation or time-out, in-school suspension, detention, exclusion from extracurricular activities, and bus suspension.”

Based on the above information, OCR has concerns that the District may have discriminated against the Student on the basis of his disability when the School implemented the Restrictions and Transitions Plan from January 29, 2018 to February 27, 2018. By January 29, 2018, the School had sufficient information about the Student’s anxiety related to his PTSD and by February 16, 2018, the Section 504 team had determined that the Student was eligible for services under Section 504 and had developed the Student’s Section 504 Plan. OCR notes that the District argues that the Restrictions and Transitions Plan was removed by February 16, 2018; however, the District’s documentation indicates that restrictions were in place until February 27, 2018.. OCR has concerns regarding the Assistant Principal’s assertion in her January 26, 2018 email to School staff that the Restrictions and Transitions Plan was going to be incorporated into the Student’s Section 504 Plan. OCR notes that only a team of knowledgeable individuals can make the decision to include provisions in a student’s Section 504 Plan, especially those provisions that impact and limit a student’s access to the educational environment. A unilateral decision to add information to a Student’s Section 504 Plan would be a violation of Section 504. With that said, OCR notes that the Restrictions and Transitions Plan was not actually included in the Student’s Section 504 Plan; therefore, OCR only has concerns regarding the Assistant Principal’s email. Prior to OCR continuing its investigation by interviewing the Student’s teachers and District administrators to determine how the Restrictions and Transitions Plan was being implemented from day to day, the District requested to resolve this allegation voluntarily.

ALLEGATION 3

1. Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against any individual who asserts rights or privileges under Title VI or who files a complaint, testifies, assists, or participates in a proceeding under Title VI.

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.

2. Analysis

The Complainant alleges that she filed a complaint on February 2, 2018 with the District stating that the School violated the Student's civil rights because the School failed to evaluate the Student and the School put into place a Restrictions and Transitions Plan. The Complainant contends that the School refused to stop implementing the Restrictions and Transitions Plan because she filed the February 2, 2018 letter with the District.

Initially, the District alleged that it was unaware "of any grievance being filed by or on behalf of the Student; therefore, the School could not have retaliated against the Student." However, during the course of OCR's investigation, the District informed OCR that it discovered the February 2, 2018 letter. The District confirmed that the Complainant provided the letter to the District's Director of Community Relations. The District explained that the Director of Community Relations spoke to the Principal about the Complainant's concerns and also shared the information with the Associate Superintendent. The District further noted that the Complainant continued to raise concerns about the Restrictions and Transitions Plan in February 2018 and that the District administrators continued to work with the Principal to address the Complainant's concerns. It is undisputed that the Complainant's concerns regarding the Restrictions and Transitions Plan were resolved by February 27, 2018.

As discussed above, to establish a prima facie case the Complainant must engage in a protected activity, the District must have taken an adverse action against the Student, and there must be causal connection between the protected activity and the adverse action. Then, OCR determines whether the District had a legitimate, non-retaliatory reason for its decision. Finally, OCR determines whether the legitimate, non-retaliatory reason is pre-textual for unlawful retaliation.

Here, the Complainant engaged in a protected activity on February 2, 2018 when she provided the letter to the Director of Community Relations, the District took adverse action when the School refused to stop implementing the Restrictions and Transitions Plan, and causal connection existed because of the timeframe between the protected activity and adverse action. The District's alleges that the decision to continue the Restrictions and Transitions Plan was independent to the Complainant's contact with the District Director of Community Relations and the Associate Superintendent. Prior to OCR continuing its

investigation to determine whether the District’s reason to continue implementing the Restrictions and Transitions Plan was independent of the February 2, 2018 letter and whether the District’s legitimate, non-retaliatory reason was pre-textual for unlawful retaliation, the District requested to resolve this allegation voluntarily.

ALLEGATION 4

1. Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person 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 race, color, or national origin.

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 of a different race. 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.

2. Analysis

The Complainant alleges that the Student was disciplined harsher than similarly situated White students, which the District denies. The District explained that the Student’s discipline was “tailored as appropriate to the behavior and were progressively more serious” and that the “consequences for the Student were consistent with the School and District’s behavior plans.”

OCR reviewed the Student’s disciplinary record, comparator data, and the District and School discipline policies and procedures. On September 8, 2017, the Student received ISS for one class period for “taunting and intimidating a classmate in art class, challenging him to fight. On October 9, 2017, the Student was “restricted from the walk break for the remainder the month” for pulling a “female classmate’s hair while walking on the track. On November 15, 2017, the Student received a one day OSS for threatening “to fight and taunt[ing] another student, after [the School] had specifically warned [the Student] not to talk about fighting. On January 16, 2018, the Student received a five day OSS for cutting in line, shoving another student, and insulting a classmate’s weight.

OCR interviewed the Assistant Principal. The Assistant Principal was the administrator responsible for each disciplinary incident. The Assistant Principal reviewed each disciplinary referral with OCR and explained how she determined disciplinary consequence. The Assistant Principal told OCR that the School tries “to make the consequences relative to when and whether the behavior occurred.” The Assistant Principal noted that the Student Code of Conduct gives her some discretion when

determining the specific consequence for an infraction. On September 8, 2017, she explained that another student complained that he was intimidated by the Student. The Assistant Principal noted that the Student was initially scheduled for chorus and art but that middle school students generally aren't scheduled for both classes at the same time during middle school; therefore, she decided to remove the Student from art and add him to PE class instead. The Assistant Principal noted that the Student requested to be in chorus and that is why she chose to leave him in chorus. On October 9, 2017, the Student was referred for pulling another student's hair and that the Student was taunting another student on the track. The Assistant Principal explained that she determined that the Student should not participate in the walking break on the track because the incident occurred on the track and therefore the consequence was directly related to the incident. On November 15, 2017, the Student was in line speaking to another student about him being overweight and talking about fighting. The Assistant Principal explained that she suspended the Student because she had already warned him about his bullying behavior at the September 8, 2017 meeting. On January 22, 2018, the Student was referred for exhibiting bullying behavior and the Assistant Principal noted that the discipline was within the Student code of conduct framework.

OCR reviewed comparator data involving White students who were disciplined for similar behavior and OCR notes that the data indicates that the School disciplined White students similar to the Student. OCR reviewed the District and School's policies and procedures pertaining to discipline. The District's Student Behavior Policies direct each school to discipline students for minor violations by requesting a parent conference, isolation or time out for short periods, behavior improvement agreements, instructions in conflict resolution and anger management, peer mediation, academic intervention, in-school suspension, etc.² The District's Student Behavior Policies allows schools to discipline student for serious violations may result in any of the violations noted for the minor violations and it also allows for long-term suspensions or expulsions if the violation threatens the safety of students. The School's Teacher Handbook explained that offenses "fall into three categories:" minor offenses, redirect offenses, and major offenses. Minor offenses, such as name calling, talking, childish behavior are generally managed by classroom interventions; redirect offenses, such as abusive language, classroom disruption, talking back, defiance, etc., require that a student report to the ISS report; and for major offenses, such as fighting, theft, communicating threats, etc., require an immediate office referral with administrative decisions. The teacher's handbook notes that office referrals can be made for repeated misbehavior and that disciplinary consequence could be lunch detention, after school detention, ISS, or OSS.

² See, <https://boardpolicyonline.com/?b=gaston>

Here, based on the information provide, the District followed its District and School policies and procedures and there is sufficient evidence that the District treated White students who exhibited similar behavior similarly. Therefore, OCR finds that there is insufficient information that the District discriminated against the Student based on his race when he was disciplined for each incident.

CONCLUSION

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on September 7, 2018 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 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 has fulfilled the terms of the Agreement. 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 Zorayda Moreira-Smith, the OCR attorney assigned to this complaint, at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

Kristi R. Harris
Team Leader, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Deborah Stagner