



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

January 8, 2019

Via Email: jcassell@waynesboro.k12.va.us

Dr. Jeffrey Cassell
Superintendent
Waynesboro Public Schools
301 Pine Avenue
Waynesboro, VA 22980

Re: OCR Complaint No. 11-18-1474
Resolution Letter / Letter of Findings

Dear Dr. Cassell:

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 September 17, 2018 against Waynesboro Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School). The Complainant alleges that the Division discriminated against the Student on the basis of disability and retaliated against the Complainant and the Student. Specifically, the complaint alleges the following:

1. The Division discriminated against the Student on the basis of disability when it stopped providing the Student with XXXXX without reevaluating his need for it, at the beginning of the 2018-2019 school year.
2. XXXXX in retaliation for her disability-related advocacy.

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.

In reaching a determination, OCR reviewed documents and photographs provided by the Complainant and the Division, interviewed the Complainant, and reviewed statements by Division staff.

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

Before OCR completed its investigation of Allegation 1, the Division expressed a willingness to resolve the allegation pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination, if the Division expresses an interest in resolving the allegations, and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a Resolution Agreement.

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 2.

The following is a summary of the evidence obtained by OCR during the investigation to date regarding Allegation 1, and OCR's findings and conclusions with respect to Allegation 2.

Background

The Student was first enrolled at the School during the XXXXX school year, when he was enrolled in XXXXX. The Student had an Individualized Education Program (IEP) while enrolled at the School, and he was eligible to receive special education and/or related aids and services under the categories of XXXXX.

Allegation 1

The Division discriminated against the Student on the basis of his disability, when it stopped providing the Student with XXXXX as a special education and/or related aid and service, without reevaluating his need for it, at the beginning of the 2018-2019 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 IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

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 interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including

persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

Analysis

OCR first reviewed the Student’s special education documentation. The Student’s IEP covering the XXXXX school year and dated XXXXX as discussed below, included XXXXX. The Division did not provide minutes from the IEP meeting, and there is no other reference to XXXXX in the IEP or other documents provided related to that meeting. On XXXXX, an eligibility meeting was held and the Student was again found eligible under the categories of XXXXX. The bases for the decision were XXXXX. The Complainant participated XXXXX.¹

Subsequently, the Division convened an IEP meeting for the Student on XXXXX. A special education teacher (Teacher 1), the Principal, the XXXXX Teacher, and a general education teacher attended the meeting. The Complainant XXXXX. After reviewing the IEP, on XXXXX, the Complainant provided permission for the IEP to be implemented for the upcoming XXXXX school year. The IEP reflects that the Student’s XXXXX. However, there is no reference to XXXXX anywhere in the IEP, including with respect to its removal. The Prior Written Notice is similarly devoid of any reference to XXXXX or any discussion of how the placement decisions were made. The Prior Written Notice states that the Division proposed to “implement the new IEP for [the Student]”, the Student was “eligible for a new annual IEP”, “[t]he most recent eligibility information was used in developing this IEP”, and “[t]here were no other choices the team considered. No action was rejected.”

The Division also provided notes that Teacher 1 typed subsequent to receiving notification of OCR’s investigation, which include:

[T]he team discussed the removal of XXXXX because there had been no XXXXX. [The Student] had not required the level of adult support that he required at the end of the XXXXX school year (XXXXX) that warranted a placement XXXXX. The team determined that if XXXXX was needed after a trial XXXXX, that it could reconvene and add XXXXX back into the IEP.

On XXXXX, another special education teacher (Teacher 2) emailed the XXXXX referencing a call she received from the Complainant regarding XXXXX. Teacher 2 wrote that she spoke with Teacher 1, who was the Student’s case manager the prior year, and that “she did not incorporate XXXXX in his IEP because she felt he did not need it.” On XXXXX, the Complainant and Teacher 2 spoke about the Student’s XXXXX. The Complainant was concerned that the Student would “flip out” or that he would get hurt. The Complainant was reportedly willing to have the Student try XXXXX. Teacher 2 followed up with the XXXXX, writing that the Complainant requested that XXXXX be put back into the Student’s IEP. Teacher 2 wrote that she assured the Complainant that she “would talk with administrator and his previous special education teacher and we would come to an agreement on what was best.” The XXXXX forwarded the email, and responded that “we can addend the IEP to reflect XXXXX.”

¹ OCR also reviewed documentation regarding the Student’s reevaluation that occurred during the spring 2018 semester.

On XXXXX, Teacher 2 wrote to Teacher 1, the Principal, and the Assistant Principal regarding the Complainant’s call. Teacher 1 responded that the Student:

[H]as not had any XXXXX (at least that were reported to me). The concern with him XXXXX However, if mom feels strongly, I don’t think it would be an issue to do an addendum to add XXXXX back into the IEP and I say go ahead and do that. If mom wants, I can run down to the home with you tomorrow to get the addendum signed.

On XXXXX, Teacher 2 and the Assistant Principal returned the Complainant’s call, wherein the Complainant informed them that there were “traumatic issues” XXXXX The notes include “XXXXX” and that the Teacher explained that he would XXXXX The Complainant reportedly was okay with him XXXXX Notes provided by both the Assistant Principal and other School staff reflect that the Student had some difficulty XXXXX On XXXXX, the Principal spoke with the Complainant, and explained that the Student had no problems XXXXX. The notes reflect that on XXXXX, the Complainant told the XXXXX that she wanted an emergency IEP meeting.

Prior to OCR concluding its investigation, the Division requested to resolve this allegation pursuant to Section 302 of OCR’s *Case Processing Manual*.

Allegation 2

XXXXX, in retaliation for her disability-related advocacy.

Legal Standard

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 consider: 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 recipient 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 recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the recipient’s reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

OCR first examined whether the Complainant engaged in a protected activity. According to the Complainant, she began advocating that the Student be provided with XXXXX at the beginning of the XXXXX school year. Based on a review of the correspondence between the Complainant and various School staff, OCR determined that the Complainant’s advocacy constitutes a protected

activity. Next, OCR determined that a school district XXXXX is an adverse action. Finally, OCR determined that because of the temporal proximity of the Complainant's frequent advocacy regarding XXXXX, and the XXXXX, there is a causal connection between the protected activity and the adverse action, thereby establishing an initial, or prima facie, case of retaliation.

Next, OCR determined whether the Division has a legitimate, non-retaliatory reason for XXXXX, and whether that reason is a pretext for unlawful retaliation.

First, OCR reviewed the Division's XXXXX Policy (the Policy) which XXXXX.

OCR also reviewed a statement provided by the XXXXX. She explained that in the morning on XXXXX.

OCR also reviewed documentation the Division provided.

XXXXX

Based on the foregoing, OCR determined there is insufficient evidence that the Division's proffered legitimate non-retaliatory reason for XXXXX is a pretext for unlawful retaliation. First, the Policy XXXXX. Accordingly, OCR will take no further action regarding Allegation 2 as of the date of this letter.

Conclusion

On January 3, 2019, the Division signed the enclosed Resolution Agreement (the Agreement) which, when fully implemented, will address Allegation 1, pursuant to Section 302 of OCR's *Case Processing Manual*. The provisions of the Agreement are aligned with Allegation 1 and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the Division to provide training to School staff on the Division's Section 504 obligations when making evaluation, reevaluation, and placement decisions. The Agreement further requires, if the Student reenrolls in the Division, that the Division convene a group of persons knowledgeable about the Student to evaluate and determine whether the Student should be provided with XXXXX as part of an IEP or Section 504 Plan and consider whether the Student should be provided with compensatory and/or remedial services for the time period he was not provided with XXXXX. Please review the enclosed Agreement for further details. OCR will monitor the Division's implementation of the Agreement until the Division has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division'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.

The Complainant has a right to appeal OCR's determination regarding Allegation 2 within 60 calendar days of the date of this letter. The Complainant must submit a written statement of no

more than ten (10) pages (double-spaced, if typed) by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; by email to OCR@ed.gov; or by fax to 202-453-6012.² The filing date of an appeal is the date that the appeal is postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why she believes the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome; failure to do so may result in dismissal of the appeal. OCR will forward a copy of the appeal to the Division. The Division has the option to submit a response to the appeal to OCR within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Division.

Please be advised that the Division 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 Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Shana Heller, the OCR attorney assigned to this complaint, at 202-453-6599 or Shana.Heller@ed.gov.

Sincerely,

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

Enclosure

cc: Mandi M. Smith, Counsel for the Division

² OCR is currently developing an appeal form that can be submitted online. At this time, anyone choosing to use the appeal form located at <https://www.ed.gov/ocr/docs/appeals-form.pdf> must first download the form before completing it, and then email the completed form to OCR@ed.gov in order for OCR to view all of the content.