



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

May 7, 2019

Ms. Cathy Moore  
Superintendent  
Wake County Public Schools  
5625 Dillard Drive  
Cary, NC 27518

RE: OCR Complaint No. 11-19-1064  
Resolution Letter

Dear Superintendent Moore:

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 XXXXX against Wake County Public Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) formerly enrolled at XXXXX (the School).<sup>1</sup> The Complainant alleges that the District discriminated against the Student on the basis of her disability.<sup>2</sup> Specifically, the complaint alleges that the District treated the Student differently from other students on the basis of her disability, when it excluded the Student's participation in the School's XXXXX (the Program), from approximately XXXXX through XXXXX XXXXX XXXXX.

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 and Title II.

During the investigation, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant. Before OCR completed its investigation, the District expressed a willingness to resolve the complaint. OCR determined that it is appropriate to resolve the complaint 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 District expresses an

---

<sup>1</sup> The Student is currently enrolled at XXXXX XXXXX XXXXX in the District.

<sup>2</sup> The Complainant reported that the Student is diagnosed with XXXXX XXXXX XXXXX and XXXXX XXXXX XXXXX.

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. The following is a summary of the evidence obtained by OCR during the investigation to date.

### **Facts**

The Student was enrolled in XXXXX at the School for the XXXXX school year. During the relevant time period, OCR reviewed documentation indicating that the Student had an Individual Health Plan (IHP) for XXXXX XXXXX XXXXX and XXXXX. Further, the Complainant contended that on or about XXXXX, she reported to the District that the Student had also been diagnosed XXXXX XXXXX XXXXX. Notwithstanding having notice of the Student’s diagnoses, the District had not identified the Student as a student with a disability under Section 504.<sup>3</sup>

During the Student’s participation in the Program, both the Complainant and the District informed OCR that in early XXXXX, other students reported to the Student’s XXXXX (the Teacher) that the Student had sent XXXX to them in which she expressed having XXXXX XXXXX.<sup>4</sup> OCR reviewed XXXXX exchanged between the Complainant and the Teacher wherein the Teacher informed the Complainant of the Student’s XXXXX, and the Teacher maintained an ongoing conversation with the Complainant about the Student’s concerns related to XXXXX XXXXX XXXXX, including adjustment to various medications. OCR also reviewed email correspondence indicating that the Complainant also discussed the Student’s XXXXX status with the School Counselor and the Principal, including how the Student’s XXXXX impeded her participation in meeting the demands of the Program.<sup>5</sup> Specifically, the Complainant reported that the Student had trouble meeting the “XXXXX XXXXX XXXXX XXXXX XXXXX.” In responding to these concerns, the District contended that School staff supported the Student by providing the Complainant and the Student opportunities to meet with the School Counselor; offering the Teacher’s office as a safe space when the Student was having XXXXX XXXXX and needed a place to XXXXX; and affording the Student flexibility in due dates for class assignments.

On XXXXX, the Teacher emailed the Student and the Complainant. OCR reviewed the email, which pertained to the Student’s behavioral conduct and participation in the Program. Specifically, the Teacher cautioned the Student regarding her continued participation in the Program given her

---

<sup>3</sup> In or around XXXXX, the Complainant inquired about the necessity of a Section 504 Plan for the Student based upon how the Student’s diagnoses impacted the Student’s academic performance. Although the District had notice of the Student’s diagnoses, as well as information to suggest that the Student’s diagnoses impacted the Student’s academic performance, the District did not refer the Student for an evaluation under Section 504 until XXXXX, at which time the Complainant declined to have the Student evaluated.

<sup>4</sup> The Complainant contended that despite the Student’s XXXXX XXXXX, of which the District was aware at least as of early XXXXX, the District delayed referring the Student for a XXXXX assessment per District protocol until XXXXX.

<sup>5</sup> The Complainant reported, and email documentation supported, that the Student also exhibited academic concerns in other subjects, including trouble concentrating, which the Complainant attributed to the Student’s diagnoses. Based on this preliminary information, coupled with the District’s notice of the Student’s diagnoses, OCR cautions the District that the Student should have been timely referred for an evaluation under Section 504. As previously stated, the District did not refer the Student for an evaluation under Section 504 until XXXXX, at which time the Complainant declined to have the Student evaluated.

declining attendance and punctuality, and for displaying a negative attitude towards other students, the Teacher, and the Program. On or about XXXXX, the Student sent a text message responding to the Teacher, in which she stated that the Teacher’s email made her XXXXX XXXXX. The Student wrote, in part:

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX  
XXXXX XXXXX XXXXX XXXXX XXXXX...

In response, the Teacher informed the Complainant, the Counselor, and the Principal of the Student’s text message. School staff also referred the Student to student support services, and the School conducted a XXXXX XXXXX assessment on XXXXX. As part of the assessment, a Counselor (Counselor 2) interviewed the Student and determined that the Student was at XXXXX risk of XXXXX.<sup>6</sup> The District did not provide OCR with any information indicating that the XXXXX XXXXX assessment resulted in any recommendations to address the risk that the Student presented XXXXX, including her removal from the Program. In addition, although requested by OCR, the District did not provide OCR with any protocols and/or policies and procedures regarding how it conducts XXXXX XXXXX assessments, or how the results of such assessments are subsequently used.<sup>7</sup>

On XXXXX, the Complainant and the Principal met to discuss the Student’s XXXXX sent on XXXXX, as well as her continued participation in the Program.<sup>8</sup> Both the District and the Complainant reported to OCR that during the meeting, the Principal informed the Complainant that she had decided to temporarily remove the Student from the Teacher’s XXXXX/Program and other Program-related activities such as XXXXX and place her in alternate location. The District asserted that instead, the Student completed a research project. According to the District, the Principal reasoned that separation from the XXXXX/Program and the Teacher would allow the Student to focus on her XXXXX XXXXX and reduce her XXXXX XXXXX XXXXX. The District did not provide OCR with any information indicating whether the Principal considered the results of the XXXXX XXXXX assessment in making her determination.

---

<sup>6</sup> The District reported that following the conclusion of the assessment, the School explained to the Complainant the supports that it could provide to the Student and offered to provide information regarding XXXXX XXXXX XXXXX and support options, but the Complainant declined.

<sup>7</sup> The District did provide OCR with a PowerPoint Training Presentation titled, “XXXXX XXXXX XXXXX XXXXX” and a “XXXXX” handout for District staff. OCR reviewed the presentation, which described warning signs of childhood XXXXX including XXXXX XXXXX behavior, and it directed staff to immediately notify an administrator or student services staff of any concerns. The handout also included similar information. However, neither the presentation nor the handout addressed how the District conducts XXXXX assessments, or how the results of such assessments are subsequently used. The District also informed OCR that guidance counselors, social workers, and others who conduct XXXXX assessments or screenings also receive training. “This training includes what to do after receiving a referral regarding a student at risk for XXXXX and recommended questions to use when interviewing students who have made XXXXX of XXXXX. The assessment outcome dictates the next steps, which vary depending on the severity of the risk. For example, after conducting the assessment, students with high to moderate risk are to be referred for an emergency evaluation. For students who are low to moderate risk, staff work with the parents and student to develop a written action plan.” However, the District did not provide OCR with such training materials or other protocols, policies or procedures. OCR notes that according to a description of the District’s practices in this regard, and because Counselor 2 determined that the Student was at XXXXX risk of XXXXX, she should have been referred for an emergency evaluation but was not.

<sup>8</sup> OCR reviewed email documentation stating that the Complainant had previously expressed a desire to have the Student work outside of the classroom while the Student navigated finding the right medication for her disabilities.

Because the Principal intended for the Student’s removal to be temporary, the District contended that in the weeks following the Student’s removal from the XXXXX/Program, the Principal attempted to meet with the Complainant to discuss the Student’s return to the XXXXX/Program. However, the District stated that the Complainant declined and stated that she did not want the Student to be in XXXXX/Program-related activities with the Teacher. Nevertheless, OCR could not readily corroborate the District’s assertions through available documentary evidence, and the Complainant rebutted the District’s claims.

Specifically, the Complainant stated that in a meeting held at her request on XXXXX, the Principal stated that the Student would remain removed from the Program through the remainder of the school year, with the intent of reintegrating the Student into the Program for the XXXXX school year. OCR reviewed email documentation supporting the Complainant’s assertions. The District provided OCR with documentation indicating that the Student completed her project and received full credit for the XXXXX/Program for the XXXXX school year. As previously noted, the District ultimately referred the Student for an evaluation under Section 504 in XXXXX, at which time the Complainant declined to have the Student evaluated.

The Student subsequently transferred to another District school for the XXXXX school year, XXXXX XXXXX XXXXX, wherein students take XXXXX XXXXX XXXXX XXXXX XXXXX. The District stated that the Student applied for and was admitted to a XXXXX at a local college unrelated to the District where she continues to pursue XXXXX.

### **Allegation**

The Complainant alleged that the District discriminated against the Student by treating the Student differently from other students on the basis of her disability, when it excluded the Student’s participation in the Program, from approximately XXXXX through XXXXX XXXXX XXXXX.

### **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 recipient treated the student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the recipient is a pretext, or excuse, for unlawful discrimination.

### **Analysis**

As a threshold matter, OCR determined that the District treated the Student differently less favorably than similarly situated students without disabilities to establish an initial claim of discrimination.

The District asserted that it temporarily excluded the Student from participating in the Program due to concerns for the Student's safety given the Student's XXXXX XXXXX XXXXX XXXXX to the Teacher, dated XXXXX, and the belief that separation from both the Program and the Teacher would allow the Student to focus on her XXXXX and reduce her thoughts of XXXXX. OCR was unable to establish why the Student remained excluded from the Program through the remainder of the XXXXX XXXXX.

However, based on OCR's investigation thus far, OCR is concerned that the District removed the Student for behavior that may have been correlated with the Student's disabilities. Moreover, and particularly because the District's actions were intended to be temporary but remained in effect through the remainder of the XXXXX XXXXX, OCR is concerned that the District's actions were not narrowly-tailored to the circumstances at hand and instead were overbroad – that is, proportionate to the issue of a legitimate safety concern rather than evidence of a discriminatory motive based on the Student's disabilities. In addition, OCR is concerned about the timeliness of the District's XXXXX assessment of the Student on XXXXX, as the District was aware that the Student had made comments regarding XXXXX to other students as early as XXXXX. Further, it is unclear what role the District's XXXXX assessment of the Student on XXXXX played in the Student's removal from the Program, and it is not readily apparent what, if any, policies and procedures that the District maintains regarding how it conducts such assessments or how they are subsequently used. OCR requires further information by conducting witness interviews to resolve the outlined concerns. Prior to OCR reaching a determination whether the District articulated a legitimate, nondiscriminatory reason for excluding the Student from the Program absent a finding of pretext, the District expressed a willingness to resolve the complaint pursuant to Section 302 of OCR's *Case Processing Manual*.

### **Conclusion**

On May 3, 2019, the District signed the enclosed Resolution Agreement (the Agreement) which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the District to provide training on the requirements of Section 504; review its XXXXX Assessment Protocol; and compensate the Student for missed XXXXX XXXXX as a result of her removal from the Program. Please review the enclosed Agreement for further details. OCR will monitor the District's implementation of the Agreement until the District has fulfilled the terms of the Agreement.

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 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  
District of Columbia Office  
Office for Civil Rights

Enclosure

cc: Jason Weber, Esq. at [jweber@tharringtonsmith.com](mailto:jweber@tharringtonsmith.com)