



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 17, 2019

Dr. Jim Causby
Superintendent
Johnston County Public Schools
2320 US 70 Business HWY East
Smithfield, NC 27577

Re: OCR Complaint No. 11-19-1264
Letter of Findings/Resolution Letter

Dear Dr. Causby:

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 20, 2019, against Johnston County Public Schools (the District). The Complainant alleged that the District discriminated against the Student on the basis of disability XXXXX. Specifically, the complaint alleges that:

1. The District failed to respond promptly and appropriately to the Complainant's reports on or around XXXXX and continuing to the present, that the Student was XXXXX.
2. The District failed to convene a group of people knowledgeable about the Student and her disability to consider whether modifications to the Student's 504 Plan were necessary in order to provide FAPE in light of:
 - a. Notice on or around March 21, 2019, that the Student was XXXXX and
 - b. Staff concerns on or around March 15, 2019, that the Student was having difficulty XXXXX.
3. The Student's teachers XXXXX failed to implement the provisions of her Section 504 Plan that provided for:
 - a. Notice to substitute teachers of the Student's 504 Plan (March 1, 2019 to present), and
 - b. Preferential seating (November 1, 2018 to present).
4. From November 27, 2019 until March 1, 2019, the District did not XXXXX, as provided in the Student's November 27, 2019 504 Plan.

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 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, and interviewed the Complainant.

Before OCR completed its investigation, the District expressed a willingness to resolve allegations #1, 2a, and 3a 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 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.

In addition, OCR completed its investigation of allegations #2b, 3b, and 4. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support these allegations.

OCR's findings and conclusions regarding allegations #2b, 3b, and 4 are discussed below, as well as a summary of the evidence obtained by OCR to date regarding allegations #1, 2a, and 3a.

Facts

During the 2018-2019 school year, the Student was enrolled in the XXXXX grade at the School, where she participated in the XXXXX. At the request of the Complainant, the Student was evaluated and identified as eligible for a Section 504 Plan on November 27, 2018, the main provisions of which were XXXXX. At the Complainant's request, the District convened another 504 team meeting on March 1, 2019, to review the Student's Section 504 Plan. The team agreed to revise the plan to include XXXXX.

Allegation 1: The District failed to XXXXX to the Complainant's reports on or around March 22, 2019 and continuing to the present, that the Student was XXXXX.

Legal Standard

Section 504 and Title II prohibit discrimination on the basis of disability. XXXXX is a form of disability discrimination. Districts are required to provide a prompt and equitable grievance process to address complaints of disability discrimination.

Analysis

From March 21, 2019 until the end of the school year, the Complainant reported a substantial number of instances XXXXX.¹ In an interview with OCR, the Student said that XXXXX. According to the evidence obtained to date, at least some of these instances involved the same students each time. On most occasions, upon learning XXXXX from the Complainant, the School administration investigated to determine whether XXXXX. According to the District, some of the XXXXX were substantiated and some were not substantiated. According to the evidence obtained to date, the District XXXXX at least some of XXXXX.

On at least two occasions, the Complainant reported XXXXX. For example, in an email dated April 11, 2019, the Complainant reported to the Assistant Principal that XXXXX. The Complainant further wrote that XXXXX. The Assistant Principal responded that she XXXXX. The Student told OCR that XXXXX.

In an email dated May 2, 2019, the Complainant reported XXXXX. In an interview, the Student explained to OCR that she believed XXXXX. This incident was reported to the Principal in the same email as another incident. In a May 2, 2019 email to Complainant, XXXXX. However, neither this email nor any of the other information the District provided to OCR established that the District addressed the XXXXX.

Thus, OCR has the following concerns. First, OCR is concerned that, with regard to XXXXX, the District had reason to know that XXXXX, and that the District did not respond appropriately. Although the Assistant Principal told the Complainant that XXXXX, OCR was concerned that her inquiry did not consider whether XXXXX. Second, OCR is concerned that the Assistant Principal may have believed that because XXXXX. Third, with regard to the May 2 incident, OCR is concerned that the District had reason to know of the XXXXX and did not respond XXXXX to determine XXXXX.

Fourth, OCR is concerned that once becoming aware of either of the XXXXX, the District did not XXXXX to determine whether those previous XXXXX for the Student, as well as convene a group of people knowledgeable about the Student and her disability to determine whether the XXXXX Student's receipt of FAPE.

Finally, OCR is concerned that although the District, in some cases, XXXXX, it did not take steps to XXXXX.

Allegation 2: The District failed to convene a group of people knowledgeable about the Student and her disability to consider whether modifications to the Student's 504 Plan were necessary in order to provide FAPE in light of:

- a. Notice on or around March 21, 2019 that the Student was XXXXX, and
- b. Staff concerns on or around March 15, 2019, that the Student was XXXXX.

Legal Standard

¹ When she reported the incidents, the Complainant said XXXXX based on her disability, but she implied as such when she wrote in an email to the Assistant Principal dated April 11, that she does not XXXXX.

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. 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 Section 504 Plan or placement are necessary.

Analysis

a. Notice on or around March 21, 2019, that the Student XXXXX

On or around March 21, 2019, and continuing until the end of the 2018-2019 school year, the Complainant reported to the District at various times that XXXXX. The incidents reported included XXXXX.

On March 26, the Complainant sent an email to the Principal and the Exceptional Children's Director asking for another IDEA evaluation because the Student's was XXXXX. In a March 29, 2019 text message to the XXXXX, the Principal requested XXXXX.

In a March 31, 2019 email, the Complainant informed the Principal that XXXXX. In an April 5, 2019 email, the Complainant told the Principal that XXXXX. In the email, the Complainant acknowledged that the Student was XXXXX. Additionally, on April 8, 10, and 15 the Complainant reported several incidents in which XXXXX.

An IDEA Eligibility meeting was scheduled for April 17, 2019. Under the section of the Referral Form outlining observations by teachers, related service providers, and administrators, it is noted: XXXXX. The evidence to date suggests that the team did not consider whether, due to the Student's experience XXXXX, modifications to the Student's 504 Plan were necessary in order to provide the Student FAPE. The Prior Written Notice did not include any further information about what would be included in a XXXXX, who would provide it, or about the type of XXXXX. In addition, the Student's Section 504 Plan was not revised to reflect the XXXXX as a related aid and service to address XXXXX, and there was no information at this stage of the investigation that the Student was provided with XXXXX before the end of the 2018-2019 school year.

In a May 7, 2019 email, the Complainant told XXXXX that she pulled the Student out of school today at lunch because XXXXX.

These emails suggest that, due to XXXXX and that the School was unsure of how to help the Student. OCR is concerned that, in light of information both before and after the IDEA

Eligibility meeting suggesting that the educational program was not meeting the Student's individual needs, the District did not convene a group of knowledgeable persons to consider whether further evaluation or revisions to the student's Section 504 Plan or placement were necessary.

b. Staff concerns on or around March 15, 2019, that XXXXX.

The Complainant alleged that the Guidance Counselor called her to discuss XXXXX. According to the Complainant, the Student told her that as a result, XXXXX. The Complainant told OCR that the Guidance Counselor implied during this call with her that the Complainant XXXXX.

According to contemporaneous notes about the incident prepared by the Principal, on March 15, 2019, the Complainant reported this incident to the Principal, who investigated it and found that XXXXX. Contemporaneous notes prepared by XXXXX reflected that on March 15, the Principal came to talk to her about the Complainant's allegation and corroborated the Principal's notes. In addition, the XXXXX wrote that the Guidance Counselor XXXXX between her and the Student.

Also in contemporaneous notes, the XXXXX wrote that a few days after XXXXX. The XXXXX notes said that she discussed this with the Principal and the Guidance Counselor, then XXXXX to discuss the Student's concerns.

In contemporaneous notes dated March 18, 2019, the Guidance Counselor wrote that she spoke to the Complainant about setting up a meeting XXXXX. According to the notes, the meeting occurred the next day.

The Complainant asserts that this misunderstanding, and the Student's XXXXX, should have put the District on notice of the fact that the Student XXXXX, which should have triggered a reevaluation. The Complainant did not allege, nor did the District provide information that would lead OCR to believe that beyond this incident, staff XXXXX. OCR finds that the single incident described above, without more, is not enough to suggest that the Student's educational program was not meeting her individual needs, thus triggering the District's obligation under Section 504 to reevaluate the Student. Therefore, OCR will take no further action with respect to Allegation 2(b).

Allegation 3: The Student's teachers in XXXXX failed to implement the provisions of her Section 504 Plan that provided for:

- a. Notice to substitute teachers of the Student's 504 Plan (March 1, 2019 to present), and
- b. Preferential seating (November 1, 2018 to present).

Legal Standard

As stated above, 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.

a. Notice to substitute teachers of the Student's 504 Plan (March 1, 2019 to present)

The Complainant alleged that the Student's teachers in XXXXX failed to implement the provisions of her Section 504 Plan that provided for notice to substitute teachers of the Student's 504 Plan. OCR reviewed a copy of the Student's Section 504 Plan dated March 1, 2019. The only mention of substitute teachers in the Plan is the following provision.

XXXXX

OCR finds that the Student's Section 504 Plan did not require notice to substitute teachers of the entire 504 Plan, but rather only of the above provision. OCR reviewed copies of information that the Student's XXXXX teachers provided to substitute teachers. The substitute teacher information from the Student's XXXXX teacher summarized the Student's needs and some of the provisions in her Section 504 Plan. However, the information did not specifically reference the Student's need for XXXXX, nor did it specifically reference the fact that the Student had a Section 504 Plan in place. The substitute teacher information from the Student's XXXXX teacher included a summary of some of the provisions of the Student's Section 504 Plan and referenced a copy of her 504 Plan in a binder. Finally, the information from the Student's XXXXX teacher included a note that said: XXXXX. The District did not provide copies of substitute teacher information from the Student's XXXXX teachers. Based on the aforementioned, OCR has concerns that some of the Student's substitute teachers were not made aware of the provision requiring XXXXX.

Regardless of whether a Section 504 Plan includes a provision that substitute teachers be given notice of the plan, Section 504 requires that all staff working with a student who has a 504 Plan, including substitute teachers, consistently implement the plan. If this does not occur and, as a result, the student does not receive a FAPE, it would be a violation of Section 504 and Title II.

Contemporaneous email correspondence between the Complainant and School staff contain several references to substitute teachers or individuals who were covering a class when a teacher was out who did not implement the provision of the Student's 504 Plan XXXXX. For example, in an email to the Complainant dated March 26, 2019, the Principal wrote, XXXXX.

In an email dated April 4, 2019, the Complainant wrote to the Principal, XXXXX. The Complainant went on to explain that when there was a substitute teacher during XXXXX, another Student told the Student, XXXXX. The Complainant said that the Student, XXXXX.

In an email dated April 5, 2019, the Principal informed the Complainant of XXXXX. In response to this email the Complainant replied, XXXXX.

Based on the above, OCR is concerned that, in some instances, substitute teachers may not have been aware of, and thus not implemented, the provision of the Student's Section 504 Plan that

XXXXXX. In an interview with OCR, the Student said that she would get XXXXXX when a substitute teacher would not allow her to XXXXXX, and that she usually asked XXXXXX. OCR notes that at least two of the instances when the Complainant reported to the principal that XXXXXX after March 21, 2019, when the Complainant started reporting XXXXXX, and that the Complainant, in her emails to the Principal, said that the XXXXXX the Student was having had increased. Thus, OCR has concerns that some of the Students substitute teachers may have denied the Student a FAPE by failing to implement the aforementioned provision of the Student's Section 504 Plan.

b. Preferential seating (November 1, 2018 to present)

The Student was initially found eligible for Section 504 services on November 27, 2018. The same day, the Section 504 team developed a Section 504 Plan that provided, in relevant part, for

XXXXXX

In its response to OCR, the District represented that the Student's teachers implemented the preferential seating accommodation consistently. OCR was unable to find any evidence during the investigation thus far indicating that the Student's teachers did not implement the preferential seating accommodation, nor did the Complainant provide information, beyond her allegation, about any specific instance in which one of the Student's teachers did not implement this provision of the Student's Section 504 Plan.

OCR notes at least one communication from the Complainant to the District in which the Complainant asked XXXXXX. However, such a provision was not part of the Student's 504 Plan and did not implicate the preferential seating provisions of the Section 504 Plan.

Based on the above, OCR finds insufficient evidence that from November 27, 2018 (the date that the Section 504 Plan took effect) to the present, the Student's teachers in XXXXXX failed to implement the provision of her Section 504 Plan that provided for preferential seating.

Allegation 4: From November 27, 2019 until March 1, 2019, the District did not XXXXXX, as provided in the Student's November 27, 2019 504 Plan.

The Student's Section 504 Plan provided in relevant part:

XXXXXX

The District represents that the Complainant misunderstood this provision of the Student's 504 Plan, i.e. that the provision did not require the District to XXXXXX, but rather the intent of the provision was to XXXXXX.

The Complainant expressed her concern about the School not XXXXXX to the Director of Social and Emotional Learning in a telephone conversation on or around February 20, 2019. In an email to the Guidance Counselor dated February 20, 2019, the Director of Social and Emotional

Learning for the District wrote that she had spoken to the Complainant on the phone and that XXXXX.

In an email to the Complainant the same day, the Guidance Counselor wrote: XXXXX.

OCR finds, based on the evidence to date, that this provision of the Student's November 27, 2019, 504 Plan was ambiguous as to who would be responsible for XXXXX. However, the Complainant expressed her concern to the Director of Social and emotional Learning on or around February 20, 2019, and as a result, the School Guidance Counselor on the same day XXXXX. On March 1, 2019, the 504 Team met and XXXXX.² This indicates that, at least as of February 20, 2019, the group had come to a meeting of the minds on how to interpret the provision of the Section 504 Plan.

Thus, OCR finds that on February 20, 2019, the District XXXXX, but between November 27, 2018 and February 20, 2019, a period of approximately three months, the District did not XXXXX. During this time, according to the Student, she felt like XXXXX. However, OCR was unable to find, nor was the Complainant able to provide, information indicating that during the period between November 27, 2018 and February 20, 2019, the failure of the District to XXXXX denied the Student FAPE. Indeed, the first instance of the Complainant reporting XXXXX to the District was February 21, 2019, after the District specified XXXXX. Thus, OCR finds insufficient evidence that the District denied the Student FAPE when it XXXXX between November 27, 2018 and February 20, 2019, and it will take no further action with respect to Allegation 4.

Conclusion

On October 14, 2019, the District signed the enclosed Resolution Agreement which, when fully implemented, will address allegations #s 1, 2a, and 3a. The provisions of the Agreement are aligned with the allegations and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the District to XXXXX; revise its policies and procedures to provide for XXXXX; provide training on XXXXX and Section 504 and II to appropriate employees at the School; and reevaluate the Student as well as determine whether she requires compensatory or remedial services.

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.

² OCR determined that the Student's March 1, 2019 Section 504 Plan states: XXXXX.

The Complainant has a right to appeal OCR's determination regarding allegations #2b, 3b, and 4 within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://wdcrobcolp01.ed.gov/CFAPPS/OCR/ocrAppealsForm.cfm>) or 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. The filing date of an appeal is the date that the appeal is submitted online, postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why he or 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 District. The District 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 District.

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 XXXXX, the OCR attorney assigned to this complaint, at XXXXX or XXXXX.

Sincerely,

XXXXX
Team Leader, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Jason Weber, Esquire