



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

June 23, 2020

sent via email: del.burns@nhcs.net

Dr. Del Burns
Interim Superintendent
New Hanover County Schools
6410 Carolina Beach Road
Wilmington, NC 28412

Re: OCR Complaint No. 11-19-1508
Resolution Letter

Dear Dr. Burns:

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 New Hanover County Schools (the District). The complaint was filed on behalf of a student (the Student) at XXXXX School (the School). The Complainant alleges that the District discriminated against the Student on the basis of disability and retaliated against the Student. Specifically, the complaint alleges the following:

1. Since XXXXX, the District discriminated against the Student based on disability when the School implemented the District's "Use of Service Animals" policy.
2. On XXXXX, the District denied the Student a free appropriate public education (FAPE) XXXXX.
3. On XXXXX, the District retaliated against the Student because XXXXX when 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. 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. 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.

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

During the investigation, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District staff. Before OCR completed its investigation, the District expressed a willingness to resolve Allegation 1 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 recipient 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. OCR completed its investigation of Allegations 2 and 3, and, after carefully considering all of the information obtained during the investigation, found insufficient evidence to support these allegations. OCR’s findings and conclusions regarding Allegations 2 and 3 are discussed below, as well as a summary of the evidence obtained by OCR to date regarding Allegation 1.

Facts

XXXXX

According to the District’s counsel, at a meeting on September 11, 2019, he informed all District principals that the service animal policy and procedures were under revision, provided them with training on the proposed changes, and instructed them to stop enforcing the existing policy and procedures. The next day, the District’s counsel issued a memorandum to all District principals reiterating that principals should no longer enforce the existing policy; in particular, the memo advised that schools should only ask the two questions allowed by the Title II regulation (whether the animal is required because of a disability and what work or tasks the animal has been trained to perform) and should not request any documentation other than proof of required vaccinations.

XXXXX

On November 5, 2019, the District’s Board adopted a revised service animal policy and procedures. The revised procedures no longer required written requests and prior approval to use service animals on District property. However, the revised procedures stated that “if a person requests or attempts to take a service animal to a place where students, staff, or others are likely to be in close proximity to and in the same room with the animal, School District staff should, prior to allowing access by the animal to those places, consider whether a Service Animal Access Plan should be developed for the protection of all involved,” for example “if the animal may come in close proximity to a person with a severe dog allergy.” Specifically, “if the use of a service animal may impact other students, staff, volunteers or visitors who may have disabilities or other rights that are impacted due to the presence of the service animal, such as allergies or psychological conditions, the service animal may be subject to a Service Animal Access Plan which: introduces the service animal to the School District environment, includes any appropriate training for staff, students, volunteers or visitors regarding interaction with the service animal, and provides reasonable accommodations required by law for others affected by the presence of the animal. Reasonable accommodations may include separating the animal and the persons whose rights are affected by proximity to the animal, such as assignment to different work stations, rooms, work locations, school buildings or classrooms.” The revised procedures further stated that “generalized concerns that other persons may have allergies or may have a fear

of a service animal are not reasons to deny access...; however specific documentation of allergies or phobias/fears of service animals may necessitate the need for a Service Animal Access Plan.”

The revised policy and procedures also no longer required the submission of documentation, with the exception of “proof that the animal has received required vaccinations.” The U.S. Department of Justice has issued guidance stating that service animals are subject to the same licensing and vaccination rules that localities apply to all dogs.¹ North Carolina state law (N.C.G.S. § 130A-190(a)) requires all dogs to wear rabies vaccination tags at all times. The New Hanover County Code of Ordinances (Section 5-5) likewise requires all dogs to receive rabies vaccinations and to wear tags at all times.

Allegation 1: Since XXXXX, the District discriminated against the Student based on disability when the School implemented the District’s “Use of Service Animals” policy.

Legal Standard

The Title II regulation, at 28 C.F.R. § 35.136, provides that a public school district generally must modify its policies, practices, or procedures to permit individuals with disabilities to use service animals. The regulation, at 28 C.F.R. § 35.104, defines a service animal as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” The regulation provides a non-exhaustive list of examples of work or tasks that may be performed by a service animal.

Under the Title II regulation, at 28 C.F.R. § 35.136, persons with disabilities have the right to be accompanied by service animals in all parts of facilities where the public, participants in programs and activities, or invitees are allowed. A public school district is not permitted to ask about the nature or extent of a person’s disability or require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. If it is not readily apparent that an animal is trained to do work or perform tasks for an individual with a disability, the public school district is permitted to make two inquiries to determine whether an animal qualifies as a service animal: 1) if the animal is required because of a disability; and 2) what work or task the animal has been trained to perform.

The Title II regulation provides that a public entity may ask an individual with a disability to remove a service animal from the premises if: (1) the animal is out of control and the animal’s handler does not take effective action to control it; or (2) the animal is not housebroken. 28 C.F.R. § 35.136(b). In addition, if admitting service animals would fundamentally alter the nature of a service or program, service animals may be prohibited. 28 C.F.R. § 35.130(b)(7).

The U.S. Department of Justice has provided guidance regarding allergies and fear of dogs, which states: “Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a

¹ https://www.ada.gov/regs2010/service_animal_qa.html, questions 18 and 20.

school classroom..., they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.”²

Analysis

At the beginning of the 2019-2020 school year, the service animal policy and procedures in effect in the District (Policy 8432 and accompanying “Procedures and Guidelines for Use of Services Animals”) required prior approval before a service animal could be used on District property. Parents were directed to submit written requests to the school principal, at least three weeks in advance, that described the need for the service animal. Parents were also required to submit the following documentation: “certification by a veterinarian that the service animal has received all required vaccinations; documentation that the handler for the service animal is properly trained; proof of adequate liability insurance; and, if appropriate, documentation from the student’s physician or other health care provider regarding the need for a service animal.”

In its response to the complaint, the District acknowledged that this policy and corresponding procedures were outdated, and that School staff were acting pursuant to this outdated policy and its procedures XXXXX.

In early September 2019, the District took steps to resolve the concerns raised by the Complainant by proposing revisions to the policy and procedures and instructing principals to stop enforcing them pending the formal adoption of revisions. XXXXX For these reasons, OCR did not find evidence that the District violated Title II’s service animal provisions XXXXX after XXXXX.

However, OCR’s review of the District’s November 5, 2019 revised service animal policy and procedures identified issues that can be addressed through a Section 302 resolution agreement. Specifically, while the procedures correctly noted that “generalized concerns” about allergies or phobias are not sufficient to limit service animal access, the revised procedures did not make clear that an individual’s documented allergy or phobia would need to rise to the level of a disability (i.e., an impairment that substantially limits a major life activity) before that individual would be entitled to accommodations that could limit the service animal’s access. In addition, the revised procedures required the submission of proof of vaccinations, which could potentially be interpreted to require service animal owners to submit information or documentation beyond the requirement that dogs wear rabies tags.

On April 28, 2020, the District signed the enclosed Resolution Agreement which, when fully implemented, will address this allegation. 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 revise its service animal policy and procedures to ensure they are consistent with the applicable provisions of Title II, its implementing regulation at 28 C.F.R. § 35.136, and the Department of Justice’s ADA service animal guidance, and to provide training to District staff regarding the revised policy and

² https://www.ada.gov/service_animals_2010.htm.

procedures.³ 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.

Allegation 2: On XXXXX, the District denied the Student a FAPE XXXXX.

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. Implementation of an Individualized Education Program (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(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement. 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.

If a school district fails to comply with the procedural requirements of Section 504 or a student’s IEP, OCR determines whether that failure resulted in a denial of FAPE to the student. In doing so, OCR considers whether the failure had a meaningful adverse impact that deprived the student of educational opportunity.

Analysis

XXXXX

³ As of the date of this letter, the District has revised the policy and procedures pursuant to the Agreement. The revised policy and procedures are published at https://boardpolicyonline.com/bl/?b=hanover_county_old#&&hs=876885 (policy) and http://downloads.microscribepub.com/nc/new_hanover_old/NHCS%20PROCEDURES%20AND%20GUIDELINE%20FOR%20USE%20OF%20SERVICE%20ANIMALS%206.2.20_20200604.pdf (procedures).

OCR notes that there is other evidence that the District did not deny a FAPE to the Student. XXXXX Thus, the Student did not experience any adverse educational impact or loss of educational opportunity as a result of XXXXX. For these reasons, OCR found insufficient evidence of disability discrimination.

Allegation 3: On XXXXX, the District retaliated against the Student because XXXXX when XXXXX.

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.

Analysis

XXXXX Therefore, OCR continued the investigation to determine whether the District had a legitimate, non-retaliatory reason for its determination.

XXXXX XXXXX, OCR determined that the District had a legitimate, non-retaliatory reason for its decision to XXXXX.

OCR considered whether XXXXX was evidence that the District’s legitimate, non-retaliatory reason was pretextual. XXXXX

XXXXX This is further evidence that District staff were not acting with a retaliatory motive. For these reasons, OCR found insufficient evidence that the District retaliated against the Student for XXXXX.

Conclusion

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.

The Complainant has a right to appeal OCR’s determination regarding Allegations 2 and 3 within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>) 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 one of the OCR attorneys assigned to this complaint: Sarah Morgan at 202-453-5922 or Sarah.Morgan@ed.gov, or Zorayda Moreira-Smith at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

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

Enclosure

cc: Deborah Stagner