



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

September 9, 2015

Via U.S. Mail

Ms. Jeana Conley, Superintendent
Cherokee County Schools
911 Andrews Road
Murphy, North Carolina 28906

Re: OCR Complaint No. 11-14-1315
Letter of Findings

Dear Ms. Conley:

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 August 29, 2014, against Cherokee County Schools (the District). The Complainant, a teacher at XXXX School (the High School), filed on her own behalf and that of her son (the Student), who attended XXXX School (the Elementary School) during the 2013-2014 school year and XXXX School (the Middle School) during the 2014-2015 school year. The Complainant alleged that the District retaliated against her and the Student during the second semester of the 2013-2014 school year and into the 2014-2015 school year because she advocated for the Student's disability rights during the 2013-2014 school year.

Specifically, the Complainant alleged the following:

1. The District retaliated against the Complainant in her employment when:
 - a. The High School Principal required her to be at work earlier each day, which allowed her only minutes to drop off the Student at his school;
 - b. In February 2014, it removed her from a volunteer position as the District's XXXX coordinator;
 - c. In February 2014, it placed a letter of reprimand in her file;
 - d. The High School Principal and Assistant Principal gave her negative evaluations for the 2013-2014 school year; and
2. During the 2014-2015 school year, the District retaliated against the Student when the Middle School no longer permitted the Student's father and the Student's caregiver to go to the Student's classroom to pick him up.

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

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

rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. 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.

As part of its investigation, OCR reviewed documents submitted by both the Complainant and the District. OCR also interviewed the Complainant and several District employees. In analyzing the allegations, OCR reviewed the evidence under a preponderance of the evidence standard, meaning that OCR evaluated the evidence obtained in the investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the District failed to comply with OCR's regulations or whether the evidence is insufficient to support such a conclusion. After a thorough investigation, OCR has determined that there is insufficient evidence to support some of Complainant's claims, while there is sufficient evidence to support one of the Complainant's retaliation claims. Below is a discussion of OCR's legal authority to investigate this complaint and our findings and conclusions.

Legal Standards

Section 504 and Title II prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. *See* 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134. 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 a materially adverse action against the complainant; and 3) whether there is some evidence that the district took the adverse action as a result of the complainant's protected activity. 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.

Factual Background and Analysis

The Complainant is employed in the District as a special education intensive intervention teacher at the High School; she was approved for tenure at the end of the 2012-2013 school year. The Complainant also is the mother of the Student, a District student who has an Individualized Education Program (IEP).

Advocating for the disability rights of a student generally is a protected activity. The Complainant engaged in a number of protected activities during the 2013–2014 school year by advocating for the disability rights of the Student. In early December 2013, the Complainant informed the Exceptional Children's Director (EC Director) that she was going to retain an attorney to get the Student a functional behavioral assessment. The EC Director then attended one of the Student's two December 2013 IEP meetings, during which behavior assessments were discussed and the Complainant raised concerns as to a lack of data and the age of the data presented; at one of the meetings, the Complainant announced she was retaining an attorney. In December or early January, the Complainant's attorney sent a letter to the District about an alleged change in the Student's placement. Finally, on February 3, 2014, the Complainant's attorney spoke to counsel for the District about issues related to the special education services of the Student. In each instance, the Complainant was advocating (either directly or through her attorney) for the disability rights of the Student.

Because OCR concluded that the Complainant engaged in a protected activity, OCR considered whether each alleged retaliatory act constituted a materially adverse action and whether there was some evidence that the District took the adverse action because of the protected activity. An adverse action is something that could deter a reasonable person from engaging in further protected activity. If these elements are met, OCR also will determine whether the District had a legitimate, non-retaliatory motive and whether that motive was pretextual.

Allegation 1(a): The High School Principal required the Complainant to be at work earlier each day, which allowed her only minutes to drop off the Student at his school.

The current principal (the Principal) of the High School was in his fifth year in the position during the 2014-2015 school year. The Principal previously served as an assistant principal and a teacher at the High School. According to the Complainant, the former principal of the High School permitted the Complainant to arrive at 7:45 a.m. instead of the standard teacher arrival time of 7:30 a.m. to allow her to drop off the Student at his school. Though this arrangement was neither documented nor officially communicated to the Principal when he assumed the position, the Complainant believed that the arrangement remained in place because the Principal did not say anything to the contrary in spite of seeing the Complainant arrive in the morning. The Complainant also believed that she was not assigned to morning duty because it was understood she had to drop off the Student.

The Principal claimed that he was not aware of a modified arrival time for the Complainant. Rather, the Principal believed that the requirement in the High School handbook that “[t]he school begins at 7:30 a.m. for faculty” applied to all faculty because the school day began at 8:00 a.m. According to the Principal, no faculty member had ever requested from him an ongoing exception to the arrival time requirement; instead, the Principal only recalled receiving infrequent one-time requests from teachers for late arrivals throughout the school year. The Principal indicated that he became aware of the Complainant’s arrival time in early February 2014 when one day as he made his morning rounds, he noticed the Complainant was not in her classroom, and he saw one of her students unattended outside her classroom shortly before school started. As a result, the Principal asked the Complainant to arrive at work by 7:30 a.m.

When the Principal asked the Complainant to comply with the 7:30 a.m. arrival requirement, the Complainant raised concerns with him about being able to drop off the Student and still arrive to work by 7:30 a.m. The Principal contacted the principal of the Student’s school, and they agreed that the Complainant would be able to drop off the Student between 7:25 and 7:30 a.m. and arrive at the High School by 7:35 a.m. In the Principal’s view, this agreement was reached to attempt to accommodate the Complainant’s (as well as the High School’s) needs.

OCR considered whether the District’s requirement that the Complainant arrive to the High School at 7:30 a.m. constituted an adverse action. Here, the Complainant indicated that she was required to arrive earlier at school after she advocated for the Student’s disability rights.

The High School’s policy required all teachers, including the Complainant, to arrive at 7:30 a.m. The policy was the same both prior to and after the Complainant’s protected activity. However, after the Complainant’s protected activity, the Principal reinforced the policy and then at the Complainant’s request worked out an arrangement for the Student to be dropped off between 7:25 and 7:30 a.m. and for the Complainant to arrive at the High School between 7:30 and 7:35 a.m. Although the requirement was not altered by the High School, the High School’s decision to enforce the policy did cause a tangible hardship for the Complainant. The change in treatment of the Complainant – from not enforcing the School’s arrival policy to enforcing it – could discourage a reasonable person from engaging in further protected activity. The closeness in time between the Complainant’s protected activities and the District’s action is some evidence of a causal connection, and the Principal acknowledged being aware of the Complainant’s advocacy on behalf of the Student at least by mid-spring. In addition, the significant period of time during which the Complainant incurred no consequences for her later arrival raises questions as to the motivation behind the Principal’s decision to request that the Complainant arrive at 7:30 a.m.

OCR next considered whether the District had a legitimate, non-retaliatory reason for taking the adverse action. The District asserted that it has a legitimate educational reason for requiring the Complainant to be at the High School at a reasonable time before school begins. Specifically, the District expressed concern about students, particularly the intensive intervention students, being left unsupervised before school began.

The Complainant claims that the stated motive is pretextual because the Principal was aware of her later arrival prior to the February 4th date on which he claims to have become aware of this issue. The Principal's four-year-long tenure as principal, as well as the close proximity in time of the arrival time change to the Complainant's protected activities between December 2013 and February 2014, tends to suggest that the District's stated reason was pretextual. On the other hand, there is no documentation of an agreement to permit the Complainant's later arrival and no evidence that the Principal had ever witnessed the Complainant arriving late (nor would he necessarily be focused on the Complainant's arrival unless it became an issue as it did with the unsupervised student on February 4th). Moreover, the High School's handbook provides for a 7:30 a.m. arrival time for all teachers. To establish that the District's actions were motivated by the Complainant's advocacy rather than solely from a concern arising from witnessing one of the Complainant's students unsupervised would require further supporting evidence.

The Complainant also told OCR that the student the Principal saw outside her classroom on February 4th did not have any requirements to be accompanied around the High School, as several of her other students did, and he was permitted to be in the hall after he was dropped off at school. OCR does not find that this information suggests that the Principal's expressed concern about unsupervised students is pretextual.

Communication between the Principal and the principal of the Student's school supports the District's stated non-retaliatory motive for enforcing the arrival time. The Principal communicated via email with the principal of the Student's school and worked out an arrangement for when the Student could be dropped off and when the Complainant would be expected to arrive at the High School. Though the accommodation offered as to the Complainant's arrival time – a five-minute grace period – was slight, the fact that the Principal contacted the Student's principal and the fact that the Principal offered any accommodation tends to show that the District was motivated by an educational reason yet one that also was intended to help the Complainant, as she was allowed to arrive at school five minutes later than other teachers.

Because the District has a legitimate reason for requiring its teachers to arrive at a certain time before school starts, and the evidence, when taken altogether, does not suggest that the District's reason was pretextual, OCR finds that the evidence is not sufficient to support the allegation that the District retaliated against the Complainant by requiring her to arrive at the High School by 7:35 a.m.

Allegation 1(b): In February 2014, the District removed the Complainant from a volunteer position as the District's autism coordinator.

In 2012, the District's then-Exceptional Children's Director (EC Director) created the District's autism problem solving team after being awarded a state grant. According to the District's Strategic Autism Plan, the mission of the problem solving team is "for every student with autism to receive supports and respect needed to graduate from high school prepared for work or post-secondary education in the 21st century." The problem solving team planned to achieve its mission by "utilizing effective assessments, providing a variety of engaging learning opportunities and experiences for students and faculty, staff, parents and administration, and implementing structured follow-up strategies for continued progress." The team facilitated "a functional and academic support plan for individual students on the Autism Spectrum that targets specific deficits, ensures meaningful engagement, provides training, support, and materials for faculty, staff, parents, and administration while monitoring students' progress and generalization into other environments."

During the 2013–2014 school year, the problem solving team consisted of the autism coordinator (i.e., the Complainant), an autism facilitator, and the new EC Director. None of the team members received an additional contract or additional compensation for their roles on the team. The Complainant and the autism facilitator had essentially the same responsibilities: scheduling meetings, providing trainings, and conducting teacher and student observations. The autism facilitator described the Complainant's performance as autism coordinator as very thorough, organized, and competent; she explained that the

Complainant may have done slightly more work for the team than her because the Complainant took the lead on compiling paperwork.

The current EC Director, who started in the position in May 2013, met with the Complainant and the autism facilitator in December 2013 to discuss the manner in which certain expenditures had to be coded to satisfy the requirements of the problem solving team's grant. The EC Director told OCR that she informed the Complainant and the autism facilitator of the requirement to inform her of trainings and on-site observations, while explaining that it was necessary in order for the EC Director to report grant expenditures such as costs for substitute teachers when the Complainant or the autism facilitator was out of the classroom conducting a training or observation. However, neither the Complainant nor the autism facilitator recalled being notified of this reporting requirement prior to the scheduling of an elementary school's training in February 2014. The autism facilitator generally copied the EC Director on communications as a courtesy to the EC Director, but she did not understand this to be a requirement. In fact, the EC Director confirmed that there were occasions when the autism facilitator scheduled training or an on-site observation without informing the EC Director. On the occasions that the autism facilitator failed to follow the reporting requirement, the EC Director stated that she would remind the autism facilitator of the need to keep her informed of trainings, but the autism facilitator would not face any additional consequences. In a letter dated February 4, 2014, the EC Director removed the Complainant from her autism coordinator position for "not follow[ing] a chain of command" when the Complainant failed to notify the EC Director of a planned training and a student observation.

During the 2014-2015 school year, the autism problem solving team consisted of only the autism facilitator and the EC Director. The autism facilitator told OCR that the team was not active that year, and the District informed OCR that the grant money was being used only for professional development.

Because OCR concluded that the Complainant engaged in a protected activity, OCR next considered whether the District's removal of the Complainant from the autism coordinator position constituted a materially adverse action. Although the autism coordinator position was a non-paid volunteer position, the position was a factor in the Complainant's 2013-2014 professional development plan. Her removal from the position is reflected in the Complainant's employment records, and she was deprived of further opportunities to help students, attend trainings, and train teachers and administrators. OCR finds that the removal caused the Complainant lasting and tangible harm and could deter a reasonable person from engaging in further protected activity. Therefore, OCR has determined that her removal constituted an adverse action.

There is some evidence based on timing that the District removed the Complainant from her autism coordinator position because of her advocacy on behalf of the Student. Before the February 4, 2014 removal letter, the EC Director had become aware of the Complainant's advocacy on at least two occasions. First, in early December 2013, the Complainant informed the EC Director that she would be retaining an attorney to get a behavioral assessment for the Student. Second, the EC Director attended the December 2013 meeting during which these issues were discussed. Because the protected activities of which the EC Director was aware preceded the removal of Complainant from the autism coordinator position by less than two months, OCR finds an apparent causal relationship between the protected activities and the adverse action.

OCR then considered whether the District had a legitimate, non-retaliatory reason for taking adverse action against the Complainant. The District maintained that the Complainant was removed from the position because of her failure to notify the EC Director when scheduling trainings and observations. The EC Director explained to OCR that it was important for her to be notified by the Complainant and the autism facilitator about any scheduled trainings or observations so that the EC Director could properly record and report those activities as part of her grant administration role. The EC Director also noted that the Complainant's failure to inform her of the scheduled training at one elementary school caused confusion

amongst school staff because the EC Director had already scheduled District-wide autism training for the same week, which the school staff members were scheduled to attend. Specifically, the EC Director recalled that a teacher at the school questioned her about having to attend two autism trainings, and that was how the EC Director became aware of the elementary school training scheduled by the Complainant. The EC Director also claimed that the Complainant did not email her to notify her when she went to an elementary school to observe a student, which meant that the coding for the Complainant's substitute teacher while she conducted the observation was not properly tied to the team grant. If true, a failure to abide by established rules requiring the EC Director be notified of trainings and observations could be considered a legitimate, non-retaliatory basis for removing the Complainant from the autism coordinator position.

OCR considered whether the District's asserted non-retaliatory basis for removing the Complainant from the autism coordinator position was a pretext or excuse for unlawful retaliation. OCR found several factors, discussed below, indicating that the District's asserted reason for removing the Complainant from the autism coordinator position was not the true reason.

For one, the District's Strategic Autism Plan does not designate or identify the reporting requirements as described by the EC Director and the District could not identify or provide any other documentation of an established requirement that the EC Director be notified of trainings or observations. Email correspondence between the Complainant and the EC Director in November 2013 reflects that the Complainant inquired about how to request a substitute through the grant funding for her observation of a student, but the EC Director's response does not specify any particular reporting requirements.

Furthermore, the three team members were inconsistent in their recollections as to whether the EC Director communicated the notification requirement to the problem solving team. After initially stating that she informed the autism facilitator and the Complainant of a reporting requirement during the May 2013 meeting, the EC Director subsequently indicated that she would have communicated the requirement during the December 2013 team meeting as part of a conversation about the coding of funds. Both the Complainant and the autism facilitator stated that they were unaware of an explicit requirement to inform the EC Director of trainings until the Complainant was removed from the position. Although the autism facilitator stated that she had a general practice of informing the EC Director of trainings and observations, she told OCR that she did not understand it to be a requirement until the Complainant was removed from her position for not doing so. The autism facilitator's lack of awareness as to a reporting requirement, when considered within the context of the Complainant's lack of awareness and the lack of documentation reflecting the requirement, tends to suggest that the District's reason for removing the Complainant was pretextual.

Even assuming such a requirement did exist, the District's inconsistent application of consequences for the failure to report is further evidence of pretext. The Complainant and the autism facilitator had essentially the same roles and both scheduled trainings and observations for which the reporting requirement would have applied. While the autism facilitator indicated that she generally informed the EC Director of upcoming trainings and observations, the EC Director acknowledged to OCR that the autism facilitator did not do so on every occasion. The EC Director told OCR that there were "a few" or "one or two" occasions when the autism facilitator did not make her aware of a scheduled training. In other words, according to the EC Director, the autism facilitator made the same "mistake" as the Complainant. Notably, on those occasions when the autism facilitator did not make the EC Director aware of scheduled trainings, the EC Director did not discipline the autism facilitator; instead, the EC Director told OCR that she reminded the autism facilitator that she needed to be informed.

In contrast, the EC Director told OCR that the Complainant had on one previous occasion not informed the EC Director of an observation, and the EC Director spoke to the Complainant about that on the phone. The EC Director then removed the Complainant from her position when the Complainant failed to notify the EC Director on a second occasion. Notably, both the Complainant and the autism facilitator denied

being counseled by the EC Director about any requirement that they notify the EC Director of their activities or the consequences of any such failure to report. However, even if these prior occasions did take place, they indicate that the EC Director may have offered the autism facilitator more than one opportunity to correct her actions, whereas she removed the Complainant from her position on the second occurrence. This different treatment of a similarly situated individual suggests that the Complainant's failure to notify the EC Director of a scheduled training was not the real reason for her removal.

Lastly, OCR considered the EC Director's explanation that the Complainant caused duplication and confused the elementary school's teachers by scheduling training without informing the EC Director. As it relates to the duplication issue, it should be noted that the autism facilitator and the Complainant did not view the two trainings as being the same. Instead, they both described the Complainant's training at the elementary school as specific to best practices for autism that the school could employ, while the EC Director's training was considered to be a more general overview for the entire District. The Complainant also indicated that the training at the elementary school was scheduled at the elementary school principal's request. These conflicting understandings of the relationship between the two trainings call into question the legitimacy of the EC Director's reason. OCR also noted that the Complainant believed that the EC Director would have been on notice about a future visit to that elementary school, since the EC Director was copied on earlier communication about student observations there and would have been aware that the behavior analysis the Complainant was performing would require more than one visit.

The District did not offer evidence that a reporting requirement had been established prior to the adverse action taken against the Complainant for her alleged violation of this requirement. In addition, the autism facilitator, who had essentially the same role as the Complainant, was unaware of the reporting requirement and failed to report scheduled trainings to the EC Director, but was not subject to any discipline. The different treatment of the similarly situated autism facilitator and the apparent failure to communicate the reporting requirement to the Complainant and the autism facilitator suggest that the reasons given for the Complainant's removal from the autism coordinator position are pretextual. Furthermore, not only was the Complainant not notified of the requirement, the EC Director knew of prior occasions where the Complainant did not notify her of plans and such conduct was, to some extent, condoned or tolerated. Altogether, a preponderance of the evidence indicates that the District's reason for removing the Complainant from her autism coordinator role was a pretext for retaliation.

OCR finds that the evidence is sufficient to support the Complainant's claim that the District retaliated against her by removing the Complainant from her autism coordinator role because she advocated for the Student's disability rights. To resolve this compliance concern, the District entered into the enclosed Resolution Agreement, signed on August 5, 2015. Once the Resolution Agreement is fully implemented, the District will be in compliance with Section 504 and Title II with respect to the issues addressed in this letter. OCR will monitor the District's implementation of the Resolution Agreement. Failure to implement the Resolution Agreement could result in OCR reopening the complaint investigation.

Allegation 1(c): In February 2014, the District placed a letter of reprimand in the Complainant's file.

The Associate Superintendent for Human Resources wrote a letter to the Complainant on March 5, 2014 reprimanding her for spending time on personal matters in the classroom. In particular, the Associate Superintendent claimed that the Complainant regularly used class time to work on an online graduate degree program, sent a lengthy email during class time about the services provided to the Student, and spent significant class time on her cellular phone. This letter was placed in the Complainant's personnel file.

The Principal told OCR that he observed the Complainant on her cellular phone during a pop-in observation, and he saw her in the hallway on her cellular phone during class time on another occasion. The Complainant countered this allegation in an April 8, 2014 response letter to the Associate

Superintendent by detailing that her review of her phone records revealed what she considered to be a negligible amount of use during class time, particularly when excluding calls to parents and other staff members. Based on her phone statements, the Complainant calculated that she spent about fifteen minutes on the phone per day, and that she spent 8.8 minutes on the phone during instructional time if parent and staff phone numbers were excluded. In regard to parent communication, the Principal indicated that the expectation would be that those communications go through administration or would be communicated through an online parent communication system or the landline telephone in the classroom. The Principal told OCR that he has not observed other teachers using their cellular phone during instructional time.

As to the Complainant's email use and work on the degree program, the Principal told OCR that the Associate Superintendent addressed the matter and based his determination on information from the technology department.¹ According to the District, the Associate Superintendent reviewed a log of online activity and discovered that the Complainant was spending a large amount of time on the website for the university at which she was working toward her graduate degree. The District did not provide any information as to the impetus for the request to review the Complainant's online activity. The technology department monitors the computer activity of teachers upon a request from someone with authority to make such a request. The District did not provide any information as to the reason the request was made or any guidelines for making such a request for monitoring information. The Principal did not have the authority to make a monitoring request, but the Principal was aware of two other teachers who had their computers monitored and were reprimanded for similar activities. The Complainant, meanwhile, refuted that she used the computer for personal purposes. The Complainant told OCR that the only computer activity that could have been perceived as degree work was when she accessed peer reviewed articles in the process of researching best practices and resources for issues brought to her by teachers. Though the Complainant acknowledged sending from her school computer a lengthy email about services provided to the Student, she clarified that she drafted the email at home before arriving at school and only sent it from her school computer because the internet at her residence was malfunctioning. The Complainant further pointed out, in relation to her addressing personal matters during instructional time, that she did not have a planning period or lunch break for large portions of the school year.

The Associate Superintendent's letter of reprimand, which went into the Complainant's personnel file, is an adverse action. If faced with such a reprimand letter, a reasonable person would have been less likely to engage in further protected activity. And, since the Complainant's protected activities were carried out only a few months before the letter of reprimand was issued, there is some evidence of a causal connection between the Complainant's advocacy on behalf of the Student and the letter of reprimand.

Next, OCR considered whether the District had a legitimate, non-retaliatory reason for the letter of reprimand. The District's stated reason for the reprimand is that the Complainant was failing to fulfill her duties as a classroom teacher. The District maintained that the Complainant violated District policy by using class time to work on her degree program, send personal emails, and talk on her cellular phone. The District's reason for the policy is that teachers should be focused on instruction during class time – not on personal matters. OCR considered whether this stated reason is pretextual.

The Complainant did not claim that the activities alleged by the District did not happen. Instead, the Complainant offered explanations and context for each activity. For example, the Complainant explained that she would have used materials available through her degree program to research resources and best practices to use in supporting teachers. The Complainant did not indicate either in the rebuttal letter or in her discussions with OCR that she informed the District of this research before the issue arose in the reprimand letter. The District's stated basis for concluding that the Complainant was working on her degree program was the amount of time the Complainant was spending on the website for the university at

¹ Because the Associate Superintendent left the District and was not available for an interview, OCR had to rely upon the information derived from interviews of the Principal and the Complainant, as well as documentation relating to the letter of reprimand.

which she sought a graduate degree. Without evidence that the District was aware and agreed to permit the Complainant to conduct this research during class time, this additional context provides limited support to a finding of pretext. Similarly, the Complainant told OCR that the lengthy email sent during class time was actually drafted earlier in the morning at home and only sent while at school because of technical difficulties experienced at home. Again, without any evidence that the District had knowledge of this fact before the reprimand, the earlier time at which the email was drafted, even if assumed to be true, does not necessarily make the District's stated motive less believable.

The Complainant also challenged the basis for the District's allegation that the Complainant was using her cellular phone excessively during the school day. When excluding calls to parents and other staff, the Complainant calculated only 8.8 minutes per school day that were spent on her phone. The Complainant explained that she used her cellular phone to contact parents and staff because the landline phone in the classroom did not enable her to be mobile to address her intensive intervention students' behavioral needs at any moment. The Principal explained that he would expect a teacher to communicate with parents using other methods, such as the parent communication technology. And the Principal added that he observed the Complainant on the phone on at least two occasions when he visited her classroom for "pop-in" observations. The Complainant acknowledged that administration may have seen her on the phone, although she took issue with the lack of criteria. In the Principal's view, this has not been an issue in the past because he has never become aware of a teacher using a cellular phone during class time. Although OCR acknowledges that the specifics of a phone use policy could be outlined in more detail, this issue does not strongly suggest pretext.

To analyze pretext, it is useful to consider whether any other teachers were subject to the same scrutiny and reprimand. According to the Principal, others teachers have not faced reprimand for cellular phone use because he has not observed other teachers using their cellular phone during instructional time. But, with respect to emailing and working on an online degree program, the Principal told OCR that at least one staff member at the High School had his or her online activity reviewed for similar concerns about improper computer usage, resulting in a formal reprimand as well. This employee had not engaged in a protected activity before the online activity was reviewed and the employee was reprimanded.

Because the District's goal of having teachers focus on instruction and not personal matters during class time is a legitimate, non-retaliatory reason for the letter of reprimand, and the available evidence does not reveal that this was pretextual, OCR finds that the evidence is not sufficient to support the claim of retaliation based on the letter of reprimand.

Allegation 1(d): The High School Principal and the Assistant Principal gave the Complainant negative evaluations for the 2013-2014 school year.

The District evaluates teachers per North Carolina requirements and utilizes the North Carolina online evaluation system. The teacher evaluation system instrument has five standards, with each standard having a number of sub-elements. A teacher's evaluation cycle lasts several years: during the middle of the cycle, a teacher is evaluated on two standards and at the end of the cycle on all five standards. Furthermore, only teachers who are at the end of an evaluation cycle are required to be formally observed; teachers on an abbreviated mid-cycle evaluation should receive two informal observations of a minimum of twenty minutes each, but they may request a formal observation.

Because the Complainant was not at the end of a renewal cycle in the 2013–2014 school year, she was not the subject of formal observations – only less formal "pop-in" observations by the Principal and the Assistant Principal. During the course of these "pop-in" observations, the administration observed a couple of factors that they felt warranted lower performance ratings for the Complainant. Namely, the Principal and Assistant Principal noted less instruction taking place in the Complainant's classroom and a failure to incorporate technology into the classroom. The Principal recalled four "pop-in" observations of about 5-10 minutes when he stayed in the classroom long enough to determine "that nothing was going

on”, and he could only recall one instance when he observed instruction during an observation. As with the Principal, the Assistant Principal noted occasions when she visited the Complainant’s classroom and did not see instruction taking place. The Assistant Principal also confirmed that she had seen more instruction by the Complainant in prior years, e.g., working with students on days of the week and counting money. In particular, the Assistant Principal was concerned with the lack of integration of technology in the classroom; whereas in years past, the Complainant would use an interactive whiteboard during class or IEP meetings, the Assistant Principal did not see the same level of utilization. The Complainant told OCR that she uses a wide array of assistive technology devices and other technology (e.g., a communicator, an iPad for video self-modeling, and an overhead projector), but was unable to use the interactive whiteboard because it is a trigger for one of her students, who will throw things at and hit computer screens. The Complainant did not communicate this concern directly to administration, although she believed them to be aware of this issue based on this particular student’s behavior witnessed by other staff members. The Principal did acknowledge that he would not anticipate as much integration of technology or team activities in the Complainant’s classroom because of the special needs of her intensive intervention students.

In addition to the “pop-in” observations, administrators considered parent complaints about the Complainant failing to engage students in instruction as a factor in the Complainant’s evaluation. At the beginning of the 2013–2014 school year, one student’s parents complained that their child stated that they had done nothing while in the class and the parents sought to have the student removed from the Complainant’s class.

The Complainant received lower performance ratings for the 2013–2014 school year than she had received the prior school year. During the 2012–2013 school year, the Complainant was at the end of the several-year cycle and was evaluated across all five teaching standards. Teachers are rated on a range of developing, proficient, accomplished, and distinguished (or not demonstrated). In 2012–2013, the Complainant was rated as accomplished in four standards and distinguished in one standard. For the 2013–2014 school year, the Complainant was in the middle of the evaluation cycle and was evaluated on only two standards: Standard I “Teachers Demonstrate Leadership” and Standard IV “Teachers Facilitate Learning for their Students”. For Standard I, the Complainant went from overall accomplished in 2012–2013 to overall proficient in 2013–2014; in the elements under Standard I, the Complainant went from two accomplished and one distinguished ratings (with two not demonstrated elements) in 2012–2013 to four proficient ratings and one developing rating. Likewise, in Standard IV, the Complainant went from overall accomplished in 2012–2013 to overall proficient in 2013–2014; in the elements under Standard IV, the Complainant went from all accomplished or distinguished ratings (with one not demonstrated element) in 2012–2013 to one accomplished rating, two proficient ratings, and four developing ratings.

Although the Complainant’s ratings are not entirely poor, OCR concluded that a lower performance rating could discourage a reasonable person from engaging in further protected activity, and therefore OCR found that the lower performance ratings constituted an adverse action. As with the letter of reprimand, the evaluation ratings took place after, and close in time to, the Complainant’s protected activities. Thus, OCR finds that there is some evidence of a causal connection between the Complainant’s advocacy and this adverse action.

Next, OCR considered whether the District had a legitimate, non-retaliatory reason for the decrease in performance ratings. The District relied heavily upon informal observations conducted by the Assistant Principal and Principal, wherein they did not witness the Complainant engaging her students in instruction. A couple of these observations took place before the bulk of the protected activities, which occurred in December 2013. The failure to instruct is a legitimate reason for the lower performance ratings since the presence and quality of instruction have a bearing on a number of performance categories. The Assistant Principal also noted a decrease in the Complainant’s use of technology in the classroom. Because the District primarily provided documentation of these reasons from after the Complainant’s protected activity, OCR considered whether the District’s stated reasons were pretextual.

The Complainant suggested that, if she was as poor a teacher as was reflected by her ratings, the District should have provided remediation to assist her in improving her teaching. While it is reasonable to expect that a District to provide remediation to a teacher that is struggling, the Principal contended that the ratings were not all that poor. The state teacher performance policy, adopted by the District, provides that teachers will be placed on a monitored growth plan when they are rated “developing” on one or more standards—the Complainant was not rated “developing” on either of the two overall standards during the 2013-2014 school year, only “developing” on a few elements under those standards. Therefore, it does not appear mandatory that the Complainant should have been placed on such a plan. Instead, the state policy provides that teachers who are rated at least “proficient” on all standards—which the Complainant was at the end of the 2013-2014 school year—shall develop an individual growth plan designed to improve performance on specifically identified standards and elements. Because it was not required, the lack of a formal remediation plan for the Complainant does not necessarily indicate pretext for lower ratings than the previous year.

The Complainant also suggested that the Principal’s comment in her 2012-2013 performance evaluation that the mandated evaluation instrument “was not a good evaluation tool for an intensive intervention teacher” and his three years of more positive evaluations of her performance showed that his more negative assessment of her work without prior notice after her protected activity showed that the Principal’s stated reasons of lack of instruction and use of technology were excuses for retaliation. However, the Principal explained that he is required to use the mandated evaluation instrument for all teachers, but his comment on the previous year’s full evaluation form related to a standard that was not part of the Complainant’s abbreviated mid-cycle evaluation for 2013-2014; the previous year’s full evaluation could reflect the Complainant’s good IEP paperwork. The Principal believed that the Complainant’s higher ratings the preceding year on the two standards present in abbreviated evaluation demonstrated her ability to perform, but for whatever reasons in the 2013–2014 school year (such as more absences, personal issues or greater non-school time demands), he observed room for improvement in the Complainant’s leadership and teaching per the standards during the 2013-2014 school year. He noted that high expectations have led to similar decreases in performance ratings for some other teachers at the High School, to the point of at least one dismissal where an experienced teacher had declined to “developing” ratings across the board. The Principal viewed the Complainant’s 2013-2014 evaluation as “not all that bad” and he noted that the High School has a number of proficient teachers.

The Complainant believed that the District did not follow regular procedures in evaluating her during the 2013-2014 school year. In Fall 2013, the Principal did send the Complainant a pre-observation conference notice notifying her that he would be looking for individualized instruction in his observations, but the Complainant said that she was not given this notice until after the first “pop-in” observation was conducted; she was on notice, however, for other informal observations during the 2013-2014 school year. The Principal also completed an abbreviated observation form dated February 19, 2014 that showed the Complainant at proficient and accomplished ratings, but with a number of elements not yet observed. Also, while the evaluation policy notes that there *should* be two informal observations at least twenty minutes each, the Principal and the Assistant Principal conducted more, but shorter, pop-in observations. Moreover, while the evaluation policy provides that teachers will have a summary evaluation conference “prior to the end of the school year and in accordance with [District] timelines,” the Complainant’s conference was on the last day of the school year; however, there was evidence showing that the District had system technical difficulties that prevented it from accessing the Complainant’s online evaluation towards the end of the school year and the Complainant had other obligations that contributed to the late scheduling of her conference. The Complainant contended that because she did not know before the last day of school that she would receive a “poor” evaluation for the year, she did not have an opportunity to request a formal observation that could have resulted in better ratings. Nevertheless, the Complainant could have requested a formal observation in any case, and she did see her parts of her evaluation online in the weeks leading up to the end of the year conference and provided the Principal artifacts showing her performance on several evaluation elements.

Overall, the District’s process for evaluating the Complainant during the 2013-2014 school year does not undermine the District’s substantive evaluation of her performance. OCR notes that it is not within our authority to substitute our judgment for that of a school system with regard to an employee’s job performance. Rather, OCR’s role is limited to determining whether a school’s actions against an employee were based on legitimate reasons that are not an excuse for retaliation. In this case, the District raised issues as to the Complainant’s job performance as a teacher, and the record does not suggest that the concerns were an excuse for retaliation. Therefore, OCR finds that the evidence is not sufficient to support the allegation that the District retaliated against the Complainant by giving her lower performance ratings.

Allegation 2: During the 2014-2015 school year, the District retaliated against the Student when the Middle School no longer permitted the Student’s father and the Student’s caregiver to go to the Student’s classroom to pick him up at the end of the school day.

The Complainant told OCR that the Middle School did not permit her husband or the Student’s caregiver to go to the Student’s classroom to pick him up after the Complainant and her attorney went to the Middle School one day in September 2014 to drop off the Student and the Complainant asked the teacher for a communication card. At the Elementary School the previous year, the Complainant’s husband and the Student’s caregiver were allowed to sign in and go back to the classroom. The Complainant believes that other Middle School parents are allowed to sign in and walk through the halls to pick up their students and there is not a rule at the High School like what the Middle School is requiring for the Student’s pick up. The Complainant would prefer for her husband to be able to see what is going on in the classroom because the Student cannot tell them about the class.

The District indicated that the Middle School requires every student checking out earlier than the regular dismissal time to be picked up at the office. The Student attended school intermittently in September 2014 while a due process hearing on his services was proceeding, and when he was at the Middle School during that time, his father or caregiver picked him up early and went directly to the classroom to get him. When the Student was being picked up from the classroom, it was distracting the class and causing safety concerns, since two of the Student’s special education classmates are “runners” who will attempt to escape anytime the doors open.

OCR assumes for the purpose of analysis that not permitting the Complainant’s husband or the caregiver to pick up the Student from the classroom is an adverse action. OCR finds that there is some evidence of a causal connection between the District’s action and the Complainant’s protected activity because after the Complainant and her attorney brought the Student to class while on the way to the hearing, the Middle School asked that the father or caregiver sign in at the office and wait for a teacher or assistant to bring the Student there.

The District offered the Middle School’s regular early pick-up practice—that parents checking their students out before the scheduled dismissal time must sign in and pick them up in the front office—as well as the safety of the Student’s classmates—in particular the two runners—as its motives for asking that the Student’s father and caregiver pick up the Student at the office. The Middle School applied its regular early pick-up practice to the Student’s father and caregiver once the Middle School learned that they were going to the classroom to get the Student in the middle of the day on days when he came to school in September. The father or caregiver coming to the classroom in the middle of the school day to pick up the Student became disruptive to the class because two students attempt to escape when a door opens, so the Middle School requested that the father or caregiver sign in at the office per the normal early pick-up practice, and the Middle School arranged for a teacher or a classroom assistant to bring the Student to the office to meet the father or caregiver. OCR considered these to be legitimate, non-retaliatory reasons for the District’s action and next analyzed whether the District’s stated reasons were pretextual.

The Complainant suggested that other parents at the Middle School are allowed to walk through the halls to pick up students. With the exception of the Complainant’s suggestion, no evidence was offered to show

that other parents are permitted to walk through the halls to the classrooms to pick up their children. To the contrary, the Middle School principal explained that normal early pick-up practice of sign in and check out at the front office applies to all parents. It appears that at the beginning of the school year while the Student was not yet regularly attending school, the Student's parents and caregiver did not yet know about the Middle School's early pick-up practices and how they may have been different from his previous school's practices. Once the Middle School learned that the father and caregiver were going to the classroom to pick up the Student in the middle of the school day when he intermittently attended school during the first few weeks of the new school year, it requested that the father and caregiver sign in at the front office and wait there until the Student was brought to the office for early dismissal. Given the absence of any known practice exceptions or documentation of an inconsistent practice, OCR does not find that the District's reason was pretextual.

Because the District has shown a legitimate, non-retaliatory reason for its action and pretext has not been shown, OCR finds insufficient evidence that the District retaliated against the Complainant by not allowing her husband or the caregiver to pick up the Student from the classroom.

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. Complainants 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 may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. 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.

OCR would like to thank District staff and the District's attorney for their cooperation during the course of the investigation. If you have any questions, feel free to contact one of the OCR attorneys assigned to the complaint, Marcelo Quiñones at (202) 453-6567 or Marcelo.Quinones@ed.gov, or Kristi Bleyer at (202) 453-5901 or Kristi.Bleyer@ed.gov.

Sincerely,

Michael S. Hing
Supervisory Attorney
District of Columbia Office
Office for Civil Rights

cc: K. Dean Shatley, Esquire