



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

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WASHINGTON, D.C.

June 2, 2015

Dr. Karen Garza  
Superintendent  
Fairfax County Public Schools  
8115 Gatehouse Road  
Falls Church, Virginia 22042

Re: OCR Complaint No. 11-15-1065  
Letter of Findings

Dear Dr. Garza:

This letter is to inform you of the disposition of the complaint that was filed with the U.S. Department of Education (the Department), District of Columbia Office for Civil Rights (OCR) December 4, 2014, against the Fairfax County Public Schools (the Division), in particular XXXX School (the School). The complaint was filed by the Complainant on behalf of her son (the Student). OCR opened the following allegations:

1. During a December 12, 2014 Individualized Education Program (IEP) meeting, the Division denied the Student a free appropriate public education (FAPE) when it failed to consider a May 2011 independent evaluation and the Student's fall 2014 language arts and mathematics assessments in determining his eligibility for a learning disability;
2. The Division denied the Student a FAPE when it failed to implement his 2014-2015 IEP by not allowing him to go to the bathroom frequently and not providing him with a word processor;
3. During the 2014-2015 school year, the Division failed to consider whether the Student was eligible to receive any related aids or services because of his XXXX; and
4. The Division retaliated against the Complainant and the Student when the Student's elementary school principal failed to provide the Complainant with copies of the Student's report cards.

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, or participates in an OCR proceeding. Because the Division

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receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

OCR reviewed documents submitted by the Division and the Complainant and conducted interviews with the Complainant and Division personnel. OCR found insufficient evidence with regard to Allegations 1, 2 (as it pertains to the bathroom breaks), and Allegation 4. As discussed more below, OCR identified preliminary compliance concerns with regard to Allegation 2 (as it pertains to receiving a word processor), and found a violation with regard to Allegation 3. During the course of the investigation, the Division expressed interested in voluntarily resolving Allegation 2 (i.e., the word processor part of the allegation) under Section 302 of OCR's *Case Processing Manual* (CPM). The Division entered into a resolution agreement, which, when fully implemented, will resolve the compliance concerns identified. OCR will monitor the Division's compliance with this agreement. A discussion of OCR's findings and analysis is below.

### **Legal Standards**

#### *FAPE*

The Section 504 regulation, at 34 C.F.R. § 104.33 (a) and (b), requires that a recipient that operates a public elementary or secondary education program must provide a FAPE to each qualified person with a disability within its jurisdiction, regardless of the nature or severity of the person's disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. The Section 504 regulation, at 34 C.F.R. §104.35(a), requires school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. School districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability.

The Section 504 regulation, at 34 C.F.R. §104.35(c), states that an evaluation of a student believed to need special education or related services must use established standards and procedures, including (1) drawing upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establishing procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensuring that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, (4) ensuring that the placement is in the least restrictive environment, and (5) providing the student's parent/guardian with notice of due process rights.

OCR has determined that implementing an appropriately developed IEP is one means of meeting this standard. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require school divisions to provide a FAPE to the same extent required under the Section 504 regulations.

As explained in the Frequently Asked Questions (the FAQs) of OCR's January 19, 2012 Dear Colleague letter, found at: <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>, implementation of a health plan for a student is insufficient if, in the creation of the health plan, the school division does not comply with the evaluation, placement, and procedural safeguard requirements of the Section 504 regulation. The FAQs advise that "[c]ontinuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school division's actions meet the evaluation, placement and procedural safeguard requirements of the FAPE provisions."

### *Retaliation*

When analyzing a claim of retaliation, OCR will look at the following three elements to determine if the Complainant has stated an initial case: 1) whether the individual engaged in protected activity (e.g., filed a complaint or asserted a right under a law enforced by OCR); 2) whether the school division took a materially adverse action against the individual; and 3) whether there is some evidence that the school division took the adverse action as a result of the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the school division has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the school division's reason for its action is a pretext or excuse for unlawful retaliation.

### **Allegation 1**

The Complainant alleged that the Division failed to consider a May 2011 independent evaluation and the Student's fall 2014 language arts and mathematics assessments in determining his eligibility for a learning disability during a December 12, 2014 IEP team meeting. OCR reviewed the December 12, meeting notes, which stated that "private testing," "grades," and "SOLs [Standards of Learning assessments]" were among the materials and documents that the team considered in determining that the Student does not have a learning disability. School personnel who were present during the December 2014 IEP team meeting consistently informed OCR that they reviewed and considered the Student's assessments and the May 2011 independent evaluation in making the learning disability eligibility determination.

As mentioned above, the Section 504 regulation states that in evaluating a student, the Division must establish procedures to ensure that information obtained from all sources is documented and carefully considered. Here, OCR found insufficient evidence that the Division failed to ensure that information obtained during evaluations are documented and carefully considered. After all, School personnel documented the information considered during the eligibility determination and informed OCR that they carefully considered this information when evaluating the Student.

As a result, OCR found insufficient evidence to substantiate that the Student was denied a FAPE, as alleged. To the extent the Complainant disagrees with the IEP team's substantive decision (that is, its decision that the Student does not have a learning disability), the Complainant has the right to dispute that decision through the Division's due process procedures.

## **Allegation 2**

With regard to the allegation that the Student was denied bathroom breaks, OCR reviewed the Student's IEP, which states that he requires "frequent breaks." The Student's teachers consistently informed OCR that they were aware that the Student is to receive bathroom breaks as needed and they also informed OCR that they were unaware of any situations when the Student was denied a bathroom break. In an October 8, 2014 e-mail from the Complainant to the School's counselor, she stated that she was upset that the Student was not able to use the bathroom in class that day. The Complainant informed OCR that she was not sure in which class this occurred. In response to the e-mail, according to the School counselor, he spoke with the Student's teachers and all of them informed him that there was not a time when the Student was denied a request to use the bathroom.

As a result, OCR is not able to substantiate the Complainant's allegation that the Student was denied bathroom breaks as required in his IEP.

With regard to the Complainant's allegation that the Student was denied a word processor, OCR reviewed the Student's IEP, which states that the Student is to "respond using a word processor." There is no written discussion or further description of how this related service is to be implemented. OCR identified preliminary concerns regarding this allegation based on conflicting information from the Students' teachers and other School personnel about when this related service was to be provided to the Student (for example, whether it depended on the length or type of assignment). School personnel also informed OCR that it was the Student's responsibility to identify that he needed the word processor and to request it.

Pursuant to Section 302 of OCR's *Case Processing Manual*, because the Division has expressed an interest in voluntarily resolving this complaint allegation prior to the conclusion of OCR's investigation through a resolution agreement, the Division signed the enclosed agreement which, when fully implemented, will resolve this allegation. The provisions of the agreement are aligned with this allegation and information obtained during the course of OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the Division's implementation of the agreement.

## **Allegation 3**

OCR considered whether the Division evaluated the Student to determine his eligibility for disability-related services for XXXX. According to documentation that OCR received from the Division, the Complainant provided the Division with medical documentation notifying it of the Student's XXXX. During the previous school year, according to a March 19, 2014 IEP team meeting, the team was "aware that the Student is taking medication for XXXX. . . Parent reported that 2 weeks of absences were caused by food related illness . . . the parent is concerned with the lack of academic progress and would like to address additional supports from the IEP to support missed assignments and time out of class." In response to these concerns, the Student's

IEP team proposed that the Student receive more academic support during lunch and limited social interaction during study hall.

This documentation certainly suggests that the Student was identified by his IEP team as having XXXX during the 2013-2014 school, and the meeting minutes from March 2014 indicate that the team provided some supports to address his absences. OCR therefore found insufficient evidence that the Division failed to evaluate the Student to determine whether he qualified for services because of XXXX.

OCR then considered whether the Division had an obligation to re-evaluate the Student during the 2014-2015 school year to determine whether he required a change to his disability-related services. On September 11, 2014, the Complainant e-mailed the Student's counselor and informed him that the Student had been absent every day since school started because he was experiencing "severe symptoms" related to XXXX. In an October 3, 2014 e-mail from one of the Student's teachers to the Complainant, the teacher stated that, "multiple absences could be having a hindering effect on his school work. . . I asked him to stay after school for additional help every week since our meeting. Every week he tells me he doesn't feel well enough to stay after school." In a November 18, 2014 e-mail from the Complainant to one of the Student's teachers, the Complainant stated that, "I am concerned that the missed instruction and amount of make[-]up work will cause him to feel overwhelmed." Two months later, in a January 22, 2015 e-mail, the Complainant informed the Student's teachers that: "he is also not able to stay after school because he gets fatigued by the end of the day and needs to rest."

In addition to these e-mails, School personnel overwhelmingly informed OCR that the Student's academic progress was negatively affected by his frequent absences that related to XXXX. In fact, the Student's teachers informed OCR that the Student performed well when he attended the School; however, his progress was harmed due to his frequent absences. The communication records show that the IEP team's prior proposal for the Student to make up work during school hours and the Student's teachers' suggestions for the Student to stay after school to make-up work were not effective in addressing his chronic absences.

OCR's review of the Student's academic performance showed that his performance was consistent with the teachers' reports. He received an "I" or an incomplete in History and English and an "F" in Math for the first two quarters, when he was absent for thirty days. The Division also provided OCR with documentation that indicated that the Student is failing his current grade. Based on the School personnel's and the Complainant's concerns about the negative impact that the disability-related absences had on the Student coupled with the Student's poor academic performance, OCR found sufficient evidence that the Division had reason to believe that the Student was not receiving a FAPE under his existing plan and therefore the Division was required to evaluate the Student to determine whether as a result of his disability-related absences he needed a change to the related services he was receiving.

OCR acknowledges that the Division made some efforts to support the Student during the 2014-2015 school year with regard to his absences. However, those efforts were not consistent with the procedural requirements of Section 504.

First, in a July 14, 2014 e-mail from the Complainant to the Division's Procedural Support Liaison, she stated that she "tried to participate in creating a health care plan . . . the standard [Division] XXXX plan was offered, but it was too restrictive." The Procedural Support Liaison informed OCR that health care plans "are separate from 504 or IEP [plans]." Among other provisions, the Student's draft "Standard Health Care Plan/Procedure" states that the Student is allowed to "carry extra fluids or water bottle for hydration," allowed "to leave the classroom for free access to the nearest bathroom. Have an extra change of clothes, underwear and personal hygiene products as needed." In addition, the Student's plan outlined a process that the School personnel were to follow if the Student vomited, experienced "stabbing abdominal pain," "abdominal swelling," "continuous vomiting," and "signs of shock." School and Division personnel informed OCR that the Complainant was not provided with procedural safeguards when developing this health care plan.

As mentioned earlier, the regulations implementing Section 504, at 34 C.F.R. §104.36, require that parents and guardians are provided with notice of their opportunity to request an impartial hearing with respect to evaluation and placement decisions. Also, according to the FAQs cited above, "implementation of a health plan for a student is insufficient if, in the creation of the health plan, the school division does not comply with the evaluation, placement, and procedural safeguard requirements of the Section 504 regulation." Here, OCR's investigation found that the Division failed to comport with Section 504's procedural safeguards in developing the health care plan because the Complainant did not receive notice of her due process rights. In fact, the Complainant informed the Division's Procedural Support Liaison that the offered health care plan "was too restrictive," however, she was not afforded an opportunity to challenge the determination about the specific types of services that the Student was to receive under the health care plan.

Second, on October 31, 2014, the Student's counselor sent an e-mail to the Student's teachers where he stated,

We had a meeting with the Student's parents who are very concerned about how his absences has [*sic*] affected his grades. In this situation, we add the variables of "chronic illness." The student will be allowed additional time to complete assignments . . . please modify assignments to include only work that demonstrates a mastery of concepts.

OCR determined that this October 31, meeting constituted a placement decision as the School personnel made decisions to provide the Student with related services to address his chronic absences. As a result of the meeting, the teachers were directed to "modify assignments to include only work that demonstrates a mastery of concepts." The School personnel who participated in this meeting informed OCR that the Student's parents again were not provided with notice of their procedural safeguards with regard to the placement decisions made. As stated above, Section 504 requires that parents receive notice of the opportunity for an impartial hearing when making placement decisions. As a result, OCR found sufficient evidence that the Division failed to comply with the Section 504 regulations when it failed to notify the Complainant of her due process rights in making this determination.

OCR then considered whether the Division re-evaluated the Student during a March 2015 IEP team meeting. During the course of OCR's investigation, on March 27, 2015, the Student's IEP team convened to consider that the Student missed "a lot of school" because of his disability and that he "does not advocate for himself by asking teachers for missed assignments. He also does not advocate for himself by letting the teacher know what he does not understand in class." According to the March 27 IEP team meeting notes, the Student "is diagnosed with XXXX which has resulted in a large number of absences." The team found that "there are gaps in his learning in large part due to number of absences as a result of illness and that [the Student] would benefit from additional supports to close those gaps." The IEP team started a discussion about homebound services (the notes indicate that the Complainant did not agree with this placement proposal). However, the meeting notes state that the "IEP team meeting was tabled – agreed to reconvene to discuss homebound, ESY, additional areas of need. . . [the Complainant] believes that the IEP team should have been prepared to discuss ESY, homebound and areas of need as these needs have been known."

While the Student's IEP team discussed his XXXX and his teachers are aware of the impact that his Celiac disease had on the Student, OCR found sufficient evidence that the Division failed to re-evaluate the Student to determine whether he required a change to his disability-related services as a result of his chronic absenteeism, which was prevalent throughout the 2014-2015 school year. It is clear that the Student's IEP team determined that the Student's academic progress was negatively affected by his chronic absences, which the IEP team directly attributed to XXXX, yet the team never completed the process of determining whether the Student should receive a change to his disability related services to address these absences.

To address these violations, the Division entered into the attached agreement. OCR will monitor the Division's implementation of the agreement.

#### **Allegation 4**

The Complainant alleged that the Division retaliated against her and the Student when the Student's elementary school principal (the Principal) failed to provide her with copies of the Student's report cards. To determine whether there was retaliation, OCR first found that the Complainant engaged in a protected activity when she requested that the Student receive disability-related services.

OCR then considered whether the Division took adverse action against the Complainant/Student (i.e., whether the Principal failed to provide the Complainant with copies of the report cards). OCR was unable to corroborate that the Division took the adverse action alleged by the Complainant. The Division provided OCR with detailed information about the elementary school's internal process for distributing report cards. The internal process states that report cards are sent home with the students at the end of the day on Wednesdays. The Principal informed OCR that the Student was given his report card in accordance with this internal process. According to the custody agreement between the Student's parents, the Student went home with the Complainant's ex-husband on Wednesdays; therefore, the Student's father likely would receive that copy of the Student's report card.

The Principal informed OCR that he recalled that in the spring of 2014, the Complainant told him that she did not receive the Student's report card. According to the Principal, he told the Complainant about the elementary school's process for distributing report cards and also offered that she could receive a copy of the report card from the front office at her request. The Principal said that the Complainant submitted a records request and the Division provided her with copies of the Student's report cards. The Complainant told OCR that she did not in fact receive a copy of the report cards through her records request but said that she did eventually receive the report card through other elementary school personnel.

In short, the Principal told OCR that the Student was given his report card in the same manner as all other students. If the Complainant did not receive the report card through that distribution system, she could request another copy at the elementary school. The Principal said she made such a request and received the report card at issue. Thus, OCR was unable to corroborate that the Division failed to provide the Student's report card to the Complainant. Therefore, OCR finds insufficient information that the Division took an adverse action against the Complainant, as alleged, and is unable to substantiate this allegation.

### **Conclusion**

As a result of the signed Resolution Agreement resolving the compliance concerns identified, OCR is closing its investigation of this complaint effective the date of this letter. OCR will monitor implementation of the Resolution Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may file a private suit in federal court, whether or not OCR finds a violation.

Please be advised that the Division may not retaliate against an individual because the individual filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment. Also, 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, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We appreciate the Division's cooperation during the resolution of this complaint, and particularly the assistance of Dawn Schaefer, Angelina Prestipino, and Kathy Murphy. If you have any questions, feel free to contact me at 202-453-6598 or at [Kay.Bhagat@ed.gov](mailto:Kay.Bhagat@ed.gov).



Sincerely,

/S/

Kay Bhagat  
Team Leader, Team III  
District of Columbia Office  
Office for Civil Rights

Enclosure

cc: XXXX (by email)