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

November 9, 2015

Ann Clark, Superintendent
Charlotte-Mecklenburg Schools
Education Center
P.O. Box 30035
Charlotte, NC 28230-0035

Re: OCR Complaint No. 11-15-1250
Letter of Findings

Dear Superintendent Clark:

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 May 19, 2015 against Charlotte-Mecklenburg Schools (the District). The Complainant filed the complaint on behalf of her son (the Student), who attended the District's XXXX School (the School) during the 2014-2015 school year. The Complainant is alleging that:

1. The District discriminated against the Student on the basis of disability by, during the Spring of 2015:
   a. Failing to implement his Section 504 Plan when, on at least three occasions, it assigned a teacher assistant to his class who was not trained to provide him with XXXX allergy-related services, resulting in that teacher assistant relocating him to another wing of the School for testing without relocating his medication to that wing; and
   b. Failing to properly evaluate him for and provide him with appropriate special education and related aids and services for his digestive impairment by failing or refusing to include that impairment in his Section 504 Plan; and
2. The District retaliated against the Student when, following the Complainant's retention of an attorney to advocate for the Student's disability-related needs in late April 2015, it began treating his absences as unexcused despite its knowledge that the they were due to his disabilities.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the

basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, it is subject to the provisions of the above laws and we have jurisdiction over it. Because the Complainant alleged discrimination and retaliation under these laws, we have jurisdiction over the allegations.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District, interviewed the Complainant, listened to audio recordings provided by the Complainant, reviewed statements provided by the District and spoke with Counsel for the District on several occasions. After considering all of the evidence obtained during the investigation, OCR has identified a compliance concern regarding allegation 1b, which the District has agreed to resolve through the enclosed resolution agreement, and has found that there is insufficient evidence to support a finding that the District is in violation of Section 504 or Title II with respect to allegation 1a or 2. OCR's findings and conclusions are discussed below.

Allegation 1a: The District discriminated against the Student on the basis of disability by, during the Spring of 2015, failing to implement his Section 504 Plan when, on at least three occasions, it assigned a teacher assistant to his class who was not trained to provide him with nut allergy-related services, resulting in that teacher assistant relocating him to another wing of the School for testing without relocating his medication to that wing.

The legal standard applicable to this allegation is that the Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free and 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 school district meets the needs of students without disabilities and that are developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent as required under the Section 504 regulation. The specific issue presented by this allegation is whether or not the District denied the Student a FAPE by failing to implement particular provisions of his October 14, 2014 Section 504 Plan (the Plan). In order to constitute a denial of a FAPE, the District must have failed

to implement substantial or significant provisions of the Plan, resulting in the Student being denied a meaningful educational benefit.

The Plan includes four "accommodations" (at page 2), the following three of which are relevant to our consideration of allegation 1a:

1. The school nurse will provide training at the beginning of the year to all teachers who have contact with [the Student]. The training will include education of the allergens, reactions, Emergency Action Plan (EAP), and Epi Pen training and locations.
2. [The Student's] teacher will indicate in the required substitute teacher folder of the existing health care plan and 504 plan.
3. The school nurse will work with [the Student's] parents to decide on specific locations within the school to house the Epi Pens so that they are in close proximity to [the Student] at all times. . . .

The District's submissions, including its July 7, 2015 narrative response to the allegations, indicate that the teaching assistant (TA) referenced in this allegation (and other School staff) received training from the school nurse on August 27, 2014. This training, part of which involved the viewing of a video (see http://cms-k12-nc.granicus.com/MediaPlayer.php?clip_id=1011), included all of the subjects listed in accommodation 1 of the Plan, above.

In the narrative the Complainant submitted on June 25, 2015 and the rebuttal of the District's narrative response that the Complainant submitted on October 9, 2015, she asserted that the TA received only "routine" allergy training, that the TA did not receive Student-specific training, and that the lack of the latter was a violation of the Plan. However, neither Section 504, Title II or the Plan require that the TA receive Student-specific training. What is required is that the TA have generalized allergy training and that she be aware of and have access to the Student's Section 504 Plan. In light of the training discussed above and the evidence indicating the TA was aware of and had access to the Plan, which was in the "substitute folder" maintained by the Student's teacher, there is insufficient evidence supporting a finding that the TA was not trained to provide the Student with nut allergy-related services.

We note that the District and the Complainant agree that the Student's medication was stored at three locations at the School. The School Principal reported to OCR that the location in which the Student took his benchmark testing was in close proximity to two of the designated locations for his medication. Although the Complainant objects that the medication was not close enough to the Student on several occasions, OCR cannot find, based on these facts, that the District is in violation of Section 504 or Title II with

respect to allegation 1a. OCR notes as well that the Student's Section 504 Plan was revised on April 30, 2015 to require that the Student's medication be kept in a red bag and that teachers would be responsible for transitioning the bag with the Student, thereby ensuring that the Student's medication would be with the Student.

Allegation 1b: The District discriminated against the Student on the basis of disability by, during the Spring of 2015, failing to properly evaluate him for and provide him with appropriate special education and related aids and services for his digestive impairment by failing or refusing to include that impairment in his Section 504 Plan.

The legal standard governing our consideration of allegation 1b is the same as the FAPE standard discussed in the above analysis of allegation 1a. OCR's investigation of an allegation that a recipient has failed to provide a student with a FAPE is normally limited to ensuring that the recipient has complied with the process requirements of Section 504 relating to educational setting, evaluation and placement, and procedural safeguards. In particular, a school district must conduct an evaluation of any individual who because of a disability "needs or is believed to need" special education or related aids and services. 34 C.F.R. § 104.35(a). An individual evaluation must be conducted before any action is taken with respect to the student's initial placement, or before any significant change in placement is made. 34 C.F.R. § 104.35. We interpret Title II as imposing similar requirements on public education systems and schools.

The evidence indicates that the District received a "Medication Authorization" form and letter from the Student's health care provider on December 16, 2014. In these documents, the health care provider stated that, with respect to the Student's digestive impairment, he should be given a particular medication 30 minutes prior to each of his lunches and be permitted to go to the bathroom when needed and have mid-morning and mid-afternoon snacks. Based on this evidence, we find that the District had before it evidence indicating that the Student *might* have a digestive disability for which Section 504 and Title II *might* require that it provide the Student with special education or related aids and services. The District was therefore required to promptly determine whether the Student needed to be referred for additional evaluation and, if so, to promptly conduct an evaluation and determine whether the Student was eligible for aids or services as a student with a digestive disability. Yet it failed to do so during the 2014-2015 school year.

We note that the District's narrative statement (at page 2) included the following paragraph relating to allegation 1b.

> It is true that the District never evaluated the Student for special education services [for his digestive impairment], nor did it have any legal obligation to do so. The Student's family **never** requested an evaluation for special education services (emphasis added). Furthermore, it is important to note that there is no special education evaluation that District personnel could conduct to determine whether or not a student actually has digestive issues. While IEP teams are fully capable of conducting special education evaluations in accordance with IDEA and the N.C. Policies Governing Services for Students with Disabilities, this sort of evaluation is something that would be conducted by a licensed medical professional.

For the reasons stated above, we disagree with the District's position that it did not have a legal obligation to at least refer the Student for additional evaluation and, possibly, to evaluate him to determine whether he was eligible for aids or services as a student with a digestive disability. As explained in OCR's *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*:

> A school district's obligation to provide FAPE extends to students with disabilities who do not need special education but require a related service. For example, if a student with a disability is unable to self-administer a needed medication, a school district may be required to administer the medication if that service is necessary to meet the student's educational needs as adequately as the needs of nondisabled students are met. In order to satisfy the FAPE requirements described in the Section 504 regulation, the educational institution must comply with several evaluation and placement requirements, afford procedural safeguards, and inform students' parents or guardians of those safeguards. 34 C.F.R. §§ 104.35(a), 104.36.

These obligations were not dependent on whether the Complainant requested such an evaluation and did not require that the District special education staff conduct a medical evaluation of the Student. Rather, the District was required to consider the medical evidence before it in determining whether the Student was eligible for aids or services as a student with a digestive disability. If it disagreed with the recommendations of the Student's health care provider, it could have had its own medical professionals conduct a medical evaluation of the Student. It did neither.

To address OCR's compliance concerns, the District has signed the enclosed resolution agreement, pursuant to which it agrees to: (1) in the event the Student enrolls in a District school, evaluate the Student to determine whether he is eligible for special education or related aids and services as a student with a nut allergy or digestive

impairment; and, if so, (2) provide him with such aids and services to the extent necessary to meet the FAPE requirement.

Once the agreement is fully implemented, the District will be in compliance with Section 504 and Title II with respect to allegation 1b. We will monitor the District's implementation of the agreement to ensure that it fully complies with it.

Allegation 2: The District retaliated against the Student when, following the Complainant's retention of an attorney to advocate for the Student's disability-related needs in late April 2015, it began treating his absences as unexcused despite its knowledge that the they were due to his disabilities.

When analyzing a claim of retaliation, OCR will look at whether: (1) the complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); (2) the school system took a materially adverse action against the complainant; (3) there is some evidence that the school system 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 school system has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the school system's reason for its action is a pretext, or excuse, for unlawful retaliation.

In applying the above retaliation standards to allegation 2, we will assume, for the purpose of this analysis, that the Complainant engaged in a protected activity. Therefore, we next consider whether there is evidence that the District took a materially adverse action against the Complainant. Because there is insufficient evidence supporting a finding that the District took such an action against the Complainant, we will limit our discussion to that issue.

A materially adverse action is anything that could deter a reasonable person from engaging in further protected activity. In a May 8, 2015 email to the Student's homeroom teacher, the Complainant notified her that two of the Student's absences – on April 23 and May 4, 2015 – were mistakenly listed an unexcused. We find that these two mistakes do not, on their own, constitute a materially adverse action against the Student, that is, that they would not deter a reasonable person from engaging in further protected activity. The Student did not lose any educational services or suffer any tangible harm as a result of the initial listing of the absences as unexcused. We also note that, in an email response that was sent within an hour of the Complainant's email, the homeroom teacher explained that this mistake was the result of the fact that neither the Complainant nor the Student's classroom teacher informed her (she is responsible for keeping track of the Student's attendance) of the reasons for these absences. She added

that she would arrange for the correction of the mistaken attendance entries and suggested that, in the future, the Complainant copy her on messages concerning the Student's absences to avoid such mistakes. Also within an hour of the Complainant's email to the Student's homeroom teacher, the School's Administrative Secretary sent an email in which she informed the Complainant that the mistaken attendance entries had been corrected, and suggested that the Complainant email her directly concerning Student attendance information if that would be easier. Finally, the Complainant's May 8th reply email to the Administrative Secretary included the following text.

> … thank you so much for fixing this. I appreciate that. And I will just send emails directly to you from now on. Thanks so much for all of your help.

In light of the above evidence and discussion, we find that a reasonable person under the above circumstances would not be deterred from engaging in further protected activity, that the School therefore did not take a materially adverse action against the Student, and that the evidence therefore does not establish a prima facie case of retaliation. Consequently, we find that there is insufficient evidence to support a finding that the District is in violation of Section 504 or Title II with respect to allegation 2.

Conclusion

OCR has identified a compliance concern regarding allegation 1b, which the District has agreed to resolve through the enclosed resolution agreement, and has found that there is insufficient evidence to support a finding that the District is in violation of Section 504 or Title II with respect to allegation 1a or 2.

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

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, 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.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Peter Gelissen, the OCR attorney assigned to this case, at (202) 453-5912 or peter.gelissen@ed.gov.

Sincerely,

/S/

Peter Gelissen for
Dale Rhines
Program Manager
District of Columbia Office
Office for Civil Rights

Enclosure