



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

March 14, 2016

Dr. Todd Martin
Superintendent
Yadkin County Schools
121 Washington Street
Yadkinville, NC 27055

Re: OCR Complaint Nos. 11-15-1377 &
11-16-1025
Letter of Findings

Dear Dr. Martin:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaints we received on September 19, 2015 and October 19, 2015 against Yadkin County Schools (the District). The Complainant filed the complaints on behalf of a student (the Student) at XXXX School (the School). The complaints allege that the District discriminated against the Student on the basis of disability. The specific allegations that OCR opened for investigation are as follows

Allegation 1: From March 23, 2015 through the current school year, School staff denied the Student a free appropriate public education (FAPE) by failing to implement the Student's Section 504 Plan with regard to extra time for assignments and tutoring/additional instruction;

Allegation 2: In the spring of 2015, School staff discriminated against the Student on the basis of disability by requiring that he sign a form if he chose not to test in a separate setting;

Allegation 3: On October 15, 2015, School staff denied the Student a FAPE by failing to implement his Section 504 Plan when the Student was not allowed to sign himself out of school when ill; and

Allegation 4: The District's policy that, as represented by the School Principal, allows the School to revoke high school credits and disqualify a student from graduating for missing more than eight days of school discriminates against students with 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

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

disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District staff.

After carefully considering all of the information obtained during the investigation, OCR identified a compliance concern with regard to the practice identified in allegation 2. Upon notice of OCR's compliance concern, the District immediately eliminated that practice and notified high school staff that the practice had been discontinued. The District also agreed to provide training to high school staff on this issue as set forth in the enclosed resolution agreement. Before OCR completed its investigation, the District expressed a willingness to resolve allegation 4 by taking the additional steps set out in the enclosed resolution agreement. OCR did not find sufficient evidence to support allegations 1 and 3. The following is a discussion of OCR's findings and conclusions, as well as the relevant legal standards and information obtained by OCR during the investigation that informed the development of the resolution agreement.

Background

The Student is 18 years old and in the 12th grade at the School. He was diagnosed with XXXX at the age XXXX. He also suffered a XXXX as an infant which caused lasting medical issues, including frequent XXXX.

He first enrolled in the District in XXXX. He had been determined eligible under Section 504 by his previous school district. His Section 504 plan was updated by the District on September 23, 2015. The Student's current Section 504 plan provides for extended time, small group testing, seating in the front of classroom, and breaks.

Legal Standards and Analysis

Allegation 1

The Complainant alleged that from March 23, 2015, through the current school year, School staff denied the Student a FAPE by failing to implement the Student's Section 504 Plan with regard to extra time for assignments and tutoring/additional instruction.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. 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 required under the Section 504 regulation.

As stated above, the Student's current Section 504 plan provides for extended time, small group testing, seating in the front of classroom, and breaks. Because there is no provision for tutoring/additional instruction provided in the plan,¹ OCR determined that there is insufficient evidence to support a finding of a compliance concern with regard to the tutoring/additional instruction aspect of allegation 1.

In order to determine whether the Student had been provided extended time for assignments, OCR interviewed all of the Student's teachers from both the spring and fall 2015 semesters. OCR asked all of the teachers if they were aware of the Student's Section 504 plan, if they had received a copy of the plan, and if they routinely provided the Student extended time for assignments. All of his teachers testified that they were aware of his Section 504 plan and had given the Student extended time for assignments as required by the plan. In most cases, the teachers had a policy or practice of allowing all students in the class as much time as needed to complete assignments without penalty.

Both the Complainant and the District provided OCR with an email exchange with the Student's XXXX teacher for the fall 2015 semester that suggested this particular teacher was not aware of the Student's Section 504 plan at the start of year. The teacher emailed the Complainant on September 16, 2015, to share that the Student currently had a D average in the class due to the fact that he had not turned in a majority of the assignments. The Student had missed a number of days at the start of the school year due to medical reasons. The Complainant referenced the Student's Section 504 plan in his response, to which the XXXX teacher replied that she was not aware he had a Section 504 plan. The teacher's practice for all students is to allow 2 days for every day of absence for a student to complete work without penalty and, until she became aware of the Student's Section 504 plan, that typical practice was what she initially offered to the Student (*e.g.*, 10 days for 5 days of absence).

OCR interviewed the Student's XXXX teacher, as well as the School's Section 504 Coordinator, who is the person responsible for distributing Section 504 plans to teachers at the start of the school year. The Section 504 Coordinator explained that it is her practice to distribute plans to teachers through their mailboxes on approximately the 10th day of classes. Up until the 10th day, students may change their schedules, so she waits until the 10th day to avoid distributing the plan to staff who do not have a need to know of a student's plan. It is also her practice to email the teachers a few days later to confirm that they received the plan. She reported that some teachers reply back, while others do not. The Section 504 Coordinator asserted that she followed this practice at the start of the fall 2015 semester with regard to the Student's Section 504 plan. The Student's XXXX teacher maintained that she never received a copy of the Student's Section 504 plan at the start of the semester. Following her email exchange with the Complainant, she went to the Section 504 Coordinator's office to request a copy. The Section 504 Coordinator was not aware of any reason why the teacher would not have received a copy of the plan on the

¹ During a conversation with OCR staff on February 24, 2016, the Complainant maintained that the Student's Section 504 Plan does, in fact, contain a provision regarding tutoring and additional instruction. He said that the provision was included in a 504 plan that had been developed for the Student in Wisconsin and that the District agreed to add it to the Student's current plan, "penciling it in" during the Section 504 meeting. Although the Complainant was given the opportunity to provide OCR with a copy of the plan that included that provision, he failed to do so. Consequently, OCR relied on the plan provided by the District, which, as noted above, does not contain a provision regarding tutoring and additional instruction.

10th day of school, but nonetheless ensured that the teacher had a copy of the plan going forward. After she received a copy of the plan, the teacher notified the Student that he would have 15 additional days to complete the missing assignments.

Accordingly, OCR determined that there is insufficient evidence that the District failed to implement the Student's Section 504 plan with regard to extended time for assignments. Although the Student's XXXX teacher initially was unaware of the Student's Section plan, the teacher promptly obtained a copy of the plan and offered the Student additional time to complete his missing assignments, in accordance with his plan.

Allegation 2

The Complainant alleged that, in the spring of 2015, School staff discriminated against the Student on the basis of disability by requiring that he sign a form if he chose not to test in a separate setting, as required by his Section 504 plan.

The District acknowledges that it has a practice that students with Section 504 plans who attain the age of 14 are permitted to opt out of classroom testing accommodations, including small group testing. When a student chooses to opt out of classroom testing accommodations, the teacher is required to ask the student to sign a Classroom/Testing Modifications: Student Refusals form. The form lists the class and the specific accommodation being declined. By signing the form the student indicates that he is declining the accommodation for the test administration. The student's signature also signifies an understanding that if the student "routinely refuses use of the modifications that have been approved to assist [the student] in becoming more successful in [his] academic efforts, [the student] will not be able to use them on any state testing ... or end-of-semester exams."

The Section 504 Coordinator for the School explained that it is the District's perspective that by the age of 14, students are able to decide whether they need an accommodation. Teachers do not force students to sign the form. If the student does not sign the form, the teacher is required to offer the testing accommodation provided for in the student's plan. The act of signing the form does not change the student's plan; the student is only opting out for that particular test. In this case, the Student signed this form on one occasion in the fall of 2015, i.e., for one test in his XXXX class.

As stated above, the Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about

the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

OCR has determined that the District’s practice of allowing students to decline an accommodation written into their Section 504 plan and asking them to sign a form indicating they decline it violates these procedural requirements. The District’s intent behind this practice is not to discriminate; rather it is intended to give high school students with 504 plans a degree of autonomy. Nonetheless, OCR has determined that the practice violates the procedural requirements of Section 504 because it allows a student to unilaterally make a change to his or her Section 504 accommodations without consideration of information relevant to assessing the appropriateness of the accommodation, such as medical documentation or performance on past tests, and without input from a group of persons knowledgeable about the student and any relevant information.

OCR suggests there are other ways the District may accomplish the same goal of giving students autonomy, as appropriate, without violating the Section 504 procedural requirements. For example, the Section 504 team could consider writing a testing accommodation into the student’s plan in a way that allows the student some choice as to whether the accommodation is used (for example: The student may, but is not required to, test in a separate setting). OCR cautions the District, however, against generalizing about a student’s abilities to self-advocate and make decisions about receiving related aids and services based on the student’s age. While a student’s age may be an appropriate consideration in determining what aids and services should be provided or the manner in which they are provided, each student’s individual circumstances must be considered by a 504 team, which decides whether and to what extent any particular student can be responsible for self-advocacy.

When OCR shared this compliance issue with the District, the District agreed that the practice needed to end and promptly notified administrators and other appropriate staff that effective February 23, 2016, the practice was discontinued. The District also signed the enclosed resolution agreement, which requires training for all high school staff on this issue. When the agreement is fully implemented, it will resolve this compliance issue. OCR will monitor the District’s implementation of the agreement.

Allegation 3

The Complainant alleged that on October 15, 2015, School staff denied the Student a FAPE by failing to implement his Section 504 Plan when the Student was not allowed to sign himself out of school when ill.

There is nothing in the Student’s Section 504 plan that permits him to sign himself out of school early when he is ill. School Board Policy 4400 Attendance/Tardies states that students are “permitted to leave school before the end of the school day only in the company of a parent or guardian or in accordance with specific written instructions from a parent or guardian.” The Complainant acknowledged that he did not sign the Student out on this occasion. The Complainant’s explanation was that “this is high school,” and he had already submitted a note

generally stating that the Student would have to leave early if he had a headache.

Because there is nothing in the Student's Section 504 plan that provides an exception to School Board policy 4400 for the Student, OCR determined that there is insufficient evidence to support a finding that the District violated Section 504 as alleged in allegation 3. It is worth noting that, although the Student's violation of Board policy is punishable by in-school suspension, in accordance with the Student Handbook, the School did not discipline the Student for leaving early without permission on this occasion and instead tried to contact the Complainant to advise him of the requirement to sign the Student out of school.

Allegation 4

The Complainant alleges that School Board Policy 4400 Attendance/Tardies, as it pertains to denial of credit after a certain number of absences, discriminates against students with disabilities. School Board Policy 4400 Attendance/Tardies provides in this regard that, for high school students, "credit will be denied after a student accumulates 9 or more absences (excused or unexcused) in a semester-long class." A denial of credit under this policy is reflected as an "FF" on a student's transcript.

The policy sets forth a "review process" when credit is denied. The review process allows a student to submit an appeal of the denial of credit to the school's Student Assistance Team or Attendance Committee. The policy states that the appropriate team or committee will review the reasons for the student's absences, quantity and quality of make-up work, exam grades, standardized tests, and teacher statements and make a recommendation to the principal to award credit, not award credit, or require the student to follow an established make-up plan to receive credit. If the principal decides to award credit, the FF on the transcript is replaced with the grade earned by the Student, unless the Student did not earn a passing average in the class and then the Student receives a P.

According to the District, this part of the policy was developed in August 2011 in response to a drop in attendance during the 2010-2011 school year. The District explained that the justification for the policy is that attendance in the high schools had been consistently low for many years. Farming is the largest industry in the county, and families rely on each other to complete duties on the farm. The policy was intended to bring attention to the importance of attending school and improve the attendance record in the District's high schools.

The Principal of XXXX School explained to OCR how the policy works in practice at the School. In order to submit an appeal of a denial of credit, a student is required to submit a one-page attendance appeal form. On occasion, if a student is medically fragile, a teacher will initiate the appeal process by submitting the form on the student's behalf, but in most instances it must be submitted by either the student or the parent. If documentation is already on file indicating the reasons for the absences (for example, notes from the parent or a physician), then the appeal is granted, typically within several days. If there are absences that are unexcused or for which there is no documentation, a meeting with the parent to discuss the absences and request the necessary documentation may be necessary. In most cases, the appeal is granted. For the 2013-2014 school year, only two students were denied credit under the policy. One of

the students received the FF while in a different school district. The second never submitted an appeal form. For the 2014-2015 school year, no students were denied credit under the policy.

Although OCR did not complete its investigation of this allegation, OCR identified a concern that School Board Policy 4400 may have a disparate impact on students with disabilities because it contains no exception for medically excused absences. The Section 504 regulation provides that a school district may not utilize criteria or methods of administration that have the effect of subjecting qualified students with disabilities to discrimination or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities.

The District is unable to provide OCR with the data necessary to prove a disparate impact because of the way the process operates. Although an FF shows up initially on a student's electronic record when credit is denied under the policy, once an appeal is granted the FF is replaced with the grade earned and there is no remaining record that an FF initially was given. For this reason, there is no way for the District to provide a list of students who were denied credit under the policy, other than for one high school that had not yet completed the appeal process for the fall 2015 semester at the time of OCR's request. Without this information, OCR cannot establish sufficient evidence to prove a disparate impact. However, OCR is concerned there is a likelihood students with disabilities, particularly students who may be absent for reasons related to a medical issue, are more likely to be denied credit under the policy. Additionally, although credit is often retrieved following the appeal process, the students still must initiate that process in most instances.

Counting medically excused absences under the policy does not further the District's asserted educational objective of improving attendance in a predominantly farming community where kids often stay home to work the farm. Moreover, it tends to penalize students who are absent frequently for legitimate medical reasons by making them go through this extra process to obtain credit for a course completed. In the course of OCR's investigation, the District expressed a willingness to revise the policy. The enclosed Resolution Agreement reflects the District's commitment to revise its attendance policy. In addition, the Superintendent immediately advised school administrators that effective February 29, 2016, where appropriate documentation is provided from a parent/guardian or physician, absences for medical reasons will not be counted toward the maximum number of absences permitted before credit is denied.

Conclusion

On March 10, 2016, the District agreed to implement the enclosed Resolution Agreement (Agreement). The provisions of the Agreement are aligned with the allegations and issues raised in this complaint and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement includes provisions, which when fully implemented, will resolve the concerns identified with regard to allegation 4 in this complaint. The Agreement also commits the District to take specific steps to address the identified areas of noncompliance and identified compliance concerns associated with allegation 2 of this complaint. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant if the District enters

into an agreement that, fully performed, will remedy the identified areas of noncompliance.. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into the by the District on March 10, 2016, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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 cooperation of District staff and of Mr. Frederick G. Johnson, counsel for the District, in the resolution of this complaint. If you have any questions regarding this letter,

please contact the attorneys assigned to this complaint: Sara Clash-Drexler at 202-453-5906 or sara.clash-drexler@ed.gov or Betsy Trice at 202-453-5931 or betsy.trice@ed.gov.

Sincerely,

/S/

Alessandro Terenzoni
Supervisory Attorney, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Mr. Frederick G. Johnson, Faw, Folger & Johnson, P.C. (via email)