



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

November 9, 2016

Dr. Aaron Spence
Superintendent
Virginia Beach City Public Schools
2512 George Mason Drive
P.O. Box 6038
Virginia Beach, VA 23456-0038

Re: OCR Complaint No. 11-16-1338
Resolution Letter of Findings

Dear Dr. Spence:

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 16, 2016 against Virginia Beach City Public Schools (the Division). The Complainant filed the complaint on behalf of his son, the Student, who attends the XXXX. The Complainant alleged that the Division discriminated against the Student on the basis of disability during the 2015-2016 school year. Specifically, the complaint alleged that:

- The Academy failed to evaluate the Student to determine whether he required special education and related aids and services during the 2015-2016 year, despite receiving notice that the Student had a diagnosis of XXXX thereby denying the Student a free appropriate public education (FAPE) (Allegation 1); and
- The Student's English Teacher (the Teacher) harassed the Student on the basis of disability by calling him a XXXX on or about XXXX, and again on or about XXXX (Allegation 2).

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.

In reaching a determination, OCR reviewed documents provided by the Complainant and the

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

Division; and interviewed the Complainant and Division faculty and staff. After carefully considering all of the information obtained during the investigation, OCR identified a compliance concern with respect to Allegation 1, which the Division agreed to resolve through the enclosed Resolution Agreement (the Agreement). OCR found insufficient evidence to support Allegation 2.

Background

<XXXX 2 PARAGRAPHS REDACTED XXXX>.

Legal Standards and Analysis

Allegation 1:

With respect to Allegation 1, the Complainant alleged that the Division discriminated against the Student on the basis of his disability. Specifically, the Complainant alleged that the XXXX failed to evaluate the Student to determine whether he required special education and related aids and services during the 2015-2016 school year, despite receiving notice that the Student had a diagnosis of XXXX, thereby denying the Student a FAPE.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipients to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. 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.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a recipient to evaluate any student who needs or is believed to need special education or related aids and services due to a disability. A recipient must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

The Division maintains a Child Find process to identify and evaluate students who are suspected of having a disability.¹ In addition to conducting screenings at interval grade levels in the areas of speech, voice, language, and fine and gross motor skills, the Division engages in Child Find activities through a referral from a parent, teacher, physician or other interested party to evaluate a student suspected of having a disability.

The Complainant informed OCR that the Student was diagnosed with ADHD in December 2015. The Complainant and the Division stated that on January 5, 2016, the Complainant submitted a Request for Administration of Medication form (the Form) to the XXXX nurse (the Nurse). OCR reviewed the Form and determined that it stated that the Student had a diagnosis of XXXX and

¹ See <http://www.vbschools.com/guidance/section504.asp>.

took prescription medication; and it authorized the Division to administer XXXX to the Student for his XXXX “at 12:30 pm after eating.” The Nurse told OCR that following receipt of the Form from the Student’s parents on January 5, 2016, her office administered XXXX to the Student. OCR reviewed the XXXX Medication Administration Record which evidenced the Student’s XXXX diagnosis and that the Student received prescription medication for XXXX from XXXX through XXXX. OCR presumes that a diagnosis of XXXX is evidence that a student may have a disability.²

However, despite notice of the Student’s XXXX diagnosis and other information provided on the Form, and the administration of XXXX to the Student, Division personnel, including the Nurse, stated that they did not identify the Student as a student with a qualified disability, evaluate the Student, or otherwise take steps to ascertain whether the Student required the provision of special education and related aids and services. Specifically, the Nurse explained that she did not inform XXXX administrators or staff of the Student’s disability due to privacy and confidentiality concerns related to divulging medical information. Generally, the Nurse informed OCR that her role is only to administer a student’s medication. The Nurse indicated that she would notify XXXX administrators and staff of a student’s suspected disability, or otherwise refer a Student for an evaluation, in instances where parents have verbalized concerns related to the student’s disability. She explained, “Once I receive authorization from the parent, I would notify staff.” Additionally, the Academy’s Director of Alternative Education (the Director) stated that Nurse’s office only refers information related to a student’s disability in instances that “would suggest that the student would require a healthcare plan such as a seizure disorder, asthma, or life-threatening allergies.” Further, the Director told OCR that “there were no problems with the student and his academic performance so we didn’t have a reason to suspect that he had a disability.”

Overall, with respect to the Student, the Division informed OCR that notwithstanding the Student’s diagnosis, it did not refer the Student for an evaluation “because there is no evidence suggesting [the Student] required additional services to receive FAPE.” OCR determined that the Nurse’s and Director’s statements are inconsistent with the Division’s obligations under Section 504. Specifically, if Division staff perceives or receives information to lead them to suspect that a student has a disability, it is the Division’s responsibility to identify and evaluate the student.

OCR also reviewed the Student’s educational records and testing scores which indicated that he generally performed well academically at the Academy. For example, for the fourth quarter rating period at the Academy, the Student earned grades of A-, B, A, B+, A, and A- in Social Studies, Math, Physical Science, English, Technology Education, and Health, respectively. Further, during the same rating period, the Student’s teachers provided positive feedback regarding the Student, including that “he is a bright young man,” he “works well in the...classroom,” and he “has been one of my best students.” In an interview with OCR, the Teacher further stated that the Student was a “good student” who “completed assignments on time.” In addition to not presenting academic challenges, the Teacher indicated that the Student generally did not exhibit behavioral concerns and reported that he was “never irritable or aggravated.” Rather, the Teacher characterized the Student’s disposition as pleasant. Finally, the Teacher stated she was unaware of the Student’s diagnosis and did not suspect that the Student had a disability. Although the Student may not have exhibited academic challenges, OCR

² See <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>, p. 10.

determined that the Nurse, and therefore the Division, had actual knowledge of the Student's disability but failed to evaluate the Student.

In addition to the Division's actual knowledge that the Student had XXXX, the Student's significant disciplinary history also indicated that the Student may have had a disability that warranted an evaluation.³ During the Student's tenure in the Division, he incurred approximately XXXX. OCR reviewed the Student's cumulative disciplinary history, which primarily included infractions for disruptive, defiant, and disrespectful behavior. Consequently, the Student received several terms of detention and in- and out-of-school suspension. <XXXX SENTENCE REDACTED XXXX> Because the Student's escalating behavior could be related to his XXXX, his behavior should have triggered the Division's obligation to evaluate the Student under Section 504.

Based on the foregoing, OCR determined that there was sufficient evidence to substantiate the Complainant's allegation that the Division failed to evaluate the Student to determine whether he required special education and related aids and services during the 2015-2016 school year. Specifically, as of January 5, 2016, the Division had actual notice of the Student's XXXX escalating behavior during school year 2015-2016, which may have been related to his XXXX. Therefore, OCR determined that the Division's failure to evaluate the Student may have denied the Student the appropriate special education and related aids and services, and therefore a FAPE.

Accordingly, OCR negotiated the Agreement with the Division to remedy the violation OCR identified with respect to Allegation 1, pursuant to Section 303(b) of OCR's *Case Processing Manual*.

Allegation 2:

Regarding Allegation 2, the Complainant alleged that the Division discriminated against the Student on the basis of his disability during the 2015-2016 school year. Specifically, the Complainant alleged that the Teacher reportedly harassed the Student on the basis of his disability, by calling him a XXXX on or about XXXX, and again on or about XXXX.

A recipient's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A recipient may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the recipient had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a

³ OCR's Dear Colleague Letter dated July 26, 2016 states that a school district must evaluate a student if it believes the student has a disability and believes the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges. See <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>.

student's ability to participate in or benefit from the recipient's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

On XXXX, the Complainant emailed the Teacher and the XXXX Assistant Principal and he complained that the Teacher called the Student a XXXX during class. In his email, the Complainant did not specifically state or otherwise indicate that the Student was harassed based on his disability, but he did contend that the Teacher's actions were inappropriate. In response, the Assistant Principal investigated the Complainant's complaint, but he did not substantiate the Complainant's allegation. Specifically, the Assistant Principal investigated by interviewing the Teacher, who denied calling the Student a XXXX or making any other derogatory remarks.⁴ Rather, the Teacher told the Assistant Principal that she had mentioned XXXX in the context of the Student telling her that he was drawing XXXX on his assignments.⁵ In addition, the Assistant Principal interviewed all of the other four students present in the Student's English class, all of whom denied hearing the Teacher refer to the Student as a XXXX. Therefore, the Assistant Principal did not substantiate the Complainant's complaint that the Teacher called the Student a XXXX.⁶

The Assistant Principal further stated that the Complainant and the Student alleged that the Teacher referred to the Student as a XXXX during the second incident that occurred on XXXX. According to the XXXX Administrative Report of the incident, the Student disrupted his English class and made disrespectful comments towards the Teacher. At the time of his outbursts, the Teacher was leading a class discussion about a nonfiction article involving a XXXX. Following the Student's remarks, the Teacher stepped into the hallway and asked Academy personnel to direct the Student to the administrator's office. The Student "left the classroom then turned around and pushed the [T]eacher to reenter the classroom. When [the Student] exited the second time, he threw a mechanical pencil at the [T]eacher. The pencil did not strike the [T]eacher but fell to the floor." The Assistant Principal reported that his investigation of the May 4, 2016 incident did not corroborate the Student's assertion that the Teacher called the Student a XXXX. Again, the Assistant Principal investigated by interviewing the Teacher, who denied calling the Student a XXXX or making any other derogatory remarks; and, he interviewed all of the other four

⁴ No other XXXX employees were in the classroom at the time of the alleged incident.

⁵ In her statement, the Teacher stated, "[The Student] was drawing molecules on his work. [The Student] regularly draws "things" on his work. In the past, when I have asked [the Student] to pay attention and stop drawing, he told me that his drawings were XXXX [The Student] told me that he didn't care whether he paid attention or not. I said, "While you may not, I cannot have you drawing XXXX in class." That afternoon, I received an email that copied [the Assistant Principals]."

⁶ To corroborate the Assistant Principal's account, OCR requested written documentation of his investigative efforts. Although the Assistant Principal stated that he prepared contemporaneous written statements of the students' testimony, he reported that he routinely shreds voluminous documents related to unsubstantiated investigations at the end of each school year. OCR cautions the Division against this practice and encourages Division staff to develop a protocol for record maintenance.

students in the Student's English class, and they denied hearing the Teacher calling the Student a drug addict. Instead, he stated that the witness accounts supported the Academy's findings that the Student made disrespectful comments and threw an object towards the Teacher. OCR reviewed a student witness statement compiled for the purposes of OCR's investigation and determined that the student's account did not corroborate the Student's allegation.⁷

OCR also interviewed the Teacher regarding both incidents on XXXX and XXXX. The Teacher informed OCR that she was unaware that the Student had a disability. She explained that although the Student frequently appeared late for class to visit the Nurse, she was unaware that the Student took prescription medication for XXXX. The Teacher denied calling the Student a drug addict or any other disparaging remark on either March 8 or May 4, 2016. Rather, she attributed any commentary related to XXXX to the Student and other students engaging in personal conversations. She recounted that during those interactions, she observed that the Student often discussed drugs with peers and drew what he described as XXXX on his assignments. She stated that based on the Student's conversations with peers, other students made drug references that were directed at the Student.

<XXXX PARAGRAPH REDACTED XXXX>

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that discrimination occurred. Based on the foregoing, OCR's investigation did not reveal information to corroborate or support the Complainant's allegation that the Teacher harassed the Student on the basis of his disability on XXXX and XXXX, as alleged. Here, the Teacher credibly denied referring to the Student as a XXXX or any other derogatory remark on either occasion. Moreover, despite the fact that neither the Complainant nor the Student complained that the Teacher harassed the Student on the basis of his disability, OCR determined that the XXXX Assistant Principal investigated both incidents but did not find any information to substantiate that the Teacher called the Student a XXXX or any other derogatory remarks. Additionally, OCR did not find, nor did the Complainant provide, any evidence that the derogatory remarks had, in fact, occurred; or, that the Teacher had otherwise harassed the Student on the basis of his disability. Because OCR was unable to establish the existence of a hostile environment, there is an insufficient evidence to support the Complainant's allegation of disability-based harassment. Accordingly, OCR will take no further action regarding Allegation 2.

Conclusion

On November 9, 2016, the Division agreed to implement the enclosed Agreement, which commits

⁷ Further, OCR asked the Complainant to provide further instances where the Teacher made derogatory remarks about the Student; however, the Complainant was unable to do so with any specificity. While the Complainant asserted that the Teacher made ongoing derogatory remarks, the Complainant failed to detail the nature of the comment or when it occurred. In addition, OCR asked the Complainant to provide supporting witnesses for the investigation. In response, the Complainant provided the first name of two students. OCR requested additional information from the Complainant to proceed, including the names of the parents/guardians for the identified witnesses and contact information. However, the Complainant did not respond to OCR's request for additional information. OCR notes that the Assistant Principal stated that he interviewed all of the students present in class and none of the students provided information to support the Complainant's allegation.

the Division to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the Division is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the Division's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the Division 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 Division on November 9, 2016, if the Division 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 Division 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 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 have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Division 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 Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact the OCR staff assigned to this complaint, Judy Briggs at 202-453-5902 or Judy.Briggs@ed.gov, or Erika Westry at 202-453-7025 or Erika.Westry@ed.gov.

Sincerely,

/S/

Letisha Morgan
Supervisory Investigator, Team II

Office for Civil Rights
District of Columbia Office

Enclosure

cc: Dannielle Hall-McIvor, Esq.