



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 23, 2016

Shelton L. Jefferies  
Superintendent  
Nash-Rocky Mount Public Schools  
930 Eastern Avenue  
Nashville, NC 27856

RE: OCR Complaint No. 11-16-1370  
Resolution Letter

Dear Mr. Jefferies:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on May 31, 2016 against Nash-Rocky Mount Public Schools (the District). The complaint was filed on behalf of a student (the Student) at XXXX School (the School). The complaint alleges that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleges:

1. The District denied the Student a free appropriate public education (FAPE) during the 2015-2016 school year when it failed to evaluate the Student to determine if she needed special education and related aids and services.
2. The District discriminated against the Student based on disability during the 2015-2016 school year when it suspended the Student multiple times because of her disability.

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.

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

### **Legal Standards**

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

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

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.<sup>1</sup>

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to reevaluate a student with a disability before any significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities. If a school district finds that the student's disability caused the misconduct, the district may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student's current educational placement.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires Districts that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. OCR examines a number of factors in evaluating whether a District's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to

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<sup>1</sup> In addition, the Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

### **Allegations 1 and 2**

The Student enrolled in the XXXX grade in the District at the beginning of the 2015-2016 school year. At the beginning of the year, the Complainant completed a health history document stating that the Student had XXXX. On XXXX, the Complainant sent a message to a teacher at the School, through a web-based program, stating that she “spoke to [the Student’s] therapist and [the therapist] is helping to [develop] a plan that the [Student] can use at school.” The Complainant also requested information about the process of starting an Individual Education Program (IEP) or a Section 504 plan for the Student. On XXXX, the Complainant mentioned to the same teacher at the School, through the same program, about a specific accommodation that she would like to request to be included in the Student’s IEP or Section 504 Plan. On XXXX, the teacher sent an email to School administrators informing them that the Complainant “has requested a Section 504 or IEP” for the Student and that the Student has “several diagnosis, including, XXXX.”

On XXXX, the School convened the Behavior and Academic Intervention Team (BAIT), which included the Complainant, principal, guidance counselor, social worker, and all of the Student’s teachers. According to the BAIT team committee meeting minutes, the Complainant expressed concerns about the Student’s academics and behavior, including her concern that the Student may hurt herself. The Complainant informed the BAIT team that Student was under doctor’s care, and that the Student was diagnosed with XXXX. The Complainant also mentioned to the BAIT team that the Student made XXXX. The BAIT team determined that the School would provide regular education interventions for disorganization and made a recommendation to develop a health care plan. The BAIT team agreed that they would follow-up the meeting by “obtain[ing] documentation of [the Student’s] disabilities and meet[ing] again.” OCR has no record that the Complainant received a copy of the District’s procedural safeguards following this meeting.

On XXXX, the Complainant gave the School permission regarding the release of the Student’s medical information. On XXXX, the School sent the request for medical documentation to the Student’s therapist. On XXXX, the Student’s therapist returned the medical documentation, and the therapist stated that the Student was medically diagnosed with XXXX<sup>2</sup>. Moreover, the documentation noted that the Student’s treatment included taking medications and attending weekly XXXX. The medical documentation also indicated that the Student “may need verbal redirection behaviorally and emotionally.” According to documentation provided by the School, the School did not convene a group of knowledgeable persons to evaluate the Student for special education or related aids and services after receiving the Student’s medical documentation.

The School contends that the Complainant expressed approval of the Student’s progress with the interventions that were being used and stated that the Complainant told the School on November

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<sup>2</sup><XXXX SENTENCE REDACTED XXXX>

17, 2015 that “she did not think [they] needed to meet again at this time.” The Complainant alleges that she requested an evaluation of the Student on multiple occasions throughout the school year based on her concerns and that an evaluation was never conducted, despite her notifying the School that the Student was in therapy for her disability. According to the records from the web-based program used by the School that the District provided, the Complainant received numerous messages from the Student’s teachers and the School regarding the Student’s behavior and disciplinary issues. Also, according to the School’s “Parent Documentation Form” for the Student, XXXX.

According to documentation provided by the School, in XXXX, the School scheduled a parent conference to consider a Section 504 plan for the Student in XXXX, as a follow up from the October meeting. The meeting was not held and, as discussed further below, the documentation shows that the Student began receiving out-of- school suspensions beginning in XXXX, which included the date of the scheduled parent conference.

According to documentation provided by the School, in XXXX, the School convened a BAIT team meeting to discuss continuing concerns about the Student. According to the BAIT team committee meeting minutes, the Complainant expressed “no academic concerns”, but expressed behavior-related concerns, such as the Student continued making XXXX and XXXX. School staff who attended the meeting also described behavior-related concerns and noted that the Student engaged in undesirable actions for peer attention. They also noted the Student’s inconsistent academic performance. The BAIT team recommended that the School will work with the Student by providing “organization strategies,” support with “self-esteem,” and “time to regroup.” The BAIT team concluded the meeting by agreeing to “meet as needed” and there is no documentation that indicates that the BAIT team referred the Student for evaluation for special education or related aids and services. OCR has no record that the Complainant received a copy of the District’s procedural safeguards following this meeting.

The School did not provide any records of disciplinary referrals for the Student until XXXX. However, according to the School’s “Parent Documentation Form” and the web-based program records, the Student had ongoing behavior issues beginning in XXXX until XXXX. <XXXX SENTENCE REDACTED XXXX>

<XXXX PARAGRAPH REDACTED XXXX>

As discussed above, prior to the conclusion of this investigation, the District expressed a willingness to resolve Allegations 1 and 2.

### **Other Concerns Identified**

#### Section 504 Procedural Safeguards

During the course of the investigation, OCR found that Division was not in compliance with Section 504 because it did not provide notice to the Complainant of the Division’s Section 504 system of procedural safeguards which explain the parents’ right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

As stated in footnote 1 above, the Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

The information shows that the Complainant's requested a Section 504 evaluation for the Student by XXXX. The District's response was to convene a meeting of the BAIT team which did not evaluate the Student under Section 504 at the meeting but indicated that they would meet again after they obtained documentation of the Student's disabilities. This documentation was received on XXXX. The District convened a second meeting of the BAIT team on XXXX, almost 6 months after receipt of the medical documentation. At this meeting, the District again did not evaluate the Student under Section 504. The Complainant was not provided notice of the District's Section 504 procedural safeguards at either of the Student's BAIT meetings where the District did not evaluate the Student. Because the Complainant was not provided notice during either of the BAIT meetings of her right to challenge the District's decision to not evaluate the Student under Section 504, OCR finds that the District did not comply with 34 C.F.R. § 104.36.

To resolve these concerns, the Division entered into the enclosed Resolution Agreement.

#### Section 504 Procedures Manual

During the course of the investigation, OCR also found that the Division's Section 504 Procedures Manual (the Section 504 Procedures), which included the Division's Section 504 grievance procedures, was not in compliance with Section 504 and Title II. Specifically, OCR found that the Section 504 Procedures provide incorrect or misleading criteria regarding what is necessary to evaluate students for eligibility under Section 504; improperly states that students who are succeeding in the general education curriculum do not have a disability that substantially limits the ability to learn under Section 504; misstates the standard for substantial limitation of learning; misstates the nature of special education that can be provided under Section 504; incorrectly limits the criteria that are necessary to evaluate students for eligibility under Section 504; and, does not provide for prompt and equitable resolution of disability-related complaints and grievances.

The ADA Amendments Act of 2008 defines a disability as a physical or mental impairment that substantially limits one or more major life activities, which include caring for oneself, performing manual tasks, breathing, learning, concentrating, functions of the immune system, and endocrine functions. 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>, In order to be eligible for services under the IDEA, a student must fall into one or

more of the disability categories specified in the statute and must also be determined to need special education. 34 C.F.R. § 300.8. Students who meet the eligibility criteria under the IDEA are also covered by Section 504 and Title II if they have a disability as defined under those laws. However, coverage under Section 504 and Title II of the ADA is not limited to students who meet the IDEA eligibility criteria. If, for example, a student has a disability under Section 504 and the ADA but needs only related services to meet his or her educational needs as adequately as the needs of nondisabled individuals are met, the student is entitled to those services even if the student is not eligible for special education and related services under the IDEA. In addition, the FAQs indicate that “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.”

The District’s Section 504 Procedures state that, “If the BAIT decides to refer to the IEP team and the student is found to be eligible for protection under the IDEA, then no Section 504 Accommodation Plan will be needed ... the IEP is sufficient. The Procedures also state that “most students who are found not to qualify for services under IDEA are also not likely to qualify under section 504.” OCR determined that the District’s Section 504 procedures incorrectly limit a student to an IEP where the student may also need services due to an allergy for which the parent has requested a Section 504 plan. Similarly, IDEA’s eligibility criteria are narrower than Section 504’s eligibility criteria. Students who do not qualify for special education under the IDEA may qualify for related aids and services under Section 504.

In other sections, the Section 504 Procedures limit the criteria that are necessary for providing a student with special education or related aids and services under Section 504. For example, the Section 504 Procedures state that if a teacher believes that a child may have a disability or that a child may need special education or other services, the school is obligated to follow a screening process. The Section 504 Procedures indicate that prior to the screening process, interventions should be attempted by the teacher and subsequent interventions should be implemented based upon a BAIT meeting. The Section 504 Procedures also indicate that the screening process should begin only after it has been determined that additional interventions and strategies are only partially effective or not effective.

While a District may provide students with initial interventions where appropriate, the successful implementation of initial interventions is not – in and of itself – a basis to obviate the District of its obligation to evaluate students who need or are believed to need special education and related aids and services. The District maintains an obligation to evaluate students who need or are believed to need special education and related aids and services, regardless of the efficacy of initial interventions.

In addition, the Section 504 Procedures state that OCR “has given the standard for substantial limitation of learning by stating by definition, a person who is succeeding in general education does not have a disability which substantially limits the ability to learn.” As discussed in the FAQs, school districts should not assume that a student’s academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person

with a disability. The Department's FAQs provide as an example a student who has ADHD but is not receiving special education or related services, and is achieving good grades in academically rigorous classes. In addition, the FAQs note that the ADA Amendments rejected the assumption that an individual with a specific learning disability who performs well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. OCR is concerned that the District's Section 504 Procedures incorrectly attribute a student's success in general education as the determining factor as to whether a student has a learning disability, which is inconsistent with the legal definition of a disability and the District's obligations under Section 504.

As stated above, the District's Section 504 Procedures Manual also contains the District's Section 504 grievance procedures. As mentioned earlier, Section 504 and Title II require the District to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints, which include where to file complaints, application of the procedures to complaints alleging discrimination by employees and an adequate, reliable, and impartial investigation of complaints. The District's grievance procedures require complainants to request a conference with the principal to discuss the grievance and seek resolution. According to the grievance procedures, the principal responds to the grievance in writing. The grievance procedures do not indicate that an investigation should be done unless it is determined to be necessary upon appeal. OCR is concerned that the grievance procedures do not provide a process for a grievance against the principal or appropriately provide for an investigation of the grievance in a prompt manner. In addition, the Section 504 Procedures do not mention that a complainant can also file a complaint with OCR.

To resolve these concerns, the District entered into the enclosed Resolution Agreement.

### **Conclusion**

Pursuant to Section 302 and 303 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on November 16, 2016 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

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, please contact Jan Gray at [Jan.Gray@ed.gov](mailto:Jan.Gray@ed.gov) or 202-453-6599 or Zorayda Moreira-Smith at [Zorayda.Moreira-Smith@ed.gov](mailto:Zorayda.Moreira-Smith@ed.gov) or 202-453-6946, the OCR attorneys assigned to this complaint.

Sincerely,

/S/

Kristi R. Harris  
Supervisory Attorney, Team IV  
District of Columbia Office  
Office for Civil Rights

Enclosure

cc: Eva B. DuBuisson