



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

June 14, 2016

Carter Petty, Director
Mountain Discovery Charter School
890 Jenkins Branch Road
Bryson City, North Carolina 28713

Re: OCR Complaint No. 11-16-1106
Letter of Findings

Dear Director Petty:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received December 18, 2015 against the XXXX School (the School). The Complainant alleged that, during the 2015-2016 school year, the School discriminated against students with disabilities by failing to:

1. Adopt and publish adequate Section 504 policies and procedures, including grievance procedures;
2. Adopt and properly publish notices of nondiscrimination;
3. Promptly and properly evaluate them for and provide them with appropriate special education and related aids and services, e.g., in adequate Section 504 Plans; and
4. Properly train School staff on Section 504 rights and responsibilities.

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 School 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 has alleged discrimination under the above laws, we have jurisdiction over the allegations.

In making our determinations concerning the allegations, we reviewed the evidence provided by the Complainant and the School and examined the School's website. Based on our consideration of the evidence obtained during the investigation, we have compliance concerns relating to all four allegations. The School has agreed to address those concerns through the enclosed Resolution Agreement. OCR's findings and conclusions are discussed below.

Allegation 1: The School discriminated against students with disabilities by failing to adopt and publish adequate Section 504 policies and procedures, including grievance procedures.¹

The Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources; 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. These procedures must comply with the educational setting, evaluation and placement, and procedural safeguards requirements of the Section 504 regulation. See 34 C.F.R. §§ 104.33-104.36. OCR interprets the Section 504 regulation to permit recipients to adopt or incorporate by reference the procedures established pursuant to the Individuals with Disabilities Education Act (IDEA) to meet these Section 504 requirements.

OCR's January 14, 2016 letter to the School included a request for:

2. Copies of or website addresses for the School's policies and procedures on, and narrative descriptions of the School's practices applicable to: . . . (b) the identification, evaluation, and educational placement of students with disabilities, including those governing the preparation and amendment of

¹ This complaint and our analysis of it are limited to Section 504/Title II grievance procedures for students and parents, e.g., the School's grievance procedures do not meet the requirements for sexual harassment complaints under Title IX of the Education Amendments of 1972 and its implementing regulation at 34 C.F.R. Part 106, which are more rigorous. See, e.g., OCR's "Title IX Resource Guide" (April 2015), pages 4-8, at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

Section 504 and similar plans (e.g., Individualized Education Programs [IEPs] and behavior plans).

In its January 25, 2016 response to OCR's letter, the School indicated that it does not have any written policies or procedures of its own on evaluating whether students are eligible for a Section 504 or similar plan, or for providing aids and services to students with disabilities. Rather, the School follows North Carolina's "Policies Governing Services for Children with Disabilities" (the Policies), which the State adopted pursuant to the IDEA. As stated above, the adoption of IDEA procedures is an acceptable means of complying with Section 504 procedural requirements.

During a XXXX telephone interview, the School Office Manager stated that the School does not provide parents or others with notice of Section 504, the Policies, the IDEA, the availability of disability-related aids and services or who to contact concerning such aids and services (OCR's review of the School's website confirmed this). Although not explicitly required by the Section 504 regulation, OCR recommends that recipients provide such notice and, in the enclosed Agreement, the School has agreed to do so.

With respect to grievance procedures, the Section 504 regulation, at 34 C.F.R. § 104.7(b), requires recipients 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 recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: (1) notice of the procedures to students, parents and employees, including where to file complaints; (2) application of the procedures to complaints alleging discrimination by employees, other students, or third parties; (3) adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (4) designated and reasonably prompt timeframes for major stages of the complaint process; (5) written notice to the parties of the outcome of the complaint; and (6) an assurance that steps will be taken to prevent recurrence of any discrimination or retaliation and to correct its effects.

Although not explicitly required, OCR also looks to whether the recipient provides an opportunity to appeal the findings, remedy, or both, and whether the recipient prohibits retaliation against any individual who files a grievance or participates in a grievance process.

With respect to the above six requirements, we find as follows.

- a. The School provides notice of its grievance procedures to students and parents at pages 7 and 8 of its “Family Handbook 2015-16 School Year.”² This notice identifies the School Director as the contact person for the filing of grievances and includes information on where the grievance procedures are located (the “front office” of the School). It therefore complies with requirement 1, above.
- b. The notice of grievance procedures indicates that it applies to “concerns” but does not mention “discrimination.” It therefore does not comply with requirement 2.
- c. Although the procedures are generally compliant with requirement 3, above, they do not explicitly provide the opportunity to present witnesses. Consequently, they do not comply with requirement 3.
- d. The procedures do not provide for written notice to the parties of the outcome of the complaint. They therefore do not comply with requirement 5.
- e. The procedures do not provide an assurance that steps will be taken to prevent recurrence of any discrimination or retaliation and to correct its effects. They therefore do not comply with requirement 6.
- f. Although not required, the procedures include an opportunity to appeal, but do not prohibit retaliation against any individual who files a grievance or participates in a grievance process. We recommend that such a prohibition be included in the School’s revised grievance procedures.

Based on the above analysis, we find that the School has failed to adopt and properly publish adequate grievance procedures.

To address the above compliance concerns and recommendation relating to allegation 1, the enclosed Agreement includes commitments that the School will adopt and publish Section 504 procedures and revised grievance procedures that meet the standards included in the Agreement.

Allegation 2: The School discriminated against students with disabilities by failing to adopt and properly publish notices of nondiscrimination.

The regulations implementing Section 504 and some of the other laws enforced by OCR require recipients to include notifications of their policy of nondiscrimination in recruitment and other general information materials. These regulations require that recipients notify students, parents and others that they do not discriminate on the basis of race, color, national origin, sex, disability, or age and that they provide equal access

² At <https://www.mountaindiscovery.org/documents/Current-MDCS-Family-Handbook.pdf>.

to the Boy Scouts of America and other designated youth groups. However, these regulations contain minor differences relating to the required content of notices of nondiscrimination and the methods used to publish them. OCR recognizes the variations among the regulations governing notice requirements and understands that recipients may wish to use one statement to comply with the all of the regulations implementing the laws enforced by OCR. OCR encourages recipients to use one combined notice of nondiscrimination for all of these regulations. A combined notice of nondiscrimination should contain two basic elements: (1) a statement of nondiscrimination that specifies the types of discrimination that are prohibited by the recipient's policy of nondiscrimination; and (2) identification by name or title, address, email address and telephone number of the employee or employees responsible for coordinating compliance with that policy.

Because the Title IX and Section 504 regulations require recipients to include notice of their policy of nondiscrimination in all general information materials (including bulletins, announcements, publications, catalogs, application forms, and other recruitment materials) that are made available to participants, students, applicants and employees, combined notices must appear in all of those materials. Also, because the Title IX regulation requires that recipients notify their students and employees of the individual responsible for coordinating their Title IX compliance efforts, combined notices of nondiscrimination must include the title, etc. (see element 2, above, for additional required information) of that individual (if different from the individual identified pursuant to element 2, above) or contact information for the Department of Education's Assistant Secretary for Civil Rights.

The School's notice of nondiscrimination, which is a combined notice does not:

- a. Reference the Boy Scouts of America or other designated youth groups;
- b. Include the above-described contact information for the employee or employees responsible for coordinating general compliance with the School's policy of nondiscrimination; or
- c. Identify either its Title IX Coordinator (assuming the School has one and that that person is not the same as the person who is responsible for coordinating general compliance with that policy) or the Department of Education's Assistant Secretary for Civil Rights.

Additionally, we were unable to locate the School's notice of nondiscrimination anywhere other than at page 15 (Appendix A) of its Family Handbook and page 14 of its Personnel Handbook.

Based on the above analysis, we find that the School has failed to adopt and properly publish adequate notices of nondiscrimination.

To address this compliance concern relating to allegation 2, the enclosed Agreement includes commitments that the School will adopt and publish a revised notice of nondiscrimination that meets the standards governing content and publication that are in the Agreement.

Allegation 3: The School discriminated against students with disabilities by failing to promptly and properly evaluate them for and provide them with appropriate special education and related aids and services, e.g., in adequate Section 504 Plans.

The Section 504 regulation, at 34 C.F.R. § 104.33(a) & (b), requires recipients to provide students with disabilities with a free and appropriate public education (FAPE), that is, regular and/or special education and related aids and services that are designed to meet these students' educational needs as adequately as recipients meet the educational needs of students without disabilities.

In addition to the requirement to provide FAPE, the Section 504 regulation, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability may be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in a recipient's programs or activities on the basis of disability. The Title II regulation contains a similar prohibition at 28 C.F.R. § 35.130(a). The Title II regulation, at 28 C.F.R. § 35.130(b)(7), also requires public schools to make reasonable modifications to policies, procedures, or practices when necessary to avoid discrimination on the basis of disability unless a modification would fundamentally alter the nature of the service, program or activity.

OCR interprets the above provisions to require that the School ensure that the School's environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of students without disabilities do not face a significant possibility of experiencing serious or life-threatening incidents or reactions to their environment while they attend the School, Section 504 and Title II require that the School provide students with medical disabilities (which can include diabetes and severe asthma and allergy-related conditions) with a medically safe environment in which they also do not face the possibility of serious or life-threatening incidents or reactions to their environment.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), also requires recipients to evaluate any student who needs or is believed to need special education or related aids or

services due to a disability. Such an evaluation must be conducted before initially placing the student in regular or special education and before any subsequent significant change in placement.

To provide FAPE to students with medical disabilities and meet the standards referenced above, the School must develop and implement a plan to meet the individualized needs of each student with a medical disability. Each plan must be based on an individualized consideration of the student's needs and should include procedures that limit or prevent the risk of serious or life-threatening medical incidents or reactions to the student's environment, e.g., insulin shock or exposure to the allergens that can cause a severe reaction while the student is participating in any type of school program or activity, including programs that take place in classrooms and common areas, the gymnasium, the cafeteria, and hallways, and during recess, extracurricular activities, field trips, and school-related activities. Each plan should also set out -- or incorporate a document that sets out -- procedures to follow when the student has a serious or life-threatening medical incident or reaction to the student's environment. Such plans must also comply with the procedural requirements of the Section 504 regulation with respect to evaluation, placement, and due process safeguards.

During a XXXX telephone interview, the School Director indicated that students with diabetes and allergies have attended the School during the 2014-2015 and 2015-2016 school years. However, none of the nine "Section 504 Accommodations Plans" (504 Plans) or 34 IEPs submitted by the School were for such students. When asked about this and related topics during a XXXX telephone interview, the School Office Manager (who is the individual identified by the School Director as having responsibility for administering medications to students) stated the following.

1. Three students with needs relating to medical conditions such as severe allergies or asthma currently attend the School.
2. None of these students has a Section 504 or similar plan, nor have they been evaluated to determine whether they are eligible for a Section 504 or similar plan.
3. The School does not evaluate students to determine whether they are eligible for a Section 504 or similar plan, but does provide students with aids and services consistent with the medical documentation it receives.
4. The School does not have a nurse.
5. During the first week of the School's 2015-2016 school year, a parent with a child who has XXXX withdrew the child from the School because she was nervous about whether the School would provide adequate training to staff

on teaching students with diabetes, although the School was prepared to obtain appropriate training and provide proper instruction to the child

To address the above compliance concerns relating to allegation 3, the enclosed Agreement includes commitments that the School will: (a) designate at least two full-time, appropriately trained staff persons and additional trained staff, as needed, to provide instruction to students with medical disabilities; (b) ensure the presence at the School of at least one appropriately trained staff person during: all regular School hours that a student with a medical disability is on the premises, all School extracurricular activities in which such students participate, and all School-sponsored or arranged transportation of such students to and from the School and extracurricular activities; (c) send letters to the parents of all School students notifying them of the School's current policies and practices on the instruction of students with medical disabilities; and (d) develop and implement an adequate Section 504 or similar plan for each such student.

Allegation 4: The School discriminated against students with disabilities by failing to properly train School staff on Section 504 rights and responsibilities.

The School's January 25 response included a description of the training the School provides to its staff. Briefly summarized, it consists of meetings with teachers to discuss students with disabilities in their classes and, at the beginning of each school year, training on accommodations to be provided during end-of-grade tests.

During the May 9th telephone interview, the School Office Manager stated that the School does not provide staff with training on teaching students with disabilities, including those with medical disabilities, and that the School Director is the only individual of whom she is aware who is familiar with the Policies.

Neither the School's narrative response nor its other submissions indicate that it provided any training to School staff other than the meetings and testing training referenced above.

The enclosed Agreement includes a commitment that the School will arrange for the timely provision of training to School staff on teaching students with disabilities, including those with medical disabilities.

Conclusion

Based on the above findings, concerns, and conclusions, and the enclosed Agreement, we are closing our investigation of this complaint effective the date of this letter. However, we will monitor the School's implementation of the Agreement to ensure that it fully complies with it and thereby resolves the allegation and all compliance issues identified in this letter. We will be happy to provide you with any technical assistance or advice you may need in implementing the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the the School'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 regardless of OCR's determination.

Please be advised that the the School may 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 School'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/

Dale Rhines

Program Manager

District of Columbia Office

Office for Civil Rights