



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

January 9, 2019

Superintendent Lawrence W. Russell, Jr.
lrussell@sau81.org

Re: Complaint No. 01-16-1173
School Administrative Unit 81, Hudson School District

Dear Superintendent Russell:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against School Administrative Unit 81, Hudson School District (District). The Complainant alleged that the District discriminated against her son (Student) based on disability when starting in September 2015, the District failed to appropriately evaluate the Student to determine whether, due to his lack of attention, concentration, and focus, he had a disability that impacted his ability to access his education (Allegation 1); and during the 2015-2016 academic year, a District teacher repeatedly made sarcastic or derogatory disability-based comments about the Student in front of his classmates (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 any program or activity receiving federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the Department. Because the District receives federal financial assistance from the Department and is a public entity, 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. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 1. Before OCR completed its investigation, the District expressed a willingness to resolve Allegation 2 by taking the steps set out in the enclosed Resolution Agreement (Agreement). OCR's findings and conclusions are discussed below.

Allegation 1: Failure to Evaluate

Background

The Complainant and the District confirmed that during the 2014-2015 school year, the Student was in the XXXXXX grade at XXXXXX XXXXXXXXXX School. The District's data indicates that on XXX X, 2015, it convened a XXXXXXXX XXXXXXXXXX team meeting to discuss a

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proposal to evaluate the Student based on District personnel’s concerns about his grades. The team included the XXXXXXXX XXXXXXXX, XXXXXXXXXXXX XXXXXXXX, XXXXXX XXXXXXXXXXXX, XXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXX, School XXXXXXXXXXXX, and a Classroom Teacher, in addition to the Complainant. After obtaining the Complainant’s consent, the District evaluated the Student’s academic performance, communication skills, XXXXXX, cognition, motor ability, hearing, and vision. The XXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXXXXXX also observed the Student’s behavior in the classroom.

On XXXX XX, 2015, a XXXXXXXX XXXXXXXXXXXX team, comprised of the Student and the same attendees from the XXX XX, 2015 meeting, convened to review the results of the Student’s evaluations. According to the meeting notes, the team determined that although the Student qualified as “other XXXXXX impaired” due to his XXXX, it did not have an adverse effect on his educational performance, and the team concluded that the Student did not require XXXXXXXX XXXXXXXXXXXX and/or related services. The team also determined that the Student did not have any other specific learning or speech and language disability that would require the provision of XXXXXXXX XXXXXXXXXXXX and/or related services.

Correspondence provided by the District reveals that at the commencement of the 2015-2016 school year, the Student started the ninth grade at Alvirne High School. On XXXXXXXX X, 2015, after the Complainant provided updated diagnosis information from the Student’s physician, the District convened a Section 504 team to examine the Student’s evaluations and determine whether he was eligible for a Section 504 plan. The team included the School XXXXXXXXXXXX, School XXXXXX, XXXXXXXX Teacher, Complainant, and a Classroom Teacher. The District’s data shows that the team reviewed and carefully considered information about the Student from a variety of sources, including his parents, classroom observations, disciplinary records, grade reports, medical information, and standardized tests. The team concluded that “[t]he [S]tudent is disabled but is not in need of a Section 504 [p]lan because the [S]tudent’s educational needs are met as adequately as those of nondisabled peers based upon the positive effect(s) of mitigating measures currently in use.” Nonetheless, the team agreed to provide the Student numerous interventions, including “preferential seating,” “queuing for clarification and understanding,” assigning him to a “Strategies for Success” class during his second period study hall where he received organization and time management support, and three to five 1:1 weekly meetings with the School XXXXXXXXXXXX.

The District’s data indicates that in XXXX 2016, the Complainant requested that the District schedule a team meeting to initiate an out-of-district placement for the Student. The Complainant also specifically requested that the District evaluate the Student’s executive functioning skills. On XXXX XX, 2016, the District convened a XXXXXXXX XXXXXXXXXXXX team for a referral disposition meeting. The team included the District Director of XXXXXXXX XXXXXXXXXXXX, School XXXXXXXXXXXX, XXXXXXXX XXXXXXXXXXXX Teacher, and Complainant.¹ The District obtained the Complainant’s consent to evaluate the Student’s executive functioning and “Key Math.”

¹ The Complainant signed District paperwork excusing the Student’s Classroom Teacher from attending the meeting.

The District's data reveals that in XXXXXXXXXX 2016, the District convened a XXXXXXXX XXXXXXXXXX team to review the Student's evaluations. The team was comprised of the XXXXXXXX XXXXXXXX of XXXXXXXX Services, School XXXXXXXXXXXXX, School XXXXXXXXXXX, XXXXXXXX XXXXXXXXXXX XXXX XXXXXXXX, Complainant, and a Classroom Teacher. The team discussed the additional evaluations and concluded that although the Student had a disability due to his XXXX, it had no adverse effect on his educational performance, and the Student was not eligible for XXXXXXXX XXXXXXXXXX. The Complainant agreed to the team's findings contingent upon their agreement to hold a follow-up meeting to determine whether the Student was eligible for related services pursuant to a Section 504 plan.

The District's data indicates that on XXXXXXXX X, 2016, the District convened a Section 504 team, including the School XXXXXXXXXXX, three Classroom Teachers, School XXXXX, and Complainant, to determine whether the Student was eligible for a Section 504 plan. The team reviewed and carefully considered information about the Student from a variety of sources, including his parents, classroom observations, grade reports, standardized tests, and medical information. The team concluded that the Student had a disability due to his XXXX but was not eligible for a Section 504 plan, because his "educational needs are met as adequately as those of nondisabled peers based upon the positive effects of mitigating measures currently in use."

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or XXXXXXXX XXXXXXXXXX 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.

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 XXXXXXXX XXXXXXXXXX or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or XXXXXXXX XXXXXXXXXX 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.

Analysis

The Complainant contends that the District has failed to appropriately evaluate the Student. Specifically, the Complainant explained that although the Student tests from the normal to above normal range on assessments due to his high intelligence, he has been diagnosed with a disability, and his lack of attention, concentration, and focus impacts his ability to access his education. The Complainant stated that the District incorrectly believes the Student's poor grades are due to a lack of motivation, and has failed to appropriately evaluate the Student's eligibility for a Section 504 plan.

The District denies that it failed to appropriately evaluate the Student. The District states that from XXX 2015 to XXXX 2016, it assessed the Student's academic performance, communication skills, cognition, motor ability, hearing, vision, executive functioning, and math comprehension. The District also contends that during this period, it observed the Student in the classroom. The District claims that based on the results of these evaluations, it determined that although the Student had a disability, he did not need an IEP or a Section 504 plan, because his educational needs were met as adequately as those of nondisabled peers based upon the positive effects of mitigating measures currently in use.

OCR finds that there is insufficient evidence to support the Complainant's contention that the District failed to appropriately evaluate the Student to determine whether his lack of attention, concentration, and focus were impacting his ability to access his education. On the contrary, the evidence establishes that the District conducted numerous evaluations of the Complainant and convened a team, who carefully considered the information and applied appropriate eligibility criteria in determining that he did not require an IEP or Section 504 plan. The District's data demonstrates that it conducted three separate cycles of evaluations over a year. In particular, the District evaluated the Student's executive functioning twice, and performed extensive assessments of his communication and cognitive skills. The evaluation reports provide information about the student's attention, concentration, and focus. Each team was comprised of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Moreover, each team reviewed and carefully considered the Student's evaluations, classroom behavior, grades, attendance and disciplinary records, medical information, and parental input. OCR did not find, and the Complainant did not provide, any other information indicating that the District failed to conduct appropriate evaluations of the Student.

OCR's investigation of this allegation was limited to determining whether the District followed the procedures required by Section 504. To the extent that the Complainant is asserting that the District failed to reach the correct determination regarding the Student's eligibility for a Section 504 plan, OCR generally does not review or second-guess the result of individual evaluation, placement, and other educational decisions as long as the District follows the "process" requirements of Section 504 (concerning identification and location, evaluation, placement, and procedural safeguards).² The evidence obtained by OCR, as described above, does not indicate that the District failed to follow any of the "process" requirements of Section 504. Given these facts, OCR finds that the District appropriately evaluated the Student and determined that he did not require XXXXXXXX XXXXXXXXXXXX and/or related aids and services.

² Substantive disagreements over a student's evaluation, services, placement, or educational program are more appropriately addressed through a due process proceeding.

Conclusion

For the reasons explained above, OCR finds there to be insufficient evidence that the District violated Section 504 and Title II by failing to appropriately evaluate the Student to determine whether, due to his lack of attention, concentration, and focus, he has a disability that has an impact on his ability to access his education.

Allegation 2: Disability-Based Harassment

Background

The District’s data indicates that in February 2016, the Complainant contacted the School XXXXXXXX to ask that one of the Student’s teachers (Teacher) leave him alone. Specifically, the Complainant reported that the Teacher was nagging him and breaking his focus, making it difficult for him to maintain his concentration. On XXXXX XX, 2016, the Complainant informed the School XXXXXXXX that the Teacher was insulting the Student by referring to him as “XXXXXXXXXX XXXX,” and noted that the Teacher’s conduct had worsened since she first reported it to the School XXXXXXXX.

Correspondence provided by the District indicated that the School XXXXXXXX investigated the Complainant’s allegation by talking with the Student, Teacher, and Paraprofessional. The School XXXXXXXX determined that the Teacher’s “actions were appropriate and therefore conducted no further investigation.” According to the School XXXXXXXX, he did ask the Teacher to “be reflective of” the Complainant’s concerns. The School XXXXXXXX also emailed both the Teacher and the Chair of the Teacher’s department (Chair) asking the Chair to attend a meeting that the Complainant scheduled with the Teacher on XXXXX XX, 2016. The Teacher responded to the School XXXXXXXX’s email by asking if he would like to speak to her paraprofessional. In response, the School XXXXXXXX stated that he had “no concerns with anything [she was] doing.”

Correspondence provided by the District shows that after the XXXXX XX, 2016 meeting, the Complainant sent an email to the School XXXXXXXX, complaining about the Teacher’s denial of her allegations. In response, the School XXXXXXXX directed the Complainant to file a bullying report against the Teacher and explained the process.

Legal Standards

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

When responding to harassment, a District must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Analysis

Before OCR completed its investigation of this allegation, the District requested to resolve it pursuant to Section 302 of the Case Processing Manual, and OCR determined that a voluntary resolution was appropriate. To date, OCR has not obtained the data necessary to determine whether the District took immediate and appropriate action to respond to the Complainant's allegation that the Teacher harassed the Student on the basis of his disability, and if so, took prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. To complete the investigation, OCR would need to conduct additional interviews, including with the School XXXXXXXX and Student.³ These interviews would provide OCR additional information about the District's investigation of the Complainant's report of disability-based harassment.

Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this allegation and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address Allegation 2. OCR will monitor the District's implementation of the Agreement.

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.

³ OCR would also need to request an interview with the Teacher, whom District counsel reported has since resigned from the District.

With respect to Allegation 1, the Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete, inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case regarding Allegation 1; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

Please be advised that the District 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, assists, or participates in a proceeding under a law enforced by OCR. 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. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, you may contact Attorney Abra Francois at (617) 289-0142 or by e-mail at Abra.Francois@ed.gov.

Sincerely,

Emma Kim
Acting Compliance Team Leader

Enclosure

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