



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

July 24, 2020

Dr. James Morse
Superintendent of Schools, SAU #5
Oyster River Cooperative School District

Via e-mail: jmorse@orcsd.org

Re: Complaint No. 01-17-1287 & 01-18-1341
Oyster River Cooperative School District

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaints¹ we received on June 26, 2017 and July 30, 2018 against Oyster River Cooperative School District (District). The Complainant alleges that the District discriminated against her son (Student), based on his disability, by failing to evaluate the Student for special education and/or related aids and services during the XXXX-XXXX school year, (Allegation 1), and by XXXXXXXXXXXXXXXXXXXXXXXXXXXX in spring XXXX (Allegation 2). The Complainant also alleges that in XXXXX XXXX, the Student's teacher subjected him to disability-based harassment by stating that he was XXX XXXXX (Allegation 3). The Complainant further alleges that the District failed to respond to a XXXXX XXXX complaint that the Student was being harassed on the basis of disability, i.e., that a peer called the Student XXXXX XXXX XXXXX, said that the Student had XXXXX XXXXX and that the Student would be on his XXXXXXXXXXXX, and pushed the Student (Allegation 4). Lastly, the Complainant alleges that the District failed to provide XXXXX XXXXX required by the Student's Section 504 Plan, leading to an outburst on XXXXX X, XXXX during which the Student was XXXXX XXXXXXXX (Allegation 5).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. Section 794, 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), 42 U.S.C. Section 12131 *et seq.*, 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.

During the investigation, OCR reviewed documents provided by the Complainant and the District, interviewed the Complainant and District staff, and conducted a site visit on September

¹ OCR consolidated the investigations of case numbers 01-17-1287 and 01-18-1341.

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

12, 2019. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant’s Allegations 2, 3, and 5.

Before OCR completed its investigation of Allegations 1 and 4, the District expressed a willingness to resolve these allegations on September 13, 2019. OCR’s findings and conclusions are discussed below.

Background

Prior to the beginning of the XXXX-XXXX school year, the Complainant enrolled the Student in the District’s XXXX XXXX XXXXX (School). Although the information that the District obtained from the Student’s previous district did not include a 504 Plan, it did include medical records reflecting that the Student had been diagnosed with a disability. District documents show that School staff learned that the Student had been XXXXXXXXXXXX XXXXXXXXXXXX for his disability which School staff XXXXXXXX XXXXXXXXXXXX.

On XXXXXXXX X, XXXX, the Complainant requested to meet with school staff to discuss how the Student was transitioning into the School. Before the requested meeting was held on XXXXXXXX X, XXXX, the Student’s teacher (Teacher 1) informed the Complainant of two behavioral incidents involving the Student. On XXXXXXXX X, XXXX, she reported that the Student XXXX XXXX XXX XXXXX, and on XXXXXXXX X, XXXX, she reported that the Student was having a XXXXX XXXX XXXXXXXX, according to correspondence reviewed by OCR. The District told OCR that when staff met with the Complainant on XXXXXXXX X, XXXX, the Student’s transition into the District was discussed, as well as possible behavioral strategies for supporting him in the classroom.

On XXXXXXXX X, XXXX and XXXXXXXX X, XXXX, Teacher 1 reported to the Complainant that the Student had additional behavioral incidents, the latter of which required intervention from the school counselor. On XXXXXXXX X, XXXX, Teacher 1 completed an Instructional Support Team (IST) Referral Form based on the Student’s behavior. The District convened an IST meeting on XXXXXXXX X, XXXX, which did not include the Complainant. It was attended by Teacher 1, a school counselor, the XXXXX XXXXXXXXXXXX /special education coordinator, the Principal, and other staff. Notes from this meeting show that the IST decided that a detailed behavioral plan and other interventions for the Student were warranted, including: regular XXXXX XXXXXXXX s with the guidance counselor, observation by the XXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXX XXXXXXXXXXXX, and referral for XXXXXXXX XXXXXXXXXXXX to support the family at home (Action plan). The District confirmed to OCR that the Action plan was not a 504 Plan, rather, the behavioral interventions were intended to provide staff with additional opportunities to observe the Student and evaluate his needs.

Despite the supports described in the Action plan, the Student was involved in another behavior incident on XXXXXXXX X, XXXX, requiring intervention from the school counselor and Principal. Although on XXXXXXXX X, XXXX the Complainant contacted the District about a lack of communication, OCR reviewed numerous unanswered e-mails from Teacher 1 to the Complainant describing the Student’s challenges. Specifically, from XXXXXXXX XXXX until

XXXXX XXXX, Teacher 1 attempted to contact the Complainant on a daily basis to report the Student’s progress and discuss any ongoing behavioral concerns.

On XXXXXX X, XXXX, the Complainant also requested that the District impose certain consequences for the Student’s continued behavioral issues. Thereafter the Complainant contacted the District throughout XXXXX XXXX to reiterate this request.

On XXXXXX XXXX, District personnel met discuss concerns with the Complainant’s requests. Shortly thereafter, School staff XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. School staff interviewed by OCR corroborated XXXX XXXXX, and it is not disputed that XXXXX XXXX XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXXXXS. The evidence reflects that the District made XXXX XXXXX in the same school year, regarding students with and without disabilities. Seven XXXXX XXXXXXXXXXX included similar XXXXXXXX.

In an e-mail dated XXXXX X, XXXX, which OCR reviewed, the Complainant requested that the District conduct XXXXXXXXXXX evaluations of the Student. In response, the District held a “fact gathering” meeting with the Complainant on XXXXX X, XXXX. Despite identifying that the Student had a disability XXXX XXXX XXXX XXXX XXXX in the classroom, however, it does not appear that the District evaluated the Student under Section 504 or the Individuals with Disabilities Education Act (IDEA) at this time, deciding instead to observe the Student, then reconvene in a few months with an updated plan for services and supports.

For the remainder of the school year, the District continued to provide behavioral interventions, observe the Student’s progress, and e-mail the Complainant about the Student’s behavior, including at least one incident that required additional staff intervention.

On XXXX X, XXXX, the Complainant provided the District with an updated medical diagnosis confirming the Student’s disability and requesting that the District “move forward” with establishing a 504 Plan. Although the District agreed to start the “504 plan process,” it does not appear that a Section 504 team meeting was held for the Student during the XXXX-XXXX school year.

Shortly after the XXXX-XXXX school year began, the Complainant e-mailed the Student’s new teacher (Teacher 2) for assistance in getting the Student additional services. Documents reviewed by OCR showed that although Teacher 2 requested to set up a meeting to “develop a plan,” and District staff attempted to set up a meeting with the Complainant throughout XXXXXXXX and XXXXXXX XXXX, it was unable to convene a meeting due to the Complainant’s schedule. On XXXXXXX X, XXXX, the District reiterated to the Complainant via e-mail its interest in “deciding on appropriate evaluations to conduct” to determine the Student’s eligibility for an Individualized Education Program (IEP) or 504 Plan. No team meeting to address the Student’s eligibility for an IEP/504 Plan was held until XXXXXXX X, XXXX.

At the XXXXXXX X, XXXX meeting, attended by the Principal, the District’s Section 504 Coordinator, Teacher 2, the Student’s case manager and the Complainant, the team agreed to establish a 504 Plan that included several behavioral supports, as well as requiring that the District “implement writing supports.” Those included providing the Student with XXXXXXX

XXXXX XXXXX, XXXXXX XXXXX XXXXX, XXXXXX XXXXX XXXXX, and the use of XXXXXX XXXXX.

The Complainant alleged that the District failed to properly implement these writing supports. She expressed concern about the Student’s work product, and stated to OCR that a number of his XXXXXX XXXXX occurred during writing exercises. District staff disputed this, telling OCR that the Student’s XXXXXX XXXXX often arose during math exercises rather than during. Teacher 2 and supporting aides also told OCR that they implemented the required consistently in furtherance of the teacher’s lesson plan and in accordance with the Student’s 504 Plan.

The Complainant alleged to OCR that the Student had been subjected to disability-based harassment, first by Teacher 1. Specifically, the Complainant alleged that on or about XXXX X, XXXX, Teacher 1 had told the Student that he was XXX XXXX, when he and Teacher 1 were alone in the classroom. When interviewed by OCR, Teacher 1 denied ever making a negative comment towards the Student. In OCR’s interviews with District staff familiar with Teacher 1’s interactions with the Student, all staff denied ever observing the teacher making the negative comment or treating the Student negatively. The Complainant did not provide any other information about this alleged incident.

On XXXX X, XXXX, the Complainant e-mailed the District School Board an eleven-page document, in which she alleged that the Student was also the victim of disability-based harassment from another student.² The District initially asserted to OCR that it had not received from the Complainant an allegation of peer-to-peer disability-based harassment. OCR reviewed the e-mail, which does include such an allegation, and learned that the School Board forwarded the document to the District Superintendent on XXXX X, XXXX.

The Superintendent explained to OCR that he thought the primary issue raised by the Complainant involved retaining her son in the XXXX XXXX, and he invited her to meet with him about those concerns. He acknowledged that he did not investigate the allegation of disability-based harassment.

Allegation 1: Whether the District failed to provide a FAPE to the Student by failing to evaluate him for special education and/or related aids and services, in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.33 and 104.35, and Title II at 28 C.F.R. Section 35.130.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to each qualified student with a disability in its jurisdiction. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and

² The Complainant raised other concerns in this document that are not relevant to OCR’s investigation.

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.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the IDEA as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. New Hampshire state regulations, like the federal IDEA regulation, require that school districts conduct initial evaluations within 60 days of receiving parental consent. Ed 1107.01(a).

The Section 504 regulation, at 34 C.F.R. § 104.35(d), also requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, when there is information suggesting that a student's educational program is not meeting the student's individual needs, such as a significant decline in the student's grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student's Section 504 Plan or placement are necessary.

In investigating a denial of a FAPE under Section 504 for a student with a Section 504 Plan or IEP, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. If OCR finds that a district has not implemented a student's plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

Analysis

Prior to OCR completing its investigation and making any findings, the District requested to engage in a voluntary resolution of Allegation 1 pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*. During the investigation, OCR reviewed documents provided by the District and interviewed the Complainant and District personnel. Based on the investigation, OCR had a preliminary concern that although the District provided behavioral supports and gathered data on the Student's needs, it may not have timely evaluated the Student, so that he may not have received a FAPE, from XXXXX X, XXXX until the XXXXX XXXX Section 504 evaluation. Prior to OCR making a final determination regarding Allegation 1, the District requested to voluntarily resolve the allegation under *CPM* Section 302, which OCR determined is appropriate.

Allegation 2: Whether the District made a referral to CPS based on the Student’s disability, in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.4, and Title II at 28 C.F.R. Section 35.130.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District’s programs or activities on the basis of disability.

One method by which OCR considers whether such discrimination occurred is to conduct a different treatment analysis, under which OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Analysis

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 2.

The Complainant alleged that the District XXXXXX XXXXXX because of the Student’s disability. OCR did not find any evidence to support this assertion, nor that the District treated the Student’s situation differently than students without disabilities regarding XXXXX XXXXXX. Rather, the evidence, i.e., documents and interviews, shows that District staff XXXXX XXX XXXXXX based on information XXXXXXXXXXXXXXXXXXXX. OCR confirmed that XXXXXXXXXXXXXXXXXXXX, and further found that the District also XXXX XXXXX XXXXX regarding students with and without disabilities, XXX XXXXX similar to the ones the District cited for this XXXXXX. The Complainant did not provide further information to support her assertion. Accordingly, OCR did not find any evidence linking the District’s XXXXX XX XXX XXXXX XX XXX to his disability.

Based on the above, OCR determined that there was insufficient evidence to suggest that the District XXXXX XXXXXXXXXXXX because of the Student’s disability.

Allegation 3: Whether the Student’s teacher (Teacher 1) subjected the Student to disability-based harassment, in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.4, and Title II at 28 C.F.R. Section 35.130.

Legal Standard

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

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 3.

OCR determined that there was insufficient evidence to suggest that Teacher 1 told him he was XXXX XXXX. OCR determined that the teacher's testimony that she had not made the alleged comment was credible, and the Complainant provided no other evidence to support her allegation of the comment. OCR's investigation revealed no evidence, beyond the Complainant's belief, to suggest that this incident occurred as alleged.

Based on the above, OCR determined that there was insufficient evidence to suggest the Student's teacher subjected the Student to disability-based harassment.

Allegation 4: Whether the District failed to promptly and effectively respond to a complaint of disability discrimination regarding alleged disability-based harassment, in violation of 34 C.F.R. Section 104.7(b) and 28 C.F.R. Section 35.107(b). (Allegation 4)

Legal Standard

As described above, 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.

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

Prior to OCR completing its investigation and making any findings, the District requested to engage in a voluntary resolution of Allegation 4 pursuant to Section 302 of OCR's *CPM*. During the investigation, OCR reviewed documents provided by the District and interviewed the Complainant and District personnel. From the evidence gathered to date, OCR has a preliminary concern that the District may have failed to promptly and effectively respond to the Complainant's allegation of disability-based harassment that she included in her June 22, 2018 e-mail to the school board. Prior to OCR making a final determination regarding Allegation 4, the District requested to voluntarily resolve the allegation under *CPM* Section 302, which OCR determined is appropriate.

Allegation 5: Whether the District failed to implement provisions of the Student's Section 504 plan, specifically provisions regarding writing support, and whether doing so denied the Student a FAPE, in violation of 34 C.F.R. Sections 104.33(a) and (b), and 28 C.F.R. Section 35.130. (Allegation 5)

Legal Standard

As discussed under Allegation 1, the Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities.

In investigating a denial of a FAPE due to a failure to implement, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. If OCR finds that a district has not implemented a student's plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

Analysis

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegation 5.

OCR determined that the 504 Plan developed at the XXXXXX X, XXXX Section 504 meeting provided for various writing supports. District staff described to OCR how they implemented these writing supports, and indicated that, contrary to the Complainant's assertion, the Student's XXXXXX XXXXXX did not occur during morning writing exercises, but rather during afternoon math exercises. The evidence shows that the specific XXXXXX XXXXXX that the Complainant alleged resulted from the Student's XXXXXX with writing took place in the

afternoon, not during the morning classroom writing time, as she had alleged. Finally, the evidence reflects that the District found the Student's writing and response to writing supports satisfactory.

Based on the above, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the District failed to implement the writing support services enumerated in the Student's Section 504 plan.

Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *CPM*, the District expressed an interest in resolving this complaint 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 all of the allegations raised in the complaint. 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.

The Complainant has a right to appeal OCR's determination with respect to Allegations 2, 3, and 5 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, 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; 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 recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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.

Sincerely,

Meighan A.F. McCrea
Compliance Team Leader

Enclosure

cc: XXXXXX XXXXX, XXXXXXXXXXXXX