



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

32 OLD SLIP, 26<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10005

RACHEL POMERANTZ  
DIRECTOR  
NEW YORK OFFICE

February 1, 2022

Sent via email only to [racquel.berry@vide.vi](mailto:racquel.berry@vide.vi)

Honorable Racquel Berry-Benjamin  
Commissioner  
Virgin Islands Department of Education  
1834 Kongens Gade  
St. Thomas, Virgin Islands 00802

Re: Case No. 02-21-1251  
Virgin Islands Department of Education

Dear Commissioner Berry-Benjamin:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the complaint filed against the Virgin Islands Department of Education (the VIDE). The Complainant alleged that the VIDE discriminated against her son on the basis of his disability, by failing to award him credit for written instructional packets he completed as a disability accommodation during the spring 2021 semester (Allegation 1); and failing to evaluate her son to determine his eligibility for special education or related aids and services during the spring 2021 semester (Allegation 2). For the remainder of this letter, OCR will refer to the Complainant's son as "the Student."

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under Title II of the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. As a recipient of Federal financial assistance from the Department, the VIDE is subject to Section 504. As a public elementary and secondary education system the VIDE is subject to Title II of the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.4, provides that qualified individuals with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity that receives federal financial assistance from the Department. The regulation implementing Title II of the ADA, at 28 C.F.R. § 35.130, contains a similar provision.

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires recipients to provide a free, appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students are met.

In its investigation, OCR interviewed the Complainant and VIDE staff. OCR also reviewed documentation that the Complainant and the VIDE submitted. OCR made the following determinations.

During school year 2020-2021, the Student was enrolled in the XXXX grade at Charlotte Amalie High School (the School), and received virtual instruction throughout the entire school year, from August 24, 2020 through May 29, 2021.<sup>1</sup> The VIDE did not classify the Student as having a disability nor deem him eligible to receive special education and/or related aids and services through an individualized education program (IEP) or a Section 504 plan for school year 2020-2021. OCR determined that for the spring 2021 semester, the Student was enrolled in four classes: XXXX, XXXX, and XXXX.

With respect to Allegation 1, the Complainant alleged that the VIDE discriminated against the Student on the basis of his disability, by failing to award him credit for the written instructional packets he completed as a disability accommodation during the spring 2021 semester. The Complainant stated that in April 2021, she requested that the VIDE permit the Student to complete written instructional packets in his classes as an alternative to virtual instruction for the spring 2021 semester, as an accommodation for the Student's disability; and provided information from the Student's therapist in support of her request. The Complainant asserted that on May 3, 2021, the VIDE agreed to provide the Student with written instructional packets in lieu of virtual instruction as an accommodation for his disability. The Complainant stated that the School instructed the Student's teachers to prepare instructional packets by May 6, 2021; however, the teachers did not provide packets to the Student until on or about May 21, 2021, which allowed the Student very little time to complete the work prior to the due date on May 28, 2021. The Complainant asserted that although the Student completed the written instructional packets for all of his courses, the VIDE did not give the Student credit for the packets he completed for three of his four courses in spring 2021, XXXX, and XXXX; and he received failing grades in those classes. The Complainant stated that the VIDE gave the Student credit for his work in XXXX, the fourth class he took in spring 2021; and he earned a passing grade.<sup>2</sup>

OCR determined that in an email to the School's Assistant Principal dated April 12, 2021, the Complainant requested a meeting to discuss an alternative to synchronous online instruction for the Student. On April 20, 2021, the Complainant and the Student's therapist met with the Assistant Principal to discuss the Complainant's request, which the therapist supported, for written instructional packets for the Student. During the meeting, the Assistant Principal requested information and documentation about the disabling condition that prevented the Student from joining his classes virtually. By email dated April 26, 2021, the Complainant provided to the Assistant Principal a letter from the therapist recommending an alternative to virtual instruction

---

<sup>1</sup> During school year 2020-2021, the School provided virtual instruction to all enrolled students.

<sup>2</sup> The Complainant clarified to OCR that the XXXX is not the subject of the current complaint.

for the Student based on his “XXXX.”<sup>3</sup> After consulting with the Principal, the Assistant Principal notified the Complainant by email on May 3, 2021, that the School had approved her request for the Student to complete written instructional packets in lieu of attending synchronous virtual instruction.

By email on May 3, 2021, the Assistant Principal notified the Student’s teachers that they should prepare written instructional packets for the Student by May 6, 2021. In emails between the Complainant and VIDE staff from May 17 through May 21, 2021, the Student’s teachers, including the teachers of the Student’s XXXX, XXXX, and XXXX classes, provided packets to the Student. The Complainant provided to OCR emails sent to the Student’s teachers dated May 23, 27, and 28, 2021, indicating that the Student had submitted completed packets for his classes during spring 2021. The VIDE representatives informed OCR that they do not have copies of the packets the Student completed for his XXXX and XXXX classes; and that they were unable to confirm whether the Student’s teachers graded those packets. The VIDE provided to OCR a copy of the Student’s graded XXXX packet; however, the information the VIDE provided did not indicate the date when the packet was graded or how the Keyboarding teacher incorporated the packet into the Student’s final grade. The Student’s transcript for the spring 2021 semester reflected that he received failing grades for his XXXX, XXXX, and XXXX classes. To date, the VIDE has not provided documentation or information to substantiate that it provided the Student with the approved accommodation for these classes.

The Student resumed participating in virtual instruction for the start of school year 2021-2022.<sup>4</sup> On or about September 22, 2021, the VIDE provided the Student the opportunity to make up the three classes he failed via an online learning platform called XXXX. The VIDE notified the Student that he could complete the coursework asynchronously on XXXX through January 2022. The Complainant informed OCR that the Student has begun completing the work.

Prior to the completion of OCR’s investigation, on January 31, 2022, the VIDE signed the enclosed resolution agreement to resolve the concern OCR identified with regard to Allegation 1. Pursuant to the resolution agreement, the VIDE will extend to the Complainant a written offer for the Student to complete his XXXX, XXXX, and XXXX courses from the spring 2021 semester (hereinafter, the Courses) asynchronously, via the XXXX platform; permit the Student to complete the Courses on XXXX through March 31, 2022; replace the Student’s final grades in the Courses for school year 2020-2021 with the grades the Student earns on XXXX; provide to the Complainant a report card and/or transcript that reflects the updated final grades for the Courses for school year 2020-2021; and provide training to all VIDE staff members and administrators who were responsible for developing, implementing, and monitoring the Student’s accommodations during the spring 2021 semester, regarding the VIDE’s obligation to ensure that the accommodations are fully and timely implemented. OCR will monitor the implementation of the resolution agreement. Upon the VIDE’s satisfaction of the commitments made under the agreement, OCR will close the case.

With respect to Allegation 2, the Complainant alleged that the VIDE discriminated against the Student on the basis of his disability, by failing to evaluate the Student to determine his eligibility

---

<sup>3</sup> The Complainant also provided XXXX of the Student to the Assistant Principal by email on May 13, 2021.

<sup>4</sup> The VIDE provided virtual instruction to all students from the start of the school year on or about August 23, 2021, through January 23, 2022.

for special education or related aids and services during the spring 2021 semester. The Complainant asserted that by email on several occasions during the spring 2021 semester, she contacted VIDE administrators, including the School Principal, the Director of Intervention Services and Section 504 Coordinator (the Director), the Director of School and Community Affairs (Director 2), the District Superintendent, and the Commissioner of the VIDE, about developing a Section 504 plan for the Student. The Complainant also stated that during her meeting with the School's Assistant Principal held on April 20, 2021, she requested that the VIDE provide the Student with a Section 504 plan. The Complainant asserted that the VIDE did not respond to her requests.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), provides that it is a recipient's responsibility to conduct an evaluation, in accordance with the requirements of 34 C.F.R. §104.35(b), of any student who needs or is believed to need special education and/or related aids or services because of a disability. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33, a recipient is required to provide a free appropriate public education to qualified disabled students, which includes special education and/or related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met.

The VIDE provided to OCR its *Parents Handbook for Special Education – Notice of Procedural Safeguards* (the Handbook). According to the Handbook, the VIDE must proceed with an evaluation if the parent “has expressed concern in writing . . . to supervisory or administrative personnel.” According to the Director, it is the VIDE's practice regarding requests for evaluations pursuant to Section 504 received during the summer, to convene a meeting shortly after the start of school in the fall, when the student's new teachers can participate.

Information the Complainant provided indicated that during the meeting held on April 20, 2021, the Complainant and the Assistant Principal discussed the process for having the VIDE evaluate the Student for a disability and/or provide the Student with a Section 504 plan. In emails dated May 3 and May 19, 2021, the Assistant Principal notified the Complainant that she should contact the Director to discuss the Student's eligibility for a Section 504 plan, noting that the medical documentation the Complainant provided did not identify a specific physical or mental condition. OCR reviewed the Complainant's emails to the VIDE administrators between May 18, 2021, and June 7, 2021. OCR determined that the Complainant's emails all related to the instructional packets for the Student and did not request an evaluation or a Section 504 plan for the Student.<sup>5</sup> The Complainant acknowledged that during the spring 2021 semester, she copied the Director on emails to other VIDE administrators, but she did not contact the Director directly to request that the Student be evaluated for a Section 504 plan. By letter to the Commissioner dated June 24, 2021, the Complainant requested a Section 504 plan for the Student. In or around early September 2021, Director 2 forwarded the Complainant's request to the Director.

OCR determined that per the Handbook, the VIDE began the process for evaluating the Student for a Section 504 plan once it had received the Complainant's written request for evaluation. OCR determined that, consistent with VIDE practice, on September 15, 2021, the VIDE convened a

---

<sup>5</sup> The Complainant copied the Director in an email to Director 2 on June 7, 2021, in which the Complainant did not request an evaluation or a Section 504 plan. The Complainant stated that “the law makes provisions for individuals who learn differently or with disabilities and the school has failed to meet the needs” of the Student.

meeting of the Section 504 team, that included the Complainant, the Assistant Principal, the School XXXX, and all four of the Student's teachers for the fall 2021 semester, and determined that the Student was eligible for a Section 504 plan based on his disability. The Student's Section 504 plan provided for XXXX.

Based on the above, OCR determined that on or about April 20, 2021, during a meeting with the Assistant Principal, the Complainant requested that the VIDE evaluate the Student for and/or provide the Student with a Section 504 plan. In emails in May 2021, the Assistant Principal notified the Complainant that her request should be submitted to the Director. OCR also determined that the Complainant did not submit the request to the Director in spring 2021 or thereafter; instead, she sent a written request for a Section 504 plan to the Commissioner by letter dated June 24, 2021, after the school year had ended. The VIDE convened a Section 504 meeting for the Student on September 15, 2021, shortly after the start of school year 2021-2022, and found the Student eligible for related aids and services. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the VIDE discriminated against the Student on the basis of his disability, by failing to evaluate the Student to determine his eligibility for special education or related aids and services during the spring 2021 semester. Accordingly, OCR will take no further action with respect to Allegation 2.

This letter should not be interpreted to address the VIDE'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 a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the VIDE 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, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint against the VIDE 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, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant has a right to appeal OCR's determination with respect to Allegation 2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information in this letter 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 VIDE has the option to submit, to OCR, a response to the appeal. The VIDE must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the VIDE.

If you have any questions, please contact Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or [jonathon.lebeau@ed.gov](mailto:jonathon.lebeau@ed.gov); Andy Artz, Senior Compliance Team Attorney, at (646) 428-3901 or [alexander.artz@ed.gov](mailto:alexander.artz@ed.gov); or Anna Moretto Cramer, Compliance Team Leader, at (646) 428-3826 or [anna.moretto.cramer@ed.gov](mailto:anna.moretto.cramer@ed.gov).

Sincerely,

/s/

Rachel Pomerantz

Encl.

cc: Cynthia B. Moore, Esq.