



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515  
100 PENN SQUARE EAST  
PHILADELPHIA, PA 19107-3323

September 28, 2023

**IN RESPONSE, PLEASE REFER TO: 03-22-1016**

**Via E-mail Only** ([myarbrough@bcps.org](mailto:myarbrough@bcps.org))

Dr. Myriam Rogers, Superintendent  
Baltimore County Public Schools  
6901 Charles Street  
Townson, MD 21204

Dear Dr. Rogers:

This is to advise you that we have completed our investigation and reached a determination in the above-referenced complaint filed with the U.S. Department of Education's Office for Civil Rights (OCR) against Baltimore County Public Schools (the District) in Maryland. The Complainant alleges that the District discriminated against her son (the Student), as well as other students, on the basis of disability by:

1. Not allowing students with Individualized Education Plans (IEP) into its virtual learning program (VLP) during the [Redacted content] school year; and
2. Denying the Student a free appropriate public education (FAPE) by failing to provide a home and hospital services (HHS) tutor for several months [Redacted content].

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 District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction pursuant to Section 504 and Title II.

In reaching a determination in this case, OCR reviewed documentation provided by the Complainant and the District and interviewed the Complainant, the District's Supervisor for the Home and Hospital program, Executive Director of Academic Programs and Options, and IEP Chair. With respect to Allegation 1, OCR found insufficient evidence that the District discriminated against the Student and other students by not allowing students with IEPs into the VLP during the [Redacted content] school year. However, with respect to Allegation 2, OCR found that the District failed to provide a FAPE to the Student in violation of Section 504, when the District was unable to provide consistent tutoring services in the [Redacted content] while the

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Student was enrolled in HHS, and that the District has not provided documentation showing that the calculation of compensatory time for the Student was discussed with the Student’s IEP team. OCR also found that the District failed to provide a FAPE to at least 168 additional students with disabilities who also were not provided with consistent tutoring while they were enrolled in HHS during the [Redacted content] school year; that the District has not yet developed and implemented a plan to adequately remedy the denial of FAPE for these students; and that the District did not accurately or sufficiently track the tutoring services that it provided to students with disabilities enrolled in HHS during the [Redacted content] school year, as required for the Department to ascertain its compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. §100.6(b)).

To address the violations identified below, the District signed the enclosed Resolution Agreement. OCR’s findings and conclusions are discussed below.

### **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires public school districts to provide a free appropriate public education (FAPE) to all qualified students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-36. Districts are required to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. 34 C.F.R. § 104.35(a). Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2).

In interpreting evaluation data and in making placement decisions, a recipient school district must draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c). 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 persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement.

The Section 504 regulation, at 34 C.F.R. § 104.6(a), provides that when OCR finds that a district has discriminated against persons on the basis of disability, the district shall take such remedial action as OCR deems necessary to overcome the effects of the discrimination. Compensatory

services are required to remedy any educational or other deficits that result from a student with a disability not receiving the evaluations or services to which they were entitled.

Additionally, the Section 504 regulation at 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)) requires districts to keep records and accurate compliance reports in such form determined to be necessary to enable OCR to ascertain whether the district has complied or is complying with the regulations.

### **Background Information**

During the [Redacted content] school year, the Student was [Redacted content] and was placed in the District's HHS program. The Student has an [Redacted content] disability, [Redacted content], and requires a high level of [Redacted content] support and assistance with activities throughout the day. At all relevant times, the Student qualified for special education services pursuant to an IEP from the District.

During the [Redacted content] school year, the Student was enrolled at [Redacted content] School (the School), [Redacted content]. In addition, during the [Redacted content] school year, the District provided virtual instruction to all of its students, including the Student. Staff at each school provided specialized instruction and support to students through the District's virtual platform. For the [Redacted content] school year, the District re-opened for in-person instruction and offered a virtual learning program (VLP) as an option for District students who preferred to remain in remote instruction. The VLP is a general education setting staffed by District personnel. Prior to the start of the [Redacted content] school year, the Complainant requested that the Student be allowed to participate in the VLP program [Redacted content].

### **Allegation 1: the Virtual Learning Program (VLP)**

The District provided OCR with a guidance document from the Maryland State Department of Education (MSDE) that it followed in determining enrollment for its VLP, including a "*Virtual School Q&A*." In addition, the District provided its "*Considering Options for Least Restrictive Environment and the Virtual Learning Program*," guidance document. Both state that students with disabilities should not be automatically excluded from enrollment in a VLP based on their disability, and that districts should ensure that admissions decisions for students with disabilities are made on an individualized basis by the IEP team. The guidance documents also state that if a student's IEP cannot be implemented in the VLP and the student would not receive FAPE in the VLP, then VLP is not an appropriate placement. The guidance documents further provide that if a student cannot attend school due to medical, emotional, or physical reasons, the family and school must utilize the established procedures for requesting services through Home and Hospital Services (HHS) and that the VLP is not a replacement for HHS.

The Executive Director of Educational Operations (Executive Director) confirmed that all District students could apply for the VLP, but that it was designed to provide a general education environment. The Executive Director also told OCR that all District principals were instructed that, if they received a request for VLP for a student with a disability, the student's

multidisciplinary team was required to meet as soon as possible to determine if FAPE could be provided to that student in the VLP.

The District provided OCR with documentation showing that 1,331 elementary aged students enrolled in the District's VLP during the [Redacted content] school year, 213 of which were students with an IEP or Section 504 plan. The District noted that only five (5) students, including the Student, from the Student's School applied for the VLP during the [Redacted content] school year. For the five students, the District provided documentation demonstrating that each student's respective IEP team met to discuss each student's potential participation in the VLP and whether the student's IEP could be implemented. Based on the particular needs of each student, the IEP teams determined that participation in the VLP was not an appropriate placement as it would not adequately address each student's needs. The documentation also shows that each family was provided with notice of their procedural safeguards.

With regard to the Student, his IEP team met on [Redacted content], to discuss the Complainant's request to place the Student in the VLP for the [Redacted content] school year [Redacted content]. The meeting summary reflects that the IEP team consisted of individuals knowledgeable about the Student, including the Complainant, [Redacted content]. The meeting summary also indicates that the IEP team discussed the Complainant's request and the reasons why the team determined the VLP was not an appropriate placement for the Student due to his significant need for services not available in the VLP. The Complainant was provided with notice of her procedural safeguards.

### **Allegation 1: Legal Analysis**

OCR finds insufficient evidence to conclude that the District discriminated against students with disabilities or the Student with regard to placement in the VLP for the [Redacted content] school year. The evidence reflects that students with disabilities participated in the VLP during the [Redacted content] school year. The record also established that the District had a procedure in place that required IEP teams to determine whether the VLP would be the appropriate educational setting on an individualized basis, and that District staff acted in accordance with this requirement. OCR reviewed the documentation of several placement decisions for students who were denied participation in the VLP, which reflect that the District engaged in an individualized determination through the IEP team for each student and provided the parent/guardian with notice of their procedural safeguards. With regard to the Student, the documentation reflects that his IEP team discussed and considered the Complainant's request for the Student's enrollment in the VLP, but the team concluded that based on the extent of the Student's need for specialized education, the VLP general education setting was not an appropriate placement. The District also provided the Complainant with notice of her procedural safeguards in making this determination. As such, OCR concludes that the District followed the procedural requirements of Section 504 and Title II in determining that the VLP was not the appropriate for the Student and other students with disabilities for the [Redacted content] school year.

### **Allegation 2: Denial of FAPE during [Redacted content] School Year**

*Home and Hospital Tutoring Services*

Pursuant to the MSDE and District guidance detailed above, for the [Redacted content] school year, students who could not attend school in person for medical reasons and who were ineligible for the VLP, could request enrollment in the District's HHS program. The HHS program provides direct tutoring to students at home. The HHS Supervisor explained that there were more requests for HHS in the [Redacted content] school year than in previous years and the District did not have sufficient tutors to meet this demand. The District acknowledged that HHS was not able to place tutors with students as quickly in the [Redacted content] school year as it did in prior years, and many students were not assigned tutors for extended periods of time.

*Denial of FAPE to the Student*

As noted above, the Student's IEP team met on [Redacted content], and considered the Complainant's request for the Student to be placed in the VLP. Because the IEP team determined that the VLP was not an appropriate placement for the Student, the Complainant agreed to place him in the District's HHS program. The meeting summary states that the IEP team agreed that, in order to achieve the goals and objectives of his IEP while in HHS, the Student required 2 hours of daily direct instruction from an HHS tutor, for a total of 10 hours of direct instruction per week. The Complainant contends that the District did not provide an HHS tutor for the Student for several months during the [Redacted content].

On [Redacted content], the Student's IEP team met and discussed the Student's tutoring services. The meeting summary reflects that an HHS tutor worked with the Student for two weeks in [Redacted content], and the tutor was then unassigned from working with the Student. Although a replacement tutor was supposed to be provided, as of [Redacted content], the Student had not yet been assigned a replacement tutor. The HHS supervisor shared during the IEP meeting that HHS was having a difficult time finding tutors, but that new hires were in the process of onboarding, and she hoped to have one assigned to the Student after [Redacted content] break. The Complainant shared during the meeting that she was seeing a regression of the Student's skills at home as a result of the lack of instruction, and the team agreed that due to the lack of services from an HHS tutor, the Student would be owed compensatory time and all hours of missed instructional time would be calculated. The summary also notes that the HHS Supervisor asked the Complainant if the Student could tolerate more than two (2) hours of daily direct instruction, three (3) days a week if he received an extended break on those days. The Complainant replied that this would be acceptable and the team agreed that the additional hours would be compensatory, but the Student's IEP would not be updated to reflect the additional hours. On [Redacted content], a tutor was reassigned to the Student.

The HHS Supervisor told OCR that, starting in [Redacted content], the Student received HHS tutoring services consistently 10 hours a week, and also started receiving compensatory hours, up to 2 hours of extra daily instruction, three days a week, based upon the agreement made at the meeting in [Redacted content], described above. However, the HHS Supervisor acknowledged that the tutor did not provide the compensatory hours consistently because there were weeks that she would only be able to provide the 10 hours. The HHS Supervisor told OCR that she

continued to calculate what services the Student was owed, but her main goal was for him to get started with tutoring in [Redacted content]; they could later establish a schedule to provide the Student the compensatory services he was owed. In an email to OCR on [Redacted content], the HHS Supervisor stated that a tutor had been assigned to the Student and was providing time each week in order to cover hours owed, and the Complainant appeared to be pleased with the assignment. She also stated that, as of [Redacted content], the Student was owed 42 back hours.

OCR requested that the District provide a list of all students with disabilities enrolled in HHS for the [Redacted content] school year, the number of tutoring hours per week assigned for each student, and whether each student received the required number of tutoring services, and if not, the number of hours missed. The District provided OCR with this information in a spreadsheet in [Redacted content], and provided an updated version of the spreadsheet in [Redacted content], described in more detail below. The [Redacted content] spreadsheet reflects that the Student began his enrollment in HHS on [Redacted content], and documents that he was supposed to receive 6 hours of tutoring services per week, which conflicts with the IEP team summary from [Redacted content], described above, in which the team agreed that the Student would receive 2 hours of daily instruction for a total of 10 hours of tutoring services per week. Further, even though the HHS Supervisor told OCR in [Redacted content] that the Student was owed 42 hours, the [Redacted content] spreadsheet noted “TBD” for the number of missed hours for the Student; and at that point the Student was still accumulating missed hours. In addition, while the District told OCR that it placed a star next to the name of each student who was not assigned a tutor, no star appeared next to the Student’s name in the [Redacted content] spreadsheet, even though the District acknowledged that the Student did not receive all of his required tutoring hours during the [Redacted content] due to a tutoring shortage.

The Complainant provided OCR with an email that she sent to the HHS Supervisor on [Redacted content], in which she requested an itemized list of dates tutoring services were provided to the Student, the tutor who provided them, and the hours completed out of the hours owed previously, including compensatory hours. The HHS Supervisor noted to OCR that, as of [Redacted content], the District owed the Student more than 42 hours, but that she was still working on the final calculation. She explained that a complicating factor was that the Complainant dismissed more than one tutor, which again left the Student without services from approximately [Redacted content], when another tutor was reassigned to the Student. She estimated that he was given approximately 60 hours of compensatory time, but that the District still owed the Student approximately 120 hours. The HHS Supervisor explained, however, that she did not believe that the Complainant would agree with this calculation, that they would need to meet to make the final determination, and that the District had been having ongoing discussions with the Complainant regarding the number of hours owed. She also explained that part of the disagreement was that HHS did not believe the District owed hours that were missed due to the Complainant’s cancellation, which is in contradiction with HHS Policy, that states that the District owes hours for cancellations due to lawful absence (illness). She added, however, that the District had been providing approximately 2 hours of back hours that he was owed, daily, since the start of the [Redacted content] school year.

As noted above, in [Redacted content], the District provided OCR with a revised spreadsheet documenting all students with disabilities enrolled in HHS for the [Redacted content] school

year, the number of tutoring hours per week assigned for each student, and whether each student received the required number of tutoring services. The District also included a copy of a letter to the Complainant dated [Redacted content] that stated that during the 36 weeks of the [Redacted content] school year, the Student was required to receive 10 hours per week of HHS, which totaled 360 hours, and as of the date of the letter, the Student had received 401 hours of compensatory education. The District told OCR that it therefore believed that the compensatory education hours owed for the Student for the [Redacted content] school year were completed. The District has not provided any more detailed documentation regarding how or when these hours were provided.

*Denial of FAPE to Other District Students with Disabilities Enrolled in HHS*

The documentation provided by the District shows that 282 students with disabilities enrolled in HHS during the [Redacted content] school year. As noted above, in [Redacted content], the District provided OCR with a spreadsheet documenting that 169 students were identified as having missed tutoring hours; 45 of these students have an entry of “TBD” for the number of missed hours, including the Student, while 123 had a specific number of hours listed. One additional student was noted as having no tutor assigned, but the spreadsheet did not indicate how many hours of tutoring that student missed. According to the [Redacted content] spreadsheet, of the 123 students identified as having missed a specific number of tutoring services, 16 students missed 100 hours or more; 44 students missed 50-99 hours; 36 students missed 20-49 hours; 23 missed 6-18 hours; and 4 missed zero hours. The updated spreadsheet provided in [Redacted content] also contains totals for tutoring hours missed for each student, with some columns still reflecting “TBD” for the number of missed hours for several students. Because the unique identifier system used by the District is different in the [Redacted content] spreadsheet than it is in the [Redacted content] spreadsheet, OCR is unable to ascertain hours provided since [Redacted content] for each individual student by comparing the [Redacted content] spreadsheets.

During an interview with OCR, the HHS Supervisor acknowledged that she participated in some IEP meetings for HHS students who did not receive tutoring services during the [Redacted content] school year, but she explained that her role was to provide the number of missed hours to the IEP team. District counsel told OCR that it was the responsibility of the IEP team to determine compensatory services. The HHS Supervisor explained that the computation for tutoring hours missed is done manually. She explained that the HHS program documents the receipt of services from the timesheets the tutor submits and subtracts that from the total number of hours that the student is supposed to receive on a weekly basis. The HHS Supervisor also stated that during IEP meetings, the missed hours are discussed, but the full team does not arrive on a specific number of hours owed; HHS instead offers to meet with the parents on a separate date to discuss the time owed. The HHS Supervisor also explained that her office called every student who missed tutoring services during the [Redacted content] school year just prior to [Redacted content] and offered to provide compensatory hours during the summer or the next school year. She told OCR that some parents accepted hours for the following academic year, some accepted hours during the summer, and some parents were not interested in compensatory hours and just wanted to move forward. She stated that the HHS program was able to supply

tutors to some of the students over the summer [Redacted content], and some students were provided with make-up hours the following school year, including the Student.

## **Allegation 2: Legal Analysis**

### *Denial of FAPE*

OCR concludes that the District violated the requirements of Section 504 and Title II when it was unable to provide a FAPE to the Student and other students with disabilities enrolled in HHS for the [Redacted content] school year due to tutoring staffing shortages. Specifically, OCR's investigation established that the Student did not consistently receive tutoring services while enrolled in HHS for most of the [Redacted content] and part of the [Redacted content]. Further, the District identified at least 168 other students who also missed tutoring services while enrolled in HHS during the [Redacted content] school year due to staffing shortages.

### *Compensatory Services*

The Section 504 regulation, at 34 C.F.R. § 104.6(a), provides that when OCR finds that a district has discriminated against persons on the basis of disability, the district shall take such remedial action as OCR deems necessary to overcome the effects of the discrimination. Compensatory services are required to remedy any educational or other deficits that result from a student with a disability not receiving the services to which they were entitled. Here, the District was required to take remedial action necessary to overcome the effects of the denial of FAPE for the Student and 168 other students with disabilities enrolled in HHS during the [Redacted content] school year. While the evidence shows that the District provided the Student with 401 hours of compensatory education due to the tutoring hours that he missed during the [Redacted content] school year while on HHS, the District has not provided OCR with sufficient documentation to confirm how or when these hours were provided to the Student, and whether the District considered additional compensatory hours owed due to the FAPE impact on the Student and any additional regression he may have experienced during the [Redacted content] school year. With regard to the other 168 students, while the District provided a supplemental spreadsheet to OCR in [Redacted content] documenting that some of the 168 students received additional compensatory hours, the District has not provided OCR with sufficient documentation to confirm how or when these hours were provided to each student, whether each student received the full amount of compensatory hours owed, and whether the District considered additional compensatory hours owed due to the FAPE impact – and potential regression – for each of these students due to the District's failure to provide tutoring services during the [Redacted content] school year.

### *Record-Keeping*

OCR also concludes that the District did not accurately or sufficiently track the tutoring services that it provided to students with disabilities enrolled in HHS during the [Redacted content] school year, as required for the Department to ascertain its compliance with 34 C.F.R. § 104.33, as required by 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.6(b)). The spreadsheet that it provided to OCR in [Redacted content] did not reflect a computation of missed tutoring hours for



at least 45 students. The spreadsheet provided in [Redacted content] still contains blanks in the column documenting what was being done for the students who missed hours. Further, OCR has concerns regarding the reliability of the data tracked in the spreadsheet. As noted above, OCR identified discrepancies in the District's tracking spreadsheet regarding the number of tutoring hours that the Student was supposed to receive. OCR is concerned that the information provided for the remaining 281 students enrolled in HHS for the [Redacted content] school year also were not tracked appropriately and consistently.

### **Resolution Agreement and Conclusion**

To address the violations identified during the investigation, the District entered into the attached Resolution Agreement on September 26, 2023, which is aligned with the issues investigated and the information obtained by OCR. With respect to the Student, the Agreement requires the District to convene the Student's multidisciplinary team to determine whether the 401 tutoring hours provided reflected the compensatory education needs of the Student, including consideration of whether the Student showed any regression for which additional compensatory services are owed. With respect to the other students with disabilities enrolled in HHS during the [Redacted content] school year, the Agreement requires the District to convene each student's multidisciplinary team to determine the number of tutoring hours still owed and consider whether each student experienced a denial of FAPE, and if so, determine their educational loss and appropriate compensatory education services. The Agreement also requires that the District provide training for all Director level staff in the District's Academic Programs and Options Department on the District's obligations to provide a FAPE to all students with disabilities, including students enrolled in HHS, the District's obligations to provide hours missed due to staffing shortages or programming, and the District's obligations to assess students for compensatory services in these circumstances. Last, the Agreement requires that the District develop an electronic tracking system to track tutoring services for students with disabilities while enrolled in HHS, and provide OCR with quarterly reports from the tracking system.

The provisions of the Agreement are aligned with these 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.

Accordingly, 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 of Allegation 1 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 District. The recipient 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 recipient.

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 please contact Michael J. Wesley, Equal Opportunity Specialist, at (215) 656-6908 or [Michael.Wesley@ed.gov](mailto:Michael.Wesley@ed.gov).

Sincerely,  
/s/  
Christina M. Haviland  
Supervisory Attorney  
OCR Philadelphia

Cc: Pamela Foresman, Counsel for the District

Enclosure