



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

VIA REGULAR AND ELECTRONIC MAIL

Mr. B.T. Drake
Interim Superintendent
Huntsville City Schools
200 White Street
Huntsville, Alabama 35801

Re: OCR Complaint No. 04-15-1383

Dear Superintendent Drake:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on May 22, 2015, against the Huntsville City Schools (District), in which the Complainant alleged that the District discriminated against her son (Student) on the basis of disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulations, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on OCR's website at <http://www.ed.gov/ocr>.

OCR investigated the legal issue of whether the District discriminated against the Student on the basis of disability by denying him a free appropriate public education when it failed to implement his Behavioral Intervention Plan developed in January 2015, in noncompliance with the Section 504 implementing regulation, at 34 C.F.R. § 104.33, and the Title II implementing regulation, at 28 C.F.R. § 35.130.

During the course of this investigation, OCR reviewed evidence provided by the Complainant and the District, including correspondence, student records, and the District's policies and procedures. OCR also interviewed the Complainant and one District staff person.

OCR evaluates evidence under a preponderance of the evidence standard; to establish a violation, the evidence must be sufficient to prove that it is more likely than not that a violation occurred. Based on OCR's investigation thus far, OCR identified a compliance concern, of which the District requested to voluntarily resolve.

Legal Standards

Section 504 prohibits disability discrimination by organizations or entities that receive or benefit from Federal financial assistance, either from the Department or an agency that has delegated investigative authority to the Department. The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a recipient that operates a public elementary or secondary program must provide an appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The term "appropriate education" is defined under 34 C.F.R. § 104.33(b) to mean the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to the Section 504 regulation's procedural requirements. Although the Title II regulation does not contain provisions specifically pertaining to the provision of an appropriate public education, as in the case of the Section 504 regulation, OCR interprets the Title II regulation's general prohibition against discrimination (at 28 C.F.R. § 35.130) to incorporate the relevant provisions of the Section 504 regulation.

Section 504 does not strictly require the development of any document. Thus, OCR's analytical approach to allegations based on the denial of an appropriate education does not track a recipient's alleged failure to have or to implement correctly any document. Rather, OCR determines (1) whether a child's needs were determined on an individualized basis; (2) whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation; and (3) whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are or were being provided.

Factual Findings and Analysis

OCR's review of the evidence obtained thus far in this investigation indicated that the Student was in the XXXXXXXX grade during the 2014 – 2015 school year and in the XXXXXXXX grade during the 2015 – 2016 school year at XXXXXXXXX XXXXXXX XXXXXXX (School).

The Complainant alleged that the District failed to implement the Student's Behavioral Intervention Plan (BIP), developed on January 27, 2015, through the 2014 – 2015 and 2015 – 2016 school years. Specifically, the Complainant alleged that the District failed to implement any of the provisions in the Student's BIP from January 27, 2015, until January 2016, and that since January 2016, the District failed to implement one provision of the BIP (teachers failed to provide regular updates on the Student's behavior to the Complainant).

January 20, 2015 Section 504 BIP

OCR's review of the evidence indicated that a committee met and identified the Student as a student with a disability ("XXXX") and made a placement decision for him, documented in the Student's *Section 504 Plan*, dated January 20, 2015. The placement decision dated January 20,

2015, identified the following related aids and services in the Student's *Section 504 Behavior Intervention Plan* as necessary for the student to receive an appropriate public education, due to "excessive suspensions" and "some problems with concentration and decisions-making skills:"

- "set clearly defined limits"
- "supervision during unstructured time and transitions"
- "reduce distracting stimuli"
- "use praise to reinforce appropriate behaviors"
- "prompt student to go to a quiet area in class where noise and activity are not allowed"
- "[Student] will be allowed to go to the counselor for a 'cool-down' period when needed (back-up person is XXX XXXX if counselor is out of the building)"
- "teachers will communicate with parents either by email or phone when needed"

OCR also reviewed a documented titled *Documentation of Appropriate Instruction & Intervention Strategies*, dated April 28, 2015, in which the following "research based strategies" based on "documentation of repeated assessments of achievement at reasonable intervals reflecting formal assessment of student progress during instruction" were identified: "one-on-one assistance to support behavior and academics" and "cooling off area – counseling with school counselor to address behavior."

May 22, 2015 IEP Behavior Goals

The Student's records also indicated that on May 11, 2015, an Individual Education Program (IEP) plan was drafted, which was effective through May 22, 2015. The IEP had no accompanying BIP; rather, the IEP stated that the Student has "behavior which impedes his/her learning or the learning of others." However, a box marked "No" was checked next to the question "does the student have a behavioral intervention plan? OCR's review of the meeting minutes for the May 11, 2015, IEP meeting stated that the Student "just qualified for special education services, so there is a behavior goal, not a behavior plan." OCR was unable to locate any records indicating that the Student's Section 504 team terminated his Section 504 Plan and/or January 20, 2015, BIP.

The May 22, 2015, IEP provided for the following behavior-based related aids and services: "School Counselor will provide strategies to address deficits (*sic*) inappropriate XXXXXX behaviors," "1 times weekly." The "amount of time" identified for this service is "30" to take place in "Resource and/or Classroom." The plan also states "Collaborative Teacher will provide strategies to address behavior deficits in the areas of verbal and physical aggression," "weekly." The "amount of time" identified is "20" to take place in "Resource and/or Classroom."

August 4, 2015 IEP Behavior Goals

The Student's records also indicated that on August 4, 2015, an IEP was drafted, which was effective through May 26, 2016. This IEP also had no accompanying BIP; rather, it listed the following behavior goals: "School Counselor will provide strategies to address deficits (*sic*) inappropriate XXXXXX behaviors," "1 times weekly." The "amount of time" identified for this service is "30" to take place in "Resource and/or Classroom." The plan also states "Collaborative Teacher will provide strategies to address behavior deficits in the areas of verbal

and physical aggression,” “weekly.” The “amount of time” identified is “20” to take place in “Resource and/or Classroom.”

January 22, 2016 IEP BIP

On January 22, 2016, the Student’s IEP team drafted a BIP; the IEP stated that the “IEP team agreed that the Class I and II offenses warrant the need for BIP . . . a meeting has been scheduled to develop BIP to address inappropriate behaviors deemed necessary for implementation.” This IEP did not contain a date range for which the plan was effective. The January 22, 2016, BIP states the following under “Consequences:” “private conversation; parent phone call; behavior log; seen by counselor, administration, security; XX XXXXXXXX room for calming time.” The BIP also states the following under “Person(s) Responsible:” under the “Interventions” heading: “Student, teachers, administration, counselor.”

February 2, 2016 IEP BIP

On February 2, 2016, the Student’s IEP team drafted another BIP, which provided the following services to address behavior in the Student’s “physical environment:” “instruction in small group/individual setting with boundaries;” “seating away from distractions and peers during individual seatwork;” “preferential seating;” “model appropriate behavior;” and “crisis intervention – techniques from “Managing Crisis Safely” may be utilized.”

The February 2, 2016, BIP provided under “instructional environment” the following: “build a rapport with the student;” “give student extra time to process directions;” “use redirection;” “be consistent in the instructional environment;” “more gestural than verbal prompts;” “give praise and positive feedback;” “use planned ignoring;” “clearly, concisely, and simply state directions;” “staff should avoid engaging in power struggles; do not engage in verbal exchanges when student is agitated;” “use a calm, consistent, non-accusatory tone;” and “use a calm manner and body language.”

Further, under the “reinforcers” section, which is under the heading “responses to behavior(s) including reinforcers and consequences,” the BIP states: “(1) provide praise and positive attention for appropriate behavior;” “(2) class XXXX points;” “(3) opportunity for leadership roles;” “(4) contact parent weekly via text email to inform of [Student’s] week.”

Under the “Consequences” heading of the BIP, the following services are identified: “(1) redirection;” “(2) planned ignoring;” “(3) loss of XXXX points;” “(4) denial of preferred activity;” “(5) remove to another area in the classroom;” “(6) contact parent;” “(7) in school suspension;” “(8) out of school suspension.”

March 15, 2016 IEP BIP

The only addition (to the February 2, 2016, BIP provisions) contained in the March 15, 2016, BIP is that under “instructional environment” “do not use sarcasm” was included.

The Complainant also stated that she believed that the Student’s January 22, 2015, Section 504 BIP was still active throughout the time during which the Student had an IEP, first drafted and effective on May 22, 2015, because the Student’s Section 504 team never met to terminate the

Section 504 plan/BIP. The Complainant did not believe that the Student's teachers were implementing his BIP and his IEP concurrently. OCR's review of May 20, 2015, IEP team meeting minutes indicated that "[the parents' advocate] contacted the State Dept. and states that she was told that the 504 was still active until the team met to discontinue it. As of May 11, 2015, [the Student] was currently under a 504 plan, however he qualified for Special Education Services on the same day May 11, 2015." OCR's review of the Student's May 22, 2015, IEP meeting notes indicated that the "[LEA representative and XXXXXXXX XXXXXXXXXX XXXXXXXXXXXXXXXXXXXX Specialist (Specialist)] explains that once the Referral process is started, it supercedes the 504 plan." During an interview with OCR, the District's Specialist notified OCR that when the IEP was drafted, the 504 team should have met separately and exited the Student from Section 504. The Specialist had no information as to whether the Section 504 team met to exit the Student from Section 504. OCR did not locate any records indicating that the Student's Section 504 team terminated his Section 504 plan and/or BIP.

Conclusion

Prior to the completion of OCR's investigation, the District requested to voluntarily resolve this complaint. Pursuant to Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved when, before the conclusion of an investigation the recipient or public entity expresses an interest in resolving the complaint. The attached Resolution Agreement (Agreement) will require the District to take actions to remedy any compliance concerns regarding disability discrimination.

On January 17, 2017, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the complaint. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, or discriminate against any individual because he or she has filed a complaint, or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive such a request, we 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.

If you have any questions, please contact Stephanie Pessin, at (404) 974-9343, or me, at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer, Esq.
Compliance Team Leader

Enc: Resolution Agreement

cc: XXXXXX XXXXX, via electronic mail