



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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December 24, 2013

Dr. Tim Markley
Superintendent
New Hanover County Schools
6410 Carolina Beach Road
Wilmington, North Carolina 28412

Re: OCR Complaint No. 11-13-1166
Letter of Findings and Resolution Letter

Dear Dr. Markley:

This letter is to inform you of the disposition of the complaint that was filed with the District of Columbia Office, Office for Civil Rights (OCR), within the U.S. Department of Education (Department), on April 3, 2013, against New Hanover County Schools (the District). The Complainant filed on behalf of XXXX (the Student) who attended XXXX (the School) during the 2012-2013 school year. The Complainant alleged that the Student was discriminated against on the basis of XX disability, XXXX, under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). Because the complaint information also showed that the District may have also discriminated against other disabled students, OCR opened the following allegations:

1. The District discriminated against the Student based on disability when it denied the Student a free appropriate public education (FAPE) by failing to properly evaluate XXXX to determine XXXX need for a Section 504 Plan and/or special education and related aids and services; and
2. The District discriminated against the Student by failing to appropriately determine whether XXXX is a qualified student with a disability under Section 504; and
3. The District denies students a FAPE by failing to conduct evaluations (eligibility meetings) of students who need, or are believed to need, special education or related services, in accordance with Section 504 by requiring the use of inappropriate criteria specified in an internal evaluation form ("Section 504 Evaluation and Eligibility Determination.")

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

OCR investigated the above allegations pursuant to its authority under Section 504, 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 any program or activity that receives Federal financial assistance (FFA) from the Department. OCR also has authority to investigate under Title II, 42 U.S.C. § 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 FFA from the Department. The District receives Federal financial assistance from the Department and is a public entity, and is, therefore, subject to the provisions of the Section 504 and Title II statutes and regulations.

In reaching a determination with regard to the complaint allegations, OCR reviewed extensive information provided by the District and the Complainant. OCR also conducted telephone interviews with the District staff, teachers and the Complainant. OCR's investigation found compliance concerns related to all three allegations. We provide a detailed explanation of the facts and OCR's analysis and conclusions regarding the allegations below.

Legal Standards

The applicable standards for determining compliance with Section 504 are set forth in the implementing regulation at 34 C.F.R. §§ 104.33, 104.35 and 104.36. Section 104.33 explains that a recipient that operates a public elementary program or activity must provide a free appropriate public education (FAPE) to each qualified person with a disability, consisting of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

Section 104.35 requires a school district to conduct an evaluation of a student who, because of a 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 change in placement. Section 104.35(c) requires that, in interpreting evaluation data and making placement decisions for students with disabilities, a recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and placement options; and (4) ensure that the placement decision is made in conformance with the educational setting requirements at section 104.34. OCR has determined that implementing an appropriately developed Section 504 Plan or an Individual Education Program (IEP) is one means of meeting this standard. Section 104.36 requires a school district to establish and implement, with respect to identification, evaluation, and educational placement decisions, a system of procedural safeguards that include an impartial hearing with opportunity for participation by the child's parents or guardian, representation by counsel, and a review procedure. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Allegations 1 & 2: Failure to Appropriately Evaluate Student

Delay in Evaluating the Student

The Complainant requested a Section 504 evaluation prior to the 2012-2013 school year. The Complainant obtained a private psychological evaluation diagnosing the Student with XXXX and provided it to the District in July 2012. This evaluation relied on information from the Student's teachers during the 2011-12 school year and indicated that the Student needed assistance with planning, self-monitoring, and had working memory deficits (trouble finishing tasks). When the Complainant provided this report to the District XXXX asked that a Section 504 Plan be developed for the Student. The Complainant wanted the Student to receive the following disability-related services, among others: separate location for testing; extended time on tests (including End of Grade [EOG] examinations); extended time to turn in assignments; and enhanced communication between the Complainant and teachers regarding the Student's assignments and class work.

Based on the Complainant's request for a Section 504 evaluation, the District scheduled a meeting on XXXX, 2012 with the Complainant and some of the Student's 2011-2012 school year teachers. The District informed the Complainant that it could not evaluate the Student under Section 504 until after the Student had completed the Response to Intervention (RTI) process. According to District staff, RTI is the initial stage of a possible Section 504 evaluation. District staff informed OCR that it is the District's preference to avoid "labeling" students as students with disabilities whenever possible, therefore it is preferred that RTI be successful and a full Section 504 evaluation unnecessary.

This XXXX meeting began the RTI process for the Student and interventions were developed, including: sending home copies of assigned novels, extended time for assessments, and secluded testing (which meant testing in the back of the room). The Student requested a separate testing location at this meeting but this request was denied. At this meeting, the Student's XXXX teacher indicated that the Student struggled to complete tests within the designated time and that organization on projects was a challenge, so he was breaking down assignments into smaller parts for XXXX. The team decided to remove the Student from the project-based XXXX class for the upcoming school year, which the Complainant indicated adversely affected the Student because the Student wanted to work on the higher level project-based assignments. At this RTI meeting there was no discussion of whether the student was a qualified student with a disability nor is there any evidence that the Complainant was provided with information about any procedures to contest the District's decision not to conduct a full Section 504 evaluation at that time.

For over three months there was no formal evaluation as to whether or not these interventions were successful or if the Student was a qualified student with a disability under Section 504. On XXXX, 2012, a follow-up meeting was held to evaluate the success of the interventions. It was determined that the School would continue to provide some of the interventions, including extended time for assessments in all subjects and tests in a secluded area of the classroom. The Complainant again requested a Section 504 Plan for the Student at this meeting, and in e-mails prior to the meeting, to assist XXXX with XXXX disorganization, but the District staff members

denied this request based on their assertion that it was the District’s process to continue to review interventions through the RTI process. At this meeting, the Student went through XXXX binder, which District staff members on the team acknowledged was very disorganized. In helping the Student organize XXXX binder during the meeting, the Complainant located several missed assignments and turned them in to school staff. The Complainant requested notice from the Student’s teachers when assignments were not turned in and extended time to turn in missed assignments as a Section 504 accommodation, but these requests were not granted.

At this meeting, the District’s XXXX indicated that a Section 504 Plan was not warranted at the time, but that the District would continue to collect data on the Student through the District’s RTI process and determine if the Student needed a Section 504 Plan by high school, approximately one and a half years later. The evidence does not indicate that the District provided the Complainant with a notice of Section 504-compliant procedural safeguards at this RTI meeting. These interventions remained in place without change or re-evaluation until XXXX 2013, when the Student was fully evaluated for Section 504 eligibility in response to the Complainant’s continuous, repeated requests for the evaluation.

The evidence indicates that the District did not timely or appropriately evaluate the Student from the beginning of the school year through XXXX 2013. During the 2012-2013 school year the District had ample reason to believe that the student may need special education or related aids and services – including a medical diagnosis of XXXX, parent requests for these services, and teacher reports of the Student’s deficits during the 2011-2012 school year - which triggered its obligation to evaluate the Student under Section 504.

Further, the over six month delay to fully evaluate the Student while the District engaged in the RTI process is inconsistent with the evaluation requirements of Section 504;¹ the RTI process cannot be used to delay a full evaluation under Section 504. In addition, because the District did not provide the Complainant with notice of its procedural safeguards during the period when it did not evaluate the Student under Section 504, it did not comply with the requirements of Section 104.36, as detailed above.

Improperly Evaluated Student

On XXXX, 2013, after the Complainant’s repeated e-mail requests for a Section 504 evaluation to the Assistant Principal and other School staff, the District convened a Section 504 evaluation meeting for the Student. This meeting was attended by the Complainant and XXXX, the Student, the Guidance Counselor/Section 504 Coordinator, the School’s Exceptional Children’s Chairperson, the Principal, the Assistant Principal, and several of the Student’s teachers. This majority of the team determined that the Student was not eligible to receive services under

¹ While not binding when assessing compliance with Section 504, a memorandum from the Department’s Office for Special Education Programs (OSEP) on this issue in the context of the Individuals with Disabilities Education Act (IDEA) is instructive. In this memo, OSEP made clear that local education agencies have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy. *OSEP, U.S. Dep’t of Educ., A[n] RTI Process Cannot be Used to Delay/Deny An Evaluation for Eligibility under the IDEA* (2011). Interventions are to be scientific and research based and only necessary for a short time; should they be necessary for a longer period, they must be recognized as related services under Section 504, with the full range of procedural protections required by the regulations.

Section 504 because XXXX did not meet the necessary criteria. The District’s “Section 504 Evaluation and Eligibility Determination” form states that a student is eligible to receive services if he or she is substantially limited in a major life activity. The form goes on to define “substantially limits” as “extremely or substantially restricted in their ability to perform a particular life activity as compared to most people in the general population.” The team determined that the major life activity that it was evaluating was “learning,” and because the Student was “successful” in XXXX classes, the team determined that XXXX was not substantially limited in this area. During interviews, School staff indicated that they felt the Student was successful because XXXX was turning in XXXX assignments, was receiving good grades, and did well on XXXX EOGs. However, the Student’s psychologist indicated that the Student excels academically but had other educational limitations due to XXXX lack of focus and difficulties with task completion. The team did not discuss the XXXX 2012 psychological report or consider whether any other major life activity other than learning may have been impacted.

The findings of the team at the XXXX 2013 meeting are problematic for several reasons. First, the definition of “substantially limits” on the District’s pre-printed form does not comply with the definition of substantially limits under Section 504. More specifically, the language contained in the form is the pre-Americans with Disabilities Amendments Act (ADAA) definition of “substantially limited” – that is, “extremely or significantly restricted” as compared to “most people” in the general population rather than the average student. A finding of substantial limitation now requires a lower degree of functional limitation than was required prior to the ADAA.

Second, the District staff focused only on the major life activity of learning with no discussion of the effects of the Student’s disability on any other major life activity. For example, the team did not consider whether XXXX disability impacted XXXX concentration, which is specifically identified in the ADAA as a major life activity. This inquiry would have been appropriate given the reports by the Student, XXXX parents, teachers, and XXXX psychologist of XXXX disorganization, distractibility, and trouble finishing tasks.

Third, evidence obtained during OCR’s investigation indicates that some of the reports about the Student’s success given by XX teachers at the meeting were inaccurate. For example, although XXXX teacher reported at the XXXXX meeting that XX was doing well in the class, four days later XXXX received an F on XXXX third quarter report card in XXXX. This poor grade was caused by the Student’s failure to turn in approximately seven homework assignments, four out of five in-class assignments, and performing poorly on in-class quizzes for which students could use their notes.² Further, the evaluation meeting notes indicate that the XXXX teacher reported that the Student was doing “great” in XXXX class and that XXXX had not received any negative information from the substitute teacher XXXX. However, during interviews the XXXX teacher stated that XXXX did not, in fact, check in with the substitute teacher about the Student’s performance in class and the grading sheets for XXXX class reflect that the Student had failed to turn in at least two assignments and performed poorly on two quizzes while the teacher XXXX.

² The XXXX teacher also indicated that the Student also utilized all of the “fix a zero opportunities” (three) for each grading period, indicating that XXXX did not initially turn in a minimum of three homework assignments for each grading period.

Fourth, it is problematic that the evaluation team did not consider the psychological report provided by the Complainant in the decision to determine that the Student was ineligible to receive services under Section 504. All District staff interviewed confirmed that this medical report was not considered, but did not provide a reason as to why the information was not considered. This document indicated that the Student did have a disability that affected XXXX focus and ability to complete tasks, and would typically be considered a critical piece of “information from a variety of sources” that requires review under the Section 504 regulation.

Allegation 3: Failure to Appropriately Evaluate Students District-wide

As discussed above, when evaluating the Student, the District utilized an internal form that contained an inaccurate definition of “substantially limits.” The evidence indicates that this is a standard form used throughout the District and has been used when evaluating all students who may be eligible for services under Section 504.

The District does not require its schools to document which students were determined ineligible to receive services under Section 504. At OCR’s request, the District conducted an informal survey of its schools and found that at least 27 students were evaluated using this standard and found ineligible for Section 504 services. While complete documentation has not been gathered on these students, brief summaries indicate that numerous students were denied services under Section 504 for reasons including that these students were academically successful without a Section 504 plan or performing at or above grade level without any modifications.³ The vast majority of these summaries show that some school administrators may not have been looking at the entire range of major life activities that may be impacted by a student’s disability when making eligibility determinations under Section 504. At least 15 schools in the District appear to be only considering whether a student is performing below average on assessments or academically as the primary criteria for qualification for services under Section 504.

Conclusion

On December 5, 2013, the District signed the enclosed agreement which, when fully implemented, will resolve the concerns identified. The provisions of the agreement are aligned with the issues raised by the Complainant and by OCR, information obtained during the course of OCR’s investigation, and are consistent with the applicable regulations. OCR will monitor implementation of the agreement.

This letter is a resolution letter issued by OCR to address an individual OCR case. Resolution letters contain fact-specific investigative findings and dispositions of individual cases. Resolution letters are not formal statements of OCR policy and they 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. Please be advised that the Complainant may file a private suit in federal court whether or not OCR finds a violation.

³ The District’s summaries indicated that various students were determined ineligible for Section 504 plans for the following sample reasons: 1) only the student’s “behavior, not academics were impac[t]ed by XX diagnosis of ADD;” 2) a student was “academically ineligible – A/B/ honor roll student;” 3) concluding from teachers that accommodations were unnecessary because a student was “honor roll.”

Please be advised that the District may not harass, coerce, intimidate, or discriminate against an individual who has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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 OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Ms. Jan Gray at (202) 453-6028 or via e-mail at Jan.Gray@ed.gov or Ms. Deborah Kelly at (202) 453-5919 or via e-mail at Deborah.Kelly@ed.gov.

Sincerely,

/S/

Rachel Glickman
Team Leader
District of Columbia Office

Enclosure