



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, D.C.

March 11, 2014

Via First Class U.S. Mail

Dr. Ethan Lenker,
Superintendent
Pitt County Schools
1717 West Fifth Street
Greenville, NC 27834

Re: OCR Complaint No. 11-13-1266
Letter of Finding

Dear Dr. Lenker:

This letter is to notify you of the resolution of the complaint that was filed by the Complainant on behalf of the Student and his mother, with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department), on June 21, 2013. In the complaint the Complainant alleged that the Pitt County School System (the District) discriminated against the Student on the basis of disability (Attention Deficit Hyperactivity Disorder (ADHD)). Specifically, the Complainant alleged that the District denied the Student a free appropriate public education (FAPE) by:

1. Failing to evaluate the Student after receiving information from the parent that the Student had a new diagnosis of Oppositional Defiant Disorder (ODD); and
2. Failing to make a manifestation determination when, on April 24, 2013, the Student, who is a student with a Section 504 Plan, received five (5) days of out of school suspension resulting in a removal from school in excess of ten (10) days.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (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 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), 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 educational systems. Because the District is a recipient of Federal financial assistance and is a public entity, it is subject to the provisions of Section 504 and Title II.

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

Following its investigation, OCR found insufficient evidence of disability discrimination with regard to the allegation that the District failed to make a manifestation determination when, on April 24, 2013, the Student, who is a student with a Section 504 Plan, received five (5) days of out of school suspension resulting in a removal from school in excess of ten (10) days. However, OCR identified compliance concerns regarding the allegation that the District failed to evaluate the Student after receiving information from the parent that the Student had a new diagnosis of ODD. The District has agreed to take action to address the concerns identified, as set forth in this letter and in the enclosed resolution agreement (the Agreement). OCR will monitor the Agreement, which when fully implemented will resolve the compliance issues identified with respect to this allegation. An explanation of our analysis and conclusions follows.

Background

The Student attended eighth grade at the School during the 2012-2013 school year. The Student is identified as a student with a disability (ADHD) and receives related aids and services under a Section 504 Plan (the Plan). On March 22, 2013, the team recommended extended time and preferential seating as the services necessary to meet the Student's individual educational needs.

On April 24, 2013, the Student received a disciplinary referral for failure to comply [with instructions]. <XXXX SENTENCES REDACTED XXXX>. As a result, the assistant principal (AP 1) assigned the Student a one (1) day out of school suspension (OSS). Later that day and after investigating the incident, it was discovered that the Student's conduct was more serious and more purposeful than initially thought and the Principal determined that a five (5) day OSS sanction was more appropriate. Because the Student already served a cumulative total of eight (8) days OSS, a manifestation determination meeting was scheduled for the next day. AP 1 called the Student's mother to notify her about the sanction and the manifestation determination meeting. During the phone conversation the Student's mother reported to AP 1 that the Student had recently been diagnosed with ODD. AP 1 noted this information about ODD on the discipline referral form and in the electronic discipline record.

On April 25, 2013, the Student's mother dis-enrolled the Student from the District and therefore the manifestation determination meeting did not occur. Subsequently, on May 21, 2013, the Student's mother re-enrolled the Student in the School.¹ Upon his return, school administrators decided to reduce the five (5) day suspension to a one (1) day OSS and considered April 24th as the day the Student served the OSS. On May 24, 2013, the Student was involved in another incident in which he failed to comply with a teacher's instruction and a different assistant principal (AP 2) proposed a five (5) day OSS sanction. The School convened a Section 504 and Manifestation Determination meeting on the same day. The Section 504 Chair told OCR staff that the team reviewed the Student's grades, behavioral concerns and his complete discipline record. The Student's mother asserts that she once again made representations at the meeting that the Student had recently been diagnosed with ODD. School staff confirmed this fact. The Section 504 Chair told OCR she could not remember if the team had a copy of the Student's Clinical Assessment/Diagnostic Assessment form (the Assessment), dated April 2, 2013. The Assessment, a copy of which the District provided to OCR, noted a primary diagnosis of ADHD, with an additional diagnosis of ODD. When OCR sought confirmation that the team reviewed

¹ The Student was not enrolled in a District school from April 25 to May 21.

the Student's psychological report (as noted on the Section 504/Manifestation Determination form), the Chair responded, "I believe this is the one Mom spoke of [sic]" initially, seeming to refer to the Assessment.² OCR staff asked the Chair whether the team considered the information it received about ODD, and the Chair replied, "No." The team concluded the Student's behavior that led to the May 24th discipline referral was not a manifestation of the Student's disability and imposed the sanction.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. §104.33 requires that school districts provide students with disabilities with a FAPE. This means that school districts must provide students with disabilities with regular or special education and related aids and services that are designed to meet the individual educational needs of a student with a disability as adequately as they meet the needs of non-disabled persons. The Section 504 regulation, at 34 C.F.R. §104.35(a), requires school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement.

The Section 504 implementing regulation at 34 C.F.R. §104.35 (c) states that an evaluation of an individual who is believed to need special education or related services must use established standards and procedures, including (1) drawing upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establishing procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensuring that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensuring that the placement decision is made in the least restrictive environment.

Pursuant to the Section 504 implementing regulation at 34 C.F.R. §104.35 (d), a recipient shall establish procedures for periodic re-evaluation of those who have been provided special education and related services. The Section 504 implementing regulation requires the District to conduct a re-evaluation (including, where appropriate, a manifestation determination) if the District contemplates a significant change in placement, including a long-term suspensions of more than 10 days (and, in some cases, cumulative short-term suspensions exceeding 10 days within a school year). Pursuant to Section 504, if the group (after conducting a Section 504 compliant re-evaluation) determines that the misconduct is not a manifestation of the student's disability, the school district may move forward with the proposed discipline in the same manner as for similarly situated non-disabled peers; otherwise, the team must continue the evaluation and determine whether the student's current educational placement is appropriate. OCR interprets

² The District's written narrative response to OCR indicated that the Assessment had been provided to XXXX when the Student's mother re-enrolled him on May 21st. OCR interviewed XXXX who denied receiving the Assessment on May 21st. However, XXXX stated that the Student's mother provided her a copy of the Assessment at the end of the school year and that XXXX forwarded it to the high school the Student attended after eighth grade. When OCR questioned AP 2 about the Assessment and whether the team had a copy of it for the meeting, he stated he remembered seeing some "forms" provided by the Student's mother. He went on to state that the form was from "some type of medical provider," such as a doctor, psychiatrist, or counselor. He told OCR that when he reviewed the information it did not appear to him to definitively conclude a diagnosis, but rather, the information noted that it was suspected the Student had ODD "tendencies."

the Section 504 and the Title II regulations to impose the same procedural requirements as with respect to manifestation determinations.

Analysis and Conclusion

Allegation 1: *Failure to provide FAPE by not evaluating the Student after receiving information from the parent about a new diagnosis of ODD.*

The Complainant and the Student's mother alleged the District failed to evaluate the Student after his mother informed school officials of a new diagnosis, ODD. OCR identified compliance concerns that the team did not consider the Student's diagnosis of ODD when evaluating him on May 24th, and in turn failed to consider what additional supports or services the Student may need as a result of the diagnosis.

OCR finds that the School was placed on notice by the Student's mother, both at the May 24th meeting and as documented on the Student's April 24th discipline record, about the ODD diagnosis. OCR determined that the District failed to consider the information provided by the Student's mother related to a possible ODD diagnosis and failed to evaluate the Student for additional or different related aids and services given the information the Student's mother provided.

Although the team met to evaluate the Student on May 24th, there is no evidence that, during the meeting, the team considered the information from the Student's mother that the Student was diagnosed with ODD. As described in more detail above, the Section 504 Chair acknowledged that the team had information about the Student's ODD diagnosis but the team did not consider it in making a determination.

Because the School failed to consider whether the Student was eligible for services under the ODD diagnosis, OCR identified concerns that the Section 504 team failed to make an individualized decision regarding the Student's placement based on his educational needs. As mentioned above, the District agreed to take action to address the concerns identified in the enclosed agreement. OCR will monitor the Agreement, which when fully implemented, will resolve the compliance issues identified with respect to this allegation.

Allegation 2: *Failure to provide FAPE by not conducting a manifestation determination meeting.*

The Complainant and the Student's mother alleged that the District failed to conduct a manifestation determination meeting for a disciplinary incident that occurred on April 24, 2013.

Based on the evidence, OCR makes the following determinations. In this instance, although the Student's April 24th five (5) day OSS referral would have resulted in a significant change of placement, the Student's mother removed him from the District on April 25th; thus the District was unable to continue with its proposed evaluation on April 25th. Also, when the Student returned in May 2013, the Principal revised the original OSS from five (5) days to one (1) day OSS. Therefore, with this revision, the Student served a total of nine (9) days OSS, prior to the May 24, 2013 incident. According to the documentary evidence and staff interviews, the Student was not subjected to a significant change in placement as a result of the April 24 disciplinary

removal, and thus the school was not required to convene a manifestation determination meeting in April 2013.

However, as a result of the May 24, 2013 incident, when the District did convene a Section 504/Manifestation Determination meeting, OCR found concerns, specifically noted above, that the District failed to consider the information provided by the Student's mother related to a possible ODD diagnosis and failed to evaluate the Student for additional or different related aids and services given the information the Student's mother provided. OCR has included in the Agreement a provision requiring the District to revisit the manifestation determination based on the District's reevaluation, particularly in light of the ODD diagnosis. Nevertheless, in regard to this allegation, related to the District's actions as a result of the April 24th incident, OCR finds insufficient evidence to support the Complainant's assertion that the District violated Section 504 and Title II as alleged.

Conclusion

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. Please be advised that the District may not harass, coerce, intimidate, discriminate, or retaliate against an individual because that individual filed a complaint or participated in any manner in an investigation, proceeding, or hearing under the laws OCR enforces. 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.

We wish to thank the District, and, in particular, District counsel, Mr. Robert Sonnenberg, for the District's cooperation and assistance as we investigated this matter. If you have any questions, feel free to contact either Josie Evola at (202) 453-5908 or josie.evola@ed.gov or Kendra Riley at 202-453-5905 or kendra.riley@ed.gov.

Sincerely,

Kay Bhagat
Team Leader, Team III
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Mr. Robert Sonnenberg, District Counsel (Via electronic mail)