



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

April 9, 2014

Dr. David Holleran
Superintendent
Mathews County Public Schools
P.O. Box 369
Mathews, VA 23109

Re: OCR Complaint No. 11-14-1017
Letter of Findings

Dear Dr. Holleran:

This letter is to notify you of the resolution of the complaint that was filed with the U.S. Department of Education (the Department), District of Columbia Office for Civil Rights (OCR) on October 22, 2013, against Mathews County Public Schools (the Division), in particular XXXX (the School). The Complainant alleged the Division discriminated against her daughter (the Student) based on disability XXXX by failing to provide the Student with a free appropriate public education (FAPE). Specifically, the Complainant alleged that the Division (1) failed to follow appropriate procedures for evaluation and placement of the Student, including at a XXXX meeting, and (2) lacks a system of procedural safeguards through which parents may challenge decisions related to the identification, evaluation, or placement of students with disabilities under Section 504.

OCR is responsible for enforcing certain Federal civil rights statutes and regulations, including 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, regardless of whether they receive federal financial assistance from the Department. Because the Division is a public entity and receives financial assistance from the Department, it is subject to the provisions of these laws and we have jurisdiction over it.

OCR concluded that there is insufficient evidence that the Division discriminated against the Student as alleged in Allegation 1. However, OCR found that the Division lacks a system of

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procedural safeguards that complies with the requirements of Section 504. In reaching this conclusion, OCR reviewed documents provided by the Division and the Complainant and interviewed School and Division staff, including the Assistant Superintendent, the Section 504 Coordinator, and the Principal of the School. Additional details regarding information gathered and OCR's analysis of that information are below.

Allegation 1

The Section 504 regulation at 34 C.F.R. § 104.33 requires school districts to provide a free appropriate public education (FAPE) to each qualified individual with a disability in the school district's jurisdiction, regardless of the nature or severity of the individual's disability. 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 persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to the procedural requirements of Section 504 pertaining to the educational setting, evaluation and placement, and the provision of procedural safeguards. OCR interprets the regulation implementing Title II as imposing substantially similar requirements to those found in the regulation governing Section 504. The Section 504 regulation, at 34 C.F.R. § 104.35, requires a school district to evaluate a student 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 student in regular or special education and any subsequent significant change in placement. An eligibility determination must be made by a group of knowledgeable persons who draw upon information from a variety of sources.

The Student is in the XXXX at the School. She was diagnosed with XXXX in November of her XXXX grade year, and the Complainant provided documentation of the diagnosis to the School. Under the Division's procedures, the first step when a student is experiencing difficulties is to convene a Child Study Team. If that team suspects the student may have a disability, the team refers the student for an evaluation under Section 504 or the Individuals with Disabilities Education Act. After receiving information regarding the Student's XXXX diagnosis, a Child Study Team met on XXXX. That team considered the Student's diagnosis, but concluded that the Student's XXXX did not rise to the level of constituting a disability in that it did not substantially limit a major life activity. Therefore, the team did not refer the Student for additional evaluation or create a Section 504 Plan for the Student. The team instead recommended that the Student implement certain organizational strategies such as the use of binders and folders.

The Complainant subsequently raised additional concerns about the Student's organization and attentiveness due to XXXX. At a XXXX Child Study Team meeting, the Complainant asked the team to consider a Section 504 Plan. The team included three of the Student's teachers, the School counselor, the Director of Special Education, the Principal, the Student, and the Complainant. Again, the team determined that the Student's XXXX did not substantially limit a major life activity and that the Student was therefore not eligible for a Section 504 Plan. The Complainant acknowledged that she received information about her right to challenge that decision through a due process proceeding.

Over the next two years, Child Study Teams convened regularly, generally at the Complainant's request, to monitor the Student's progress. The outcomes were typically recommendations of steps the Student could take, such as the use of organizational folders and the use of a resource study period. The Complainant recently raised concerns about the Student's poor performance on tests despite high achievement on homework and classwork. Records from a XXXX Child Study Team meeting reflect that the Section 504 Coordinator asked the Student if she believed any formal testing accommodations such as extended time, breaks during testing, or proximity to the proctor would be helpful if formalized in a Section 504 Plan; the Student responded that she did not. The Complainant told OCR that the Student "may well have" said that. That meeting was attended by a group of knowledgeable persons, including the Complainant, the Student, the Section 504 Coordinator, the School counselor, and multiple teachers.¹

Division and School staff reported to OCR that the Child Study Teams continued to monitor the Student's progress. They said that there are a number of students with XXXX in the Division who have been found to be eligible for a Section 504 Plan. However, in the Student's case, the Child Study Teams believed that the Student was successful using only general education strategies that may be used with all students.

Except in extraordinary circumstances not present in this case, OCR does not second-guess individual evaluation and other educational decisions made by a school system, but merely ensures that such decisions are made consistent with the process requirements of Section 504. Individuals have the option of filing for a due process proceeding to challenge the substance of such decisions. Although the Complainant disagrees with the Division's decision that the Student is not eligible as a student with a disability under Section 504 and objects to the "voluntary" recommendations made by the Child Study Teams, OCR finds that the decisions were made by groups of knowledgeable people (including the Complainant) and were based on information provided by teachers and the Complainant and the Student. The Division notified the Complainant of her right to file for due process to challenge the decisions. OCR finds that there is insufficient evidence to support a finding that the Division discriminated against the Student as alleged here.

Allegation 2

The Section 504 regulation at 34 C.F.R. § 104.36 requires school districts to 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. The Title II regulation at 28 C.F.R. § 35.130(a) prohibits a public entity from denying a qualified person with a disability the benefits of its services, programs or activities. The standards adopted by Title II of the ADA were designed not to restrict the rights and remedies available under Section 504. OCR has determined that the Title II regulations

¹ The Complainant recently told OCR that she had obtained additional testing of the Student from an independent evaluator that shows a XXXX. She acknowledged that she had never requested such testing from the Division. Most recently, the Complainant informed OCR that she had presented the results of the independent testing to Division staff and that the Student now has a Section 504 plan.

applicable to the issues raised in this complaint do not provide greater protection than the applicable 504 regulations and has, therefore, applied the relevant Section 504 standards in addressing this allegation.

OCR has determined that the Division's complaint procedures for contesting the identification, evaluation, or placement of students with disabilities do not comply with Section 504 and Title II. The Division's procedures through which parents may challenge a decision regarding the identification, evaluation, and/or placement of their child, as set forth in the Division's Procedural Safeguards, direct parents to submit a request for an impartial hearing to the Division's Section 504 Coordinator. The procedures indicate that the Section 504 Compliance Officer or designee will sit as hearing officer. The Section 504 Coordinator told OCR that the hearing officer would be herself, the Superintendent, or the Assistant Superintendent. In all cases, then, the hearing officer is a Division employee. The procedures then allow for parents who disagree with the decision of the hearing officer to request a review and appeal. Again, that appeal must be filed with the Section 504 Coordinator.

OCR has consistently interpreted the impartiality requirement of 34 C.F.R. § 104.36 to bar school district employees and district officials, including school district board members, from serving as hearing or review officers. The impartiality requirement incorporates traditional notions of fundamental fairness and due process, which require that district employees and school board members be disqualified from serving as hearing or review officers. Because of their professional and financial relationship with the district and the potentially large financial consequences to the district that may result from a Section 504 hearing, district employees and board members cannot be considered neutral, disinterested fact finders. An employee such as a 504 Coordinator, in particular, cannot be expected to be impartial when policies developed and/or administered by that employee or decisions he or she made and/or approved could be at the heart of the dispute. In addition, Section 504 hearings differ from other types of hearings, such as disciplinary hearings, where administrators and board members may be empowered to act as hearing officers because the disputed issues require only consideration of the institution's own policies. In Section 504 hearings, in contrast, the hearing officer must construe independent legal standards and may be called upon to conclude that the district's policies and procedures conflict with Federal law.

Thus, OCR determined that the Division's procedural safeguards do not comply with the requirements of Section 504 and Title II in that they do not provide for an impartial hearing or review procedure. To address OCR's concerns regarding Allegation 2, the Division entered into a Resolution Agreement, a copy of which is enclosed. OCR will monitor the Division's implementation of the Resolution Agreement, full implementation of which will resolve OCR's concerns. Accordingly, OCR has closed its investigation of this complaint, effective the date of 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.

Please be advised that no person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of OCR case resolution, the individual may file a complaint alleging such treatment. Also, 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, information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We appreciate the cooperation of Division staff, most notably that of Louise LeBron, Director of Special Education & Federal Programs, in the resolution of this complaint. If you have any questions or concerns regarding this letter, please contact Martha Russo at 214-661-9622 or martha.russo@ed.gov or Betsy Trice at 202-453-5931 or betsy.trice@ed.gov.

Sincerely,

/S/

Alessandro Terenzoni
Team Leader, Team II
District of Columbia Office
Office for Civil Rights

Enclosure