



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, DC

February 19, 2015

Richard Rosenberger, Superintendent
Anderson County School District 2
10990 Belton-Honea Path Highway
Honea Path, South Carolina 29654

RE: OCR Complaint No. 11-14-1186
Resolution Letter

Dear Dr. Rosenberger:

The purpose of this letter is to inform you of our disposition of the above-referenced complaint, which was filed with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education, on April 11, 2014, against Anderson School District 2 (the District). The Complainant filed the complaint on behalf of her son (the Student), who attended the District's XXXX School until April 2014. The Complainant alleged that the District discriminated against the Student on the basis of disability XXXX by failing to properly evaluate him for and provide him with appropriate special education and related aids and services (e.g., in a Section 504 Plan), resulting in District staff expelling him from the School on XXXX, and assigning him to an alternative school.

As we have previously informed you, 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, it is subject to the provisions of the above laws and we have jurisdiction over it. Because the Complainant alleged discrimination under the above laws, we have jurisdiction over the allegations.

Legal Standards

Failure to Properly Evaluate the Student

With respect to the alleged failure to properly evaluate the Student for and provide him with appropriate aids and services, the applicable legal standard is that Section 504 requires school systems to provide students with disabilities with a free and appropriate public education (FAPE), that is, regular and/or special education and related aids and services that are designed to meet these students' educational needs as adequately as they meet the educational needs of students without disabilities. OCR's investigation of an allegation that a school district has failed to provide a student with FAPE is normally limited to ensuring that the school district has complied with the process requirements of Section 504 relating to educational setting, evaluation and placement, and procedural safeguards. For example, in determining whether a school system has failed to promptly and properly evaluate a student, we look to whether the school system: (1) had before it evidence indicating that the student might have a disability for which Section 504 might require that the school system provide the student with special education or related aids and services;¹ (2) if so, promptly determined whether the student needed to be referred for additional evaluation; and (3) if so, promptly conducted an evaluation and determined whether the student was eligible for services as a student with a disability pursuant to Section 504. We interpret Title II as imposing similar requirements.

Expulsion of the Student

With respect to the expulsion element of the allegation, the above Section 504 FAPE standard also requires school systems to conduct an evaluation of any student who, because of a disability, needs or is believed to need a change in special education or related services before making any significant change in the student's placement. Under Section 504, long-term suspensions of more than 10 days and, in some cases, cumulative short-term suspensions exceeding 10 days within a school year constitute a significant change of placement prior to which a reevaluation process (that includes a manifestation meeting) must be conducted. The first step in this reevaluation process is to properly determine whether the misconduct leading to the disciplinary action was a manifestation of the student's disability, or resulted from the school system's failure to develop or fully implement a Section 504 Plan, by ensuring that the determination is made by a group of persons that includes individuals knowledgeable about the student, all relevant evidence in the school system's possession, and the student's disability. This group may be the

¹ We note that this standard does not provide that a student *must* be an individual with a disability for a school system to be required to determine whether it should evaluate the student, but only that the school system have before it information that the student *might* have a disability.

same group that made the initial placement decision for the student. If the group determines that the misconduct was neither a manifestation of the disability nor the result of the school system's failure to develop or fully implement a Section 504 Plan, the student may be disciplined in the same manner as similarly situated students without disabilities are disciplined. On the other hand, if the group determines that the misconduct was a manifestation of the disability or the result of the school system's failure to develop or fully implement a Section 504 Plan, the student may not be disciplined, and the group must continue the evaluation process to determine if the student's current placement is appropriate and, if not, provide the student with an appropriate placement. We interpret Title II as imposing similar requirements.

Analysis

Failure to Properly Evaluate the Student

With respect to the alleged failure to properly evaluate the Student for and provide him with appropriate aids and services, the evidence indicates that, as of November 2013, the District's knowledge of the Student included the following.

1. During the 2010-2011, 2012-2013, and 2013-2014 school years, it had provided the Student with academic and *behavioral* interventions through the Response to Intervention (RTI)/Student Intervention Plan (SIP) process.
2. During the 2013-2014 school year, it had disciplined the Student 17 times for behavior such as failing to follow directions (five times), being disruptive (five times), excessive talking (three times), and failure to remain in his seat (twice).
3. It had placed the Student on behavior contracts on September 25 and November 5, 2013, and had provided him with accommodations such as nonverbal cues for redirection, permission to see a counselor when he was upset or angry, "preventive measures," preferential seating, and strategic placement vis-à-vis other students to minimize distraction and inappropriate behavior.
4. The Student has "a focus problem" and is "easily distracted" (October 8, 2013 SIP), and that "focus is an issue for him" (November 5, 2013 SIP).
5. The Student had been diagnosed with XXXX and was taking medication for it.

Based on the above, we find that the District had before it evidence indicating that the Student might have a disability for which Section 504 and Title II might require that it provide the Student with special education or related aids and services. Yet the District failed to refer the Student for additional evaluation, conduct an evaluation, or make a determination regarding whether the Student was eligible for services as a student with a disability pursuant to Section 504 and Title II.

We note that the Complainant's attendance at a December 3, 2013, RTI meeting at which the District determined that the Student did not need to be evaluated for Section 504 or Title II eligibility is not a basis upon which the District can be excused from the above evaluation requirements, particularly in light of the Complainant's assertion that she only agreed that the Student did not need to be evaluated for academic services – she believed that the Student did need to be evaluated for *behavior-related* services under Section 504 and Title II.

We also note that the fact that the Student was receiving services pursuant to a SIP did not alter the requirement that the District promptly conduct an evaluation of the Student and determine whether he was eligible for services as a student with a disability, as almost all of SIP services were not directly related to the Student's XXXX and the RTI/SIP provisions submitted by the District (in Exhibit B) don't provide Section 504 protections, e.g., they include no hearing, appeal, or other due process procedures or rights.

Finally, although the District asserted, on the second page of its "Responsive Narrative" (Exhibit A of its submissions), that it adheres to a South Carolina publication which states that the RTI/SIP process "cannot be used to delay or deny the provision of a full and individual evaluation [for services as an individual with a disability]," the above discussion indicates that the effect of the District's actions was to deny the Student such a School evaluation during the 2013-2014 school year.

Expulsion of the Student

With respect to the expulsion element of the allegation, the evidence indicates that, on April 7, 2014, the District expelled the Student from the School. The evidence establishes, and the District admits, that it failed to conduct an evaluation/reevaluation of the Student prior to expelling him, despite the evidence discussed above and the fact that the expulsion constituted a significant change in the Student's placement.

Conclusions

Based on the above discussion, we find that the District is in violation of Section 504 and Title II with respect to the allegation because of its failure to properly evaluate the Student and determine whether he was eligible for services as a student with a disability, and its failure to evaluate/reevaluate the Student prior to making a subsequent significant change in the Student's placement, i.e., prior to expelling him from the School and assigning him to an alternative school.

Resolution

To address OCR's compliance concerns, the District has signed the enclosed Resolution Agreement, pursuant to which it agrees to: (1) promptly evaluate the Student to determine whether the conduct that gave rise to the District's Spring 2014 expulsion of him from XXXX (the School) and placement in the alternative school was a manifestation of the Student's disability; (2) if so, expunge the Student's disciplinary and all other records, place the Student in the School, conduct an evaluation of the Student to determine whether changes are needed regarding the special education or related aids or services provided by the alternative school and, if changes are needed, make them, and provide those compensatory education services that it determines the Student needs; (3) with respect to similarly situated School students, determine whether they may be in need of services as students with disabilities and, if so, evaluate them and, if eligible, develop and implement Section 504 Plans and/or IEPs for them; and (4) prior to imposing disciplinary action against any School student with a disability that would constitute a significant change in the student's placement, follow the procedures described above in the second part of the Legal Standards section.

The provisions of the agreement are aligned with the complaint and information obtained during the course of OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the District's implementation of the Agreement to ensure that the District fully complies with it.

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.

Please be advised that the District may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Please note that, 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.

If you have any questions about this letter or the outcome of this complaint, please contact Peter Gelissen, the OCR attorney assigned to this case, at (202) 453-5912 or peter.gelissen@ed.gov.

Sincerely,

/S/

Dale Rhines
Program Manager
District of Columbia Office
Office for Civil Rights

Enclosure