



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

March 12, 2015

Dr. Aaron C. Spence
Superintendent
Virginia Beach City Public Schools
2512 George Mason Drive
P.O. Box 6038
Virginia Beach, Virginia 23456-0038

Re: OCR Complaint No. 11-14-1316
Resolution Letter

Dear Dr. Spence:

The purpose of this letter is to inform you of the outcome of the above-referenced complaint filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department) against the Virginia Beach City Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School). The Complainant alleged that the Division discriminated against the Student on the basis of disability when it denied his request to receive credit for an alternative physical education course taken over the summer and required that he enroll in physical education during the 2014-2015 school year in order to remain in the School.

OCR initiated an investigation of this complaint pursuant to its authority to enforce 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 recipient of Federal financial assistance from the Department and is a public entity, it is subject to the provisions of Section 504 and Title II.

To investigate this complaint, OCR reviewed documentation submitted by the Complainant and the Division. OCR also interviewed Division staff. After careful consideration of all information gathered, OCR concludes that there is insufficient evidence to find that the Division violated Section 504 as alleged. However, in the course of the investigation, OCR identified a violation of Section 504 with regard to the Division's failure to reevaluate the Student. A discussion of OCR's findings and conclusions follows.

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

Background

The Student is currently in the tenth grade and is enrolled in the International Baccalaureate Middle Years Program (IBMY Program) at the School. The IBMY Program operates like a school within a school and covers grades nine and ten, leading up to the IB Diploma Program in grades eleven and twelve at the School. The Student began the program in the ninth grade. The School is not the Student's home school, which means that if he were not enrolled in the IBMY Program he would attend a different high school based on zone.

The Student has been determined eligible for services under Section 504 for a XXXX allergy. When the Student first enrolled in the IBMY Program in September 2013, the Student's Section 504 team convened a meeting to modify a previously existing 504 plan. The Student also has been diagnosed with XXXX; however, the Section 504 plan in place does not address the Student's XXXX.

Beginning in September 2014, following guidance from the International Baccalaureate Organization, the IBMY Program changed the curriculum requirements. The change required students in the IBMY Program to take six required courses, instead of the previously required eight courses. The six required courses include the four core subjects – Math, Science, English, and Social Studies – and a foreign language course. The sixth required course is the student's choice between Physical Education/Health and Art. The school day has eight blocks, so the change from eight to six required courses allows students in the IBMY Program to choose two electives from the other courses offered at the School.

The IBMY Program staff advised all students in the IBMY Program of this curriculum change in January 2013 by speaking with the students in their classrooms. They also explained to the students at the time that they would no longer be able to take an online PE class during the summer in lieu of taking a PE/Health class during the school year because the online class would not satisfy the new IBMY Program curriculum requirements. The IBMY Program staff also checked all student schedules, including the Student's schedule, in the spring to ensure that they met the new requirements.

The Student was among those students who had received credit for an online PE course taken during the summer before his ninth grade year. During his ninth grade year, the Student had a study hall block in place of the block he otherwise would have taken PE. Despite the guidance about the curriculum change, the Student completed online PE again during the summer of 2014 before his tenth grade year. On August 18, 2014, the Complainant wrote a letter to the Coordinator of the IBMY Program (Coordinator) requesting that the Student be granted an exception to the new curriculum requirements, so that he could receive credit for the online PE course he had already completed and be exempt from the requirement to take PE/Health during his tenth grade year. The Complainant requested that the Student be permitted to have a study hall block instead of PE/Health. The Complainant's letter was accompanied by a note from the Student's doctor, which stated that the Student has multiple asthma flare ups yearly that can cause him to miss significant amounts of school. The doctor's note further advised that permitting the student a study hall block would allow him to take extra medications so that he could remain in school during these exacerbations. There was no indication from either the

Complainant or the doctor that the Student's asthma would interfere with his ability to participate in PE.

The Division's documentation did not include a written response from the Coordinator to the Complainant's August 18 letter. However, the Division did provide an email from the principal of the School dated September 9, 2014. The email indicated that he was following up on a meeting with the Complainant during which she had requested a waiver of the PE/Health requirement. The principal explained that, after discussing the IBMY Program curriculum requirements with the Coordinator, he was able to offer the Student the opportunity to take Art instead of PE/Health, but that the Student would need to take one or the other to meet the curriculum requirements. According to the Coordinator, ninth grade students are required to have a study hall block in their schedules. That is not required of tenth grade students who may fill that period with an elective. The Student is enrolled in two electives this year – Computer Science and Advanced Band. At the start of the year, he would have had the option to drop one of the electives to permit time for a study hall. Thus, the Student had an option that would enable him to meet the IBMY Program requirements and still have a study hall block.

The Student has experienced a high rate of absences during the first half of the school year and is significantly behind in his course work. His attendance records for the 2014-2105 school year reflect that he has been absent between 19 and 39 times from each class block, largely due to illness. The Complainant told OCR that the Student had been absent due to his XXXX. He also missed class, on a number of occasions either for the whole day or several consecutive class blocks because of medical appointments. He currently has incompletes for the second semester in all classes except foreign language. In early September 2014, the School sent a letter to the Student's parents offering to schedule a Section 504 meeting to review the Student's Section 504 plan. The Coordinator explained to OCR that they were aware of the Student's XXXX and recognized that the Student's Section 504 plan from 2013 did not address his XXXX. As the year progressed, the School also was aware that the Student was falling behind due to his high number of absences. According to the Student's Counselor, the parents never responded to the letter offering to set up a meeting. The Counselor told OCR that he sent two subsequent letters offering to have a 504 meeting. The parents only recently, on January 9, 2015, wrote to the Counselor asking to schedule a 504 meeting to include the principal of the School and the Coordinator. The Counselor and the Coordinator both explained to OCR that a Section 504 meeting had not been held to date because the Complainant never responded to the invitations to meet.

Legal Standard

Section 504 requires a public school district to provide a free appropriate public education (FAPE) to each qualified individual with a disability. To provide a FAPE, a school division must meet the individual needs of a student with a disability as adequately as it meets the needs of students without a disability. To satisfy the FAPE requirements described in the Section 504 regulation, the educational institution must comply with several evaluation and placement requirements, afford procedural safeguards, and inform students' parents or guardians of those safeguards. 34 C.F.R. §§ 104.35(a), 104.36.

More specifically, the Section 504 regulation, 34 C.F.R. § 104.35(a), requires a recipient to conduct an evaluation of any person 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 person in regular or special education and any subsequent significant change in placement. In addition, §104.35(c) states that in interpreting evaluation data and in making placement decisions, a recipient shall (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 the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

Analysis

OCR has not identified a compliance concern with regard to the School's decision to deny the Complainant's request to waive the in-class PE requirement to allow time for a study hall period. This was a curriculum requirement that applied to all students in the IBMY Program, and the Student maintained the option of taking one less elective class in order to allow time for a study hall period.

However, OCR has identified a violation under Section 504 with respect to the School's failure to re-evaluate the Student to determine if he required a change in services in order to meet his individual needs. The Section 504 regulatory requirements discussed above encompass a duty for the school division to re-evaluate a student when there is reason to believe the Student's current placement or services are not adequately meeting the student's individual needs. Further, although it is best practice to invite a parent or guardian to participate in this process, the Section 504 procedural requirements do not require that a parent or guardian participate in a Section 504 meeting. Thus, if a parent or guardian does not respond to an invitation to schedule or attend a Section 504 meeting, that does not relieve the school division of its obligation to hold a meeting with a group of knowledgeable people to re-evaluate or consider whether changes to a student's services are required to meet the student's individual needs.

In this case, the School was aware that the Student's Section 504 plan needed to be re-visited early in the 2014-2015 school year. The Coordinator acknowledged to OCR that she was aware of the Student's XXXX. The doctor's note attached to the Complainant's August 18, 2014 letter further highlighted the severity of the Student's XXXX, as well as the likelihood that it would impact his ability to function at school. The Counselor sent the Student's parents one or more letters in the fall of 2014 offering to schedule a Section 504 meeting, but when the parents did not respond, no meeting was scheduled. In an email exchange dated October 15, 2014 between the Coordinator and the Counselor, the Coordinator forwarded concerns raised by the Complainant regarding testing, and the Coordinator wrote to the Counselor, "Have you had the 504 meeting as I suggested at the beginning of the school year?" Despite the School's awareness that a Section 504 meeting was needed to revisit the Student's Section 504 plan and that the Student was missing a significant amount of school and falling behind, the School failed to have a Section 504 meeting.

On March 10, 2015, the Division signed a Resolution Agreement to remedy this violation. OCR will monitor the Division's implementation of the Agreement. This concludes OCR's investigation of this complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the recipient type's compliance with any other regulatory provision or to address any issues other than those addressed in 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 the Division 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.

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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, feel free to contact Judy Briggs, Senior Investigator, at judy.briggs@ed.gov or (202) 453-5902 or Sara Clash-Drexler, Attorney, at sara.clash-drexler@ed.gov or (202) 453-5906.

Sincerely,

/S/

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