



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

March 16, 2015

Dr. Jamelle S. Wilson
Superintendent
Hanover County Public Schools
200 Berkley Street
Ashland, VA 23005

Re: OCR Complaint No. 11-15-1005
Letter of Findings

Dear Dr. Wilson:

This letter is to inform you of the disposition 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 6, 2014, against Hanover County Public Schools (the Division), in particular XXX (the School). Specifically, the Complainant alleged that the Division discriminated against the Student based on disability (XXXX) when:

1. The Division failed to evaluate her for related aids and services; and
2. The Division failed to ensure that the Student would be able to fully participate in the XXXX activity at the School.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities that receive or benefit from Federal financial assistance from the Department. OCR also has authority to enforce Title II of the Americans with Disabilities Act of 1990 (Title II), and its implementing regulation, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems, regardless of whether they receive Federal financial assistance from the Department. The Division is a recipient of Federal financial assistance and a public entity; therefore, OCR has jurisdiction over the Division pursuant to these laws.

OCR reviewed data submitted by the Division and the Complainant and conducted interviews with the Complainant. OCR found sufficient evidence that Allegation 2 was resolved during the course of the investigation and OCR found a violation with regard to Allegation 1. OCR also identified additional violations with regard to the Division's Section 504 Guidelines and Procedures. The Division entered into a resolution agreement, which, when fully implemented, will resolve the compliance concerns identified. OCR will monitor the Division's compliance with this agreement. A discussion of OCR's findings and analysis is below.

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

Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.33 requires school divisions to provide a free appropriate public education (FAPE) to each qualified individual with a disability in the school division'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 division 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. In interpreting evaluation data and in making placement decisions, the school division must draw upon information from a variety of sources, establish procedures to ensure that information obtained from such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Also, the Section 504 regulation at 34 C.F.R. § 104.36 requires that the school division establish and implement procedural safeguards that include an opportunity for the parents/guardians to request an impartial hearing with respect to actions regarding the identification, evaluation, or placement of students with disabilities.

As explained in the Frequently Asked Questions (the FAQs) of OCR's January 19, 2012 Dear Colleague letter, found at: <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>, implementation of a health plan for a student is insufficient if, in the creation of the health plan, the school division does not comply with the evaluation, placement, and procedural safeguard requirements of the Section 504 regulation. The FAQs advise that "[c]ontinuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school division's actions meet the evaluation, placement and procedural safeguard requirements of the FAPE provisions."

The regulation implementing Section 504, at 34 C.F.R. § 104.7, requires a recipient that employs fifteen or more persons to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints. When evaluating a recipient's Section 504 grievance process, OCR considers a number of factors, including whether the procedure provides for: 1) clear notice of how, when, and where to file a complaint; 2) a thorough and objective investigation of complaints, including the opportunity to present evidence; 3) designated and reasonably prompt timeframes for the major stages of the complaint process; 4) notice to the parties of the outcome of the complaint; and 5) appropriate due process.

Background

During the 2013-2014 school year, the Student enrolled in the Division as a first grader. Prior to enrolling in the Division, the Complainant and his wife met with the School's health services coordinator and with the School's Assistant Principal to inform them of the Student's food allergies. According to the Division, the Complainant and his wife described the Student's XXXX and explained that she was diagnosed with these allergies several years ago and can experience XXXX reaction. During the meeting, they created a school individual emergency health care plan (Health Care Plan). The Health Care Plan outlined a number of strategies to prevent the Student from experiencing an allergic reaction in the cafeteria, classroom, and at class events and parties. The Division and the Complainant confirm that the Complainant and his wife were not provided with notice of procedural safeguards in conjunction with this meeting. On October 2, 2014, the School's Assistant Principal e-mailed the Complainant forms for a "child student referral." On October 3, 2014, the Complainant contacted the School to inquire if the Student needed a Section 504 plan for her XXXX. According to the Student's teacher's telephone call log, the teacher "said no because all had been managed successfully through medical plans."

In anticipation of an XXXX activity at the School, the Complainant contacted the School to ensure that the Student would be able to safely attend. According to the Complainant, the School informed him that because the event was sponsored by the Parent Teacher Association (PTA) there would be "no accommodations" made for the Student and that he and his wife were not permitted to bring in peanut-free candy. During the course of the investigation, the Complainant and the Division worked collaboratively toward a resolution to permit the Student to attend the event. The Division provided OCR with a copy of an agreement, dated October 23, 2014, and signed by the Complainant and the School's Principal. The agreement outlined guidelines for the XXXX activity, which included a differentiated XXXX at each "candy stop" that is labeled "Allergy Aware" and contains candy that is accessible for students with food allergies and a note to all students with known food allergies, notifying them of the XXXX buckets. The agreement also provided for training of these guidelines to the volunteers working at the event and to PTA board members. In addition, the agreement stated that for future PTA events, parents/guardians of students with food allergies will receive written notification of how to ensure that students with food allergies receive necessary accommodations to participate in the events. In a November 19, 2014 telephone call with the Complainant, he confirmed to OCR that Allegation 2 was resolved, the Student was able to participate in the event, and he stated that he was "satisfied" with the result and that the Halloween activity went well.

Analysis

Allegation 1: The Division failed to evaluate the Student

As mentioned above, the Division is required to evaluate all students who need or are believed to need special education and related aids and services. The FAQs clarify that "the Section 504 regulation does not set out specific circumstances to trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances of each case."

Here, the Division was made aware of the Student's food allergies and of the severity of the food allergy (i.e., risk of XXXX) in August 2014. OCR determined that the Division had information that the Student had a disability (i.e., that is a substantial impairment of a major life activity) and had information that the Student needed related aids and services to ensure that she receive a FAPE.

While the Division developed a Health Care Plan for the Student around August 2014, OCR found that it failed to follow the procedural requirements of the Section 504 regulation, at 34 C.F.R. § 104.36. Specifically, the Division failed to notify the Complainant and his wife of their procedural safeguards, which provide an opportunity for them to have an impartial hearing with respect to actions regarding the identification, evaluation, or placement of the Student. As a result, OCR found sufficient evidence that the Division failed to evaluate the Student to determine eligibility under Section 504. To resolve these concerns, the Division entered into the enclosed resolution agreement.

Allegation 2: XXXX

As mentioned above, during the course of the investigation, the Division entered into an agreement with the Complainant to ensure that the Student could safely participate in the October 24 event and have equal access to participate in this event. The Complainant confirmed that the Student was able to participate in the event. According to OCR's *Complaint Processing Manual*, when OCR obtains credible information indicating that a complaint allegation has been resolved, there are no class-wide allegations, and no current allegations appropriate for further complaint resolution, OCR will close the allegation. As a result, OCR determined that the complaint allegation has been resolved and there are no current allegations for resolution, and is therefore closing this allegation, effective the date of this letter.

Other Concerns Identified

During the course of the investigation, OCR found that the Division's Section 504 Guidelines and Procedures (Section 504 Procedures) were in violation of Section 504 and Title II. Specifically, OCR found that the Section 504 Procedures incorrectly define the criteria that constitute a disability; improperly state that students who receive passing grades do not need services under Section 504; misstate the nature of special education that can be provided under Section 504; provide incorrect criteria that are necessary to evaluate students for eligibility under Section 504; and do not provide for equitable grievance procedures.

FAPE Concerns

The ADA Amendments Act of 2008 defines a disability as a physical or mental impairment that substantially limits one or more major life activities, which include caring for oneself, performing manual tasks, breathing, learning, concentrating, functions of the immune system, and endocrine functions. The Division's Section 504 Procedures state that "an impairment as defined by Section 504 may include any disability, long-term illness, or various disorder that 'substantially' reduces or lessens a student's ability to access learning in an educational setting

because of a learning-, behavior-, or health-related condition.” In contradiction with the ADA Amendments Act, the Division’s disability definition narrowly limits the term disability to an impairment that substantially limits the major life activity of *learning*, but does not include the other types of major life activities (such as breathing, caring for oneself, endocrine functions, etc.) that would also constitute a disability. As an example, a XXXX may result in a substantial impairment of the major life activity of breathing, but not the major life activity of learning, but nonetheless can still constitute a disability under Section 504. As a result, OCR found that the Division’s definition is inconsistent with Section 504 and Title II.

As mentioned earlier, a school division has an obligation to identify and evaluate any student who needs or is believed to need special education and related aids and services. Under Section 504, related aids and services can include instruction-related services, such as extended time to complete assignments and preferential seating, as well as health-related services, such as the administration of medication, use of an inhaler, administration of insulin, etc. Also, under Section 504, students can receive special education, which is specialized instruction in either a self-contained setting or within the general education setting. The FAQs state that, “[s]chool districts should not assume that [a] student’s academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. . . Thus, grades alone are an insufficient basis upon which to determine whether a student has a disability.”

The Division’s Section 504 Procedures state that that, “where a child is already passing his/her classes (without modifications) he/she is likely receiving educational benefit and in no need of Section 504 accommodations regardless of whether they are performing to their potential. By definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn.” OCR determined that the Division’s Section 504 Procedures incorrectly attribute a student’s academic performance as the determining factor as to whether a student has a disability, which is inconsistent with the legal definition of a disability and the Division’s obligations under Section 504.

In a few other sections, the Section 504 Procedures limit the criteria that are necessary for providing a student with special education or related aids and services under Section 504. For example, the Section 504 Procedures state that if interventions / modifications put in place by a child study team are successful, the Division is not obligated to evaluate a student under the IDEA or Section 504; the 504 Section Procedures also say that students who qualify for homebound instruction typically do not require a Section 504 plan. For the following reasons, OCR determined that these examples are in violation of Section 504.

First, while a school division may provide students with initial interventions while it is evaluating students for eligibility under Section 504, the successful implementation of initial interventions is not – in and of itself – a basis to obviate the Division of its obligation to evaluate students who need or are believed to need special education and related aids and services. The Division maintains an obligation to evaluate students who need or are believed to need special education and related aids and services, regardless of the efficacy of initial interventions. Second, while it is possible that some students who qualify for homebound instruction do not need services under Section 504, this is a determination that should be made in accordance with

the procedural requirements of Section 504. After all, it is not uncommon for a student to be placed on homebound as a placement decision made by the student's Section 504 team.

Grievance Procedure Concerns

As mentioned earlier, Section 504 and Title II require the Division to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints, which include designated and reasonably prompt timeframes for the major stages of the complaint process. The Division's Section 504 Procedures require complainants to file a complaint within fifteen days of the act of alleged discrimination. OCR determined that this timeframe for filing a complaint is too short and is therefore not equitable. The Section 504 Procedures also mention that a complainant can file a complaint with OCR; however, the Section 504 Procedures list filing with OCR as a step following the internal complaint process. As a result, the Section 504 Procedures imply that a complainant can only file with OCR after exhausting the Division's internal process, which is not correct.

To resolve these concerns, the Division entered into the enclosed Resolution Agreement.

Conclusion

As a result of the signed Resolution Agreement resolving the compliance concerns identified, OCR is closing its investigation of this complaint effective the date of this letter. OCR will monitor implementation of the Resolution Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Division'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 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 because the individual filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another 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, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We appreciate the Division's cooperation during the resolution of this complaint, and particularly the assistance of the Division's attorney, Yvonne Gibney. If you have any questions, feel free to contact me at 202-453-6598 or at Kay.Bhagat@ed.gov.

Sincerely,

/S/

Kay Bhagat

Team Leader

District of Columbia Office

Office for Civil Rights

Enclosure

cc: Yvonne Gibney, Esq. (by email)