



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

August 12, 2015

Via Facsimile at 757-678-7267 and U.S. Mail

Charles E. Lawrence, Superintendent
Northampton County Public Schools
7207 Young Street
Machipongo, Virginia 23405

RE: OCR Complaint No. 11-15-1101
Resolution Letter

Dear Dr. Lawrence:

This letter is to advise you of the outcome of the complaint with the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) that we received on January 13, 2015 against Northampton County Public Schools (the Division). The Complainants allege that the Division discriminated against the Student on the basis of disability XXXX. Specifically, the complaint alleges that the Division:

1. Denied the Student a free appropriate public education (FAPE) during the 2014-2015 school year when it:
 - a) failed to promptly evaluate the Student to determine eligibility for disability-related aids or services; and
 - b) failed to fully implement the disability-related aids and services contained in the Student's Section 504 Plan, including failing to implement procedures to ensure that students clean their hands following lunch.
2. Failed to address the concerns raised in the grievance submitted to the Division regarding implementation of the Student's 504 Plan.

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 Division

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

receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination about the above allegations, OCR reviewed data submitted by the Division and the Complainants. After careful review of the information gathered, OCR identified potential concerns about allegation 1. The Division resolved allegation 1 by signing a voluntary resolution agreement. OCR finds insufficient evidence of a violation of Section 504 and Title II with respect to allegation 2. The basis for our findings is set forth below.

Legal Standards and Analysis

Allegation 1

The Section 504 regulation, at 34 C.F.R. §104.33, requires public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in the school's jurisdiction, regardless of the nature or severity of the individual's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections.

As set out in the Section 504 regulation, at 34 C.F.R. § 104.35, a school must evaluate students who need, or are believed to need, special education or related services before the initial placement of the student and any subsequent significant change in placement. In interpreting evaluation data and in making placement decisions, a school must draw upon information from a variety of sources, establish procedures to ensure that information obtained from all 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 child, the meaning of the evaluation data, and the placement options. OCR interprets the regulation implementing Title II as imposing substantially similar requirements to those found in the regulation governing Section 504. The development and implementation of a Section 504 Plan or individualized education program (IEP), in accordance with the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), designed to meet the needs of a student with a disability is one means by which school districts may provide a FAPE. In complaints like this one that raise an allegation about the implementation of a student's plan, OCR reviews both whether the school developed the plan in accordance with the procedural provisions of the Section 504 implementing regulation and whether the school carried out the plan it developed.

During OCR's investigation, the Division expressed a willingness to resolve the complaint. OCR reviewed the Division's policies and procedures, correspondence, and the Student's educational records to inform the development of a voluntary resolution agreement.

OCR identified preliminary concerns about the Division's actions with respect to allegation 1. Specifically, OCR identified possible concerns: a) that the School's Section 504 evaluation process creates a potential procedural barrier for students diagnosed with allergies; b) about whether the Section 504 team incorporated the provisions listed in the Student's Individualized

Health Care Plan (IHCP) into the Student's September 2014 Section 504 Plan, specifically, offering hand cleansing wipes to students after lunch; and c) about whether the School implemented the provisions of the Section 504 Plan, including to offer hand wipes.

Allegation 1 (a): Failure to Evaluate the Student

On July 23, 2014, the Complainant emailed the Division Director of Special Programs/Division Section 504 Coordinator (Section 504 Coordinator) requesting a Section 504 Plan to address the Student's PTA while in school. On July 24, 2014, the Coordinator initially responded by email that the Student's allergy is a medical diagnosis that would best be supported by an individualized health care plan (IHCP). The Complainant replied that day by email that the Student has a severe allergy and, therefore, a Section 504 plan would be appropriate. Even later on that same day, July 24, 2014 the Coordinator acknowledged OCR guidance that severe allergies could trigger eligibility under Section 504. The Coordinator again suggested scheduling a meeting with a school-based team that would discuss and develop an IHCP and if the team determined that the Student needed supports that could not be provided by an IHCP, the team would schedule a Section 504 eligibility meeting.

Upon return from summer break, the School convened a team of administrators, the School nurse, a teacher, and the parents to first develop an IHCP to address the Student's allergy. The team requested documentation from the Complainant to show the impact of his allergy. The team met on August 22 and August 29 to develop an IHCP. The School received documentation noting the severity of the Student's allergy on September 10, 2014. Then, the team found the Student eligible under Section 504 on September 22, 2014. The Section 504 team met to develop a Section 504 plan, which was written and agreed upon on September 26, 2014.

The Section 504 regulation does not provide specific timelines under which meetings must be convened to discuss and determine evaluation and placement of students. OCR generally looks to see whether such actions occur within a reasonable timeframe so as to not have the effect of denying a student with a disability meaningful, equal access to the educational services provided to students without disabilities. In determining whether a recipient completed an evaluation and eligibility determination within a reasonable timeframe, OCR may consider whether the School followed established timeframes as described under IDEA. Under IDEA, an initial evaluation, is conducted within 60 days of receiving parental consent for the evaluation or within the State-established timeframe within which the evaluation must be conducted, in accordance with 34 CFR §300.301(c)(1).¹

In this case, the Complainant requested a Section 504 Plan on July 23, 2014 and school started evaluation September 2, 2014. The Division granted the Complainant's request for homebound services while evaluating the Student's needs. The School convened a Section 504 eligibility meeting on September 22, 2014 where the Student was found to be eligible for a Section 504 Plan due to PTA. On September 26, 2014, the team, with the Complainant in attendance, met and developed the Student's Section 504 Plan (effective September 29, 2014). The Complainants reported to OCR that the Student began attending school immediately after the

¹ In Virginia the requirement is to complete the evaluation within sixty-five (65) days. See <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+8VAC20-81-60>.

Plan was put in place. While the School completed the evaluation process within the IDEA’s prescribed timeline, OCR’s investigation raised concerns about the Division’s apparent delay in initiating the evaluation process based on 1) the School’s initial, repeated insistence that it first meet to develop an Individualized Health Care Plan (IHCP), prior to convening a Section 504 eligibility meeting, and 2) the School’s requests that the Complainant provide updated medical documentation without having first reviewed what additional information was necessary, which may have delayed evaluation further. OCR notes that the Division was already on notice as to the Student’s PTA and potential severity because the Student already had a medical/allergy plan in place during the previous school year in the Division and because of reports that the plan was breached. Given the information the Division had about the Student’s allergy, the initial insistence on creating an IHCP before considering Section 504 eligibility and, moreover, the (albeit temporary) assertion that Section 504 eligibility was only possible if an IHCP could not meet the Student’s needs, appear to have been incorrect. While the Division ultimately evaluated the Student within a reasonable period of time, OCR has concerns about the potential delay in evaluating the Student’s eligibility under Section 504 because of the School’s insistence on additional medical documentation and its insistence on developing an IHCP first.

OCR is concerned that the procedural barriers may have resulted in a denial of FAPE in violation of Section 504. OCR would need additional information to determine whether any delay impacted the Student. Therefore, we determined the Division’s request to resolve the allegation was appropriate.

Allegation 1 (b): Failure to Implement the Student’s Section 504 Plan

The Complainants allege that the Division did not implement the provision in the Student’s Section 504 Plan developed on September 26, 2014 that required the School to hand out wet wipes to third and fourth grade students after lunch periods. The Student’s Section 504 Plan states as a modification, “Classroom norms/expectations for hand washing before and after handling or consuming food.” The Plan also states, “The team recommends . . . that [an] . . . individualized health care plan will be in effect for the 2014-2015 school year.” The IHCP, dated September 24, 2014, is much more detailed and includes, in relevant part:

Use of Wet Ones or Cleansing wipes comparable . . . for wiping of hands in cafeteria after eating and prior to going outside for recess . . . daily after consuming lunch prior to exiting the building for recess . . . Student(s) will be encouraged to use cleansing wipes on their hands after lunch prior to exiting the cafeteria for recess.

It is not clear to OCR whether the Section 504 Plan provision for handwashing included encouraging students to use hand wipes or whether the IHCP provisions were meant to be incorporated by reference into the Section 504 Plan. In documentation provided by the Division, the Section 504 Coordinator asserted that they were not included in the Section 504 Plan. The Complainants, on the other hand, were under the impression that the provisions of the IHCP were part of the Student’s Section 504 Plan, based on discussion at the Section 504 team meetings, on the School staff’s correspondence with the Complainant about offering hand wipes, and on the School staff’s actions in handing out wipes on occasions when the Complainant visited the School during lunch. Prior Written Notice provided to the Complainants notes that

the Division would provide teachers with a copy of both the Section 504 Plan and the IHCP. The School noted that the IHCP would “cover the [Student’s] needs in terms of the steps that the staff will take to ensure his safety.” OCR has preliminary concerns about the creation of two documents with similar purposes, but which contained different provisions. Moreover, OCR is concerned about the apparent confusion around whether the terms were incorporated in the Section 504 Plan after it insisted on developing an IHCP, despite that the Complainants continued to request a Section 504 Plan.

Pursuant to Section 302 of OCR’s Case Processing Manual, OCR determined that resolution was appropriate. On August 11, 2015, the Division signed the enclosed agreement which, when fully implemented, will resolve the concerns raised by allegation 1 in this complaint. The provisions of the agreement are aligned with the allegations and issues raised by the Complainant, information obtained during OCR’s investigation, and are consistent with applicable law and regulation. OCR will monitor the Division’s implementation of the agreement. Failure to implement the agreement could result in OCR reopening the complaint.

Allegation 2: Failure to Address the Complainants’ Grievance

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient that employs fifteen or more persons adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging discrimination based on disability in violation of Section 504. Generally, when determining whether a recipient’s procedures provide for “prompt and equitable” resolution of such complaints, OCR considers the following factors: notice to potential grievant of the procedure, including where complaints may be filed; application of the procedure to complaints alleging discrimination; an adequate, reliable, and impartial investigative process, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for the major stages of the complaint process; and notice to the parties of the outcome of the complaint. While not expressly required, it also is recommended that such procedures incorporate a prohibition against retaliation. Moreover, where procedures provide for an appeal, there should be reasonably prompt timeframes for the appeal process.

In a series of emails in XXXX from the Complainants to the Section 504 Coordinator and the Superintendent, the Complainants alleged that the School was not implementing the Section 504 Plan requirement to encourage the use of cleansing wipes after lunch. In an email dated XXXX sent to the Section 504 Coordinator, the Complainant confirmed her desire for the Division to consider her email as a formal grievance filed under the Division’s Grievance Procedures and Appeals Process. The Complainants followed the internal grievance procedures, first meeting with the Principal and Section 504 Chair, next moving for a factual investigation conducted by the Associate Superintendent, and finally appealing the Associate Superintendent’s finding to the Superintendent.

The Principal responded in writing in a letter dated XXXX within the prescribed ten business day timeframe. He stated that he did not determine the Student’s Section 504 Plan required the School hand out cleansing wipes and so discussion of whether the School handed out the wipes was unnecessary.

The Complainants were not satisfied with the outcome and, on XXXX, noted their intention to move to the next step of the grievance procedure: a request for a review and factual inquiry by the Section 504 Coordinator. In this case, the Section 504 Coordinator recused herself and the Associate Superintendent conducted an investigation. The Associate Superintendent collected and reviewed relevant documentation (including the Section 504 Plan and IHCP) and conducted interviews with staff, teachers, and students. On XXXX, the Associate Superintendent communicated her findings in writing to the Complainants. In her letter she wrote the she investigated the following concerns:

Did OES fail to implement [the Student’s] Section 504 Plan with respect to the accommodation which addresses "Classroom norms/expectations for hand washing before and after handling or consuming food"?

Did OES follow adequate procedures to safeguard [the Student] from allergens that could possibly harm him?

The Associate Superintendent wrote that she found that the School “took reasonable steps to protect [the Student] . . . and fulfilled the objectives outlined in the original Section 504 plan that addresses classroom norms for hand washing and/or using wet wipes.”

In email responding to the determination the complainants wrote:

We believe you have misinterpreted our complaint by the focus you stated in the response letter dated XXXX. You did, however, answer the question on page three in the final sentence of the first paragraph: ‘According to the teachers, students were encouraged to use the wipes, but they no longer handed the wipes out to them as during the initial weeks.’

The Associate Superintendent conducted an investigation and provided a written notice of outcome to the Complainants on XXXX. On XXXX, the Complainants requested an appeal to the Superintendent. On XXXX, the Superintendent met with the Complainants. In a letter dated XXXX, he wrote about the meeting stating, “[At] this meeting both parties agreed that the amended 504 plan as now written and implemented, was meeting the expectations found in both the Individual Health Care Plan and [the Student’s] 504 plan.”

OCR finds that the Division responded appropriately to the Complainants’ grievance. While the Division did not squarely answer whether hand wipes were passed out to students after lunch, the Principal’s initial response addressed the issue when he concluded that the Section 504 Plan did not require School staff to pass out hand wipes to provide FAPE. While the Principal’s response was not the outcome the Complainants hoped for, OCR finds that it was responsive to the grievance. Next, on appeal, the Associate Superintendent did make a factual finding that, initially, teachers and students were encouraged to use wipes and, that at the time of the investigation, they were no longer handing them out to students. Although she found that the School was not handing out the wipes, the overall conclusion was that the School “took reasonable steps to protect [the Student] . . . and fulfilled the objectives outlined in the original Section 504 plan that addresses classroom norms for hand washing and/or using wet wipes.”

The Complainants' grievance highlighted confusion over what actions were necessary to meet the Student's needs. At the third level of review, the Superintendent noted in his findings that the lack of clarity about the requirements of the Student's IEP had been resolved by revisions made at a Section 504 meeting on XXXX. Once the requirements of the Section 504 Plan were made clear, OCR understands the Division to have implemented its terms. As a result, OCR finds the Division's was responsive to the Complainants' grievance; therefore, we find insufficient evidence to support a violation with respect to allegation 2.

Conclusion

This concludes OCR's investigation of the complaint. This letter 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 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, OCR may need 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.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions, please contact Amy S. Williams or Josie Evola, the OCR attorneys assigned to this complaint, at 202-453-5933 or 202-453-5908, or amy.s.williams@ed.gov or josie.evola@ed.gov.

Sincerely,

/S/

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

Enclosure

cc: Anne Witt, esq. (via e-mail)