



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

May 6, 2016

Dr. Dennis Sawyer
Administrative Director
Arapahoe Charter School
9005 NC Highway 306 South
Arapahoe, NC 28510

Re: OCR Complaint No. 11-15-1162
Letter of Findings

Dear Dr. Sawyer:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on March 15, 2015, against Arapahoe Charter School (the School). The complaint alleges that the School discriminated against the Student on the basis of disability - <XXXX> - by denying him a Free Appropriate Public Education (FAPE) when it failed to properly evaluate him for an Individualized Education Program (IEP) or a Section 504 Plan during the 2014-2015 school year.

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 School 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, OCR reviewed documents provided by the Complainant and the School; interviewed the Complainant and <XXXX SENTECNE REDACTED XXXX>

After carefully considering all of the information obtained during the investigation, OCR identified compliance concerns. The School agreed to resolve the concerns through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

Background

At the time of OCR's receipt of the above-referenced complaint the Student was <XXXX> and had been enrolled in kindergarten at the School from <XXXX>. This was the Student's first year in a school setting. The Student was not diagnosed with any emotional or behavioral disorders until after he left the School,¹ but the Complainant and the School explained to OCR that the Student presented behavioral issues while enrolled in the School. The School responded to the Student's behavioral issues by implementing a <XXXX> program. The parties disagree as to whether the School should have also formally evaluated the Student for an IEP or a Section 504 Plan.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

Facts

In the complaint and in subsequent emails and phone conversations, the Complainant explained to OCR that the Student had not been diagnosed by his <XXXX> or any behavioral disorder during the time that the Student was enrolled at the School. According to the complaint, early in

¹ The Complainant told OCR that the Student was diagnosed by a medical professional with <XXXX> shortly after he transferred to another school. However, more recently the Complainant told OCR that the Student does not have ADHD and that his updated diagnoses include <XXXX>.

the school year the parents requested that their pediatrician conduct a mental health evaluation of the Student, but the pediatrician “was sure [the Student] would grow out of this behavior.” The Complainant also requested that the School evaluate the Student for services due to the behavioral issues he was experiencing. In an email to the kindergarten teacher on Friday, September 18, 2014, the Complainant wrote:

At some point, I would like to know exactly what he will be doing, **and whether or not an IEP or Behavioral Plan will be put in place.** It would be nice to have something in writing that way we would know exactly what is going on. His doctor’s appointment went well yesterday and it was decided that he is not <XXXX> but there are <XXXX>. They did not even mention medicating him at all. I will do my best to keep you up to date on what we are doing on our end. He has been referred to a <XXXX>, but I’m waiting for the appointment date. (emphasis added).

According to the kindergarten teacher’s written statement, the Student’s father told her and the <XXXX> in mid-September that he wanted the School to put in place a behavior plan. The Student’s therapist explained to OCR that she thought the Student might have <XXXX> because the Student’s behaviors were so extreme, but when she met with the parents at the beginning of the year about sending the Student for further evaluation, the S<XXXX>r said he did not want the Student “labeled.” The therapist understood that to mean that the <XXXX> did not want the Student evaluated because he did not want him to be labeled with a <XXXX>. <XXXX SENTENCE REDACTED XXXX>. <XXXX SENTENCE REDACTED XXXX> however, told OCR that while he did not want his son stigmatized and labeled as a bad child, he did want to know what was causing the problems and thought that there should be a 504 or IEP in place.

A few days after receiving the email from the Complainant and conversing with the <XXXX> designed an RtI process to try to assist the Student with his behavioral issues.² The Student was placed on a daily behavior chart measuring specific behaviors in 30-minute increments, and was given stars if the behavior goal was reached and a check mark if it was not. If the Student turned his behavior around, the check was turned into a star. OCR received over 70 pages of behavior charts that document the process was implemented from September 22, 2014 – January 30, 2015. The Student also started <XXXX SENTENCE REDACTED XXXX>

In addition to the behavior charts, OCR received over 65 pages of email correspondence between the Complainant, the Student’s father, and the School. OCR notes that there are many emails between the parents and the kindergarten teacher from <XXXX> that indicate that the parents and the kindergarten teacher were pleased with the implementation of the behavior plan and the progress that the Student was making. According to the email correspondence, the Student continued to struggle with behavioral issues but was often able to turn his day around. However, in early <XXXX>, the Complainant was concerned that the Student’s behavior had regressed, and she wanted to work with the School to understand the possible cause of the regression. Several emails from mid-December indicate that the Student was removed from the classroom and sent to either the <XXXX> or to the In School Suspension (ISS) room/alternative learning

² The School explained to OCR that the EC teacher implemented the RtI process for the Student but that she did not serve in the capacity to provide him with special education services.

center on several occasions including one day that he spent four hours in ISS. Emails from January indicate that the kindergarten teacher thought the Student was making progress with his behavior but that he still had difficulty following directions and would sometimes use inappropriate language.

By the end of January 2015, the pediatrician informed the Complainant that based on information from the School, including from the <XXXX>, the Student might be on the <XXXX>. After receiving the news that the Student might have a disability, the Complainant had a meeting on January 30, 2015, with the <XXXX>, his <XXXX> and the <XXXX>. The parties differ with regard to the purpose and outcome of the meeting. But, both parties agree that during the meeting the Student had a temper tantrum and that the Director had to be called in to remove the Student from the meeting and calm him down. Later that afternoon, the <XXXX SENTENCE REDACTED XXXX>

<XXXX 2 PARAGRAPHS REDACTED XXXX>.

OCR requested meeting notes from the <XXXX>. The School therapist provided OCR with a verbal summary of her notes from the January 30th meeting and told OCR that the team discussed intervention and that the Complainant agreed to have the Student go to an alternative class until his work was completed; the Complainant agreed to have the Student removed from the classroom. The therapist said she did not have in her notes and did not recall if the alternative learning environment was just for that day or for longer. The School administration was aware that the <XXXX> did not provide OCR with a redacted copy of her notes and stated that the School did not have any other notes to submit.

OCR received from the School the Student's report card from the first two marking periods, his attendance report, and four discipline referrals. The teacher comments from both marking periods state that the Student was making daily progress on his behavior. He received mostly "Meets Expectations" marks in the academic categories and a combination of "Progressing toward Expectations" and "Meets Expectations" marks in the "Personal and Social Development" areas. <XXXX PARAGRAPH REDACTED XXXX>

The Complainant alleged that rather than evaluating her son and addressing his behavioral issues, the School constantly placed the Student in the ISS room or asked the parents to pick him up from school; she stated that the Student was "isolated from his peers" all semester and "was told by his teacher, administrators, etc. that he couldn't be good." The Complainant expressed to OCR that the Student lost instruction because he seemed to be sent to ISS nearly every day, and perhaps sometimes without her knowledge. The Student's father told OCR that the Student was put in ISS regularly, as often as two-three days a week for long periods of time. The Director explained that the ISS room was also used as an alternative learning center where students could take their work with them and "just chill out" if they needed to be away from their classmates. The Assistant Director explained that the Student was not being assigned to ISS but would go to the ISS/alternative learning center to calm down when he was throwing things; as soon as he got control, he would be returned to class. The kindergarten teacher told OCR that the Student would be sent out of the classroom to the <XXXX> because of misbehavior about once a week but was sent to the ISS teacher only three or four times; some of these times were because the

<XXXX> was working with other students. The School also said that on several occasions the parents were asked to pick the Student up afterschool because of misbehavior in class or on the school bus, but the parents said that they were asked to pick the Student up from school so many times, it had become absurd.

Analysis

The Complainant alleged that the School failed to properly evaluate the Student for an IEP or a Section 504 Plan even though the parents requested an evaluation and the School was aware of the Student's behavioral issues. As explained in detail below, OCR found sufficient evidence to show the Student needed or was believed to have needed special education or related services due to a disability under 34 C.F.R. § 104.35(a) and that the School should have either properly evaluated the Student or provided procedural safeguards to the Complainant once the School decided not to evaluate the Student.

In their data response, the School provided four reasons as to why they did not evaluate the Student for an IEP or a Section 504 Plan. These four reasons were elaborated upon in interviews with School staff, all of whom acknowledged that they were aware of the Student's behavioral issues. First, the School stated that it is normal for some students to need an adjustment period when they first enter kindergarten. Because this was the first time the Student was in a school setting, OCR finds that it was reasonable for the School to allow the Student some time to develop appropriate school behaviors before evaluating him for a disability. However, the Student's behavior was described as "extreme" by the <XXXX> and not typical of a kindergartener who is adjusting to a school setting. The therapist told OCR that she thought the Student might have <XXXX>; this is sufficient to establish that at least by October 2015, the School suspected the Student might need special education or related services due to a disability.

Second, the School argued that the Student was not evaluated because he responded well to the RtI process. OCR notes that the RtI process was implemented right after the parents requested a behavior plan and was tailored to the Student's specific needs. The email correspondence, the behavior charts, and the decrease in discipline referral forms indicate that the RtI process was faithfully implemented and that the School and the parents thought that the Student was making progress. However, RtI cannot be used to delay or deny the comprehensive evaluation of a student for an IEP or a Section 504 Plan. If a parent requests an evaluation either before or during the RtI period, a school can either obtain the parent's consent and proceed with the evaluation or decide not to evaluate but when doing so must provide the parent with procedural safeguards and the opportunity to go to due process.

Third, the School stated that they did not have a formal diagnosis that would require an IEP or a Section 504 Plan. The School referenced the email that the Complainant sent to the kindergarten teacher on September 18, 2014 that stated the Student's pediatrician did not diagnose the Student with <XXXX>. Further, the kindergarten teacher told OCR that after each doctor's appointment, the Complainant would tell her that the doctor did not find anything wrong with the Student. The Director told OCR that the School does not get into the business of suggesting diagnoses and will use the RtI process unless parents come to the School with a diagnosis at which time the School will make a 504 Plan. A medical diagnosis is not needed in order for a school to have a

legal responsibility to evaluate a student. Therefore, OCR finds that even without a diagnosis, the School was legally obligated to comply with Section 504 and Title II and needed to either evaluate the Student or to provide the parents with procedural safeguards when the School decided not to evaluate him.

Fourth, the School said that the <XXXX> explicitly stated that the parents did not want the child labeled, and he often questioned if the Student's behavior was typical of a <XXXX>. The Complainant asked in her <XXXX> "whether or not an IEP or Behavioral Plan will be put in place." But, everybody affiliated with the School said that they understood that the Student's parents, especially the Student's father, did not want the Student evaluated. OCR notes that there may have been miscommunication between the Complainant, the <XXXX>, and the School with regard to whether parents asked for an evaluation or if they just wanted a behavior plan. But, even assuming that the School was not clear as to whether both parents wanted the Student to be evaluated, the School should have had procedural safeguards in place to provide appropriate protection to the parents and to protect itself. Under the Section 504 regulation, at 34 C.F.R. § 104.36, the School should have provided notice to the parents explaining the decision not to evaluate the Student and explained to the parents their right to appeal any decision through an impartial hearing.

When considered either alone or together, the School's four reasons for not conducting an evaluation of the Student per the Complainant's September request are insufficient to relieve the School of the obligation to timely evaluate the Student.

OCR also looked at whether the Student was denied meaningful access to educational opportunities when he was pulled out of the classroom. The Student's parents told OCR that the Student was sent to ISS regularly for long periods of time and that they were often asked to pick him up from school. However, the behavior charts show that the Student was given a lot of positive reinforcement and the email correspondence indicates that the Student had many good days in the classroom and would often just go to the <XXXX> at the end of the day to show her his behavior chart and to get a sticker. The discipline referrals indicate that the Student was suspended once and sent to the ISS room only once as a disciplinary measure. The kindergarten teacher told OCR that the Student was sent to the <XXXX> or to the alternative learning center about once a week but would return to the classroom as soon as he could calm down. Further, the Student's report cards show that he was meeting or progressing toward expectations in all academic and social development categories. Because of conflicting and inconclusive evidence with regard to how often and for how long the Student was sent to the <XXXX> or to the ISS/alternative learning center and how often he was sent home, OCR cannot determine that the Student was removed from the classroom excessively and denied FAPE.

The Complainant told OCR that after the meeting on January 30th, the Director told her that the Student would not be allowed to return to the classroom until he was diagnosed and medicated. But, the video, behavior chart, and statements from the kindergarten teacher do not support this. In the video, the Director can be heard telling the Student that he needed to do his work and earn stars. The classroom teacher verified that once the Student calmed down, he returned to the classroom and earned stars in the afternoon as shown on his behavior chart for that day. OCR cannot resolve the conflicting evidence as to what the plan was for the Student moving forward

by looking at what actually happened the days after the meeting because the Student did not return to the School after that day. Therefore, OCR has insufficient evidence to determine that the School planned to place the Student in the ISS/alternative learning center until he was diagnosed and medicated.

OCR notes that the lack of documentation of meetings, particularly the lack of documentation regarding the January 30th meeting and a meeting that the therapist told OCR was held at the beginning of the school year, impeded the investigation. As detailed in the Agreement, the School must improve its process of record keeping with respect to actions regarding the identification, evaluation, and educational placement of students with disabilities.

Conclusion

On April 14, 2016, the School agreed to implement the enclosed Resolution Agreement (Agreement), which commits the School to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the School is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the School deemed compliant if the School enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the School's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the School has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into by the School on April 14, 2016, if the School fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the School written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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 School must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or 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 regarding this letter, please contact either Sebastian Amar at (202) 453- 6023 / Sebastian.Amar@ed.gov or Dana Russo at (202) 453-6559 / Dana.Russo@ed.gov who are the OCR attorneys assigned to this complaint.

Sincerely,

/S/

Michael Hing
Supervisory Attorney, Team 1
Office for Civil Rights
District of Columbia Office