



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

XXXX

Dr. Eric Williams
Superintendent
Loudoun County Public Schools
21000 Education Court
Ashburn, Virginia 20148

Re: OCR Complaint No. 11-16-1123
Letter of Findings

Dear Dr. Williams:

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 XXXX against Loudoun County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXX (the School). The Complainant alleged that the Division discriminated against the Student on the basis of his disability during the XXXX school year. Specifically, the complaint alleged that the Division:

1. Failed to timely reevaluate the Student when it delayed scheduling a meeting to discuss the Student's progress and Behavior Intervention Plan (BIP) during the XXXX semester; and
2. Failed to provide the Student with the special education and/or related aids and services as required by the Student's Individualized Education Program (IEP) when it prohibited the Student's Special Education Teacher from providing direct XXXX instruction to the Student during the XXXX semester.

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.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division; interviewed the Complainant and Division faculty and staff; and conducted an on-site visit to the Division on XXXX and XXXX.

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

After carefully considering all of the information obtained during the investigation, OCR determined that there was sufficient evidence to substantiate violations of Section 504 and Title II regarding the allegations, which the Division agreed to resolve through the enclosed Resolution Agreement pursuant to Section 303(b) of OCR's *Case Processing Manual*. OCR's findings and conclusions are discussed below.

Background

During the XXXX school year, the Student was a Grade XXXX student enrolled in a combined class for students in Grades XXXX. The Student was a student with a disability who received special education and/or related aids and services pursuant to an IEP. The Student's IEP for the XXXX school year, dated XXXX,¹ required that the Division provide the Student with special education instruction for XXXX and behavior management, both in the general education setting, using an inclusion model, as well as in the resource room, using a pull-out model, throughout each week.

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.

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. While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and when the district conducts the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Virginia regulations generally require that all evaluations and decisions about eligibility be completed within 65 business days of the receipt of the referral by the special education administrator or designee (8VAC20-81-60(b)(1)(g)).

¹ The IEP was dated XXXX, but signed by the IEP team participants on XXXX.

The Section 504 regulation also requires, at 34 C.F.R. § 104.35(d), that a school district periodically reevaluate a student who has been provided special education and/or related aids and services. Also, when there is information suggesting that a student’s educational program is not meeting the student’s individual needs, such as a significant decline in the student’s grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student’s IEP, BIP, or placement are necessary.

Analysis

Allegation 1

With respect to Allegation 1, the Complainant alleged that the Division discriminated against the Student on the basis of his disability by failing to timely reevaluate the Student when it delayed a meeting to discuss the Student’s progress and BIP during the XXXX semester. Specifically, the Complainant alleged that she requested a meeting to discuss the Student’s progress and BIP beginning in XXXX, but the Division had failed to respond to her request at the time of her complaint to OCR, and the Division did not otherwise reevaluate the Student until the end of the XXXX school year.

The Student’s IEP, dated XXXX, stated that the Division was to provide the Student with behavior services in the amount of XXXX minutes XXXX times per week in the resource room and in the special education setting. The IEP also provided for additional behavior services in the general education classroom and setting in the amount of XXXX minutes XXXX times per week. The IEP stated that “the team recommends special education support in the general education and special education settings with the goal of full inclusion because of XXXX. He will receive behavior services in the general education setting for XXXX minutes / day.” The Student’s IEP also stated that the Student would have a BIP, and the IEP included behavior goals such as using strategies in the BIP to start assignments, transition between activities, interact with others, and remain on-task. Further, in referring to a Functional Behavior Assessment (FBA) of the Student, the Supplementary Aids and Services section of the IEP stated that staff working with the Student “need[ed] to be familiar with his FBA and how to implement the plan.”

The Division developed a BIP, dated XXXX, to address the Student’s target behaviors, which included XXXX. The BIP included XXXX strategies for addressing these behaviors including, using a check sheet, providing the Student with leadership opportunities, using shortened assignments, providing a mentor, and using a written schedule that outlines tasks; proximity to teacher; movement breaks; daily check-ins; and choice of activities. It outlined multiple steps for staff to take when the Student engaged in such behaviors. The BIP also identified quarterly dates for BIP team review meetings: XXXX, XXXX, XXXX, and XXXX.

As stated above, the Complainant alleged that she requested a meeting to discuss the Student’s progress and BIP beginning in XXXX, but the Division failed to respond to her request or to otherwise reevaluate the Student with respect to his behavior. Specifically, the Complainant stated that she requested a meeting to discuss the Student’s behavior and BIP on XXXX at XXXX, after she learned from the Special Education Teacher that the Student had been having behavioral difficulties and had not been completing homework.

The Complainant stated that the School previously had scheduled a BIP meeting sometime in XXXX, which was canceled, and the Division also failed to convene the quarterly BIP review meeting tentatively scheduled for XXXX. Specifically, regarding the first quarter meeting planned for XXXX, the Special Education Teacher emailed the Principal on XXXX and asked if she could schedule the meeting. The Principal responded on XXXX and again on XXXX, stating that the Special Education Teacher could schedule the meeting for the following week(s). The Special Education Teacher scheduled a meeting for XXXX, but the Principal canceled the meeting. Thereafter, the Special Education Teacher rescheduled the BIP meeting for XXXX; the Complainant did not attend the meeting, and the Division did not meet in the Complainant's absence. Instead, the Division stated that they subsequently rescheduled the meeting for XXXX, which the Principal canceled on XXXX. On XXXX, the Complainant requested a meeting to discuss the Student's IEP as well as his behavior and BIP, but the Division refused to combine meeting purposes and to meet regarding revisions to the BIP until XXXX.² The Division's Special Education Coordinator wrote in an email to the Complainant that the meeting for XXXX had been canceled because the School staff needed to collect additional information to update the Student's FBA and BIP. Then, although refusing to discuss the Student's BIP, the Student's IEP team met on XXXX to discuss the Student's needs, including his behavior, and determined to increase his special education services, in particular, his behavior management instruction, and to conduct a comprehensive reevaluation. Ultimately, the team completed its reevaluation of the Student on XXXX, but it did not meet to discuss the Student's BIP and create an appropriate plan until XXXX.³

OCR reviewed information and documentation provided by the Division, the Special Education Teacher, and the Complainant. Based on this documentation, OCR could not corroborate that the Complainant requested a meeting to review the Student's progress or his BIP in XXXX, as she alleged. Instead, the information described above indicates that, based on the Student's BIP, the Division was to have scheduled a quarterly BIP meeting for XXXX, but the meeting did not occur. Thereafter, OCR confirmed that the Complainant did make requests for such a meeting beginning XXXX.⁴

OCR next considered whether the Division had reason to believe a reevaluation was warranted, that is, whether the Student exhibited behavior suggesting that his educational program was not meeting his individual needs prior to XXXX when the IEP Team determined to reevaluate the Student.

OCR reviewed information and documentation indicating that the Student had behavioral difficulties early in the XXXX semester of XXXX, which increased throughout the remainder of the semester; the Complainant stated that she received three to four calls per month from the Principal notifying her of the Student's behavioral difficulties. The Complainant said that the Student XXXX the first quarter of the XXXX academic year; and he was failing XXXX all of his subjects by XXXX. The Complainant stated that she first learned from the Student's report card that his behaviors were interfering with his academic progress.

² The Division terminated this meeting before completion.

³ The Division convened an additional IEP meeting on XXXX, and completed an FBA of the Student XXXX, but the School did not hold another BIP meeting until XXXX.

⁴ Although the Division asserted that the Complainant failed to attend the meeting scheduled for XXXX, OCR determined that the Division was responsible for the remainder of the meeting cancellations and schedule changes.

OCR reviewed documentation and information provided by the Division indicating that the Division had notice of the need to reevaluate the Student to ensure that he was receiving special education and related aids designed to meet his educational needs. The General Education Teacher stated that, starting in XXXX, the Student exhibited non-compliant behaviors, such as XXXX, that were different from those targeted by his IEP and BIP.⁵ She noted on BIP behavior tracking forms that the Student’s target behavior was not what she was seeing in class. She wrote that she did not know how to track the new behaviors because the BIP did not address them. She further stated that there were times when the Student exhibited a lot of “target” behaviors, but there was not much appropriate or corrective replacement behavior. The Principal further stated that the Student’s behavior escalated in XXXX.

Further, a XXXX observation report made by the Division’s Special Education Consulting Teacher demonstrates that the Special Education Teacher was implementing the Student’s BIP with 43% fidelity.⁶ The Special Education Teacher, in turn, explained this by stating that the BIP was too long and did not meet the Student’s needs; she stated that she did not implement parts of the BIP that did not work for the Student. She stated, for instance, that the Student needed a place to cool down and a visual timer. She further stated that the BIP included too many steps, “wait time” that was too long to meet the Student’s needs, and points that did not motivate him. The General Education Teacher similarly noted during an interview with OCR that the Student was embarrassed by the “point sheet” contemplated by the BIP and often XXXX. She stated that the BIP was not necessarily working, and, at that point, in XXXX, the IEP Team determined to increase the Student’s services. Likewise, the Principal stated that by the XXXX IEP meeting, it was clear that the BIP needed to be revised.

Both teachers indicated that they made changes to what was written in the Student’s BIP as a result (e.g., by using a punch card instead of a point tracking sheet, and altering the length, frequency, and type of the rewards used to motivate the Student). The teachers indicated that they spoke with a Division specialist in XXXX and XXXX or XXXX, and made some changes, as a result of their concerns about the Student’s behavior and the effectiveness of the BIP. The Special Education Teacher provided OCR a copy of a revised BIP she drafted in XXXX, in anticipation of the quarterly BIP review meeting that never occurred.

Therefore, OCR determined that the Division had notice of the Student’s academic and behavioral difficulties during the XXXX semester.

OCR next considered whether the Division failed to reevaluate the Student in a reasonable amount of time after having notice that reevaluation was warranted. The Division had at least some notice that the Student’s needs were not being met given the differences in the behaviors the Student exhibited and the changes the teachers made to the BIP because it was not effective as written. Division staff disagreed about the point at which the Student’s behaviors became problematic and the BIP was not meeting his needs, but all agreed that by XXXX, reevaluation was necessary. Notwithstanding the timely IDEA evaluation that the IEP Team initiated in XXXX and completed in XXXX, and the decision to increase special education services to

⁵ The General Education Teacher stated that the purpose of avoiding a particular task was the motivation for both types of non-compliant behavior. She told OCR that by “XXXX” the Student’s behavior escalated to include more XXXX to complete assignments so the Student missed skills, and this was reflected in his grades.

⁶ The Observation Report notes that the Special Education Consulting Teacher used a BIP Integrity Check from to track each element of the Student’s BIP, and the results indicated it was implemented with 43% fidelity.

support behavior, OCR is concerned that the Division failed to discuss the Student's BIP when considering his behavior in XXXX, or to make revisions to it as part of the reevaluation (even though the BIP was incorporated into the IEP, and the IEP goals addressed the same behaviors and strategies identified in the BIP). Moreover, the documentation and information obtained did not explain the XXXX-month gap between completing the reevaluation on XXXX, and revising the BIP on XXXX. The information obtained indicated that the Division's failure to reevaluate the Student in this regard resulted in a denial of FAPE.

Based on the foregoing, OCR determined that there was sufficient evidence to substantiate the Complainant's allegation that the Division failed to timely reevaluate the Student when it delayed a meeting to discuss the Student's progress and BIP during the XXXX semester, in violation of Section 504 and Title II. Although the Division had notice of the Student's behavioral difficulties from the beginning of the XXXX semester, it failed to timely reevaluate the Student with respect to his behavior until XXXX. OCR determined that failure to reevaluate the Student with respect to his BIP served to deny the Student a FAPE based upon his ongoing behavioral and academic difficulties through the XXXX school year.

Allegation 2

Regarding Allegation 2, the Complainant alleged that the Division discriminated against the Student on the basis of his disability by failing to provide the Student with the special education and related aids required by his IEP when it prohibited the Special Education Teacher from providing direct XXXX instruction to the Student during the XXXX semester. Specifically, the Complainant asserted to OCR that the Division refused to allow the Special Education Teacher to speak to the Student.

The Student's IEP, dated XXXX, stated that the Division was required to provide the Student with XXXX instruction for XXXX minutes, XXXX times per week. The IEP specifies the location of these services as "resource room," and identifies the instruction setting for XXXX services as "general ed classroom."

OCR reviewed information indicating that there was an ongoing conflict between the Special Education Teacher and the General Education Teacher that impacted the Student's receipt of the required special education services. As a result, the Special Education Teacher believed that she was not to speak when providing "push-in" services to the Student in the general education setting. Both teachers met with the Principal to discuss their ongoing difficulties in XXXX. In an email that summarized the meeting, dated XXXX, the Special Education Teacher stated that she was told that she was not present in the general education classroom to "instruct" in subject matter or content area but to monitor behavior and so she was only able to point and observe with respect to the Student. The Special Education Teacher informed OCR that she was not supposed to speak to the Student because it was disruptive to the General Education Teacher and that the General Education Teacher told her during the first week of school not to interrupt instruction or to speak in class. The Special Education Teacher asserted to OCR that the Principal supported the General Education Teacher. According to information the Special Education Teacher provided to OCR, she sat in the classroom, sometimes next to the Student, and observed or pointed, but she acknowledged that she did not provide XXXX or behavioral instruction or support that was contemplated by the Student's IEP.

Further, the Special Education Teacher’s service logs indicated that there were multiple occasions when she could not enter the general education classroom to provide push-in services because of XXXX in the classroom.⁷ Therefore, the Special Education Teacher acknowledged that she did not provide services to students, including the Student, on those occasions.

OCR reviewed email correspondence between School staff regarding the issue, including a memorandum from the Principal dated XXXX, that stated the Special Education Teacher is to provide behavior support and that talking was disruptive when the General Education Teacher was giving directions. In the memo, the Principal directed the Special Education Teacher to prompt students verbally and non-verbally as well as to provide instruction, re-teach, and clarify information.

Based on the information and documentation OCR obtained, OCR determined that there was insufficient evidence to substantiate that the Division prohibited the Special Education Teacher from speaking to the Student to implement his IEP, as the Complainant alleged. Nevertheless, OCR determined that regardless of the circumstances, such as the Special Education Teacher’s impression that she could not speak in the classroom and inability to enter the classroom because of XXXX, the Special Education Teacher failed to provide the Student with “push-in” special education instruction in behavior and XXXX during the XXXX school year, as required by the Student’s IEP.

Moreover, during the course of OCR’s investigation, OCR reviewed information and documentation indicating that the Division generally failed to provide the Student with the required amount of special education services from the beginning of the XXXX school year until approximately XXXX, based on the School’s schedule for providing special education services to students. Specifically, in XXXX, the Special Education Teacher and General Education Teacher each raised concerns that the Student was not scheduled for the appropriate amount of services; the General Education Teacher created charts that showed the Student to be approximately an hour “short” in receiving behavior and XXXX services each week. In XXXX and again in XXXX, the Principal directed the Special Education Teacher to add XXXX services for the Student on XXXX. The Division provided the special education schedules for the Student, which changed periodically over the course of XXXX, and each schedule reflects that the Student was not scheduled to receive the amount of instruction required by his IEP from the beginning of the school year until the week of XXXX. Further, correspondence reveals disagreement about when the Student was to receive behavioral support at the beginning and end of the school day and what was supposed to happen during that time period. Service logs provided by each teacher conflict with each other, but both sets of logs suggest the IEP was not fully implemented.⁸ Although the documentation indicates that such services were not provided, OCR was unable to ascertain how many hours of services the Student missed with respect to instruction in XXXX and behavioral support.

⁷ XXXX SENTENCE REDACTED XXXX.

⁸ Finally, OCR notes that the Division was aware of concerns about the special education schedule at the School in general. On XXXX, the Special Education Director emailed the Special Education Teacher stating that she had several compliance concerns based on her review of another student’s IEP and that she would be looking at each student’s IEP. She noted that the IEP service location and instructional setting conflicted because that student’s IEP identified both the general and special education classroom, a concern also found in the Student’s IEP. She further noted that the instructional schedule generally illustrated limited services in the general education setting, which also was a concern for the Student.

Based on the foregoing, OCR determined that there was sufficient evidence to substantiate that the Division failed to provide the Student with the special education services that were necessary for him to receive FAPE as required by the Student's IEP, particularly push-in behavioral support and push-in and pull-out XXXX instruction, during the XXXX school year. As discussed above with respect to Allegation 1, OCR determined that there were indications that such failures served to deny the Student a FAPE based upon his failing grades and ongoing behavioral and academic difficulties through the XXXX school year, in violation of Section 504 and Title II.

Conclusion

On May 14, 2018, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of noncompliance with regard to Allegations 1 and 2. The Agreement entered into by the Division 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 Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the Division'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 Division 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 Division on May 14, 2018, if the Division 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 Division 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 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 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.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Amy S. Williams, the OCR attorney assigned to this complaint, at 202-453-5933 or amy.williams2@ed.gov.

Sincerely,

/s/

Letisha Morgan
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Anne E. Mickey, Esq., via email