



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 23, 2016

Dr. Phillip Rice
Superintendent
Stokes County Schools
PO Box 50, 100 Courthouse Circle
Danbury, North Carolina 27016

Re: OCR Complaint No. 11-16-1333
Letter of Findings

Dear Dr. Rice:

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 1, 2016 against Stokes County Public Schools (the District). The complaint alleges that the District discriminated against the Student on the basis of disability when it denied her request to evaluate the Student for a Section 504 plan in XXXX because “XXXX” could have Section 504 Plans.

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 District 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 District, and interviewed the Complainant and District staff. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant’s specific allegation. However, during the course of OCR’s investigation, OCR identified compliance concerns regarding the District’s understanding and implementation of its procedure with regard to the referral of students for evaluation under Section 504, as well as the District’s failure to evaluate the Student in a timely manner under Section 504. The District agreed to resolve these concerns through the enclosed resolution agreement.

OCR’s findings and conclusions are discussed 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.

Facts

The Student enrolled in the District from another school district in XXXX. The Student attended the XXXX at the School during the 2015-2016 school year. In XXXX, the School received the Student's special education records from the school district in which she was previously enrolled. These records indicated that the previous district had exited the Student from special education services on XXXX because she no longer met the eligibility requirements for speech language impairment or specific learning disability under the Individuals with Disabilities Education Act (IDEA).

On September 24, 2015, the Student's teacher completed the Student Support Team (SST) consultation forms documenting her concerns regarding the Student's performance in Reading/English and written language. The next day, the Teacher sent home a form notifying the Complainant about the Teacher's concerns and about the Teacher's intention to work collaboratively with the SST to implement strategies and interventions to help the Student be more successful at school. The Student Problem-Solving Parent Notification form further indicated that the parent had previously been contacted about these concerns on September 17, 2016.

On XXXX teachers met with the Complainant for Parent-Teacher conferences and expressed their concerns about the Student's understanding and progress in the fourth grade. At that time, the Complainant told the teachers that the Student was miserable and hated school. The teachers told the Complainant that the Student was working with a reading tutor at school as an intervention to improve comprehension and fluency. In addition, they told the Complainant that the School did not have a math tutor available.

On XXXX, the Complainant sent the Teacher an email stating that the Student cried all the way to school that morning and told the Complainant that she does not understand the school work that is being given to her and struggles to complete it. The Complainant stated that there must be something beyond a tutor that can be done to help the Student. The Teacher responded that from what she saw in the Student's records from her previous school district, the Student had been re-evaluated last year and no longer qualified for special education services. The Teacher further said that she forwarded the email to the School Counselor so that the School Counselor could talk with the Student about her school anxiety. The School Counselor is also the School's Section 504 Coordinator.

On October 28, 2016, the Complainant sent the Teacher an email stating that the Student does not understand any of the math assignments the teacher sends home and requesting a Section 504 Plan for the Student. The Teacher responded that it was her understanding that a student had to have a medical diagnosis or other disability in order to qualify for a Section 504 Plan and that, based on the records received from the Student's previous school district, the Student did not have such a diagnosis. In addition, the Teacher forwarded the Complainant's request for a Section 504 Plan to the School Counselor to respond to the question about a Section 504 Plan.

On November 4, 2015, the School Counselor sent the Complainant an email introducing herself as the School's Section 504 Coordinator and stating that "in order to consider [sic] eligibility for

Section 504, a student must have a handicapping condition that is impeding learning.” The School Counselor continued that if the Student was given such a diagnosis, the School would be happy to look at the paperwork. The School Counselor further advised the Complainant that “504 Plans do not give students small group pullout instruction.”

On February 4, 2016, the SST reviewed the Student’s progress and, because the Student had gone from a Level J to a Level L in reading, the SST decided to continue the same interventions.

On or about XXXX, the District received a letter from the Student’s pediatrician diagnosing the Student with Reading Based Learning Disability and Developmental Coordination Disorder and recommending that the District implement a Section 504 Plan for the Student with specific accommodations. The Principal forwarded the letter to the Exceptional Children’s Teacher at the School, who consulted informally with the Section 504 Coordinator for the District.

On March 1, 2016, the EC Teacher contacted the Complainant and reiterated that in order to receive a Section 504 Plan, a Student must have a documented medical condition or disability, and that the Student would again be on the SST agenda for the next week.

On March 3, 2016, the Section District’s Section 504 Coordinator contacted the School to advise it to convene a DEC1 meeting, which refers to the form to be completed to refer a student for evaluation under the IDEA, and the School did so on April 4, 2016. OCR did not find, nor did the District provide, any evidence to indicate that it ever convened to evaluate to the Student for a Section 504 Plan, as originally requested.

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 a 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. § 104.35(b), requires a school district to establish standards and procedures for the evaluation and placement of such students.

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 the district's conducting 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. North Carolina state regulations require initial evaluations to be completed and placement determined within 90 days of receipt of a written referral (NC 1503-2.2(c)(1)).

Analysis

The Complainant alleged that that the District discriminated against the Student on the basis of disability when it denied her request to evaluate the Student for a Section 504 plan in October 2015 because “only children with XXXX” could have Section 504 Plans. The Complainant subsequently clarified to OCR that the EC Teacher made this comment to her. However, the EC Teacher denied ever making such a comment to the Complainant. OCR could not find, nor could the Complainant provide, any evidence to indicate that the EC Teacher specifically told the Complainant that “only children with XXXX” could have Section 504 Plans.

However, during the course of the investigation, OCR found that the District had reason to believe that the Student needed special education or related services due to a disability and, as such, should have referred the Student for evaluation under Section 504 as early as October 2015. Specifically, the Student's teacher received copies of the Student's EC records from her previous school district in September 2015. This put the District on notice that the Student had had an IEP since she was three years old and that the previous district had recently found the Student ineligible for an IEP because the Student no longer met the definition to be classified as having a specific learning disability or speech language impairment under the IDEA. While the fact that the Student had qualified for an IEP for the previous seven years is relevant to the District's belief that the Student may have a disability, the previous district's decision that the Student no longer qualified for an IEP is not dispositive that the Student did not have a disability for purposes of a *Section 504* evaluation. This is because the definition of disability contained in the IDEA regulation is different and more narrowly framed than the definition of disability contained in Section 504. Thus, a student may be ineligible for services under the IDEA, and still be eligible for services under Section 504.

In addition to being on notice that the Student had previously been considered a student with a disability for purposes of an IEP, District staff was also aware of significant academic concerns. Specifically, in September 2015, the Teacher developed concerns about the Student's performance in school and notified the Complainant of her referral of the Student to the SST for interventions. The documentation provided to OCR by the District showed that the School implemented interventions for the Student through the SST beginning on October 1, 2015

stemming from these issues, and that in mid-October 2015, the Student’s teachers met with the Complainant for a parent-teacher conference to convey their concerns regarding the Student’s academics. At that meeting, the Complainant told the teachers that the Student was miserable and hated school. The Complainant was told that the Student was working with a reading tutor at school, and that she might want to pursue math tutoring. Given the Student’s recent exit from the special education program and the teachers’ concerns about the Student’s progress, it would have been reasonable for School staff, including the Teacher, to believe that the Student might benefit from related services due to a disability and referred the Student for evaluation under Section 504 as early as October 2015, even prior to the Complainant’s request for a Section 504 Plan.

OCR determined that on October 28, 2015, the Complainant sent the Teacher an email stating that the Student does not understand any of the math homework that the Teacher sent home, and requesting a Section 504 Plan for the Student. The Teacher forwarded the email to the School’s Section 504 Coordinator for a response to the Complainant’s request, and the 504 Coordinator responded to the Complainant via email on November 4, 2015. This email informed the Complainant that in order for the Student to be to be considered for Section 504 eligibility, the Complainant must provide documentation of a diagnosed “handicapping condition that is impeding learning.”¹ As stated above, if a district believes that a student may need related services due to a disability, it is the district’s obligation to evaluate that student under Section 504.² OCR finds that the District incorrectly placed the burden on the Complainant to establish the Student’s eligibility for services under Section 504.

On or about XXXX, the District received a letter from the Student’s pediatrician diagnosing the Student with Reading Based Learning Disability and Developmental Coordination Disorder and recommending that the District implement a Section 504 Plan for the Student with specific accommodations. Even after the District received documentation from the Student’s doctor of a diagnosed impairment, another month went by while School and District staff continued to discuss whether an evaluation should be conducted and, if so, under what law. The Student was referred for evaluation under IDEA on April 4, 2016, despite the fact that the Student’s previous district found her ineligible for services under the IDEA and the Complainant requested the Student be evaluated under Section 504. The District found the Student eligible for an IEP on June 16, 2016.

Based on the above, OCR finds there was an unreasonable delay of almost six months in the District’s referral of the Student for evaluation. Specifically, OCR determined that by October 2015, the Student’s history of disability-related services, her significant academic concerns, and the Complainant’s request for a Section 504 Plan to address these concerns was sufficient to

¹ The definition of disability under Section 504 is a physical or mental impairment that substantially limits a major life activity. A major life activity may be something other than learning, e.g., speaking, walking, seeing, or hearing, etc. See 34 C.F.R §104.3(j)(2)(ii).

² In addition to placing the burden to show eligibility on the Complainant, the Section 504 Coordinator told the Complainant that Section 504 Plans do not give students small group pull-out instruction. OCR finds that this statement is in conflict with Section 504’s requirement for an individualized determination for each student that is found eligible under Section 504 of what meets that student’s educational needs. If a Section 504 team finds that a student with a disability needs small group pull-out instruction in order to meet that student’s individualized educational needs, then that Student’s Section 504 Plan or other individualized plan should provide for such instruction.

create a reasonable belief that the Student needed or was believed to have needed related services due to a disability. This should have triggered a Section 504 evaluation by the District; however, the District did not refer the Student for an IDEA evaluation until April 2016.³ Moreover, OCR finds that the District inappropriately placed the burden on the Complainant to determine the Student's need for a Section 504 evaluation. OCR determined that each of these concerns are not in compliance with 34 C.F.R. §104.35(a). Finally, OCR finds that the District has not, as required by 34 C.F.R. §105.35(b), established standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education or related services. Specifically, OCR found that the District does not currently have Section 504 policies or procedures in place. Accordingly, OCR finds that the District is in violation of the Section 504 regulation at 34 C.F.R. §104.35(a) and (b).

Conclusion

On September 22, 2016, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District 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 District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the District'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 District 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 the by the District on September 22, 2016, if the District 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 District 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 District'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 District 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.

³ Additionally, to date, the District has not conducted a Section 504 evaluation.

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 District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact the OCR attorneys assigned to this complaint: Samantha Shofar, at 202-453-5929 or samantha.shofar@ed.gov, or Eugene Sowa, at 202-453-6869 or eugene.sowa@ed.gov.

Sincerely,

/S/

David Hensel
Supervisory Attorney, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Allison Tomberlin, Esq.