



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

November 23, 2016

Via U.S. Mail and Facsimile (843) 873-4053

Mr. Joseph R. Pye, Superintendent
Dorchester Two School District
102 Green Wave Boulevard
Summerville, SC 29483

RE: OCR Complaint No. 11-16-1400
Resolution Letter

Dear Superintendent Pye:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on June 15, 2016 against Dorchester Two School District (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School) alleging that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleged:

Allegation 1: Since December 6, 2015, the District has denied the Student a free appropriate public education (FAPE) when it failed to implement the provision of his Section 504 Plan requiring teachers to input his assignments into a written agenda.

Allegation 2: The District denied the Student a FAPE on March 4, 2016 when, during his first period class, a teacher failed to implement the 504 Plan's provision requiring proximity when anxious behaviors are present.¹

Allegation 3: The District discriminated against the Student on the basis of disability on March 4, 2016, when a guidance counselor made the Student stand in front of his peers as a form of discipline.

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

¹ OCR revised this allegation on August 17, 2016 after receiving clarification from the Complainant.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness

by fostering educational excellence and ensuring equal access.

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.

Before OCR completed its investigation, the District expressed a willingness to resolve Allegations 1 and 2 by taking the steps set out in the enclosed Resolution Agreement. OCR found insufficient evidence with respect to Allegation 3. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement regarding Allegations 1 and 2, and OCR's findings and conclusions regarding Allegation 3.

Background

During the 2015-2016 school year, the Student was in the XXXX grade at the School. The Student is identified as a student with a disability XXXX and receives services under a Section 504 Plan (the Plan). The Plan, effective August 14, 2015, required the following relevant accommodations: (1) "Assignments written in sufficient detail for [the Student] to copy in his agenda – initialed daily by teachers and parents;" and (2) "Teacher proximity to [the Student] when he becomes too fidgety or displays anxious behaviors."

On March 4, 2016, during the Student's first period Social Studies class, the XXXX grade guidance counselor (Guidance Counselor) led a guidance presentation, with the Student's homeroom/Social Studies teacher (the Teacher), also present. It is not in dispute that the Student talked during the presentation, and the Guidance Counselor, after reportedly asking the Student to stop, required the Student to stand. When the Student sat down, the Guidance Counselor asked him to leave the room. He refused, and the Teacher called an administrator to remove the Student. As a result of this incident, the Student received a one-day suspension.

On March 17, 2016, the Student's Section 504 team met and revised the Plan. As amended, the 504 Plan requires the following relevant accommodation: "Assignments written in sufficient detail for the Student to copy in his agenda – initialed daily by teachers and parents. 7th and 8th period teachers will check his agenda to ensure all assignments are written and signed prior to dismissal."

Allegation 1

Since December 6, 2015, the District has denied the Student a free appropriate public education (FAPE) when it failed to implement the provision of his Section 504 Plan requiring teachers to input his assignments into a written agenda.

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. 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.²

As previously noted, each of the Student's Plans in place for the 2015-2016 school year require, in part, that the Student copy his daily assignments into his written agenda, and that his teachers then initial this agenda. Accordingly, OCR found that the plain language of the Plans indicate that School staff had no obligation to input the assignments directly into the Student's written agenda, as alleged. Nonetheless, the Plans make clear that teachers must initial the agenda completed by the Student in an effort to ensure that the Student's agenda is written in an organized manner.

OCR reviewed some copies of the Student's agenda book provided by the Complainant, and found 23 instances during January and February 2016 when the entries were blank and contained no initials from the teachers.³ Additionally, OCR reviewed contemporaneous Complainant email communications to School staff dated January 12, 2016 and April 5, 2016 indicating that the Complainant complained about the School's failure to initial the Student's written agendas to ensure completion. Lastly, OCR found documentation indicating that the Student's Section 504 team discussed the noncompliance of this provision at a March 17, 2016 team meeting. Specifically, the meeting minutes for the March 17, 2016 meeting state, in part, that "[m]oving forward, we need to make sure [the Student's] agenda reflects the assignments in all class [sic]." OCR found that as a result of this meeting, the team amended the Plan to require that the Student's 7th and 8th period teachers check the Student's agenda daily to ensure that the assignments were written and initialed. However, neither the modified Plan nor the meeting minutes indicate that the team considered whether the failure to implement this provision of the Plan resulted in a denial of FAPE or warranted compensatory related aids and services. Furthermore, an email dated April 5, 2016 indicates that the Complainant still had concerns about the provision's implementation even after the revision of the Plan.

Pursuant to Section 302 of OCR's *Case Processing Manual*, on August 16, 2016, the District indicated its willingness to enter into a voluntary resolution agreement for Allegation 1.

Allegation 2

The District denied the Student a FAPE on March 4, 2016, when, during his first period class, the teacher failed to implement the Section 504 Plan's provision requiring proximity when anxious behaviors are present.

As stated above, the Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities.

OCR determined that the Student's Plan that was in place on March 4, 2016 requires, in part, "teacher proximity to [the Student] when he becomes too fidgety or displays anxious behaviors."

² This standard also applies to Allegation 2.

³ In addition, OCR found several other instances where it is unclear whether teachers initialed the agenda, even though it contained information.

OCR determined that on March 4, 2016, during the Student’s first period class, the Student talked during a presentation, resulting in discipline. Contemporaneous documentation reviewed by OCR does not indicate that either the Guidance Counselor or the Teacher were in close proximity to the Student during this incident. OCR spoke to the Guidance Counselor, who confirmed that during the incident, she was “mostly” at the front of the class.⁴ The Guidance Counselor added that “at some point” during the incident, the Teacher became involved and “asked [the Student] to stop.” The Guidance Counselor stated that when that occurred, the Teacher was at or near her desk, which was on the other side of the room from the Student.

In response to this allegation, the District asserts that the Student’s behavior did not trigger an obligation to implement the proximity provision of his Plan. The District states that the Student did not exhibit “fidgety and anxious behaviors” but instead “would not stop talking,” and that he “displayed the behavior of ‘refusal’ when asked to leave the room. Asserting that the Student’s behavior did not “normally include a direct and consistent act of defiance towards the teacher,” the District argues that “the behaviors of being ‘fidgety and anxious’ are not all-encompassing terms that include ‘any’ behavior that a person chooses to identify.”

Notwithstanding the District’s assertions, OCR found evidence indicating that in emails dated September 22, 2015 and January 11, 2016, the Complainant conveyed to School staff her view that the Student’s anxious behavior might manifest itself in behaviors like excessive talking or argumentation. Moreover, OCR was unable to find contemporaneous evidence indicating that School staff disagreed with the Complainant’s understanding of this provision. In the September 22, 2015 email, for example, the Complainant stated to the School Assistant Principal (the Assistant Principal): “[T]his is exactly the type of anxious behavior I anticipated [the Student] would experience in his classroom environment. . . . The description below is high anxiety in [the Student] as we’ve discussed in his 504 Plan meeting prior to the beginning of the school year. Excessive talking, argumentative, etc....”

Moreover, in the January 11, 2016 email, the Complainant emailed a number of School Staff (including the Teacher) that the Student might have “increased anxiety” over an upcoming surgery, stating: “Again, this will look like hyperactivity, excessive talking and yelling out, argumentative, agitated, fixated on something and not being able to let it go, refusal to comply with instructions, etc.” Additionally, early in the 2015-2016 year, the Complainant provided an information packet to School staff containing articles relating to the Student’s disabilities and resulting behaviors, including anxiety-produced disruptive behavior such as “oppositonality” and impaired concentration. The Assistant Principal represented to the Complainant that he would share this packet with the Student’s teachers. Moreover, the Guidance Counselor confirmed to OCR that staff received the packet and that she read it, likely before the March 2016 incident.

Pursuant to Section 302 of OCR’s *Case Processing Manual*, on August 16, 2016, the District indicated its willingness to enter into a voluntary resolution agreement for Allegation 2.

⁴ She stated she was not sure how far she was from the Student when she was in the front of the room, but thought she was “maybe two feet away.”

Allegation 3

The District discriminated against the Student on the basis of disability on March 4, 2016, when a guidance counselor made the Student stand in front of his peers as a form of discipline.

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability. When investigating an allegation of different treatment under Section 504 and Title II, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Here, the Complainant alleged that during the March 4, 2016 incident, the Guidance Counselor had the Student stand after he exhibited anxious behaviors "in an obvious attempt to embarrass and belittle [the Student] in front of his peers." OCR determined that similarly-situated students without disabilities were not made to stand in front of their peers for talking. Therefore, OCR finds sufficient evidence to establish a prima facie case of discrimination.

OCR next examined whether the District had a legitimate, nondiscriminatory reason for requiring that the Student stand before his peers in class. According to the Guidance Counselor, she required the Student to stand on March 4, 2016 "to get his attention, get him to participate a little bit more, and to get him to stop distracting his classmates." She stated that the Student was the one doing the majority of the talking while other students were just "grinning," and that the Student was "distracting others." She added that she has not heard of any other teachers or administrators requiring a student to stand before.

OCR then considered whether the offered reasons were a pretext for discrimination. OCR reviewed the District's disciplinary policies and procedures, which do not address the practice of requiring a student to stand in class. However, in a statement, the School Principal stated that mandated standing is "sometimes" used informally by District teachers. The Principal listed a number of reasons why teachers employ mandated standing: "so they have the student's attention while speaking with them," "so students do not require the assistances of an administrator," "so they can have a short conversation to redirect and get [the students] back on track," or "to correct minor behavior issues."

OCR asked that the District produce data including a list of students made to stand as a form of discipline during the 2015-2016 school year, including (along with other information) each student's disability status. However, the District informed OCR that no such records exist. According to the Principal, "[h]aving a student stand is not a consequence that is issued by an administrator for a disciplinary referral.... The school administration handles disciplinary referrals and keeps records of all consequences issued by the school administration. The school

does not keep a record of all the attempts teachers make to redirect students and get them back on track within their classrooms.”

Notwithstanding the lack of comparator data, OCR found the Guidance Counselor’s statements about why she asked the Student to stand to be credible. Additionally, the Complainant did not provide any additional evidence indicating that the Guidance Counselor’s actual motivation for requiring that the Student stand stemmed from different treatment, rather than as an informal strategy to help get the Student’s attention.⁵ While OCR cautions the District to monitor closely any disciplinary method that its teachers employ—whether or not it results in a disciplinary referral to an administrator—OCR uncovered insufficient evidence to conclude that the Guidance Counselor’s rationale for requiring the Student to stand constituted pretext, or that the actual motivation stemmed from disability discrimination. Accordingly, OCR finds insufficient evidence of a violation, and will take no further action with respect to Allegation 3.

Conclusion

Pursuant to Section 302 of OCR’s *Case Processing Manual*, the District signed the enclosed Resolution Agreement on November 22, 2016 which, when fully implemented, will resolve Allegations 1 and 2 raised in this complaint. The provisions of the Agreement are aligned with Allegations 1 and 2, issues raised by the Complainant, and the information discussed above that was obtained during OCR’s investigation, and are consistent with applicable law and regulation. OCR will monitor the District’s implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

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.

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.

⁵ To the extent that this strategy constitutes a denial of FAPE, OCR notes that this issue is being addressed through Allegation 2 of this complaint.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact Kendra Riley, the OCR attorney assigned to this complaint, at 202-453-5905 or Kendra.Riley@ed.gov, or Kathryn Love, another OCR attorney assigned to this complaint, at 202-453-6948, or Kathryne.Love@ed.gov.

Sincerely,

/S/

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

Enclosure

cc: Mr. Charles Kirtley (via email)