



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

April 27, 2017

Dr. Bert L'Homme
Superintendent
Durham Public Schools
P.O. Box 30002
Durham, NC 27702

Re: OCR Complaint No. 11-16-1861
Letter of Findings

Dear Dr. L'Homme:

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 Durham Public Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX (the School). The Complainant alleges that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleges the following:

1. The District failed to timely evaluate the Student to determine his eligibility as a student with a disability and his need for special education or related services during the XXXX school year.
2. The District failed to conduct a manifestation determination after XXXX during the XXXX 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 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 sufficient evidence of a violation of Section 504 and Title II regarding Allegation 1, which the District agreed to resolve through the enclosed resolution

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agreement. However, OCR determined during this investigation that Allegation 2 was not timely filed and is administratively closing that allegation. OCR’s findings and conclusions are discussed below.

Background

The Student was enrolled in the XXXX grade at XXXX (the School) during the XXXX school year. A summary prepared by the District for an eligibility determination meeting in XXXX contains the following information about XXXX history:

XXXX PARAGRAPH REDACTED XXXX

The Student scored at XXXX on the XXXX grade End of Grade (EOG) reading test, indicating below grade level proficiency and a limited command of knowledge and skills, despite receiving daily reading interventions. He also scored at XXXX on the XXXX grade math EOG, indicating below grade level proficiency and only partial command of knowledge and skills.

XXXX 6 PARAGRAPHS REDACTED XXXX

On XXXX, the School received a written referral for an evaluation from the Student’s parent. The Guidance Counselor told OCR that she and the School’s EC Facilitator went to the Student’s home and assisted the parent in writing the referral. On XXXX, the Individualized Education Program (IEP) team decided to conduct an evaluation. XXXX 2 SENTENCES REDACTED XXXX.

On XXXX, the IEP team determined that the Student met the eligibility criteria for special education services for XXXX as his primary disability. In doing so, “the team made note of XXXX.” The team also determined that the Student met the eligibility criteria for XXXX as his secondary disability, based on his weakness in reading comprehension. On XXXX, the IEP team developed the Student’s IEP. The IEP provides for specially designed instruction in XXXX for 45 minutes per day in the general education setting, and specially designed instruction in XXXX skills for 30 minutes per day in the general education setting and 30 minutes three times per week in a XXXX classroom. The Student is currently in the XXXX grade attending XXXX.

Allegation 1

The Complainant alleged that the District denied the Student a free appropriate public education (FAPE) by failing to timely evaluate the Student to determine his eligibility as a student with a disability and his need for special education or related services during the XXXX school year.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide 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 IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) 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 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 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)).

The District developed an IEP for the Student on XXXX, within 90 days of receiving a written referral from the Student’s parent on XXXX, as required by state regulations. However, OCR found sufficient evidence to conclude that the District unreasonably delayed in waiting until XXXX to initiate the evaluation. The evidence indicates the District had reason to suspect the Student was a student with a disability and may need special education or related services prior to XXXX based on his longstanding history of XXXX during XXX, resulting in XXXX; and academic concerns, including XXXX EOG scores from the previous school year. OCR determined that the District should have sought parent consent to initiate an evaluation at least beginning on XXXX, in response to the Student’s XXXX.¹ At that time, the Student had consistently displayed XXXX. In addition, the notes from the XXXX meeting specifically referenced “XXXX.”

The Principal told OCR that prior to obtaining the parent’s written referral in XXXX, the School reached out to the Student’s parent by phone several times about coming in for a referral meeting but the parent would not commit to a meeting date. The Principal also told OCR that the School wrote a referral for evaluation prior to XXXX but had to wait for parent consent. However, there is no evidence in the written record documenting any contacts with the parent about referring the Student or obtaining consent for evaluation prior to XXXX, and there is no evidence of School staff completing a referral itself prior to obtaining the parent’s referral.

¹ OCR notes that the District may have had sufficient information to suspect a disability and need for special education or related services earlier than XXXX, including when the School referred the Student for XXXX.

The District’s response to the complaint contends that the School was not on notice that the Student may have a disability because the Student’s “XXXX”. According to the District, “XXXX.” OCR acknowledges that the Student’s parent completed a questionnaire for the XXXX team in XXXX in which she attributed the Student’s XXXX. In addition, the referral for XXXX. However, as described above, the District itself documented the Student’s extensive history of XXXX. Therefore, the District should have recognized that his XXXX predated the XXXX school year, rather than attributing these problems solely to XXXX.

When OCR interviewed the Principal and Guidance Counselor, they provided alternative explanations for the Student’s XXXX. The Guidance Counselor stated that based on her conversations with the Student, XXXX 5 SENTENCES REDACTED XXXX.

We acknowledge that the District made significant efforts to put interventions in place for the Student throughout the XXXX school year through the XXXX. While the Department supports the use of evidence-based intervention frameworks, such frameworks must not delay or deny an evaluation for a student suspected of having a disability and needing special education or related services. Districts must timely evaluate such students regardless of receipt of general education interventions.

For these reasons, OCR found sufficient evidence of a violation of Section 504 and Title II with respect to the District’s delay in initiating an evaluation of the Student until XXXX. The enclosed resolution agreement requires the District to provide compensatory education to the Student and provide training to School staff.

Allegation 2

OCR is administratively closing this allegation because OCR determined that it was not filed in time. As explained in Section 106 of OCR’s *Case Processing Manual*, OCR generally will take action only with respect to allegations that are filed within 180 days of the act of alleged discrimination. During the evaluation of this complaint, the Complainant told OCR that she believed the Student’s XXXX of the XXXX school year occurred in XXXX. However, OCR determined that the XXXX occurred on XXXX. The Complainant filed this complaint on XXXX, more than 180 days later.

While OCR is administratively closing this allegation, we caution the District that if it has reason to believe a student has a disability and needs special education or related services, it must conduct a manifestation determination prior to a significant change in placement for XXXX reasons, pursuant to 34 C.F.R. § 104.35(a), even if the student has not yet been determined eligible for services. OCR considers an XXXX to be a significant change in placement. A series of short-term XXXX may also be a significant change in placement.

Conclusion

On April 27, 2017, 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 by the District on April 27, 2017, 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.

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 one of the OCR attorneys assigned to this complaint: Shana Heller at 202-453-6599 or Shana.Heller@ed.gov, or Sarah Morgan at 202-453-5922 or Sarah.Morgan@ed.gov.

Sincerely,

/s/

Kristi R. Harris
Team Leader, Team IV
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Ken Soo