



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
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XXXX

Via Email/andreadublin@johnston.k12.nc.us

Dr. David Ross Renfrow
Superintendent
Johnston County Schools
2320 US 70 Business Hwy East
PO Box 1336
Smithfield, NC 27577

Re: OCR Complaint No. 11-17-1056
Letter of Findings

Dear Dr. Renfrow:

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 Johnston County Schools (the District). The Complainants filed the complaint on behalf of a student (the Student) who began the school year at XXXX Elementary School (XXXX) prior to being transferred to XXXX Elementary School (XXXX). The Complainants allege that during the fall 2016 semester the District discriminated against the Student on the basis of disability by failing to provide the Student with a free appropriate public education (FAPE). Specifically, the complaint alleges that the District failed to follow proper procedures in evaluating the Student for special education services and in making placement decisions.

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 Complainants and the District, and interviewed the Complainants and District staff members. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence of a violation of Section 504 and Title with respect to (i) the District's initial determination of the Student's eligibility for special education and related services and (ii) the District's initial placement decision regarding the Student. However, OCR found sufficient evidence of a violation of Section 504 and Title II with respect to (iii) the District's subsequent

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by fostering educational excellence and ensuring equal access.*

change in the Student's placement, which the District agreed to resolve through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

Background

The Student, XXXX, began his education within the District in the XXXX. Prior to the start of the school year, the District and the Complainants had identified possible concerns about the Student's development, specifically with respect to XXXX. As such, the District evaluated the Student and determined he was eligible for special education and related services. On XXXX, the Student was initially placed in a special education setting at XXXX, the District school zoned for his address, and began receiving XXXX as a related service. However, on XXXX, the IEP Team reconvened and decided to move the Student to a different special education setting at another District school, XXXX. The Student was scheduled to be transferred to XXXX on XXXX but did not actually transfer until XXXX.

The Complainants allege that the District failed to follow proper procedures in evaluating the Student for special education services and in making these placement decisions. Specifically, the Complainants contend that the evaluation data relied upon by the District was inconclusive and incomplete; that the District improperly labeled the Student as XXXX; that the District refused to consider information from the Student's pediatrician and private XXXX; that the District misrepresented the placement options available for the Student; and that the District moved the Student to a more restrictive setting that required the Student to travel by bus an hour each way.

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.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

The Section 504 regulation, at 34 C.F.R. § 104.34(a), requires a school district to educate a student with a disability with his/her nondisabled peers to the maximum extent appropriate to the

needs of the student with a disability. A school district must place a student with a disability in the regular educational environment unless the district demonstrates that it cannot satisfactorily educate the student in the regular environment even with the use of supplementary aids and services. When a district places a student in a setting other than the regular educational environment, it must take into account the proximity of the alternate setting to the student's home.

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.

Analysis

I. Initial Determination of Eligibility for Special Education and Related Services

OCR examined the evaluation process conducted by the District leading up to the initial determination of special education and related services for the Student on XXXX. Through this investigation, OCR determined that the District completed an evaluation of the Student by several professionals prior to the start of the XXXX academic year, and that the results of this evaluation were shared with the Complainants and considered by the IEP Team.

On XXXX, the Complainants completed a XXXX, which provided detailed information about the Student to assist in the evaluation process. That same day, the Student was tested in a separate, quiet room by XXXX. Each of these professionals evaluated the Student through a records review, behavioral observations, and the administration of standardized assessments. All XXXX professionals provided detailed written reports to the IEP Team.

These same professionals also participated in the initial IEP Team meeting on XXXX. Notes from this IEP meeting show that each professional shared the results of their evaluation of the Student. At this meeting, the Complainants gave signed consent for the initial eligibility determination that the Student met the criteria for XXXX and required special education and related services.

OCR did not find evidence to support the Complainant's contention that the District refused to consider information from the Student's pediatrician or XXXX, or that the District labeled the Student as XXXX without basis. According to the Complainants, the Student's pediatrician confirmed that the Student's only issue was a XXXX, and that the Student showed no further signs of XXXX. The pediatrician referred the Student to a XXXX on XXXX. At an appointment on XXXX, the XXXX diagnosed the Student with XXXX. District staff informed OCR that they did not recall the Complainants providing any information from the Student's pediatrician, private XXXX or any other service providers at either XXXX IEP meeting. Moreover, the

District maintains that the IEP Team did not label the Student as XXXX. According to District staff, the school XXXX shared that there were indicators present that the Student *may* XXXX. However, the IEP Team identified the Student as having a developmental delay without making a determination as to whether the Student is XXXX. As such, OCR has determined that the District complied with the Section 504 regulations in interpreting evaluation data and determining that the Student was eligible for special education and related services. We find insufficient evidence to establish a violation pursuant to Section 504.

II. Initial Placement Decision

The Complainants maintain that they requested at the initial IEP Team meeting that the Student be in a regular education classroom to see how he interacted with other students with pull-out only for one-on-one XXXX to address his XXXX. According to the Complainants, the Principal insisted that the only options available for the Student were the special education classrooms at either XXXX or XXXX, and that the IEP Team would not consider putting the Student in the regular education setting.

In contrast, District staff maintains that the IEP Team discussed a range of placement options, including the regular education setting, the special education cross-categorical classroom at XXXX, and the special education XXXX classroom at XXXX. In our interviews, District staff recalled the Complainants requesting that the Student spend some or all of the day in the regular education classroom setting, and that this was discussed as an option by the IEP Team. The District staff also told OCR that the IEP Team discussed the level of support the Student required with communication and the need for a smaller group setting XXXX.

The District documentation OCR reviewed contained some contradictory information. For example, on page XXXX of the Student's XXXX IEP, the District did not check any alternative placements considered by the team aside from the separate special education classroom despite a prompt to do so on the standardized IEP template in "Section VI. Continuum of Alternative Educational Placements." Similarly, the Prior Written Notice, issued to and signed by the Complainants on XXXX, requires the IEP Team to list other placements considered, including the continuum of alternative educational placements if applicable, and to explain why these options were rejected. The District wrote: "The team rejected qualifying [the Student] because he qualifies under the XXXX classification." Finally, the meeting notes make no mention of a discussion of any placement options other than in the special education classrooms at XXXX and XXXX. Specifically with regards to the initial placement decision, the minutes read: "A discussion took place about what room would best meet [Student's] needs. An agreement was made to try a couple weeks in the cross categorical room at XXXX and then revisit how he is doing at another meeting on XXXX. Services will take place in the separate setting."

Despite the inconsistencies in the meeting notes, the finalized IEP, and the Prior Written Notice, OCR is unable to confirm, by a preponderance of the evidence, that the District failed to consider a full continuum of placement options for the Student as required by the procedures outlined in Section 504. Importantly, the Complainants and the District staff interviewed all acknowledged a conversation took place about whether a regular education setting would be appropriate for the Student. The District documented provision of the Prior Written Notice and obtained signed

parental consent for the initial provision of special education and related service; both documents include information on the District’s Handbook of Parents’ Rights.

Ultimately, the Complainants signed the proposed IEP on XXXX pursuant to which the Student was placed into the cross-categorical special education classroom at XXXX.¹ As such, OCR has determined that the District complied with the Section 504 regulations in interpreting evaluation data and placing the Student.

III. Subsequent Change in Placement

At the School’s request, the Student’s IEP Team reconvened on XXXX. Based on the interviews OCR conducted and the records we reviewed, the District appears to have viewed the initial placement at XXXX as a “trial period” to see how the Student progressed. The District considered the XXXX meeting as an extension of the initial IEP meeting although the evaluating professionals and the assigned XXXX were not participants. The participating IEP Team included the Principal, the Student’s special education teacher at XXXX, a regular education teacher at XXXX, the special education teacher at XXXX, the XXXX Specialist and the Complainants.

As a result of the XXXX IEP meeting, the Student was moved from the cross-categorical special education classroom at XXXX to the XXXX special education classroom at XXXX. All three District staff members interviewed confirmed that the Student’s IEP was changed to remove any opportunity during the day for inclusion with non-disabled peers. As a result of the IEP amendments put into effect on XXXX, the Student would no longer participate in art, assemblies, lunch, recess, and content areas in the regular education setting. Rather, in the XXXX placement, the Student would spend 100% of his time in a special education setting, including lunch and recess, aside from XXXX sessions in the XXXX room.

During our investigation, the District asserted that the Student’s placement was not changed, and that any changes made on XXXX were purely administrative. However, as evidenced by the acknowledged differences in the cross-categorical classroom and the XXXX special education classroom, OCR has determined that the move to XXXX constituted a significant change in placement that triggered the 504 procedural requirements. As such, OCR investigated whether the District adhered to the Section 504 procedural requirements when moving the Student from the cross-categorical classroom at XXXX to the XXXX classroom at XXXX. In particular, OCR considered whether the District drew upon information from a variety of sources, included knowledgeable persons in the decision-making process, and considered the extent to which the Student could be educated with peers without disabilities.

District staff maintains that any changes to the Student’s IEP, in addition to the differences in the two classrooms, were discussed with the IEP Team. OCR established that the IEP Team

¹ OCR asked each of the District staff members interviewed about this specific provision written into the XXXX IEP. The Cross-Categorical Special Education Teacher, who confirmed that she wrote the IEP, informed OCR that this was an error and that the Student was supposed to receive content support in the special education setting. The Principal and the XXXX Specialist did not have any knowledge about this provision, or whether it was implemented.

discussed, generally, the differences in the classrooms. The District's XXXX Specialist informed OCR that, in contrast to the cross-categorical special education classroom, the XXXX special education classroom at XXXX includes mostly students with developmental disabilities. While the same services and modalities can be provided in either classroom, the XXXX special education classroom places a greater emphasis on communication, visual supports, and structure. The Cross-Categorical Special Education teacher likewise informed us that all of her students are verbal, and that her students "work on academics in the classroom." The teacher stated that, based on what the XXXX teacher shared at the IEP meeting, the XXXX special education classroom worked on academics but was "XXXX." The District representatives of the Student's IEP Team explained to OCR that they believed the Student would do better at XXXX because the XXXX classroom was based around communication, whereas the cross-categorical students were mostly verbal.

The District maintains that the IEP Team discussed, at least to some degree, the Student's progress and capacities at the XXXX meeting. However, the revised IEP, new Prior Written Notice, and meeting minutes did not include any new information or data about the Student's performance or progress since the initial placement in the cross-categorical special education classroom at XXXX. The Cross-Categorical Special Education Teacher informed OCR that she kept documentation on the Student, in particular a behavior log, which was shared at the XXXX IEP meeting. The Complainants confirmed that they had reviewed the behavior log, and that the Cross-Categorical Special Education Teacher had shared her concerns at the meeting based on classroom observations. OCR discussed the Student's progress during the few weeks he spent in the cross-categorical classroom with both the teacher and the Complainants; we note that the descriptions differ significantly. OCR also reviewed the ten daily behavior logs for the Student completed by the teacher prior to, and shared with the IEP Team at, the XXXX IEP meeting. According to the data reviewed and based on the teacher's system as explained, 48.3% of the time measured the Student was meeting the expectations for behavior, attaining a Level 4 or 5. 81% of the time the Student was meeting or close to meeting the behavior expectations, attaining a Level 3 or higher. About 19% of the time, the Student behaved below average expectations, attaining below Level 3, being scored at the lowest level, Level 1, less than 1% of the time. The District did not identify any other information or sources considered in the decision-making process leading up to the Student's classroom change.

The provision of an appropriate education to a student requires adherence to the procedures outlined in §§104.34, 104.35, and 104.36. Pursuant to §§104.34(a) and 104.36(c)(4), the District must demonstrate that the education of a student with a disability in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily before placing the student in a different setting. Moreover, even if the student is placed outside the regular educational setting for academics, the District must ensure that the student participates with non-disabled peers in non-academic and extracurricular services and activities, including meals and recess periods, to the maximum extent appropriate to the student's needs. *See* 34 C.F.R. §§104.34(b) and 104.37.

OCR did not identify any evidence that the IEP Team considered the extent to which the Student would participate with nondisabled peers once the Student moved to the XXXX special education classroom at XXXX although the Student had been participating with nondisabled

peers at several junctures each day while at XXXX. The IEP meeting notes do not indicate any discussion regarding the Student's future participation in nonacademic and extracurricular activities with non-disabled peers. The absence of such documentation is particularly concerning where the District completed documents specifically prompting the District to list placement options considered and why these options were rejected. As such, OCR has determined that the District did not make this threshold determination for the Student prior to or during its discussion of the subsequent change in placement.

OCR noted a particular concern with the District staff's understanding of the presumption of education in an integrated setting for academic *and* non-academic services absent a determination that integration would not be appropriate to the student's needs. For instance, comments by the School Principal, who served as the District's representative leading the Student's IEP Team, appeared to misunderstand this principle. The Principal told OCR that the Student had a difficult time participating in XXXX and XXXX classes alongside his non-disabled peers and needed a Teacher's Assistant (TA) to assist him in a one-to-one capacity in the regular education setting. The Principal stated to OCR this was "most restrictive," suggesting it was more restrictive than the Student's placement full-time in a special education setting without any inclusion in the regular education setting for XXXX and XXXX, with or without one-to-one assistance.

Procedural Safeguards

The Complainants indicated, by signature, that they received a copy of the Handbook of Parents' Rights that explains due process procedures. The Complainants also confirmed receipt of the procedural safeguards to OCR. While OCR has determined that the Complainants were provided written information about how to contest the District's actions, OCR has reservations about whether District staff misrepresented and undermined the notification of these rights in the course of the IEP Team meetings. The Complainants maintain that the School Principal, who served as the LEA representative on the Student's IEP Team, informed them that they had only two options: either agree to the Student's relocation to XXXX or remove the Student from the District to pursue homeschooling or private education at their own expense. OCR was unable to confirm this allegation in our investigation. However, OCR informs the District that such misrepresentations, if made, would run afoul of the process requirements of Section 504.

To summarize, OCR determined that, contrary to the District's assertion, the XXXX IEP meeting resulted in a change to the Student's placement. Furthermore, OCR found sufficient evidence to establish that the District failed to adhere to the procedures required by Section 504 when making the change in placement. The enclosed resolution agreement, once fully executed, will resolve the identified compliance concerns.²

² OCR found insufficient evidence to determine that the District failed to consider the proximity of the XXXX setting in relation to the Student's home when making the subsequent change of placement decision as required by 34 C.F.R. § 104.34(a) and as alleged by the Complainants. Evidence shows that the District recognized that the Student would require transportation to XXXX, and that District told the Complainants that it would provide the Student with appropriate transportation. For example, the Cross Categorical Teacher informed OCR that the family chose to try bus services, in lieu of carpool, even though the Student had not been on a bus before; the teacher acknowledged that there was no further discussion about how the bus transportation, in terms of time and distance, would impact the Student due

Please note that OCR’s investigation of this complaint was limited to determining whether the District followed the procedures required by Section 504. OCR generally does not review or second-guess the result of individual evaluation, placement, and other educational decisions as long as the District follows the “process” requirements of Section 504 (concerning identification and location, evaluation, placement, and procedural safeguards). Section 504 requires the District to educate the Student with his nondisabled peers to the maximum extent appropriate to the needs of the Student. The District must place the Student in the regular educational environment unless the District demonstrates that it cannot satisfactorily educate the Student in this environment with the use of supplementary aids and services, such as a one-to-one aide. *See* 34 C.F.R. § 104.34(a).

Here, the Student’s IEP Team decided to move the Student to a different classroom setting wherein the Student would spend 100% of his time apart from his nondisabled peers pursuant to the terms of the XXXX IEP. OCR has not made any determination as to whether this level of restriction is appropriate for the Student. Substantive disagreements over a student’s evaluation, services, placement, or educational program, such as these, are more appropriately addressed through a due process proceeding. The Complainants retain the right to challenge the substantive decisions made by the Student’s IEP Team. We encourage the Complainants to seek more information about North Carolina’s IDEA due process procedures at <http://ec.ncpublicschools.gov/parent-resources/dispute-resolution/due-process-hearings>.

Conclusion

On March 9, 2018, 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 March 9, 2018, 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

to his disability. On XXXX, the IEP Team included transportation as a required related service. When describing the special transportation services in the IEP, the District wrote: “[Student] needs transportation as a related service because a regular bus is XXXX.” The School Principal informed OCR: “It was our understanding that only other [exceptional] children would be on the bus.” District staff seemed to believe, and to relay to the Complainants, that the Student’s transport time would be much shorter than the actual length of the bus route once in effect. While the bus transportation provided to the Student may have been different than what was described at the XXXX meeting, or required by the terms of the Student’s IEP, OCR cannot conclude that the District failed to consider XXXX proximity in contrast to XXXX when moving the Student.

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, please contact Megan Rok, the OCR attorney assigned to this complaint, at 202-453-6978 or megan.rok@ed.gov.

Sincerely,

/s/

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

cc: Carolyn Waller, Esq., *via email/CWaller@tharringtonsmith.com*