



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

March 27, 2020

Via electronic mail GilmoreM@acs.k12.sc.us

Dr. Margaret Gilmore
Allendale County Public Schools
3249 Allendale-Fairfax Highway
Fairfax, South Carolina 29827

Re: OCR Complaint No. 11-17-1438
Letter of Findings

Dear Dr. Gilmore:

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 May 24, 2017 against Allendale County Public Schools (the District).¹ The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School) and alleged:

Allegations

1. The District failed to properly reevaluate the Students before executing a change in placement; specifically, by reducing the number of hours the Student attended daily.
2. The District failed to make a manifestation determination when, on XXXX, the Student, who is a student with a Section 504 Plan, received ten (10) days of out of school suspension resulting in cumulative removals from school in excess of ten (10) days for the 2016-2017 school year.
3. The District treated the Student differently than students without a disability by requiring the Student's mother to be present with the Student in school.

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

¹ The District is currently managed by the South Carolina Department of Education. See at <https://www.acs.k12.sc.us/o/acs/page/our-district--88>. <http://www.acs.k12.sc.us/>

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

receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During the investigation to date, OCR reviewed information and documentation provided by the Complainant and the District. Before OCR completed its investigation, the District expressed a willingness to resolve the complaint pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination if the District expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement.

Facts

The Student XXXX enrolled in XXXX grade on XXXX, 2016. At the Student's previous school, the school had developed a Section 504 plan. The Student had previously been identified as eligible to receive related aids and services based on a primary impairment of Attention Deficit Hyperactivity Disorder (ADHD).

According to the District, as early as September, the Student demonstrated "extreme behaviors, like fighting, kicking, and running out of the classroom."² Reportedly, following a XXXX meeting between the Complainant, District and School administrators, the Student was placed on an abbreviated school day schedule.³

The District convened a Behavior Support Team meeting on XXXX, 2016, with the stated purpose of considering the development of a functional behavior assessment. An email from the School Section 504 Coordinator to the District Section 504 Coordinator indicates the meeting was continued to XXXX, 2016. However, prior to that date, the Complainant briefly removed the Student from the District. The Student returned on or about XXXX, 2016, as indicated by records provided to OCR.⁴

On XXXX, 2016 the School convened the Section 504 team, which included the Complainant and the principal. The District provided OCR with documentation from the meeting. The meeting minutes state that the Student's school day had been "abbreviated." According to the meeting notes, the Student was briefly in school for an abbreviated period of time (two hours) upon his return in XXXX. Finally, the team determined as necessary that the District conduct a functional behavior assessment (FBA). The FBA was finalized and reviewed by the Section 504 team on XXXX, 2017.

Between XXXX, 2016 and XXXX, 2017, the Student continued to experience behavioral challenges. According to District records, as of XXXX, 2017, the Student had been removed from school a total of nine days for out of school suspensions (OSS). On XXXX, 2017 the principal

² Documentation submitted by the District did not include any referrals or other specific incident reports detailing the Student's behavior prior to XXXX, 2016.

³ The District's response does not specifically indicate how the day was "abbreviated."

⁴ According to an email from the School Section 504 Coordinator to the principal and the District Coordinator, the school attendance record evidences the Student was out of school from XXXX- XXXX, 2016.

verbally informed the Student’s Section 504 Coordinator that the principal was reviewing an incident involving the Student which occurred on the bus.⁵ On XXXX, 2017, the principal issued a ten day out of school suspension against the Student for bringing a XXXX on the bus.⁶ Based on the Student’s record, the Student served only eight days (XXXX, 2017- XXXX, 2017).

On XXXX, 2017, the Student’s Section 504 team, including the Complainant, met for a manifestation determination review meeting. In the District’s position statement, the District reported the team found that the XXXX, 2017 incident was not a manifestation of the Student’s disability. Documentation is lacking from this meeting. According to the attendance record the Student was marked as serving eight days OSS (from XXXX, 2017; XXXX, 2017, and XXXX, 2017). It is not clear from the submissions provided to OCR the reason for discrepancy between the sanction assigned (ten days OSS) and the discipline record. The District convened another manifestation determination meeting on XXXX, 2017, after an incident which occurred on XXXX, 2017. In XXXX the team found the conduct was a manifestation of the Student’s disability and returned the Student to school. In reviewing the Student’s final grades, OCR observed that the Student failed all of his courses, except for art and music.

Allegation 1:

The District failed to properly reevaluate the Student before executing a change in placement; specifically, by reducing the number of hours the Student attended daily.

Abbreviating School Day and Complainant Classroom Presence

Additional Relevant Facts

OCR interviewed the Complainant on XXXX, 2017. According to the Complainant, when she met with the administrators in XXXX the principal told the Complainant there was no one at the School who could assist the Student’s needs. The Complainant stated that home-based instruction was suggested, however, the administrators told her it would take some time to find a qualified teacher. Instead, according to Complainant, the administrators abbreviated the Student’s school day to a XXXX and asked the Complainant to be present in the classroom with the Student. The Complainant told OCR that when the Complainant could no longer attend school with the Student, she briefly removed him from school.

According to the District, as early as XXXX, the Student demonstrated “extreme behaviors” at school. Records provided by the District, including meeting minutes of the XXXX 2016 Section 504 meeting, indicate that the former superintendent and principal met with the Complainant during the week of XXXX, 2016 to discuss the Student’s behavior.

The District asserted that the Complainant agreed to the abbreviated school day upon the Student’s re-enrollment in XXXX 2016. However, documentation shows the Student began attending abbreviated school days in XXXX, after the Complainant met with the administrators. Statements in the XXXX Section 504 meeting minutes label the administrators’ decision to place

⁵ According to the District, on XXXX, 2017 the bus driver reported a student (the Student) XXXX. The driver wrote a bus violation referral and suspended the Student from the bus for ten days.

⁶ The District’s Conduct Policy at the time did not specifically set out XXXX as named violations, though the conduct is generally described in the level of categories listed in the District’s Student Conduct Policy, specifically Policy JICDA and JICDA-R at <https://boardpolicyonline.com/?b=allendale>.

the Student on an abbreviated day an “accommodation” which was put in place as a result of a “safety meeting,” and “not 504 related.” Internal emails from the former principal to the former District Section 504 Coordinator advised the Coordinator that the former superintendent suggested the Complainant sit in the classroom while the District explored home-based instruction as an option.⁷ On XXXX, 2017, OCR interviewed the former District Section 504 Coordinator along with the Student’s school-based Section 504 Coordinator. Both reported that the administrators met with the Complainant and intervened in September without including the Coordinators; the Coordinators told OCR that they subsequently discovered the administrators’ actions.

Legal Standard

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.

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.

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. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related 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 Section 504 Plan or placement are necessary.

Analysis

⁷ On November XXXX, 2016, the Section 504 team included in the Section plan a requirement to assign a District adult support person to assist the Student. OCR determined the District did assign support staff.

OCR is concerned about the administrators' actions and their impact on the Student's access to FAPE. 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, the Section 504 regulation requires a group of knowledgeable persons meet to consider whether further evaluation or revisions to the student's Section 504 Plan or placement are necessary. Furthermore, a district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement. In this case, the Student, who had previously been found eligible for a Section 504 plan based on a diagnosis of ADHD, was experiencing behavioral challenges. OCR is concerned that rather than convene a group of persons knowledgeable about the Student (including the Complainant), evaluation data, and the placement options, administrators took actions which may have inappropriately affected the Student's access to the educational program. However, without documentation from the XXXX meeting and without interviewing the administrators, OCR cannot determine whether or not the administrators' intervention may have denied the Student FAPE.

Finally, OCR identified an, additional concern related to the District's delay in conducting an FBA. While in the XXXX, 2016 meeting the Section 504 team determined it was necessary to conduct an FBA, the District did not complete one until XXXX, 2017; after the Student continued to engage in conduct which resulted in exclusion from the instructional setting. In OCR's review of the District's documentation it is not evident the reason for the delay. OCR notes the attendance record shows seventeen (17) unexcused absences on and after XXXX, 2016. Without interviewing members of the Section 504 team, including the principal and the teacher, OCR cannot determine the reason for the delay and whether the delay denied the Student FAPE. Prior to completing OCR's investigation, the District expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Allegation 2:

The District failed to make a manifestation determination when, on XXXX, 2017, the Student, who is a student with a Section 504 Plan, received ten (10) days of out of school suspension resulting in cumulative removals from school in excess of ten (10) days for the 2016-2017 school year.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to reevaluate a student with a disability before any significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities. If a

school district finds that the student’s disability caused the misconduct, the district may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student’s current educational placement.

Analysis

OCR considers disciplinary exclusion of more than 10 school days to be a significant change in placement which requires the District to reevaluate a student with a disability. OCR is concerned that the Student may have been removed from school in excess of ten days, without conducting a reevaluation. The District provided OCR with the Student’s discipline-related records which document out of school suspensions starting on or after XXXX, 2016. Based on documentation provided by the District, as of XXXX, 2017, the Student had been removed from school a total of nine (9) days for out of school suspensions (OSS). On XXXX, 2017 the principal issued a ten-day (10) OSS; to start on XXXX, 2017.⁸ Therefore, it appears as of XXXX, 2017 the Student had been removed from school for an excess of ten days. However, the discipline noted on a referral form is not always corroborated in the attendance record. Furthermore, without a documentary record, OCR is not able to establish what if any exclusionary discipline actions were taken prior to XXXX, 2016. Without interviewing the school administrators, OCR cannot determine an accurate account of the amount of time the Student was excluded from instruction and whether or not the Student was denied FAPE. Prior to completing OCR’s investigation, including interviewing the principal, the former superintendent, and teacher, the District expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Allegation 3:

The District treated the Student differently than students without a disability by requiring the Student’s mother to be present with the Student in school.

Legal Standard

When investigating an allegation of different treatment, 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.

Additional Relevant Facts and Analysis

The Complainant reported that she was told by administrators in XXXX 2016 that the District did not have teachers to serve the Student’s needs. According to the Complainant, administrators told her she needed to sit in the classroom with the Student until the District could put in place home-based instruction. In the District’s response, it denied the Complainant’s allegation. Further it denies requiring any parent or guardian of any student to sit in class with the student “during the 2016-2017 school year.”

⁸ Attendance records indicate the Student was out of school only a total of eight school days.

When reviewing allegations of different treatment OCR first establishes whether or not a Student has been treated less favorably than similarly situated individuals without a disability. In this case, the Complainant reported the principal told her that the School was not able to serve the Student's needs and recommended she sit in class to assist the Student.

The District denies the Complainant's claim. According to the District, it did not require any parent or guardian to sit in class with a student. Without interviewing the District and School administrators, along with the teacher, OCR cannot determine whether the District required the Complainant to sit in the classroom because of the Student's diagnosed disability.

Prior to completing OCR's investigation, including interviewing the principal, the former superintendent, and teacher, the District expressed a willingness to resolve the complaint by taking the steps set forth in the enclosed Resolution Agreement.

Conclusion

On March 17, 2020, 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. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into and fulfills the terms of a resolution agreement. 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 visits and may request information as necessary to determine whether the District has fulfilled the terms of the Agreement. If the District fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR will 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, assists, or participates in a proceeding under a law enforced by OCR. 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.

If you have any questions regarding this letter, please contact Josie Evola, the OCR attorney assigned to this complaint, at 202-453-5908 or josie.evola@ed.gov.

Sincerely,

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

Enclosure: Resolution Agreement