



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

XXXX

Via Email Sovined@fcpsk12.net

Dr. David Sovine
Superintendent
Frederick County Public Schools
1415 Amherst Street
Winchester, VA 22601

Re: OCR Complaint No. 11-17-1448
Letter of Findings

Dear Dr. Sovine:

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

1. The Division denied the Student a free appropriate public education (FAPE) when the Division failed to evaluate the Student to determine if the Student needed special education and related aids and services when:
 - a. in XXXX, the Student's teachers reported to the XXXX that the Student had XXXX;
 - b. in XXXX, the Complainant requested the Student to be evaluated;
 - c. in XXXX, the School was aware that the Student's XXXX; and,
 - d. in XXXX, the Complainant provided the School medical documentation¹ about the Student's disabilities.²
2. The Division discriminated against the Student on the basis of race because the School did not treat similarly situated Caucasian students with similar behavior the same way when³:
 - a. in XXXX, Teacher 1 XXXX;
 - b. in XXXX, the School's Assistant Principal XXXX;

¹ The medical documentation diagnosed the Student with XXXX.

² OCR notes that the Complainant explained that the School's XXXX put in place "interventions" for the Student during the XXXX school year and has recommended several accommodations for the Student for the XXXX school year, but refused to evaluate the Student for special education and related aids and services.

³

- c. in XXXX, Teacher 1 XXXX; and,
- d. in XXXX, Teacher 2 XXXX.

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. OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504, Title II, and Title VI.

During the investigation, OCR reviewed documents provided by the Complainant and the Division and interviewed the Complainant and a Division administrator and School administrators and staff. After carefully considering all of the information obtained during the investigation, regarding Allegation 1, OCR found sufficient evidence of noncompliance with Section 504 and Title II, and before OCR completed its investigation, the Division expressed a willingness to resolve Allegation 2 on September 22, 2017. OCR's findings and conclusions are discussed below.

ALLEGATION 1

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. 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.

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.

Background

During the XXXX school year, the Student was enrolled in XXXX(the School). At the beginning of the school year, the Student was referred to the School's XXXX. XXXX 2 SENTENCES REDACTED XXXX. During each meeting, the XXXX reviewed the Complainant's concerns, read the XXXX that were completed by the Student's core teachers, discussed the Student's data (i.e., academic progress and test scores), developed strategies and interventions for the Student, and monitored and reviewed the strategies and interventions after they were implemented. The XXXX declined to refer the Student for special education or related aids or services during the XXXX school year.

In XXXX, the Complainant contacted the School to express concerns about the Student's XXXX and she requested XXXX for the Student. The Student was referred to the XXXX. Subsequently, the Student was referred to the XXXX.

XXXX PARAGRAPH REDACTED XXXX.

On XXXX, the XXXX met to "monitor [the S]tudent's progress" and noted that the Student XXXX. XXXX 6 SENTENCES REDACTED XXXX. The XXXX declined to refer the Student for special education and related aids or services noting that the Student's XXXX⁴ made it difficult to accurately gauge the Student's progress. The XXXX recommended to reconvene in XXXX to collect more information and to discuss the Student's progress XXXX. The team did not meet in XXXX.

On XXXX, the XXXX reviewed the Student's academic progress; teacher narratives, input, and grades in classes; input from the Complainant; and input from the XXXX. XXXX 3 SENTENCES REDACTED XXXX. The XXXX agreed to continue with academic interventions (e.g., XXXX); and continue with classroom interventions (e.g., XXXX)." The XXXX dismissed the Student from the XXXX process because the Student was progressing academically and proposed to continue monitoring the Student through monthly student support meetings.

From XXXX to XXXX, the Student was monitored by the XXXX. The XXXX met on a monthly basis and reviewed all students who were referred to the XXXX during the meeting. The Complainant did not participate in the meetings as parents are not generally invited to the meeting. Also, there is no formal XXXX meeting notes of each meeting. OCR notes that there is no documentation showing when or if the Student was discussed at each meeting and what was discussed.

On XXXX, the School sent the Complainant a letter stating that the Student XXXX.

⁴ The XXXX noted that the Student XXXX.

On XXXX, the Complainant contacted the Division's Director of Special Services (the Director) to discuss her concerns regarding the Student. The Complainant told the Director that the Student got tested, she has XXXX, and she has XXXX. She mentioned that the Student was XXXX. OCR notes that XXXX. The Director referred the Student back to the XXXX.

On or about XXXX, the Complainant provided the School a XXXX which was paid for by the Complainant. The report diagnosed the Student with XXXX.

On XXXX, the XXXX met and reviewed the Student's academic progress, the Complainant's input, the teachers' input, and the XXXX. The XXXX reviewed the Student's fourth quarter grades and noted that the Student earned a XXXX. The XXXX reviewed the Student's XXXX and incorporated XXXX of the XXXX recommendations from the XXXX. The XXXX proposed that the School's guidance counselor or XXXX work with the Student in XXXX. The XXXX declined to refer the Student for special education and related aids or services because the Division was "implementing the recommendations [from the XXXX] along with additional strategies to support her in the classroom with XXXX." Therefore, the team determined that "the recommendations and strategies can be implemented in the classroom" and did not refer the Student for an evaluation.

On XXXX, the XXXX conducted a follow-up meeting to discuss the Student's progress. The XXXX reviewed the Student's fourth quarter grades noting that XXXX. The Complainant indicated that she did not have "additional concerns or questions" and noted that "she feels as though [the Student] has shown [] progress in recent weeks." The XXXX declined to refer the Student for evaluation for special education and related aids or services because the Student and teachers reported that the "classroom interventions implemented since the XXXX were [] appropriate." The XXXX agreed to continue with the interventions.

Analysis

The Complainant alleged that the Division denied the Student a FAPE by failing to evaluate the Student to determine her eligibility as a student with a disability and her needs for special education or related aids and services during the XXXX school year. The Division contends that it was not on notice that the Student may have had a qualifying disability during the XXXX school year and that the Division refused to refer the Student for special education and related aids or services because the XXXX determined that the Student was progressing academically with the intervention strategies that were developed for the classroom.

OCR interviewed a Division administrator and several School administrators and staff and each individual confirmed the information provided in the XXXX meetings' documentation, but each individual told OCR that they could not remember information if it was not noted on the documentation; therefore OCR relied on the documentation from the XXXX meetings for this analysis. Based on the documentation and statements from School administrators and staff, OCR finds sufficient evidence that the Division denied the Student a FAPE when the School failed to evaluate the Student by XXXX.

First, the School contends that the Complainant never requested the Student to be evaluated. As an initial matter, OCR notes that Section 504 does not require a parent or anyone else to specifically request that a student be evaluated for special education and related aids or services.

Instead, as noted above, school divisions are obligated to evaluate students who need or are believed to need special education or related aids and services. However, here, the Complainant alleged to OCR that she did request an evaluation of the Student, but used the word “testing” rather than evaluation.

OCR reviewed the documentation from the XXXX meetings and found that the Complainant requested that the Student be “tested” on at least two occasions: in XXXX, and at the XXXX meeting. The School confirmed this, but explained to OCR that staff interpreted the Complainant’s request for testing to mean educational testing. However, given the information that the Complainant provided the School at the time of both requests, it is clear that the Complainant’s requests for testing meant that she was requesting that the Student be evaluated for special education or related aids or services. In XXXX, OCR notes that the documentation states that the Complainant contacted the School to specifically request testing for the Student. At the time of the request for testing, the Complainant spoke to Assistant Principal 2 and told her that she had concerns with the Student’s XXXX and XXXX noting that she was bringing a XXXX⁵ for the Student’s teachers. In XXXX, the XXXX meeting documentation indicates that the Complainant requested again that the Student be tested and she also told the team that the Student had XXXX and that she was concerned with the Student’s XXXX.

Second, School administrators and staff told OCR that they did not know or did not suspect that the Student was a qualified student with a disability because they did not have sufficient information that indicated that the Student had a disability. However, the evidence directly contradicts these statements. The XXXX meeting notes state that on XXXX, the Complainant told the Division that the Student had XXXX; on XXXX, the Complainant told the Division that the Student XXXX; and on XXXX, the Complainant told the Division that the “XXXX.” Moreover, OCR interviewed the School’s Guidance Counselor and she explained that she began meeting with the Student XXXX to go over the Student’s XXXX that was developed. She explained that she asked the Student XXXX. Additionally, as noted above, the Student’s teachers repeatedly reported to the XXXX that the Student XXXX. OCR notes that a physician’s medical diagnosis, by itself, may at times not be sufficient to refer a student to be evaluated; however, it is a factor that should be considered.

Third, the Division explained that the Student was not referred to special education and related aids or services and was dismissed from the XXXX on XXXX, because she was progressing academically with the interventions that the XXXX developed. OCR reviewed the Student’s academic performance from quarter 1 to quarter 2 and notes that despite the Student’s improvement in XXXX of her core classes, as discussed above, the improvement in the XXXX classes was minimal. Furthermore and of greater weight, OCR notes that that the Student’s final semester grade showed that the Student received XXXX in her core classes. Also, the Student’s teachers consistently reported concerns about the Student’s XXXX. The Student’s teachers repeated these similar concerns to the XXXX on XXXX, reporting that the Student XXXX.

In conclusion, by the XXXX on XXXX, the Complainant had requested the Student to be tested on two occasions and the School had plenty of information that the Student may need special

⁵ XXXX.

education related aids or services. The School was aware that the Student had XXXX⁶ and was XXXX; the Complainant had concerns about the Student's XXXX; the Student's core teachers shared similar concerns that the Complainant shared and the Student's teachers consistently reported their concerns to the XXXX; the Student's XXXX; and the Student was XXXX. Therefore, based on the above information, OCR finds that the Division had more than enough information to suspect that the Student had a qualifying disability and needed special education and related aids or services.⁷

OCR also finds that the Division denied the Student a FAPE due to the Division's refusal to evaluate the Student. The documentation shows that the Student had significant academic challenges in her core classes during the XXXX school year. The Student's teachers repeatedly reported concerns about the Student's XXXX. Moreover, the Student took the Virginia Standards of Learning (SOL) Assessment in XXXX and she XXXX. OCR notes that the Student had also XXXX. Moreover, when OCR interviewed the Student's XXXX teacher, she confirmed that the Student XXXX and she noted that she did not see any academic improvement during the school year. OCR also spoke to the School's Principal and he confirmed that, in XXXX, he sent the Complainant a letter informing her that the Student was XXXX. Based on the above information, there is sufficient documentation and information to conclude that the Division failed to provide the Student a FAPE.

To resolve the Division's noncompliance, we propose that the Division enter into the attached Resolution Agreement, pursuant to which it would agree to evaluate the Student, determine compensatory education for the Student, and reimburse the Complainant for the private evaluation that was conducted by Dominion Center for Behavioral Services.

Other Concerns- Section 504 Policies and Procedures

Furthermore, OCR has concerns regarding the Division's Special Education Policies and Procedures and practices regarding identification that were explained by School staff during the investigation. Specifically, OCR cautions the Division in regards to who determines whether a Student can be referred for special education or related aids or services, a potential practice of requiring medication documentation prior to evaluating students, and reliance on classroom interventions as a prerequisite for referral for special education or related aids or services.

First, the Division's procedures seem to imply that a single person in the school can deny a request for an evaluation and determine that a student is not eligible for special education or related aids and services. The Division's Eligibility for Special Education Procedures states a School administrator will (1) refer a student to the Child Study process, (2) initiate the evaluation process, or (3) deny the request. Assistant Principal 1 explained that she was designated as the school-level administrator overseeing the Child Study Process and Section 504. Assistant Principal 2 noted that she was designated as the school-level administrator overseeing special education. Both administrators told OCR that the School's practice when an individual requests that a student be evaluated for special education or related aids and services is that the request

⁶ Research estimates that approximately one-quarter to one-third of all children with XXXX also have a learning disability. XXXX SENTENCE REDACTED XXXX.

⁷ Since OCR determined that the Division was noncompliant with Section 504as of XXXX, Allegations 1(b)-(d) are effectively moot since the dates are subsequent to XXXX.

will go to an administrator first and that the administrator will decide the next steps, including whether to deny the request. Section 504 requires that a group of knowledgeable people must meet to determine whether a Student is eligible. The Division's Special Education Procedures clearly states that an administrator can decide to refuse an evaluation and both administrators confirmed that this process was implemented at the School; therefore, OCR finds that the Division's Special Education Procedures are not compliant with Section 504.

Second, the Division's Special Education Procedures under Section 504 do not require medical documentation and the Division administrator and School administrators and staff confirmed that this was the policy. Yet, Assistant Principal 1, who was the administrator who oversaw XXXX of the XXXX meetings, explained that she was aware that the Complainant had been in contact with the Guidance Counselor and had requested help for the Student, but she told OCR that she "XXXX." She clarified that she knew that the Student was seeing someone but that the Complainant was not getting the information to the School. OCR notes that Section 504 does not require a specific diagnosis or the submission of medical documentation to the school prior to evaluation; it only requires the Division to determine whether a student may need special education or related aids and services due to a substantial limitation in a major life activity and that the limitation is caused by a mental or physical impairment.

Third, the purpose of the XXXX is to "gather and review existing data, make recommendations to meet student needs, monitor and review the results of implementation of those recommendations. These teams also determine if a referral is necessary for evaluation for special education, related services and/or 504 interventions." The Division's XXXX Guidance Document clearly states that the "team will ensure that the implementation of the interventions does not needlessly delay a child suspected of having a disability from being evaluated for special education, related services or 504 accommodations." Nevertheless, OCR notes that one of the primary reason School administrators and staff told OCR for not referring the Student to be evaluated was because the classroom interventions that were developed and implemented were working. The School also told OCR that, XXXX, the School refused to refer the Student to be evaluated after receiving a XXXX because the School believed it could implement all of the suggested interventions that were in the report in the classroom; therefore, a referral was not warranted. OCR acknowledges that the Division made efforts to put interventions in place for the Student throughout the XXXX school year through the XXXX process, however, the interventions should not have been the reason for not referring the Student to special education and related aids or services. OCR cautions the Division that XXXX teams developing and implementing intervention strategies should not be a substitute to a Section 504 team that determines a student's eligibility and, if warranted, the student's accommodations. OCR notes that while the Department supports the use of intervention frameworks, such frameworks must not delay or deny an evaluation for a student suspected of having a disability.

Prior to concluding the investigation, the Division volunteered to resolve OCR's concerns. The enclosed resolution agreement requires the Division to revise the Division's Special Education Procedures and to train Division administrators and School staff who are directly involved with the Division's Special Education process or with the Division's Child Study Process. To complete the investigation, OCR would need to conduct additional interviews and review additional documents.

ALLEGATION 2⁸

Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Division's programs or activities on the basis of race, color, or national origin.

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 Division treated the Student less favorably than similarly situated individuals of a different race. If so, OCR then determines whether the Division had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the Division is a pretext, or excuse, for unlawful discrimination.

Analysis

The Complainant alleged that the Student was treated less favorably than her peers because of her race (African American) during specific incidents during the XXXX semester of the XXXX school year. The Division disputes that the School treated the Student less favorable than her peers.

Regarding Allegation 2(a), the Complainant states that Teacher 1, the Student's XXXX teacher, XXXX The Complainant noted that Teacher 1 told the Student to XXXX. The Complainant further stated that the Student requested to see the Guidance Counselor, but that Teacher 1 rejected the request. XXXX SENTENCE REDACTED XXXX. The Division alleges that there is no record of this incident and Teacher 1 told OCR that she did not remember this specific incident. There is no documentation or record of this incident.

Regarding Allegation 2(b), the Complainant explained that the Student was XXXX. The Complainant explained that Assistant Principal 2 took the Student to the office XXXX. The Complainant responded to Assistant Principal 2 requesting that she XXXX. The Complainant noted that Assistant Principal 2 XXXX and informed her of the information. The Division contends that there is no record of a referral of this incident.

Regarding Allegation 2(c), The Complainant alleges that Teacher 1 treated the Student differently because of her race when she XXXX. The Division contends that the School did not discriminate against the Student based on her race. Teacher 1 told OCR that she did not remember the specific details of the incident, but that she remembered that the Student XXXX. Teacher 1 reviewed the referral and confirmed that she wrote the Student the referral on XXXX. XXXX 4 SENTENCES REDACTED XXXX. The Division noted that the School imposed XXXX times for similar offenses, of which XXXX were imposed on Caucasian students and XXXX were African American students.

Regarding Allegation 2(d), the Complainant alleges that Teacher 2, who is one of the School's XXXX teacher, "XXXX." The Division notes that there is no record of the Student receiving a

⁸ OCR notes that the Complainant did not request an individual remedy for the Student regarding Allegation 2.

referral for this incident. XXXX 5 SENTENCES REDACTED XXXX. On XXXX, the Complainant provided OCR additional documentation that notes the incident referenced in this allegation.

Prior to completing the investigation, the Division volunteered to resolve the above allegations. The enclosed resolution agreement requires the Division to provide staff training on the School's referral process and classroom management policies, practices, and procedures and discussing the School's commitment to using its policies to ensure a safe and orderly educational environment and the fair and equitable treatment of all students when addressing student behavior. OCR notes that to complete the investigation, OCR would need to conduct additional interviews and request additional documentation, specifically comparator data and copies of other students' referrals for each incident.

Conclusion

On December 20, 2017, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the Division 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 Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the Division'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 Division has fulfilled the terms of the Agreement and is in compliance with Title VI, Section 504, and Title II with regard to the issues raised. As stated in the Agreement entered into by the Division on December 20, 2017, if the Division 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 Division 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 Division'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 Division 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.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Zorayda Moreira-Smith, the OCR attorney assigned to this complaint, at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

/s/

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

Enclosure

cc: Lindsay Brubaker