



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

December 7, 2018

Dr. Amy E. Cashwell
Superintendent
Henrico County Public Schools
P.O. Box 23120
3820 Nine Mile Road
Henrico, Virginia 23223

Re: OCR Complaint No. 11-18-1390
Resolution Letter

Dear Superintendent Cashwell:

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 June 12, 2018 against Henrico County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School). The Complainant alleges that the Division discriminated against the Student on the basis of disability. Specifically, the complaint alleged the following:

1. From February 2018 to June 2018, the Division did not provide the Student a free and appropriate public education (FAPE) when it failed to provide him a one-on-one aide for behavior support, which was required by his behavioral intervention plan (BIP).
2. In approximately March of 2018, the Division failed to provide the Student a FAPE when a School staff member did not comply with his BIP, which requires staff to offer him a cool down or provide verbal prompts; instead, School staff physically struggled with the Student XXXXX.

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

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

During the investigation, OCR interviewed the Complainant and reviewed documents provided by the Complainant and the Division. Before OCR completed its investigation, the Division expressed a willingness to resolve the allegations 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 Division 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. The following is a summary of the evidence obtained by OCR during the investigation to date.

Background

From XXXXX, the Student was enrolled as a XXXXX. In XXXXX, the Student was transferred to XXXXX (the School). At the time the Student transferred to the School, he had an Individualized Education Program (IEP). The Student also had a BIP at the time of his XXXXX transfer. In March and May of 2018, the Student's IEP team met but did not make any changes to the services relevant to this complaint.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school divisions 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.

Allegation 1

The Complainant alleged to OCR that the Student's IEP XXXXX and the Division denied the Student a FAPE when a 1:1 aide was not available multiple times during the spring of 2018 to provide services to the Student. OCR reviewed the Student's IEPs and BIPs that were in effect from February to June 2018, the Student's disciplinary and behavior records, the Student's academic record, internal correspondence, and correspondence between Schools staff and the Complainant. OCR found that the Student's IEPs, and BIPs in effect from February 2018 to June 2018, do not require that the Student be provided a one-to-one aide. Although the Student's IEPs do not require a one-to-one aide, OCR found, through its review of the Division's documentation, that a number of services required by the Student's IEPs require direct interaction with and/or instruction from an instructor or aide. Specifically, the Student's IEPs require that the Division provide the Student XXXXX, XXXXX. OCR notes that the Division's documentation indicates that the Division hired an Instructional Assistant (IA) to provide these and other services to the Student in accordance with his IEPs and BIP. The Complainant alleged that when the IA was absent, the Student did not receive services required by his BIP and IEPs.

Because the Student’s IEP and BIP do not require a one-to-one aide, OCR finds insufficient evidence that the Division denied the Student a FAPE by not providing one at all times. However, because the Complainant alleged that when the IA was absent, the Student did not receive the services in his IEP and BIP, OCR considered whether the Division denied the Student a FAPE when School staff failed to implement the Student’s IEP and BIP. The Division’s narrative response contends that on the occasions that the IA was absent, the Division ensured another staff member was present to provide the targeted assistance. However, OCR reviewed internal correspondence and correspondence between the Division and the Complainant, which indicates that the School did not have a plan in place to provide the required services to the Student when the IA was absent in February and March 2018. For example, XXXXX, a day the IA was absent, the Complainant emailed the Student’s teacher asking what plan was in place for the Student since the IA was absent. The Student’s teacher responded that there was not a substitute IA and that there was no plan. She also indicated in a subsequent email that she was not sure how it worked when the Student’s IA was absent. The documentation provided to OCR indicates that the Student’s IA was absent on seven days between February and May 2018.

Based on the above information, OCR has concerns that the Division may have denied the Student a FAPE when School staff failed to implement the services in the Student’s IEPs and BIP. Specifically, based on documentation provided by the Division, it is unclear whether the Student was provided special education and related aids and services when the Student’s IA was not present. Prior to completing this investigation and making this determination, the Division requested to voluntarily resolve this allegation.

Allegation 2

The Complainant alleged that, on XXXXX, an incident occurred in the classroom, during which the Student’s teacher and the Student XXXXX. She alleged that the incident XXXXX. The Complainant alleged that the incident was a result of the School failing to follow the behavior related aids and services in the Student’s BIP. Specifically, the Complainant told OCR that the Student’s IEP and BIP required the Student’s teacher to offer the Student a “cool down” or use “verbal prompts”; she alleged that the Student’s teacher did not offer him a cool down nor did she use any verbal prompts, resulting in the Student being injured.

The Division confirmed that an incident occurred on XXXXX. However, the Division denied there was a denial of FAPE and noted that the Student was not disciplined nor denied access to instruction as a result subsequent to the incident.

As an initial matter, OCR reviewed the Student’s XXXXX IEP (in effect on this date), and confirmed that the Student’s IEP requires School staff to provide the Student a cool down area/de-escalation zone when the Student is XXXXX. In addition, the Student’s BIP requires that staff prompt the Student XXXXX.

OCR then reviewed documentation related to the XXXXX incident including the Student’s behavior communicator, the teacher’s statement, the case manager’s statement, office visit report, and email correspondence related to the incident.¹ OCR notes that there is no information

¹ OCR notes that statements in the documentation are consistent with the Complainant’s explanation of the incident.

in any of the Division’s documentation that School staff provided the Student any verbal prompts or offered the Student an opportunity to go cool down before or during the incident.

Generally, in order to amount to a denial of FAPE, a complainant must allege more than a de minimus harm (e.g., OCR typically would not accept an allegation that a school division denied a student a FAPE because a school failed to implement a particular provision of a 504 Plan just a few times, with no educational detriment). Here, OCR reviewed documentation provided by the Division to determine whether this failure to provide prompts or a de-escalation area was a single occurrence. OCR also reviewed the Student’s Classroom Behavior Data sheets, provided by the Division, which documented the dates that prompts were provided to the Student, the number of prompts provided, and a description of the related incident. OCR notes that this data shows that School staff did not provide a prompt on the date in question. OCR further notes that, according to this documentation, School staff rarely provided prompts in February, March, and April 2018. A goal checklist provided to OCR by the Division concerning the Student’s behavior also indicates that School staff never used his “cool down” intervention.

Based on the above information, OCR has concerns that the Division failed to implement the Student’s IEP and BIP during the incident on XXXXX and other times during spring 2018. Prior to completing this investigation, the Division requested to voluntarily resolve this allegation as well.

Conclusion

On December 7, 2018, the Division signed the enclosed Resolution Agreement which, when fully implemented, will address the allegations investigated. The provisions of the Agreement are aligned with the allegations and the information obtained during OCR’s investigation, and are consistent with applicable law and regulation. The Agreement requires the Division to: (1) develop a written plan for instances when School staff assigned to provide services to the Student are absent; and (2) convene an IEP meeting to determine whether School staff provided the Student services required by his IEPs and BIPs in spring 2018 (and, in particular, when School staff were absent). If the team determines that appropriate services were not provided to the Student, the team will determine whether the Student needs compensatory services for those days. The resolution agreement also requires that the IEP team convene to examine whether the Student is owed compensatory education due to any failure to provide “verbal prompts,” “cool down,” and “targeted assistance” and to examine whether these services should be modified or clarified to ensure consistent implementation. Please review the enclosed Agreement for further details. OCR will monitor the Division’s implementation of the Agreement until the Division has fulfilled the terms of the Agreement.

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 or Timothy Riveria, the OCR attorneys assigned to this complaint. You may reach Ms. Moreira-Smith at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov. You may reach Mr. Riveria at 202-453-6796 or Timothy.Riveria@ed.gov.

Sincerely,

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

Enclosure

cc: Megan Watkins, Division Counsel