



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 17, 2020

Via Regular Mail and Email at superintendent@wjccschools.org

Olwen E. Herron, Ed.D.
Superintendent
Williamsburg-James City County Public Schools
P.O. Box 8783
Williamsburg, VA 23187-8783

Re: OCR Complaint No. 11-18-1449
Resolution Letter

Dear Dr. Herron:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on August 17th, 2018, against Williamsburg James City County Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXX (the School). The Complainant alleges that the School discriminated against the Student on the basis of disability. Specifically, the complaint alleges the following:

1. The Division failed to provide the Student a free and appropriate public education (FAPE) when:
 - a. From approximately January 2018 to June 2018, the Student's XXXX and Physical Education teachers did not maintain regular communication with the Complainant about the Student's progress as required by her Section 504 Plan.
 - b. In XXXX of 2018, regarding a manifestation determination review, the Division failed to draw upon information from a variety of sources and include staff knowledgeable about the meaning of evaluative data.
 - c. From approximately November 2017 to June 2018, the Division failed to re-evaluate the Student due to behavioral concerns and failing XXXX her class.
 - d. In XXXX of 2018, while the Student was receiving homebound instruction, the Division failed to provide the Student extended time on her assignments as required by her Section 504 Plan.

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

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

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.

During the investigation, OCR reviewed documents provided by the Complainant and the Division and interviewed the Complainant and Division faculty/staff.

Before OCR completed its investigation, the Division expressed a willingness to resolve allegation #1(c) 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 recipient 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.

OCR completed its investigation of Allegations #1(a), #1(b), and #1(d). After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's allegations.

OCR's findings and conclusions regarding of Allegations #1(a), #1(b), and #1(d) are discussed below, as well as a summary of the evidence obtained by OCR to date regarding Allegation #1(c).

Background

During the 2017-2018 school year, the Student attended the School as a XXXX grader. Entering the school year, the Student had a Section 504 Plan for her disability of Bipolar disorder. The Section 504 plan was developed by the Student's XXXX at the end of the previous school year. In September 2017, the School convened a Section 504 team meeting and largely adopted the June 2017 plan. The Student's Section 504 Plan included the following accommodations:

1. Student will have liberal access to the nurse and school counselor when needed.
2. Student and teacher will arrange a way to communicate the [S]tudent's level of anxiety to express when breaks are needed.
3. Teacher will have regular communication with parent about student's progress.
4. Student will have extended time on assignments for any missed classes for medical related reasons, not to exceed 3 extra days.

Allegation 1(a): From approximately January 2018 to June 2018, the Student's XXXX and XXXX teachers did not maintain regular communication with the Complainant about the Student's progress as required by her Section 504 Plan.

Facts

The Complainant alleged that the Student's XXXX teacher (the History Teacher) and Physical Education teacher (the PE Teacher) failed to implement the accommodations in the Student's Section 504 plan when they did not have "regular communication with the parent about student's progress." As noted above, OCR confirmed that this provision was included in the Student's Section 504 plan. The Complainant did not specify any particular information that she expected or that she was not provided by either of these teachers. Instead, the Complainant generally asserted that she did not receive regular communication from these teachers.

The Complainant told OCR staff that the History Teacher only communicated with her towards the end of the school year after the Student switched to homebound instruction. The Complainant also stated that the PE Teacher only communicated with her at the end of the school year, and that her first email was in May 2018. The Student received a failing grade in her PE class and a "D" in XXXX.

Both the History Teacher and PE Teacher asserted that they implemented this provision of the Student's Section 504 plan by communicating the progress of the Student through a program utilized by the School called ParentVue.¹ The PE Teacher also stated that she communicated with the Complainant by email and bi-weekly progress reports. The History Teacher stated that she responded to all of the Complainant's emails and also used a separate mobile app to communicate with the Complainant and the Student about upcoming assignments. The Complainant stated that homework was listed on ParentVue, but she did not know whether other communications were on the site. Emails provided by the Complainant and the Division indicate that the only emails by either of the teachers were sent to the Complainant during and after May of 2018.

The Division denied that the teachers failed to comply with the Student's Section 504 Plan, and noted that the plan did not specify the duration, frequency, or method of communication with the Complainant. The Division further stated that the History and PE Teachers implemented the Student's accommodation by consistently posting the Student's grades and work on the School's online system. The History Teacher told OCR staff that she put assignment grades into the ParentVue system two or three times a week. She further stated that the system had reminders about upcoming assignment due dates and tests, and included class PowerPoint presentations. The PE teacher also reported that she regularly updated the Student's graded work on ParentVue. The Division's website also indicates that the purpose of this system is to keep parents apprised of student progress.

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

¹ The Division's website states: ParentVue will provide online access to help families stay up-to-date about their students' grades, assignments and attendance. Additionally, ParentVue will provide families with another way to communicate with schools and for schools to communicate with families.

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.

Analysis

OCR finds insufficient evidence that the teachers failed to implement the Student's Section 504 plan as alleged. Ultimately, the Complainant was not able to articulate how the Student was denied access to the educational program due to any lack of communication or what types of communication she expected or did not receive from the teachers. OCR agrees with the Division that the Student's Section 504 Plan did not contain any description of the "regular communication" accommodations and does not specify that the communication must be by email or phone. The plan also does not specify or exclude any means of communication like an online portal. Further, the Complainant did acknowledge that both teachers utilized ParentVue despite a previous statement that they did not communicate through it, and an email obtained by OCR indicates that the Student checked the system to monitor her grades.

OCR considered whether the efforts by the XXXX History and PE teachers were consistent with the language of the Section 504 Plan. OCR notes that the Complainant did not provide any information to OCR about information she did not receive in these classes other than to state that she did not believe she received regular communication. According to both the Complainant and the History Teacher, information about upcoming assignments was provided by the History teacher via ParentVue. In addition, the History teacher updated the Student's grades via ParentVue on a biweekly basis. Finally, towards the end of the spring semester, the History teacher also communicated with the Complainant via email. OCR did not find any evidence that the History teacher did not respond to communications from the Complainant or refused to provide any information to the Complainant during the relevant time period. Regarding the Student's PE class, OCR finds that the PE teacher regularly updated the Student's grades via ParentVue and also emailed the Complainant towards the end of the semester. Based on all the above, OCR finds insufficient evidence that the teachers failed to implement this provision of the Student's Section 504 plan.

Allegation 1(b): In XXXX of 2018, regarding a manifestation determination review, the Division failed to draw upon information from a variety of sources and include staff knowledgeable about the meaning of evaluative data.

Facts

The School issued the Student a two-day out-of-school suspension on XXXX, 2018. On XXXX, 2018, the School, per the request of the Complainant, convened a child study meeting and the team determined that that Student needed to be evaluated for additional special education-related services. The team determined: "[The Student] has continued to struggle despite some supports. Attendance and behaviors associated with her diagnosed bipolar have increased the difficulty for her to be successful."

According to documentation provided by the Complainant and the Division, on XXXX, 2018, the Student and another student agreed XXXX to fight. Due to this behavior, the School issued the Student a ten-day out-of-school suspension for “Assault and Battery Against Student.” On XXXX, 2018, the School convened a manifestation determination review (MDR) meeting to review the XXXX behavioral infraction. The meeting was attended by the Complainant, a school counselor, the School’s Assistant Principal, and a general education teacher. The team ultimately determined that the behavior was not a manifestation of the Student’s disability, but the Complainant disagreed with this conclusion. The Complainant alleged that the appropriate school personnel did not attend the meeting and that the team did not properly consider information about the Student’s disability, in violation of the Section 504 procedural regulations. As evidence of this, the Complainant stated that, “[The Assistant Principal] said that the behavior was not bipolar because he has a family member who is bipolar and this didn’t sound like her behavior.”

The Division asserted that the School complied with the procedural requirement of Section 504 and the MDR meeting participants carefully considered information from a variety of sources by reviewing the “the Student’s records, the Student’s discipline reports, and input from the MDR committee members.” The Division further stated that the committee members also considered the Student’s Section 504 Plan along with the possible impact of her disability. The Assistant Principal provided an alternative account of events and stated that the Complainant “wanted to share information on bi-polar disorder from an internet search that she brought to the meeting. “I stated that we are aware of [the Student’s] 504 and bi-polar disorder.” He went on to state, “XXXX.” The Counselor who participated in the MDR meeting told OCR staff that the Complainant read a portion of an online Bipolar disorder resource she brought to the meeting. The Counselor also told OCR staff that she has professional experience and education that allowed her to interpret evaluative data relating to Bipolar disorder. The School staff at the meeting ultimately determined that the behavior at issue was not a manifestation of the Student’s disability. The Counselor told OCR staff her conclusion was based on her experience with the Student and because the Student did not seem to be in a manic state at the time of the incident. The Complainant disagreed with the conclusion of the team and the Student was suspended until XXXX, 2018.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school division 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 division may discipline the student in the same manner as it disciplines students without disabilities. If a school division finds that the student’s disability caused the misconduct, the division 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.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school division 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.

Analysis

The Complainant alleged that the Student's MDR was inappropriately conducted when the School failed to draw upon information from a variety of sources and include staff knowledgeable about the meaning of evaluative data.

OCR reviewed documentation provided by the Division and finds that the participants at the MDR did consider information from a variety of sources. Documentation provided to OCR shows that the participants considered the Student's special education records and information provided by the Complainant and the Division. OCR also found insufficient evidence that the meeting attendees (which included a counselor, teacher and assistant principal who were all knowledgeable about the Student) were not knowledgeable about the Student, the evaluative data, and the placement options, as required by the Section 504 regulation.

The information obtained by OCR also indicates that the Counselor had the ability to interpret evaluative data, as required by 34 C.F.R. § 104.35(c). The Counselor told OCR staff that she has a bachelor's degree in psychology and that she received training on psychological disabilities through a master's level counseling program. Further, she stated that she has been counseling students, including those with a variety of mental health diagnoses, for XXXX years. Finally, OCR notes that the counselor was directly involved in the Student's evaluation and was a part of the child study team that evaluated the Student. Based on this information, OCR finds that the MDR meeting included appropriate staff.

OCR also found evidence that the information presented at the MDR was discussed and considered by the meeting participants. The Complainant stated that there was limited discussion at the meeting but also stated she was allowed to speak and present some information at the meeting. The Complainant shared that, from her personal observations, the Student was not well and there had been several incidents throughout May that caused her concerned and she believed these were symptoms of Bipolar disorder. The Assistant Principal confirmed that the Complainant shared about the Student's behavior and brought general information about Bipolar disorder to the meeting. He also added that he did share about having a family member with Bipolar disorder, but that he did tell the Complainant that School staff was "aware of [the Student's] 504 and bi-polar disorder" in an effort to move forward with the MDR analysis during

the meeting. The Counselor told OCR staff that she did not interpret any evaluative data at the MDR meeting but based on her knowledge of the Student, she did not appear to be manic at the time and it is during those times when she acts impulsively. The general education teacher who attended the meeting further confirmed that the team reviewed information provided by the Complainant and the Student's behavior leading up to the incident.

Based on all the above, OCR finds insufficient evidence that the Division failed to draw upon information from a variety of sources or include staff knowledgeable about the meaning of evaluative data. The evidence provided to OCR by the Division and interviews with the Complainant and Division personnel demonstrates that the team considered information provided by the Complainant, the Student's 504 plan, the Student's behavior leading up to the incident, the Counselor's impressions of the Student from working with her, and input from the teacher. Based on this evidence, OCR finds insufficient evidence of a violation of Section 504 or Title II regarding this allegation.

Allegation 1(c): From approximately November 2017 to June 2018, the Division failed to re-evaluate the Student due to behavioral concerns and failing her XXXX class.

Facts

The Complainant alleged that the School denied the Student a FAPE when her Section 504 team did not reconvene during the entire 2017-2018 school year to develop a better plan for the Student in order to address her difficulties with behavior and her XXXX class. The Complainant told OCR staff that the Student had multiple conflicts with peers during the school year, resulting in multiple suspensions. Discipline records provided by the Division confirmed the Student received three suspensions - one in XXXX 2017 and two in XXXX 2018. The Complainant also stated that the Student struggled with her XXXX class during the school year. During the school year, the Division changed the Student's XXXX teacher at the request of the Complainant and provided the Student a peer tutor.

Attendance records demonstrate that the Student accumulated extensive absences during the school year. Attendance records from XXXX, 2017, through XXXX, 2018, show that during that time period, the Student was not present at school for any two consecutive days without a tardy, absence, or early pickup by the Complainant. A period by period analysis shows that the Student's attendance was worse in XXXX and XXXX. The Student's report card contains comments by both the XXXX Teacher and XXXX Teacher stating "Absences/tardies are affecting achievement." The XXXX Teacher further stated that the Student was absent from class "quite a bit" and also went to the restroom often in her class.

On January XXXX, 2018, there was a meeting convened wherein the Division discussed alternative placements available to the Student. The Complainant declined to move the Student. The Division also completed a safety plan/behavioral contract with the Student. The Counselor stated that around this time period, the Student would only come to school up to two times per week. She further stated that she would receive emails from the Complainant stating that the Student had a "rough night," needed to talk to a therapist before coming to school, and the Student was not feeling comfortable at the School.

The Counselor stated that she observed a deterioration of the Student's behavior in April of 2018. She reported at this time, the Student's class avoidance issues had increased, the Student was spending several hours with the Counselor (often instead of being in class), and emails from the Complainant increased. The Division convened a Child Study meeting in May 2018 and the Student was found eligible for Special Education Services on August XXXX, 2018.²

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school division 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

Here, OCR is concerned that School staff had sufficient information that the Student needed additional disability-related services, primarily due to the Student's increasing school avoidance and extensive absences. The Student, who the School was aware was diagnosed with Bipolar Disorder, increasingly stopped attending school and her classes when she attended school. This lack of attendance impacted the Student's grades and access to the curriculum, as evidenced by comments by the Student's teachers and grade reports. OCR reviewed the information available to the Division during the 2017-2018 school year. The Division's records indicated that the Student had an extensive amount of absences starting from the beginning of the year. Through attendance reports, Counselor observations, and communications from the Complainant, the School was likely on notice from at least January that the Student was not accessing the educational program. OCR has concerns that the School did not begin the evaluative process until May 2018.

Prior to OCR's determination whether this failure to reevaluate amounted to a denial of FAPE, the Division agreed to address OCR's concerns through a voluntary Resolution Agreement. Because the Division agreed to resolve this allegation, OCR also did not complete its analysis of whether the Student's academic performance in Algebra provided sufficient evidence that the Student needed to be reevaluated.

Allegation 1(d): In June of 2018, while the Student was receiving homebound instruction, the Division failed to provide the Student extended time on her assignments as required by her Section 504 Plan.

Facts

² OCR notes that the Student was suspended after the initial referral and XXXX for the last part of the 2017-2018 school year.

At the end of the 2017-2018 school year, the Student experienced XXXX spent the remainder of the school year at home. The Complainant alleged that, during this period, the Division failed to comply with the Student's Section 504 plan by failing to provide her extended time on her assignments. The Division stated that staff provided the Student ample time to complete her assignments after her XXXX, in addition to the assistance of a homebound teacher to assist with final examinations.

On May XXXX, the Student XXXX and the Complainant requested homebound instruction. The Student XXXX and the Complainant notified the Division that the Student was XXXX on June 6, 2018. Homebound instruction was put in place to assist the Student with taking the final exams for her classes on the approximate dates of June 11-15th.

The Division's Supervisor of Health Services (the Supervisor) told OCR staff that she received a certification of the Student's need for homebound instruction on Friday, May 25, 2018. She stated that it was approved on the same day, and she began looking for an instructor. She further stated that, on Wednesday, May 30, 2018, she heard from the School's principal that the Student was XXXX. She said that she received information that the Student was home on June 6, 2018 and she assigned a homebound instructor on the same date. In terms of the homebound instructor's objective, the Supervisor stated that the homebound instructor was assigned to assist the Student with year-end exams on the dates of June 11th, 12th, 14th, and 15th. The XXXX teacher told OCR staff that she provided work to the Student throughout May and June via packets she sent home in mid-to-late May and that the Student had until June 15th to complete the provided assignments. The XXXX Teacher also submitted copies of the assignments she provided to the Student in May of 2018. The XXXX Teacher stated that she provided classwork to the Student during her May 2018 suspension and she allowed her until the end of June 2018 to complete her outstanding assignments. She also stated that she sent a final examination to the Student's homebound instructor. Emails submitted to OCR, discussing a submitted assignment, indicate that the PE teacher provided and graded the Student's outstanding assignments.

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.

Analysis

As noted above, the Student's Section 504 Plan provides, "Student will have extended time on assignments for any missed classes for medical reasons not to exceed 3 extra days." The information obtained by OCR indicates that the Student had at least three days beyond the time XXXX to complete her missed classwork. After speaking to Division staff, OCR asked the Complainant whether there were any particular assignments for which the Student did not receive three days. The Complainant did not identify any such assignments. Based on this

information, OCR finds that there is insufficient evidence that the Division failed to provide the Student a FAPE by failing to provide her three days to make up assignments after her hospitalization.

Conclusion

On March 9th, 2020, the Division signed the enclosed Resolution Agreement which, when fully implemented, will address Allegation 1(c). The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the Division to 1) convene a group of persons knowledgeable about the Student to discuss whether the Student is eligible for compensatory services, and 2) provide training to School staff on Section 504's reevaluation requirements. 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.

The Complainant has a right to appeal OCR's determination on Allegations #1(a), #1(b), and #1(d) within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>) or a written statement of no more than ten (10) pages (double-spaced, if typed) by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; by email to OCR@ed.gov; or by fax to 202-453-6012. The filing date of an appeal is the date that the appeal is submitted online, postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why he or she believes the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome; failure to do so may result in dismissal of the appeal. OCR will forward a copy of the appeal to the Division¹. The Division has the option to submit a response to the appeal to OCR within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Division.

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 Jasmine Gibbs, the OCR attorney assigned to this complaint, at 202-401-7949 or jasmine.gibbs@ed.gov.

Sincerely,

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

Enclosure: Resolution Agreement, Williamsburg James City County Schools, OCR Complaint #11-18-1449

cc: Katherine Ballou, Counsel for the Division, KBallou@reedsmith.com