



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

January 25, 2019

Dr. Elie Bracy III
Superintendent
Portsmouth Public Schools
801 Crawford Street
Portsmouth, VA 23704

RE: OCR Complaint No. 11-18-1495
Resolution Letter

Dear Dr. Bracy:

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 September 26, 2018 against Portsmouth Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX School (the School). The Complainant alleged that the Division discriminated against the Student on the basis of disability. Specifically, the complaint alleged that the Division:

1. Failed to evaluate the Student in a timely manner to determine her eligibility for special education and related services after receiving documentation of her medical condition in spring 2018; and
2. Refused to allow the Student to attend school in person, and instead assigned her to homebound instruction, pending the completion of an evaluation during the 2018-2019 school year.

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.

During the investigation to date, OCR interviewed the Complainant and reviewed documents provided by the Complainant and the Division. Before OCR completed its investigation, the

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

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

The Student began the 2017-18 school year in XXXXX grade at the School. At that time, she was not identified as a student with a disability. XXXXX

On January XX, 2018, XXXXX emailed the Division's Special Education Coordinator (SPED Coordinator), stating: "Due to the nature of the Student's condition, it would be difficult for her to participate in a typical school curriculum without modifications or accommodations in place. That being said, I would like to refer her for Child Study." On January XX, 2018, the Division completed a referral form for a special education evaluation. The Division held a meeting on February XX, 2018, to discuss the referral. XXXXX The XXXXX who initiated the referral recommended that the Student continue to be observed prior to formal evaluations. The minutes indicated that a follow-up meeting was scheduled for April XX, 2018. The Division issued a Prior Written Notice on February XX, 2018, indicating that it was refusing an evaluation at that time because, "due to XXXXX, the recommendation has been made for the student to continue to be observed prior to formal evaluations, if needed." An interim report card issued by XXXXX in March 2018 noted that the Child Study team had decided to continue observing the Student because she was continually changing and to give more time to make an accurate determination regarding her functioning.

On April XX, 2018, XXXXX. The same day, the Division's Special Education Supervisor (SPED Supervisor) who covers the School emailed special education staff at the School to alert them that the Student would be reenrolling. She instructed the School to "put [the Student] on your schedule, and inform XXXXX of the date and time, so that they can participate by phone. Contact the parent first to be sure that this is still her desire." There is no record that a meeting was scheduled in response to this email.

On May XX, 2018, XXXXX. The Complainant told OCR that she provided the Division with the Student's XXXXX and other medical documentation to enroll the Student in homebound instruction, as recommended by the Student's doctor. The Division provided homebound instruction to the Student for two weeks at the end of the 2017-18 school year, XXXXX. The Complainant told OCR that she contacted XXXXX at the School in June 2018 and requested a school-based team meeting to start the special education process. According to the Complainant, XXXXX stated that such meetings were not conducted during the summer and she would have to wait until the beginning of the school year.

On August XX, 2018, the Complainant emailed the SPED Coordinator to request a special education team meeting. In response, the Division held a meeting on August XX, 2018. The meeting minutes stated: "[The Student] will begin the school year with an abbreviated schedule

for 1/2 of a school day and recommendation for 1 homebound class. Referral is made for the development of a 504 plan. The team is referring [the Student] to Eligibility for consideration of a disability.” The Prior Written Notice from this meeting indicated that the team proposed a special education evaluation to determine the Student’s eligibility under IDEA, and also agreed on “development of a 504 plan, as well as an abbreviated school day with one homebound class.”

On August XX, 2018, the Complainant emailed several Division staff, including the SPED Coordinator and SPED Supervisor, inquiring about the status of the “referral for a 504.” The same day, the SPED Supervisor contacted the Complainant to explain that the SPED office was evaluating the Student for special education eligibility but does not handle Section 504 Plans. The SPED Supervisor then advised School staff to “honor what was stated at [the August XX meeting], by scheduling a meeting to discuss a 504 plan so that [the Division] is in compliance.” The Complainant also emailed School staff, stating that during the August XX meeting she was “assured that a 504 committee would convene before the opening of school to put supports and services in place to accommodate [the Student] prior to her return on Sept. 4, 2018.”

On August XX, 2018, the SPED Supervisor emailed the Complainant about her availability for a meeting with the Division’s Supervisor of Health Services. The SPED Supervisor stated that the Supervisor of Health Services needed XXXXX and “information indicating that [the Student] is able to return to school.” According to the Complainant, during the week before school started the Division informed her that the Student could not return to school until the Supervisor of Health Services participated in a meeting.

On September XX, 2018, the Division conducted a Section 504 meeting with the Supervisor of Health Services and the Student Services Coordinator in attendance. The team at the September XX meeting determined that the Student has a disability as defined by Section 504 but did not develop a Section 504 Plan. The meeting notes acknowledged that the Student “was scheduled to start school on 9/4/18 with 504 in place while waiting for IEP approval.” According to the Complainant, Division staff at the meeting decided that the Student could not return to school after questioning whether the School could accommodate the Student and specifically asking the Complainant about XXXXX. The meeting notes stated that the Student’s “current limitations were discussed including XXXXX,” and that the Student “will need assistance XXXXX.” The notes further stated that the requested accommodations included “XXXXX.” According to the Complainant, Division staff explained that the level of services required by the Student could not be provided in a Section 504 Plan, so the Student could not return to school until the special education evaluation process was completed. The meeting notes indicated that “504 limitations were discussed” and that the Complainant “acknowledged the limitations of the 504 agreement.” The notes concluded that the Student “will receive 8 hours of homebound services until the IEP is approved.” Also of note, the meeting notes indicated that the Complainant “was informed that 504 meeting could not be conducted during summer break.”

On September XX, 2018, XXXXX faxed current medical records to the Division. In a memorandum addressed to the Supervisor of Health Services, the Student’s physician stated that the Student “is now at a time when she is able to attend school on a reduced schedule of 2 classes for the upcoming semester with the following accommodations: XXXXX.”

At an IEP meeting on October XX, 2018, the Division reviewed the evaluations it conducted over the preceding two months and determined that the Student was eligible for special education and related services under the disability classifications of XXXXX. At IEP meetings on October XX and November XX, 2018, the Division developed an IEP providing that the Student would be placed in the general education setting and receive the following services: 100 minutes per week of study skills instruction, 100 minutes per week of academic monitoring and consultation, 120 minutes per month of speech-language pathology, 60 minutes per week of occupational therapy, 60 minutes per week of physical therapy, and special transportation. In addition, the IEP provides numerous academic and testing accommodations as well as support for XXXXX. According to the Division's counsel, the Student returned to school on XXXXX.

Allegation 1: The Complainant alleged that the Division discriminated against the Student on the basis of disability by failing to evaluate the Student in a timely manner to determine her eligibility for special education and related services after receiving documentation of her medical condition in spring 2018.

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.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Virginia state regulations generally require that all evaluations and decisions about eligibility be completed within 65 business days of the receipt of the referral by the special education administrator or designee (8VAC20-81-60(b)(1)(g)).

The evidence indicates that the Student was initially referred for evaluation in January 2018, but the Division determined that an evaluation was not appropriate at that time. The evidence reviewed by OCR to date suggests that the Division did not reconvene to discuss the Student's need for evaluation following XXXXX in April 2018 and XXXXX in May 2018, despite

knowing of the severity of her medical condition, and did not take steps to initiate an evaluation prior to receiving a written request from the Complainant in August 2018. In addition, there is evidence suggesting the Complainant was told that evaluation meetings could not be held during the summer.

Allegation 2: The Complainant alleged that the Division discriminated against the Student on the basis of disability by refusing to allow the Student to attend school in person, and instead assigning her to homebound instruction, pending the completion of an evaluation during the 2018-2019 school year.

As noted above, 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. The Section 504 regulation, at 34 C.F.R. § 104.34(a), requires a school district to educate a student with a disability with his/her nondisabled peers to the maximum extent appropriate to the needs of the student with a disability. A school district must place a student with a disability in the regular educational environment unless the district demonstrates that it cannot satisfactorily educate the student in the regular environment even with the use of supplementary aids and services.

As discussed above, the Student did not have an IEP in place at the beginning of the 2018-19 school year. The evidence suggests that the team at the August XX meeting decided to address this issue by putting a temporary Section 504 Plan in place to allow the Student to attend school pending the completion of the IDEA evaluation process and development of an IEP. However, at the September XX meeting, a different team declined to develop a Section 504 Plan and instead decided to place the Student on homebound instruction pending completion of the IDEA evaluation, against the wishes of the Complainant and Student. The evidence suggests that Division staff at this meeting may have believed that Section 504 did not require the Division to provide the level of services and accommodations needed by the Student in the school setting, reflecting a possible misunderstanding of the extent of Section 504's FAPE requirement. Furthermore, it does not appear that the Division revisited this decision after receiving the doctor's recommendation that the Student return to school with specific accommodations in place.

Conclusion

On January 22, 2019, 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 determine whether the Student requires compensatory educational services, issue a memorandum to relevant staff to clarify Section 504 requirements, and provide training to relevant staff regarding the timely initiation of evaluations. 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, please contact Sarah Morgan, the OCR attorney assigned to this complaint, at 202-453-5922 or Sarah.Morgan@ed.gov.

Sincerely,

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

Enclosure

cc: Anne Mickey, counsel for the Division (via email)