



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

XXXXXX

Via U.S. Mail and Email: superintendent@charleston.k12.us

Dr. Gerrita Postlewait
Superintendent
Charleston County Schools
75 Calhoun Street
Charleston, SC 29401

RE: OCR Complaint No. 11-19-1077
Resolution Letter

Dear Dr. Postlewait:

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 XXXXX against Charleston County School District (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School).

- Allegation 1: The District discriminated against the Student based on race/national origin XXXXX by not providing him with the same language services during the IEP evaluation process as they provide to English XXXXX students.
- Allegation 2: The District failed to provide the Student with FAPE by denying him an IEP evaluation in his native language of XXXXX.
- Allegation 3: The District failed to provide the Student with FAPE by not providing him with a comprehensive evaluation in all areas of suspected disability XXXXX.
- Allegation 4: The District failed to provide the Student with FAPE by taking over seven months to have an IEP eligibility meeting after the Complainant requested that the Student be evaluated in XXXXX.

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. OCR also 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. In addition, OCR 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

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

individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Title VI, Section 504, and Title II.

During the investigation to date, OCR reviewed extensive information provided by the Complainant and the District and interviewed the Complainant. Before OCR completed its investigation, the District 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 District expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

Facts

XXXXX A Section 504 Plan was developed that day. The 504 Plan included preferential seating in the classroom and for testing, lesson presentation strategies, teacher training by the XXXXX, consultation with the XXXXX for assistive technology, small group testing with frequent breaks, and a peer buddy. Procedural safeguards were provided to the Complainant.

The Student's educational team had an internal meeting on XXXXX to review their plan for the Student, to collect informal language and academic data, and to schedule a meeting with the Complainant to review current data and discuss next steps including recommendations for the summer. The team met with the Complainant on XXXXX. Both parties agree that at this meeting the Complainant asked about the next steps for obtaining a speech and language evaluation. The District states that they thought it would be better to conduct the evaluation in the fall XXXXX. The Complainant XXXXX asserts that since XXXXX and was available for evaluation for most of the summer, there was no reason for the District to delay the testing until the fall.

XXXXX The Student's educational team met with the Complainant on XXXXX for an Evaluation Planning meeting. Internal emails from the two weeks leading up to the meeting suggest that School and District staff were questioning whether a cognitive test would be necessary and whether it would be appropriate to test for a learning disability using norm-referenced standardized achievement tests since there was a lack of documentation XXXXX. The summary states that the District would provide an interpreter to help with an evaluation. The summary also states that the special education teacher would do some screenings, the XXXXX would complete some observations, the English to Speakers of Other Language (ESOL) teacher would complete a more current assessment, and the District would do a cognitive evaluation. The summary notes do not state how the District planned to complete the cognitive evaluation and whether it would be completed in XXXXX.

The evaluations took place during the following few weeks XXXXX. With regard to the cognitive evaluation, the District stated XXXXX therefore a nonverbal cognitive assessment was utilized." According to the Evaluation Report, because of the Student's "limited English

proficiency, only his Non-verbal cognitive skills were measured.” The school psychologist administered two non-verbal cognitive tests to the Student without the use of a XXXXX. The Differential Abilities Scale for Children (DAS-II) was completed on XXXXX. On the Evaluation Report, a cautionary note under the DAS-II assessment results states:

Significant cautions should be applied when reviewing and interpreting these results. XXXXX The DAS-II was administered only in English and results should be considered in light of language and cultural impacts. It is unlikely that the XXXXX designation is valid due to language learning factors.

Concerned about the validity of the scores of the DAS II because part of the assessment was administered verbally in English, the school psychologist was advised by a colleague to administer a completely non-verbal cognitive test. The Evaluation Report states that the Universal Nonverbal Test (UNIT-2) was completed on XXXXX. The notes state that because this test is administered “completely non-verbally through body gestures,” it was used “to limit the impact of language” and “the results of this assessment are likely a better estimate of his current cognitive processing abilities.” XXXXX

A XXXXX interpreter was utilized for the communications component, and it was noted that the Student had articulation errors in English and in XXXXX which “negatively impacted his intelligibility in both languages.”

The Student’s educational team and the Complainant met on XXXXX for an eligibility meeting. The Student was found eligible for special education services under the category of XXXXX. After the eligibility meeting, the Complainant expressed concerns to the District and filed a complaint with OCR about the validity of the evaluation because most of the assessments were not conducted in XXXXX and not all areas of suspected disability were properly assessed.

In subsequent weeks, there was communication between the District and the Complainant regarding the opportunity to reopen the evaluation and to include the ESOL teacher and a XXXXX interpreter to gather more information. The District also drafted an Individual Education Plan (IEP) and scheduled an IEP meeting, but for various reasons, XXXXX, the IEP team did not meet again to discuss the reevaluation or the draft IEP until May 2019. During this time the Student’s Section 504 Plan remained in place.

On XXXXX, the District held an IEP meeting to discuss a comprehensive reevaluation of the Student for all areas of suspected disability as well as the draft IEP. Several days after that meeting, the District sent a Prior Written Notice (PWN) to the Complainant informing her that the District XXXXX.

Allegation 1

- The District discriminated against the Student based on race/national origin XXXXX by not providing him with the same language services during the IEP evaluation process as they provide to English XXXXX students.

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

Analysis

Based on the evidence obtained to date, OCR understands that the District did not use a XXXXX speaking assessor for the Student nor did they utilize assessments in XXXXX. The District typically utilizes English-speaking assessors and assessments in English for English-speaking students and typically provides XXXXX. The District asserted that their legitimate, nondiscriminatory reason for the different treatment is that there were no tests available in XXXXX and they believed that a nonverbal cognitive assessment would be best for the Student. They also asserted that they used a XXXXX interpreter for the speech evaluation. Prior to the conclusion of OCR's investigation, the District agreed to resolve the concerns by reevaluating the Student per the Complainant's request for an independent educational evaluation (IEE) by a XXXXX-speaking assessor.

Allegations 2 and 3

- The District failed to provide the Student with FAPE by denying him an IEP evaluation in his native language of XXXXX.
- The District failed to provide the Student with FAPE by not providing him with a comprehensive evaluation in all areas of suspected disability XXXXX.

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 IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

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.

Analysis

Based on OCR's review of the District's documents, including notes in the Evaluation Report and emails between members of the Student's educational team that indicate that School and District staff were worried about the reliability of the cognitive evaluation data because of the Student's limited English, OCR has concerns that the Student may have been denied FAPE through an evaluation process using evaluation data from tests that may not have been reliable, valid, or accurate. XXXXX. Prior to the conclusion of OCR's investigation, the District agreed to resolve the concerns by having the Student assessed in the areas of cognitive, academic, speech and language, and social/emotional/behavior utilizing either a XXXXX-speaking assessor or interpreter.

Allegation 4

- The District failed to provide the Student with FAPE by taking over seven months to have an IEP eligibility meeting after the Complainant requested that the Student be evaluated in XXXXX.

Legal 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. South Carolina state regulations, like the federal IDEA

regulation, require that school districts conduct initial evaluations within 60 days of receiving parental consent (SC State Board of Education Regulation 43-243(IV)(B)(1)(c)(1)).

Analysis

OCR recognizes that the District had very little prior information about the Student when he first enrolled in the District in XXXXX and that there were several complicating factors such as the fact that the Student XXXXX. OCR also recognizes that the District provided the Student with assistive technology and found him eligible for a Section 504 Plan shortly after his enrollment in the District. However, OCR is concerned that the Student was not evaluated for special education services until XXXXX even though the Complainant requested an evaluation in XXXXX and the District had knowledge that the Student might be eligible for special education services. Prior to the conclusion of OCR's investigation, the District agreed to resolve the concerns by convening a meeting to discuss the provision of compensatory and/or remedial services to the Student for the time period the Student did not receive appropriate regular and/or special education or related services, including, but not limited to, speech services from XXXXX to the date of the compensatory education meeting.

Conclusion

On XXXXX, the District 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 District to convene a meeting within three weeks of the IEE being completed to discuss the IEE and to develop an IEP consistent with the regulatory requirements of 34 C.F.R. §104.35-36. XXXXX Further, the District will convene a meeting to discuss the provision of compensatory and/or remedial services to the Student for the time period the Student did not receive appropriate regular and/or special education or related services, including, but not limited to, speech services from XXXXX to the date of this compensatory education meeting. Please review the enclosed Agreement for further details. OCR will monitor the District's implementation of the Agreement until the District has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact Dana Russo, the OCR attorney assigned to this complaint, at 202-453-6559 or dana.russo@ed.gov.

Sincerely,

Michael Hing
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Natalie Ham via email: natalie_ham@charleston.k12.sc.us