



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

May 31, 2019

Erin Kirkpatrick
Chair, Board of Directors
Union Day School
P.O. Box 1005
Waxhaw, North Carolina 28173

RE: OCR Complaint No. 11-19-1119
Resolution Letter

Dear Ms. Kirkpatrick:

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 December 3, 2019 against Union Day School (the School). The Complainant filed the complaint on behalf of a student (the Student) alleging that the School discriminated against the Student on the basis of disability. Specifically, the complaint the following:

1. In Fall 2018, the School denied the Student a free appropriate public education (FAPE) when School staff failed to implement the Student's Individualized Education Program (IEP) by failing to provide the Student:
 - a. Preferential seating, and
 - b. Writing services in general education class for twenty (20) minutes per session for three (3) sessions per week.
2. In Fall 2018, the School denied the Student a FAPE when the School failed to reevaluate the Student despite having sufficient evidence that the Student needed additional special education and/or related aids and services due to a disability.

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 Charter School receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Section 504.

During the investigation, OCR reviewed documents provided by the Complainant and the School; interviewed the Complainant and School staff; and conducted a site visit on March 14, 2019. After carefully considering all of the information obtained during the investigation, OCR

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

found insufficient evidence to support Allegation 1(a). Also, before OCR completed its investigation, the School expressed a willingness to resolve Allegations 1(b) and 2 on May 29, 2019. OCR determined that it is appropriate to resolve Allegations 1(b) and 2 pursuant to Section 302 of the Case Processing Manual because the 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.

Allegation 1

Facts

The Student XXXX during the 2018-2019 school year with an IEP, dated XXXX. Among other accommodations and services, the Student's IEP required the School to provide the Student "preferential seating" during academic classes and writing services for three (3) sessions per week for twenty (20) minutes per session during regular education class.

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.

Analysis: "Preferential Seating"

The Complainant contends that the Student's teacher failed to provide the Student preferential seating in accordance with the Student's IEP. The School disputes this allegation and asserted that Staff "followed the IEP directive" regarding seating. Specifically, the School explained in its narrative response that the Student's teacher "had the Student sitting next to him and even moved the Student with him when he moved his teaching location."

OCR reviewed the Student's IEP, dated XXXX, and notes that the IEP requires preferential seating. By way of explanation of this provision, the IEP states that the Student "will be seated away from distractions." OCR interviewed the Student's teacher and he explained to OCR that the Student sat in two different places while he was in his class. At the beginning of the school year, the Student sat at the front of the classroom, in front of the main instructional board and in the front row. The teacher explained that he had two boards in his class, the instructional board and a white board. The Student was facing the teacher and the instructional board. The teacher noted that the white board and instructional board were swapped by IT in October 2018. The teacher stated that he did not move the Student because the Student was still in the front row and close to the instructional board and the teacher.

The teacher told OCR that he changed the Student's seat XXXX to be closer to the instructional board after he received an email from the Complainant requesting that he move the Student's seat. The teacher told OCR that he believes that he provided the Student preferential seating in

the new location as well because the Student was always in close proximity to him and to the instructional board and that the Student’s IEP does not require a specific location.

OCR reviewed correspondence between the Complainant and the School regarding this provision. While the Complainant contacted the teacher frequently during the 2018-2019 school year, OCR only identified one conversation pertaining to the Student’s seating. As discussed above, the Complainant emailed the teacher on Saturday, December 1, 2018 requesting that the Student’s seat be moved so he can be front and center and the teacher responded on Monday, December 3, 2018 informing the Complainant that the Student “already sits at the front” but that he moved him, per her request, so he is “directly in front of the board.”

OCR finds insufficient evidence that the School failed to implement this provision of the Student’s IEP. As stated above, the IEP requires the School to provide preferential seating and the IEP notes that preferential seating means that the Student is to be seated away from distractions. The teacher asserted to OCR that the Student sat in the front of the class near the teacher and documentation provided by the School confirmed this occurred. Based on the information provided, OCR finds that there is insufficient evidence that School staff failed to implement this provision of the IEP.

Analysis: “Writing Services for twenty (20) minutes for 3 sessions per week”

The Complainant contends that the School failed to provide the Student writing services for twenty (20) minutes for three (3) sessions per week in the Student’s general education class, as required by the Student’s IEP.

The School, in its narrative response, stated that the School reviewed the records and that Exceptional Children (EC) “services were, in fact, provided in an EC environment,” but did not specify that these were writing services. On multiple occasions, OCR requested documentation of the writing services the School provided to the Student during the 2018-2019 school year. To date, the School did not provide any documentation that shows writing services were provided to the Student in the general education class. When OCR inquired of the Student’s teacher about the writing services, he confirmed that no writing services were provided to the Student in the general education class. Instead, the teacher explained to OCR that the School provided EC services to the Student inconsistently throughout the Fall of 2018. Specifically, he noted that the Student was pulled out consistently for EC services in September 2018, not pulled out consistently for EC services in October and November 2018, and then pulled out consistently for EC services in December 2018. OCR notes that it is not clear whether writing services were provided when the Student was pulled out of the general education class during these periods, but the Student’s IEP states these services were to be provided in the general education classroom.

OCR also spoke to the School’s Assistant Head of School and the School’s XXXX EC Director (Director 3)¹. The Assistant Head of School explained that she oversaw the EC Directors during the 2018-2019 school year and that she took over direct responsibility of the EC Department in XXXX. The Assistant Head of School and Director 3 told OCR that they had no knowledge regarding whether the School provided the Student writing services as required by his IEP.

¹ XXXX.

Here, the School did not and could not provide any documentation or information that shows that the School did, in fact, provide writing services in the general education classroom as required by the Student's IEP. The Student's teacher indicated to OCR that these services were not provided in the general education classroom (as required), and OCR is unable to determine whether the services were provided in the EC classroom. Therefore, OCR finds that the School failed to implement the Student's IEP. Accordingly, OCR has concerns that the School failed to provide the Student a FAPE when it failed to implement the Student's IEP. Prior to OCR completing its investigation, including whether the failure to implement this provision amounted to a denial of FAPE, the School requested to voluntarily resolve this complaint and the School agreed to: (1) train staff on Section 504 and its requirement that the School provide students with disabilities a FAPE; and (2) convene a group of knowledgeable individuals, including the Student's parents, to discuss compensatory and/or remedial services.

Allegation 2

Facts

On XXXX, 2018, the Student's IEP team agreed that the School would conduct educational, psychological, intellectual, social appraisal, speech/language, motor, and adaptive behavior assessments for the Student. The XXXX, 2018 IEP team consisted of the Student's parents, the School's Head of School as the LEA representative, the School's EC Director, and the Student's teacher.

On XXXX, 2018, a contract psychologist retained by the School emailed the Complainant informing her that the School decided that it would not reevaluate the Student. Specifically, her email noted that the "purpose of an initial evaluation is to determine eligibility, while the purpose of a re-evaluation [is] to determine continuing eligibility... The request for a new evaluation was made in error." The Complainant disputed this finding and continued to communicate with School staff that the Student needed to be reevaluated.

On XXXX, 2019, the IEP team reconvened and determined that the School would conduct psychological, speech/language, educational, vision screening, behavioral/emotional, and observation assessments. On XXXX, 2019, the IEP team reconvened again to amend the Student's IEP. The IEP team consisted of the Student's parents, the LEA representative, the Student's general education and special education teacher, and the Student. The IEP team amended the Student's IEP, including increasing the amount of services provided to the Student. Specifically, the Team determined that the Student required writing services for thirty (30) minutes per session for five (5) in the special education setting and reading services for thirty (3) minutes per session for two (2) sessions per week in a special education environment. The Complainant withdrew the Student from the School in XXXX.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district 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 IEP or placement are necessary.

Analysis

The Complainant alleges that the School failed to reevaluate the Student despite the IEP team's determination in XXXX 2018 that the Student needed to be reevaluated. The Complainant noted that despite the IEP team's decision to evaluate the Student, the School unilaterally decided in XXXX 2018 that the School would not conduct the reevaluation without holding an IEP meeting to make this determination.

The School does not dispute that the IEP team met on XXXX, 2018 and determined that a reevaluation was required. Further, the School confirmed that, outside of an IEP meeting that conformed with the Section 504 regulation at 34 C.F.R. § 104.35(d), in XXXX 2018, School personnel decided that a reevaluation was not necessary and would not be conducted. The School's narrative response stated that the XXXX, 2018 IEP meeting was conducted in error because the EC Director "did not thoroughly review the records nor consult with the [School's contract psychologist], an appointed IEP team member, for her expertise and guidance in determining that assessment components were needed for this evaluation."

OCR interviewed staff and reviewed the Student's special education file. The School's contract psychologist, who stated she was not a member of the IEP team, told OCR that the School contracts with her to conduct student evaluations and reevaluations. She explained that when she received the Assistant Head of School's request to reevaluate the Student in XXXX 2018, she reviewed the Student's file and she determined that the reevaluation determination was not appropriate. When she informed the Assistant Head of School about her opinion, the administrator requested that she notify the parents of the decision not to reevaluate the Student. The contract psychologist explained that the IEP team met again on XXXX, 2019 and that she explained to the Complainant her opinion but that the Complainant disagreed. Ultimately, despite initial disagreement among the IEP team members, the IEP team agreed to conduct various assessments.

The Assistant Head of School confirmed that the School's contract psychologist determined that a reevaluation was not appropriate and that she agreed with the contract psychologist's position. She noted that the Complainant disagreed with the School's position. The Assistant Head of School noted that she then tried to schedule an IEP team meeting but that she had a challenging time trying to schedule a new IEP team meeting with the Complainant in XXXX of 2019.

OCR has concerns that: (a) School staff unilaterally decided not to conduct a reevaluation that a properly convened IEP team determined was necessary; (b) after making this decision, School personnel informed the Complainant of the decision and did not provide her with any procedural safeguards indicating her rights regarding this decision; and (c) School staff delayed the reevaluation of the Student based on this unilateral decision, resulting in the Student not receiving the additional services the team ultimately decided he required. Again, there is no dispute that the XXXX 2018 IEP team convened and determined that the School would conduct a reevaluation, and on XXXX, 2018, School staff determined that the School would not conduct the reevaluation (and failed to provide the Complainant procedural safeguards). Based on the

above information, OCR finds that the School failed to comply with the procedural requirements of Section 504 regarding the decision not to reevaluate the Student. Accordingly, OCR has concerns that the School failed to provide the Student a FAPE. Prior to OCR completing its investigation, including determining whether this amounted to a denial of FAPE, the School requested to voluntarily resolve this complaint and the School agreed to: (1) train staff on Section 504 and its requirement that the School provide students with disabilities a FAPE; and (2) convene a group of knowledgeable individuals, including the Student's parents, to discuss compensatory and/or remedial services.

On May 29, 2019, the School 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 School to (1) train staff on Section 504 and its requirement that the School provide students with disabilities a FAPE; and (2) convene a group of knowledgeable individuals, including the Student's parents, to discuss compensatory and/or remedial services. Please review the enclosed Agreement for further details. OCR will monitor the School's implementation of the Agreement until the School has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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 School 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 School's cooperation in the resolution of this complaint. If you have any questions, please contact Zorayda Moreira-Smith, the OCR attorney assigned to this complaint, at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

Kristi R. Harris

Team Leader, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXX