



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

September 5, 2019

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

RE: OCR Complaint No. 11-19-1258
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 March 19, 2019 against Portsmouth City Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX XXXXX School (the School). The Complainant alleged that the Division discriminated against the Student on the basis of his disability. Specifically, the complaint alleged the following:

1. The Division failed to comply with procedural requirements of Section 504, when School staff determined that the Student's behavior was not a manifestation of his disability during a Manifestation Determination Review held on XXXXX XX, XXXX; and
2. The Division denied the Complainant's request for an impartial hearing in or around XXXXX and XXXXX XXXX, in violation of Section 504.

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, OCR reviewed documents provided by the Complainant and the Division. Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint. OCR determined that it is appropriate to resolve the complaint pursuant to Section

302 of the *Case Processing Manual* because the investigation has identified issues that can be addressed through a resolution agreement.

Facts

During the 20XX-20XX school year, the Student was enrolled in Grade X at the School. OCR reviewed the Student's initial Section 504 Plan (the Plan) for the 20XX-20XX school year, dated XXXXX X, XXXX. The Plan states that the Student has been diagnosed as having XXXXX XXXXX XXXXX XXXXX (XXXXX), and requires that the Division will provide the Student with the following special education and/or related aids and services: a XXXXX XXXXX from XXXXX, XXXXX XXXXX to complete XXXXX XXXXX XXXXX, and permission to XXXXX XXXXX.

The Division provided OCR with a copy of the Student's discipline record. The record includes a copy of a notice of disciplinary action dated XXXXX XX, XXXX, which states that the Student was found to be in possession of a XXXXX longer than X XXXXX on school property. The Student was given a 10-day out-of-school suspension (OSS) on XXXXX XX, XXXX, to conclude on XXXXX XX, XXXX, with a recommendation for outside placement for being in possession of a XXXXX in school.¹ The notice stated that pending the disciplinary hearing, the Student could return to the School with a parent for reinstatement on XXXXX XX, XXXX. OCR reviewed the incident reports, comprised of summaries written by the Student, a student witness, the Principal, and the faculty member who found the XXXXX on the Student on XXXXX XX, XXXX.²

OCR also reviewed a letter from the Student's social worker, dated XXXXX XX, XXXX, that states that the Student is diagnosed with XXXXX and a symptom of that is XXXXX, as well as being in the moment. The letter further states that due to the Student's XXXXX, he will act without thinking through his behavior thoroughly or considering possible future repercussions.

OCR reviewed documentation pertaining to the manifestation determination review (MDR) for the Student conducted on XXXXX XX, XXXX. The MDR states that impulsivity and reckless behavior were indicated, but that these were not "symptoms" of the Student's "current documented behaviors". The MDR also stated that XXXXX is a symptom of XXXXX.

The Manifestation Determination Findings (MDF) state that the MDR team found that the Student's behavior in question was not a manifestation of his disability. Specifically, the comments in the MDF note that discussion at the MDR established that the Student can be highly impulsive and forgetful. However, the comments note that the MDR team solely based its findings to the Student's documented disability of XXXXX. The MDF also states that the Complainant disagreed with the results of the MDR.

The Division informed OCR that the MDR team considered all relevant information before making its determination whether the Student's conduct was a manifestation of his disability. The team

¹ The Student had not received a prior suspension during the 201XX-20XX school year. OCR also notes that the Martin Luther King, Jr. holiday fell on XXXXX XX, XXXX, such that school was not in session.

² The Division also provided OCR with documentation indicating that during the course of investigating this incident, it also found a piece of XXXXX XXXXX in the Student's XXXXX, which had a XXXXX of XXXXX XXXXX types of XXXXX and the type of XXXXX required for each, and the following words, "XXXXX XXXXX XXXXX XXXXX". This issue was not included in the notice of disciplinary action. However, the Division also recommended to the Complainant that she have the Student evaluated, which she did.

reviewed the Student's discipline records, teacher input and observations, the Plan and implementation thereof, the fact that the Student's parents were having the Student evaluated and that he had been admitted to a behavioral health entity, and input from the Complainant.³

The Division stated that following the disciplinary hearing held on XXXXX XX, XXXX, the Student was no longer recommended for an outside placement, such that his discipline was reduced to a short-term suspension. The Division also amended the Student's suspension notice to state that the Student's suspension began on XXXXX XX, XXXX and concluded on XXXXX XX, XXXX, such that the Student could return on XXXXX XX, XXXX.⁴⁵ The Student's out of school suspension ended on XXXXX XX, XXXX, but on XXXXX X, XXXX, the Complainant unilaterally removed the Student from the School and placed the Student in a XXXXX XXXXX program which included an educational component. The Student remained at the therapeutic program until XXXXX XXXX.

OCR reviewed a XXXXX XX, XXXX letter the Complainant allegedly sent to the Coordinator of Student Services at the Division. The letter requested a due process hearing for the Student. The letter also challenged the MDR for the Student and the Division's general failure to consider the Student's hospitalization and residential treatment placement and their identification and treatments of the Student's disabilities and impairments. The Division informed OCR that it never received a request for an impartial hearing from the Complainant.

The Division provided OCR with documentation indicating that that the Student's Section 504 team reconvened, reevaluated the Student, and updated the Student's Plan on XXXXX XX, XXXX. The Eligibility Committee report classified the Student as having both XXXX and XXXXXXXX. The report notes the Student's major life activities that are substantially limited are his ability to concentrate and utilize executive functional skills. When addressing the impact that the Student's disability has on his education, it states that his disability affects his ability to think and learn. The revised Plan states that the Student would be provided with a support plan, as well as prompt private feedback to redirect behavior.

Allegation 1

The Complainant alleged that the Division failed to comply with procedural requirements of Section 504, when School staff determined that the Student's behavior was not a manifestation of his disability during the MDR held on XXXXX XX, XXXX.

Specifically, the Complainant asserted to OCR that the Division only considered the Student's XXXXX diagnosis, but did not consider other information she presented regarding other

³ The Complainant and the Division both provided OCR with a letter from the Student's XXXXX dated XXXXX XX, XXXX, after the MDR, which states that due to a higher dosage of medication, the Student was experiencing symptoms of restlessness, irritability, and impulsivity.

⁴ The Division also provided OCR with a copy of a revised Student Placement Disposition Form after the Complainant raised concerns about the coding of the Student's offense. The offense, which was originally listed as XXXXX - XXXXX of a XXXXX (longer than X XXXXX) was changed to XXXXX on or about XXXXX XX, XXXX, with the offense listed as possession of a XXXXX less than X XXXXX.

⁵ In addition, on XXXXX XX, XXXX, the Principal contacted the Complainant and informed her that the Student's XXXXX account contained an XXXXX XXXXX a XXXXX - XXXXX XXXXX. The Principal asked the Complainant to have the Student change his XXXXX, to obtain information from the Student's doctors that he was cleared to return to school, and that she intended to create a safety plan for the Student upon his reentry.

forthcoming diagnoses in making its determination regarding the Student. The Complainant stated that during the course of the MDR, she informed the team that the Student also had XXXXXX, and that his medication had recently changed. The Complainant also stated that she presented the letter from the Student's therapist at the MDR discussing the Student's impulsivity, but the MDR team also refused to consider that information. The Complainant explained that the team informed her that it could not consider any information that was not already included in or referenced by the Plan.

Legal Standards

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.

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.

Analysis

OCR reviewed the documentation provided by both the Complainant and the Division. Specifically, OCR reviewed the Student's discipline record, the Division's discipline policy, and related correspondence. Upon review, OCR was unable to determine what documentation the MDR members reviewed and considered before making a final determination, as well the specific information that was discussed at the MDR.

Without conducting interviews with Division staff to clarify what documents the MDR team considered before making its decision as to whether the student's behavior was a manifestation of his disability and whether the Student was denied a FAPE, OCR has compliance concerns as to whether the Division failed to comply with procedural requirements of Section 504 when it conducted the Student's MDR on XXXXX XX, XXXX.

However, based on the documentation OCR obtained from the Complainant and the Division thus far, the Division ultimately imposed a 10-day OSS on the Student from XXXXX XX through

XXXXXX XX, XXXX, such that it did not suspend or otherwise exclude the Student for more than 10 school days or change the Student's placement.

As discussed above, before OCR completed its investigation, the Division requested to resolve the Complainant's complaint through a resolution agreement obtained pursuant to Section 302 of OCR's *Case Processing Manual*. OCR has determined that entering into a resolution agreement under Section 302 of the *Case Processing Manual* is appropriate.

Allegation 2

The Division denied the Complainant's request for an impartial hearing in or around January and XXXXX XXXX, in violation of Section 504. Although the Complainant provided OCR with a letter, dated XXXXX XX, XXXX, in which she requested an impartial hearing for the Student, the Division denied that it received such a request.

Legal Standards

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

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that a school division establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires a school division to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

Analysis

OCR reviewed the data provided by both the Complainant and the Division, including educational records and correspondence regarding the Student. Upon review, OCR was unable to determine whether the letter requesting an impartial hearing that the Complainant provided to OCR was delivered to the Division such that the Division was on notice of the Complainant's impartial hearing request.

Without conducting interviews with Division staff to clarify whether they received the Complainant's written request and whether the Student was denied a FAPE, OCR has compliance concerns as to whether the Division failed to comply with procedural requirements of Section 504. However, as discussed above, before OCR completed its investigation, the Division requested to resolve the Complainant's complaint through a resolution agreement obtained pursuant to Section 302 of OCR's *Case Processing Manual*. OCR has determined that entering into a resolution agreement under Section 302 of the *Case Processing Manual* is appropriate.

Conclusion

On September 4, 2019, the Division signed the enclosed Resolution Agreement (the Agreement) which, when fully implemented, will address the allegation 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 remove the MDR conducted on XXXXX XX, XXXX from the Student's records. The Agreement also requires the Division to develop and provide training to School staff, including teachers, administrators, and any other School/Division personnel responsible for providing services to students with disabilities, on the requirements of Section 504 and Title II with respect to the provision of a free appropriate public education (FAPE) to students with disabilities, including the Division's policies and procedures regarding the same. 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.

If you have any questions, please contact Mordecai Simha, the OCR attorney assigned to this complaint, at 202-453-7084 or Mordecai.Simha@ed.gov.

Sincerely,

Letisha Morgan-Cosic
Team Leader, Team II
Division of Columbia Office
Office for Civil Rights

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Enclosure

cc: LaRana J. Owens, Counsel for the Division (Sent via email)