



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

August 20, 2020

Via Email: XXXXX

Dr. Sheila Quinn
Superintendent
Clover School District
604 Bethel Street
Clover, South Carolina 29710

Re: OCR Complaint No. 11-19-1407
Resolution Letter

Dear Dr. Quinn:

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 June 24, 2019 against Clover School District (the District). The Complainant filed the complaint on behalf of his son, a student (the Student) at XXXXX School (the School). The Complainant alleged that the District discriminated against the Student on the basis of disability. Specifically, the complaint alleged that the District:

1. Discriminated against the Student on the basis of disability when it failed to timely conduct an evaluation of the Student until February 13, 2019, despite receiving notice of his possible disabilities in November 2018.
2. Harassed the Student on the basis of disability when a staff member referred to the Student as being XXXXX to another adult, while making a circular motion near her ear, indicating that the Student was “crazy,” in the spring of 2019, when the Student was serving an in-school suspension (ISS).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, 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), 42 U.S.C. §§ 12131 et seq., 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 District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

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

During the investigation to date, OCR reviewed information provided by the Complainant, the Student's mother (the Parent), XXXXX, and the District; and interviewed the Complainant, the Parent, and District faculty and staff.

Before OCR completed its investigation, the District expressed a willingness to resolve Allegation 1 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 Allegation 2. After carefully considering all the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's allegation. A summary of the evidence obtained by OCR to date regarding Allegation 1 is discussed below, as well as OCR's findings and conclusions regarding Allegation 2.

Allegation 1

The Complainant alleged that the District discriminated against the Student on the basis of disability when it failed to timely evaluate the Student until February 13, 2019, despite receiving notice of his possible disabilities in November 2018. Specifically, the Complainant alleged that the District initially failed to find the Student eligible as a student with a disability under Section 504 until February 2019. The District subsequently found the Student eligible under the Individuals with Disabilities Education Act (the IDEA) in May 2019.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipients 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 IDEA is one means of meeting this standard.

If a recipient fails to comply with the requirements of Section 504, OCR determines whether that failure resulted in a denial of FAPE to the student. In doing so, OCR considers whether the failure had a meaningful adverse impact that deprived the student of educational opportunity.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), further requires a recipient to evaluate any student who needs or is believed to need special education or related services due to a disability. A recipient must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

Although the Section 504 regulation requires a recipient 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 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 recipients 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 recipients conduct initial evaluations within 60 days of receiving parental consent (SC State Board of Education Regulation 43-243(IV)(B)(1)(c)(1)).

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

Findings of Fact

During the 2018-2019 school year, the Student attended the School as a Grade XXXX student. In an email sent on August 29, 2018, the Parent reported to the School Principal that she believed the Student had a disability, possibly XXXXX, and that she was seeking private testing. The Principal responded to the email the same day by stating that she would send the Parent a referral form and procedural safeguards, and she explained that the Parent would need to complete the form to begin the District’s evaluation process. The District provided OCR with documentation that it sent the referral form and the procedural safeguards to the Parent on August 30, 2018. The Parent returned the referral form to the School on September 24, 2018.

According to telephone logs maintained by the School, on September 27, 2018, a staff person at the School contacted the Parent by telephone to initially schedule an evaluation meeting for October 17, 2018. However, due to the unavailability of the Student’s family at this time, the meeting was rescheduled for November 20, 2018.¹

During the referral and evaluation planning meeting held on November 20, 2018, a team (the Team) of School staff, including the Student’s general education teacher (the Teacher), the School psychologist, special education teacher, Local Education Agency representative (LEA), and the Complainant and the Parent (to be collectively referred to as “the Student’s Parents”), reviewed the Student’s educational records, class performance, and District testing; considered teacher

¹ Both the Complainant and the District informed OCR that in October 2018, the Student’s family experienced circumstances that rendered them unavailable to participate in meetings and testing for a period of time.

observations and the Student's Parents' input; and reviewed information in a letter from the Student's psychologist diagnosing him with XXXXX.² As a result of the meeting, the Team determined that it would not refer the Student for a special education evaluation under the IDEA because he did not have skill deficits, and it did not have information to support that he required specialized instruction. Instead, the Team determined a Section 504 Plan would be appropriate and proposed that having accommodations, as well as a behavior contract, would likely be appropriate for the Student to maintain access to the general education setting. The Prior Written Notice (PWN) and meeting summary indicates that the Team transitioned to a Section 504 referral meeting, and the Team agreed that it could revisit a special education referral at a later time, and that no additional data was necessary. The Team did not determine that the Student was eligible for or develop a Section 504 Plan for the Student at this point; however, the Student's Parents signed a "consent for evaluation" form the day of the meeting on November 20, 2018.

Following the meeting on November 20, 2018, when the District returned from its Thanksgiving holiday on November 26, 2018, the Teacher collected data on the Student's work completion and behavior and did so for approximately five days. On December 7, 2018, the Student's private evaluator faxed the psychological-educational evaluation report to the School; the School received the report on Tuesday, December 11, 2018. On December 12, 2018, the Teacher emailed the Complainant a listing of the assignments the Student had completed and not completed and stated that she "should be able to start his behavior 504 plan Monday or Tuesday." Based on the information collected, the School Psychologist worked with the Teacher to develop a behavior contract/reward system (Behavior Contract), which the School sent to the Student's Parents and began to implement on December 17, 2018.

Email correspondence, dated December 18, 2018, indicates that the Student did not respond well to the Behavior Contract, which the Teacher and School Psychologist also told OCR. Following the Student's return from the District's winter break on January 8, 2019, School staff continued to attempt to implement the Behavior Contract, while making tweaks and revisions. According to an email from the Teacher to the Parent on January 14, 2019, the Behavior Contract was "not having the pull hoped for with class work." The Complainant asked, in response, when the Teacher thought the District would hold another Section 504 meeting. On January 18, 2019, the Teacher wrote to the Parent and the Complainant that the Student's behavior had worsened, that he was completing less work, and that she was checking with the School guidance counselor (the Counselor) to schedule a Section 504 meeting.

In email correspondence to the Teacher on January 21, 2019, the Student's Parents asked whether the Student should have an Individualized Education Program (IEP) since "504 isn't enough." On January 23, 2019, the Counselor emailed the Student's Parents to schedule a Section 504 meeting for February 13, 2019. Subsequently, the Student's Parents and the Teacher continued to correspond about the Student's school performance, and the Parent requested a meeting prior to the Section 504 meeting to discuss the Student's behavior.

At the February 13, 2019 eligibility meeting, according to the meeting summary, the Team discussed that the Behavior Contract was not successful, reviewed data from the Student's private

² The Prior Written Notice indicates that the parents did not receive a copy of evaluation report when they met with the evaluator to discuss the results on November 16, 2018.

testing, and agreed that the data supported the Section 504 referral. The Team determined that the major life activities of learning, academic performance, and interacting with others were impacted by the Student's disabilities, which included XXXXX, and, therefore, the Student was eligible for protections and services under Section 504. The Team developed a Section 504 Plan that included preferential seating near the source of instruction, an option to use "talk-to-text" on longer assignments, and positive reinforcement.

On February 20, 2019, the Student's Parents requested an evaluation for a functional behavioral assessment (FBA), i.e., an evaluation for special education under the IDEA. According to the School's records, the scheduling assistant called the Parent on February 26, 2019 to schedule the special education referral meeting for March 21, 2019. During the meeting on March 21, 2019, the Team discussed the Student's needs and the ineffectiveness of his existing Section 504 Plan; and the Parent signed consent for additional assessments for the purpose of determining the Student's eligibility under the IDEA. Following educational testing, the Team reconvened on May 16, 2019, and determined that the Student was eligible for special education and/or related aids services under the IDEA. Due to a scheduling difficulty on the part of the Student's Parents, the Team reconvened to complete development of the Student's IEP on June 3, 2019.

However, the District did not have an opportunity to implement the Student's IEP. The Student was absent due to vacation and then due to illness from May 17 to June 5, 2019, which was the last day of school. Prior to the beginning of the 2019-2020 school year, the Student's Parents withdrew him from the District, as the Student enrolled in the school district where the Complainant resides.

Analysis

Based on the foregoing, OCR considered whether the District had reason to suspect the Student had a disability and when it had notice that it had an obligation to evaluate whether the Student required special education and/or related aids and services.

OCR determined that the District had information, as early as August 29, 2018, that the Student was suspected of having a disability, given the Parent's communication to the Principal that she was seeking outside testing for the Student. Additionally, email correspondence from the Teacher and the Counselor during the fall 2018, as well as statements made by the Teacher during an interview with OCR, indicates that the School staff had reason to suspect that the Student had a disability based on increasing behavioral difficulties and declining academic performance.

OCR next considered whether the District evaluated the Student in a reasonable amount of time after having notice that evaluation was warranted. Based on the information obtained to date, OCR has concerns that the District may have failed to appropriately evaluate the Student in a timely manner during the middle of the 2018-2019 school year, as required by the regulation implementing Section 504, at 34 C.F.R. § 104.35(a).³ Specifically, the District began evaluating

³ OCR notes that the period from August 29, 2018 through November 20, 2018 is untimely for the purposes of the instant OCR complaint; however, OCR described what occurred during this timeframe for context. Based on the information gathered, OCR found that there was a reasonable delay from August 29, 2018 until the District first convened a meeting regarding the Student on November 20, 2018 because, following the Parent's notice to the School

the Student and proposed that a Section 504 plan was appropriate for the Student on November 20, 2018, but it did not determine his eligibility under Section 504 until February 13, 2019. The evidence obtained demonstrates that the District gathered classroom data for five days after the November 20, 2018 meeting, and it received the private assessment report by December 11, 2018; however, OCR has not obtained any evidence thus far that the District gathered additional data for the purpose of determining the Student's eligibility between December 11, 2018 and February 13, 2019. The documentation and information obtained did not explain the 85-day period between referring the Student and ultimately determining his eligibility for and developing a Section 504 Plan on February 13, 2019, which exceeds the 60-day timeframe required by the IDEA and South Carolina state regulations.⁴ Even accounting for the holiday breaks that occurred within this time period,⁵ OCR has concerns that District failed to reconvene the Team and move the eligibility process forward within a reasonable timeframe.

OCR also has concerns that after the meeting on November 20, 2018, the Student's Parents may have understood that the Student had already been found eligible as a student with a disability under Section 504, and that Student's Behavior Contract constituted a Section 504 Plan⁶; some of the correspondence between the District and the Student's Parents is confusing in that regard.⁷

Additional Concerns

Moreover, OCR has concerns that in interpreting evaluation data and making placement decisions, the District may not have carefully considered all information relevant to the Student, as required by the regulation implementing Section 504, at 34 C.F.R. § 104.35(c), for the meeting held on November 20, 2018. Specifically, the evidence obtained indicates that on that date, the Team rejected the need for special education and/or related aids and services under the IDEA because the Student had no skill deficits and, instead, determined that a Section 504 Plan or a behavior contract may be appropriate, although it had not yet determined whether the Student was a student with a disability under Section 504. The rationale for the District's decision is unclear given that it appeared to have made an eligibility determination before completing an evaluation, while simultaneously acknowledging that it needed more data.⁸

of the Student's potential disability on August 29, 2018, the Parent returned the referral form to the School September 24, 2018, and, thereafter, due to family circumstances, the Student's family was unavailable to participate in meetings until November 2018.

⁴ The District did not assert to OCR that it determined the Student's eligibility under Section 504 on November 20, 2018, such that the Student's Behavior Contract would have met the requirements of Section 504.

⁵ OCR notes that the District had student and staff holidays from December 24, 2018 through January 4, 2019, and on January 21, 2019.

⁶ For example, as discussed above, in an email to the Teacher on January 21, 2019, the Student's Parents stated that "504 isn't enough."

⁷ Further, as stated above, in an email sent on December 12, 2018, the Teacher told the Complainant that she "should be able to start his behavior 504 plan Monday or Tuesday."

⁸ Moreover, the Team's determination on November 20, 2018, that the Student would not require special education services under the IDEA, may have contributed to a delay in determining the Student's special education eligibility under the IDEA. OCR has concerns that the Team's determination at that time may have precluded any discussion of IDEA eligibility during the subsequent meeting held on February 13, 2019, when the Team reviewed evaluation data for the Student.

As stated above, before OCR completed its investigation of Allegation 1, the District expressed a willingness to resolve the allegation. On August 14, 2020, the District signed the enclosed Resolution Agreement which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with Allegation 1 and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the District to consider compensatory education for the Student and to provide training to School faculty and staff. 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.

Allegation 2

The Complainant alleged that the District harassed the Student on the basis of disability when an administrator (the Staff Member) referred to the Student as being XXXXX to another adult, while making a circular motion near her ear, indicating that the Student was "crazy," in the Spring of 2019, when the Student was serving an ISS.

The Complainant informed OCR that the Student told the Parent that during one of his suspensions he was the only student in ISS at the time with the Staff Member, who is a member of support staff and not a teacher. At some point, another teacher, whom the Student could not identify, came into the ISS room and was talking to the Staff Member. The Student told the Parent that during the conversation, the Staff Member said, "that kid is XXXXX" while circling her ear, which he knew referred to him as being crazy. The Complainant stated that the Principal informed him that she confronted the Staff Member, who denied making the comment. The Complainant and the Parent informed OCR that the Parent texted the Complainant regarding the incident on April 20, 2019, so the incident occurred prior to that date. The Complainant and the Parent were unable to identify the other teacher in the room, as the Student could not identify that individual to them.

Legal Standards

Section 504 and Title II prohibit discrimination on the basis of disability. Disability-based harassment that creates a hostile environment is a form of disability discrimination. A recipient is required to provide a prompt and equitable grievance process to address complaints of disability discrimination.

A recipient's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A recipient may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the recipient had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with

or limit a student's ability to participate in or benefit from the recipient's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment typically must consist of more than casual or isolated incidents to constitute a hostile environment.

When responding to harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Findings of Fact

OCR interviewed the Staff Member, who was XXXXX XXXXX XXXXX for the School, among other duties, during the 2018-2019 school year. She explained that individuals come into her room and XXXXX. She stated that while completing her tasks, she XXXXX, which entailed ensuring that the students had whatever supplies they had and encouraging them to complete their work. If she needed to leave the room for any reason, an administrator would come into the room to cover for her.

With respect to the Student, the Staff Member recalled that the Student had been assigned to the ISS room between three and six times during the year, and he typically completed any work that he was responsible for completing; sometimes he would ask to use the restroom. Regarding the comment/conduct she was alleged to have engaged in, the Staff Member denied making the comment or anything to that effect. She also did not recall that anyone came into the ISS room while the Student was present, or that anyone made any comment about him in her presence. The Staff Member also stated that she had never had any issues with the Student, either in the ISS room or in general, and was surprised to learn of the allegation.

OCR reviewed the Student's disciplinary records, which indicate that the Student served ISS several times in the spring of 2019; however, none of those disciplinary incidents occurred on or immediately before April 20, 2019, the day on which the Student's Parents recalled that the Parent texted the Complainant about the incident.

In response to the Complainant's allegation, the District informed OCR that during a meeting on May 16, 2019, the Student's Parents reported to School staff, including the Principal, that the Staff Member harassed the Student on the basis of disability. The Principal requested additional information about the alleged harassment in writing. In a follow-up email to the Principal and other School staff on the morning of May 17, 2019, the Parent elaborated that sometime in Spring

2019, while the Student was serving an ISS, the Staff Member referred to the Student as being “XXXXX” to another adult who was present, while making a circular motion near her ear, indicating that the Student was “crazy.” The Parent also stated that she did not wish the Student to be present around the Staff Member. The District informed OCR that the Parent and the Student were not able to specify the date of the ISS or identify or describe the other adult to whom the Staff Member allegedly made the comment.

The Principal informed OCR that upon receiving the Parent’s report, she immediately notified the District’s Human Resources Department (HR) of the same. The Principal told OCR that the District’s HR XXXXX instructed her to interview the Staff Member with another administrator present, and that these instructions and procedures were consistent with past investigations she had performed.⁹ The Principal interviewed the Staff Member the same day, on May 17, 2019. During the interview, the Staff Member denied making the alleged comment and gesture, or anything that could have been misconstrued as such, and stated that she had not heard anyone else make the alleged comment.

In an email sent the afternoon of May 17, 2019, the Principal informed the Student’s Parents of the results of her investigation. She reported that the Staff Member denied making the comments and had not heard anyone else making derogatory comments. She also informed the Student’s Parents that the School would do its best to limit contact between the Staff Member and the Student.

Analysis

Based on the foregoing, OCR found insufficient evidence to substantiate that the Staff Member harassed the Student on the basis of his disability, as the Complainant alleged. The Staff Member denied engaging in the alleged harassing conduct, and the Student’s Parents did not provide, and OCR could not find, any other evidence or witnesses to substantiate that the conduct occurred.

Nevertheless, OCR determined that after receiving notice of the alleged harassment from the Student’s Parents on May 16, 2019, the District responded promptly and effectively to their report, and it conducted an investigation comparable to that of OCR. Specifically, although the Principal did not interview the Student or obtain a written statement from him because he did not return to the School after the Complainant’s report on May 16, 2019, the Principal interviewed the Staff Member following her receipt of a written description of the alleged harassment from the Student’s Parent the next day on May 17, 2019. The Principal explained that without additional information about the date of the alleged harassment and without information identifying the person to whom the Staff Member made the comment, she could not proceed any further with her investigation. Further, the Principal reported the results of the investigation to the Student’s Parents via email the same day she completed the investigation, thereby providing them with notice of the outcome. Although the Principal’s investigation did not substantiate that any harassment of the Student on the basis of his disability had occurred, the Principal agreed to limit the future interactions between the Staff Member and the Student, which was reasonably calculated to prevent any harassment.

⁹ As discussed with respect to Allegation 1 above, the Principal noted that the Student did not return to School following May 16, 2019, so she did not interview the Student or to obtain a written statement from him.

Accordingly, OCR determined that there was insufficient evidence to substantiate that the District discriminated against the Student, on the basis of disability, as alleged. Therefore, OCR will take no further action regarding Allegation 2.

Conclusion

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 Jacob Griffith or Amy Williams, the OCR attorneys assigned to this complaint, at 202-453-5730 or jacob.griffith@ed.gov, or 202-453-5933 or amy.williams2@ed.gov, respectively.

Sincerely,

Betsy Trice
for Letisha Morgan-Cosic
Team Leader, Team II
District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXXX, Counsel for the District, Via Email
XXXXX, XXXXX, Via Email