



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 17, 2023

By email only to taylorbr@hickoryschools.net

Dr. Bryan Taylor
Superintendent
Hickory Public Schools
432 4th Avenue SW
Hickory, North Carolina 28602

Re: Case No. 11-22-1228
Hickory Public Schools

Dear Dr. Taylor:

This letter is to advise you of the outcome of the investigation that the U.S. Department of Education, Office for Civil Rights (OCR) conducted of a complaint filed against Hickory Public Schools, which we will refer to as the District. The Complainant alleged that the District discriminated against the Student on the basis of disability when it failed to reevaluate the Student before significantly changing his placement during school year 2021-2022.

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. 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. The District receives federal financial assistance from the Department of Education and is a public entity, so OCR has jurisdiction over it pursuant to Section 504 and Title II.

During its investigation, OCR reviewed documents provided by the Complainant and the District. OCR also interviewed the Complainant and School staff. Before OCR completed its investigation, the District expressed interest in resolving the complaint 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 concerns that can be addressed through a resolution agreement. OCR summarizes below the evidence obtained during the investigation to date.

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Legal Standards

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. As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. 28 C.F.R. § 35.103.

In determining the educational services to be provided to students with disabilities, districts must look closely at their individual needs, and determine the specific combination of services that will meet those needs. For this reason, it is important that districts offer a range of placement options, so that students are not denied the services they need because of the unavailability of particular placements, or because those services are incompatible with a particular program model.

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. When a district places a student in a setting other than the regular educational environment, it must take into account the proximity of the alternate setting to the student's home.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), also 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, Section 504 Plan, or placement are necessary.

If a student with a disability transfers to a school district from another district with a Section 504 Plan or IEP, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options, determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district should evaluate the student consistent with the procedural requirements set forth in the regulation implementing Section 504, at 34 C.F.R. § 104.35, and determine which educational program is appropriate for the student.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district 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 district may discipline the student in the same manner as it disciplines students without disabilities. If a school district finds that the student's disability caused the misconduct, the district 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.

Facts

The Student enrolled at the School as a XXXX-grader on XXXXX for the 2021-2022 school year. The Student had an IEP and Behavior Intervention Plan (BIP), both dated XXXXX, from his prior school district, which included placement in a XXXXXXXXX program at his prior school for students "who struggle with XXXXXXXX" (Program 1).¹ The Complainant asserted that she gave the records regarding the Student's prior placement to the School's XXXX before the start of school year 2021-2022. The XXXX did not deny this assertion.

At the start of school year 2021-2022, the District placed the Student in a XXXXX education classroom, and pulled him out to receive special education and other related services in a XXXX setting. School staff informed OCR that any student with an IEP enrolling at the School is initially assigned to a general education classroom unless the student has a significant cognitive delay. If a student has a significant cognitive delay, the student is assigned to the School's self-contained classroom for students with Autism.

From XXXXXXX, the Student exhibited behaviors such as making threats of XXXX, XXXXX, and XXXX and XXXX other students. The School issued the Student a XXXX-day out-of-school suspension (OSS), served on XXXXX and XXXXX, for XXXXX behavior. On XXXXX, the Principal recommended that the Complainant enroll the Student in a local private XXXXX program for students with XXXXX; however the Student's parents declined to enroll him in that program at the time.

On XXXXX, the School held its first IEP meeting for the Student, which the Principal attended. The team determined that the Student should be placed in a XXXX education setting with some special education services provided in a XXXX classroom. The team also revised the Student's BIP and agreed to meet in XXXX weeks to determine whether it still met the Student's needs. Between XXXXXXX, the Student exhibited more XXXXX behaviors. The IEP team met again on XXXXX and revised the Student's BIP.

From XXXXXXX, the Student continued to exhibit XXXXX, including XXXX, XXXX, and XXXX other students; XXXXXXX XXXXX; XXXXXXXX; XXXXXXX; and XXXXX harm to other

¹ The Student qualified for special education services as a student with an XXXXXXX. The Student's IEP stated that the placement in Program 1 was "due to XXXXXXX deficits that require a XXXXX, XXXXXXX and a XXXXX XXXXXXX."

students and staff. The School issued the Student a XXXXX, from XXXX, XXXX, for engaging in inappropriate behavior. The School also issued the Student a XXXX XXXXX on XXXXX, for engaging in XXXXXX behavior.

On XXXXX, the School held an IEP meeting to review the Student's classroom behaviors and disciplinary referrals. During the meeting, the IEP team discussed whether a XXXXX was appropriate for the Student and determined it was not. From XXXXX, the Student's behavioral incidents continued including, according to documentation provided by the District, XXXXXXXX in class on XXXXXXX. On XXXXXXX, the School issued the Student a XXXXX, to be served on XXXXXXX. On Monday, XXXXX, the IEP team conducted a manifestation determination review and determined that the Student's behavior was a manifestation of his disability. The IEP team recommended placement of the Student on XXXXXXX for the next XXXXX school days, from XXXXXXXX.

On XXXXXXX, upon the recommendation of the XXXXX, the Complainant enrolled the Student in a private XXXXXXX program (Program 2) to "work on XXXXXXX." ² OCR has not found any evidence to date indicating that the District offered to pay for Program 2, and it is unclear what role the Student's IEP team played in the recommendation to Program 2. The Student attended Program 2 until the end of December, when his parents decided to pull him out. During this time, the evidence to date fails to indicate that the Student was receiving education services from the District that would have amounted to a FAPE.

On XXXXXXX, the IEP team met; considered verbal reports from Program 2 staff that the Student's behaviors had not improved while in Program 2; and determined that in addition to XXXXX, the Student would receive in-person services for XXXXXXX and a XXXXXXX with his special education teacher each school day. The IEP team considered whether, instead of placement on XXXXXXX, it would be appropriate to change the Student's classroom within the School; however, the IEP team determined that this would be inappropriate because the Student exhibited behaviors across all settings at the School. The Principal informed OCR that the only options at the School for students for whom placement in a general education classroom is inappropriate are "reduction of service time, homebound, and referral to [a private day treatment program] when a student needs that extra step of service"; and that because the Complainant no longer wanted the Student to attend Program 2, the only alternative was XXXXXXX. OCR found no evidence to date that the IEP team considered any possible placements for the Student other than a general education setting at the School or homebound instruction. On XXXXXXX, the IEP team met and changed the least restrictive environment in the Student's IEP from special education to homebound for all service areas "due to disciplinary events."

On XXXXXXX, the IEP team reconvened to discuss the Student's placement. According to the Prior Written Notice (PWN), during the meeting, the IEP team, including the Student's parents, discussed various options, including, per the parents' request, placement of the Student in Program

² OCR determined that this treatment program offers several types of services to "children in grades K-12 whose XXXXX have been an obstacle to their access of the curriculum in the regular school setting." This includes a XXXXXXX "XXXXXX" of approximately XXXXX with "XXXXXXXXXXXX," with the goal of "help[ing] children develop XXXXX skills and XXXXXXX strategies that will enable them to return successfully to their traditional schools."

1 at his prior school. The XXXXX informed OCR that placement of the Student in Program 1 was not possible;³ and that neither the School nor any other school in the District had a self-contained program appropriate for the Student.⁴ The IEP team recommended that placement on XXXXX continue and the Student remained on XXXXX for the remainder of the 2021-2022 school year. The evidence provided by the District to date did not indicate that the District considered any other placement of the Student in any other non-District program.

Analysis

With respect to the Student's initial placement in the District, as stated above, the Complainant asserted, and the XXXXX did not deny, that she gave the XXXXX records regarding the Student's prior placement in Program 1 before the start of school year 2021-2022. The evidence to date does not indicate that, at the start of the school year, the District reviewed the Student's IEP from his prior school district to determine whether the IEP, including its provision for placement in a self-contained special education program, was appropriate; and the evidence instead indicates that the School assigned the Student to a general education classroom and provided special education and other supports in a resource setting because this was the School's standard practice. However, OCR determined that an IEP team convened on XXXXX, to review the Student's IEP and placement.

With respect to the Student's suspensions from school, OCR determined that prior to excluding the Student from school for more than 10 school days for disciplinary reasons, the School held a manifestation determination review on XXXXX; determined that the Student's behavior was a manifestation of his disability; considered the appropriateness of the Student's current educational placement; and determined that placement on homebound instruction was appropriate. The IEP team convened on several subsequent occasions, including on XXXXX, and XXXXX, to consider the Student's placement, and determined that XXXXX continued to be an appropriate placement for the Student.

However, OCR is concerned, based on the information provided to date, that the District may have failed to provide the Student with a FAPE while he attended Program 2 between XXXXX and the XXXXX, 2021. Additionally, OCR is concerned that the District did not meaningfully consider any possible placements for the Student other than homebound instruction. While there is evidence that the XXXXX inquired as to whether the Student could attend Program 1 in his prior school district, after learning that this placement was unavailable, the District did not consider any placements other than XXXXX, including possible placement in a non-public or out-of-district program. Based on the XXXXX's statement to OCR that no schools in the District offer a self-contained program for students with disabilities other than Autism, OCR has concerns that the District may be denying students, including the Student, with the services needed to provide a FAPE in the least restrictive environment. OCR also has concerns that the District may not be

³ The District stated that its XXXXX had contacted the previous school in or about XXXXX and the school informed her that it could not enroll the Student in Program 1. OCR requested an interview with the former Director but she declined to participate in the OCR investigation.

⁴ The Principal informed OCR that no schools in the District offer a self-contained program for students with disabilities other than Autism.

offering a sufficient range of placement options so that students, including the Student, receive the individualized services they may need.

Conclusion

On XXXXX, the School District agreed to implement the enclosed Resolution Agreement which, when fully implemented, will address the evidence obtained and 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 the applicable law and regulation. OCR will monitor the School District's implementation of the agreement until the School 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 School 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. OCR would like to make you aware that individuals who file complaints with OCR 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 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 against the School District 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, OCR will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We appreciate the School District's cooperation in the resolution of this complaint. If you have any questions, please contact the OCR attorneys assigned to this complaint, Samantha Shofar at Samantha.Shofar@ed.gov, or Amy Fellenbaum at Amy.Fellenbaum@ed.gov.

Sincerely,

Jennifer Barmon
Team Leader, Team III
Office for Civil Rights
District of Columbia Office

cc: Jason White, Esq.