



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

July 27, 2023

By email only to superintendent@fcps.edu

Dr. Michelle Reid
Superintendent
Fairfax County Public Schools
8115 Gatehouse Rd.
Falls Church, VA 22042

Re: Case No. 11-23-1168
Fairfax County Public Schools

Dear Dr. Reid:

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 the above-referenced complaint filed against Fairfax County Public Schools (Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (School). The Complainant alleged that the Division has been discriminating against the Student on the basis of disability from the beginning of the school year in August 2022 through the present by failing to provide the Student with dedicated, properly-trained staff to facilitate the Student's access to XXXXX as required by his Individualized Education Program (IEP).

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 Division 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 to date, OCR reviewed information provided by the Complainant and the Division and interviewed the Complainant and Division staff. Before OCR completed its investigation, the Division expressed interest in resolving the allegation 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 school 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. The following is a summary of the evidence obtained by OCR during the investigation to date.

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

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Facts

The Student, who is XXXXX, was enrolled in the XXXXX grade at the School during the 2022-2023 school year. The Student's Individualized Education Program (IEP) requires dedicated individuals to facilitate access to XXXXX. Additionally, the Student's IEP provides that the School will provide a one to one staff ratio throughout the day and minimize the number of staff members (no more than 4, not including related service providers or specials teachers) interacting with the Student to ensure consistency and facilitate the least restrictive environment. The Division's Program Manager for XXXXX Services (Program Manager) told OCR that, in practice, one instructional aid works with the Student on a one-to-one basis, and a maximum of three other instructional aids provide interim support throughout the school day, or when the primary aid is unavailable to work with the Student.

The Student's IEP also states that it is essential that staff members working with the Student have the proper training to effectively support him and his unique needs. The IEP requires all staff working with the Student to be trained in the following training modules available through XXXXX: "An Overview of XXXXX and Instructional Strategies" (Module 1); "The Sensory System, The Brain and Learning" (Module 2); and "The Role of XXXXX in the Educational Setting" (Module 3). However, the Complainant did not consent to the provisions in the IEP listing the specific training modules and requested that the Student work with one qualified individual who can provide access to the learning environment. The Complainant requested and provided more rigorous training plan suggestions for staff and specifically requested one qualified XXXXX.¹

The Program Manager told OCR that the four instructional aids assigned to work with the Student had no experience in working with XXXXX students prior to working with the Student. While the Division initially stated to OCR that staff had completed training through XXXXX no later than August 2022, the Division provided training records that reflect that, as of the end of the 2022-2023 school year, the four instructional aids assigned to the Student had only completed Module 1. The Program Manager further clarified to OCR that, as of May 2023, the assigned instructional aids were still building the strategies and skills within Module 1, in consultation with XXXXX, and must demonstrate mastery in those skills before progressing to the next module. The Program Manager told OCR that staff were nearing mastery of Module 1 skills and planned to meet with XXXXX in May 2023 to discuss progression to Module 2.

The Complainant asserted that, although training was intended to be ongoing, there was a significant gap following the initial training provided in August 2022. Correspondence provided by the Division reflects communication between Division staff and XXXXX in September 2022, following the initial August 2022 training, and then a long gap until January 2023. The Program Manager told OCR that there was not an anticipated timeline for completion of the agreed upon modules listed in the Student's IEP, but also acknowledged there was a delay in staff's communication with XXXXX. Email correspondence OCR reviewed further indicates that, after a consult meeting in January, XXXXX was waiting to hear back from School staff about tools designed to facilitate communication with the Student from January through April 2023.

¹ In educational environments, XXXXX services are provided by an individual who has received specialized training in XXXXX. XXXXX provides consistent XXXXX and one-to-one support to a student who is XXXXX throughout the instructional day. Relatedly, the Program Manager told OCR that the Division does not currently have any certified XXXXX on staff. However, the Division does have paraprofessionals who have completed many of the XXXXX training modules.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33(a), requires school districts to provide a free appropriate public education (FAPE) to each qualified student with a disability who is in the school district's jurisdiction. 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.

If a school district fails to comply with a student's IEP, OCR determines whether that failure resulted in a denial of a FAPE to the student. In doing so, OCR considers whether the failure had a meaningful adverse impact that deprived the student of educational opportunity.

In addition to the requirement to provide FAPE, the Title II regulation, at 28 C.F.R. § 35.160, further requires school districts to ensure that communication with students with hearing, vision, or speech disabilities is as effective as communication with students without disabilities. To do this, school districts must provide appropriate auxiliary aids and services where necessary to provide effective communication so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the district. Title II requires public schools to give primary consideration to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student. A school district is not required to provide a particular auxiliary aid or service if the district can demonstrate that doing so would fundamentally alter the nature of a service, program, or activity, or that it would be an undue financial and administrative burden. However, the district still has an obligation to provide an effective auxiliary aid or service to the maximum extent possible.

School districts must apply both a FAPE analysis and the Title II effective communication analysis in determining how to meet the communication needs of a student with a hearing, vision, or speech disability. In some cases, in order to comply with Title II's effective communication requirement, a district may have to provide the student with aids or services that are not required for the student to receive FAPE.

Analysis

Based on the information reviewed, OCR has concerns that the staff assigned to work with the Student have not been properly trained to ensure the Student's receipt of FAPE or to provide communication that is as effective as communication with students without disabilities, as required by Section 504 and Title II. The significant delays in training during the 2022-2023 school year also suggest a failure to fully implement the Student's IEP.

Before OCR completed its investigation of the complaint, the Division expressed interest in resolving the complaint pursuant to Section 302 of OCR's *Case Processing Manual*. On July 26, 2023, the Division agreed to implement the enclosed Resolution Agreement, which, when fully implemented,

will address the evidence obtained and the allegation investigated. OCR will monitor the Division's implementation of the agreement until the Division is in compliance with the terms of the agreement and the statutes and regulations at issue.

Conclusion

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. 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 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 against the Division 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 Division's cooperation in the resolution of this complaint. If you have any questions, please contact Sara Clash-Drexler at 202-987-1386 or sara.clash-drexler@ed.gov or Ravan Austin at 202-987-1291 or ravan.austin@ed.gov, the OCR attorneys assigned to the complaint.

Sincerely,

Dan Greenspahn
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Jeanne-Marie Burke, Assistant Division Counsel, jsburke@fcps.edu
Tina Wrubluski, Senior Specialist, cmwrubluski@fcps.edu