



**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 14, 2023

By email only to RMaxey@horrycountyschools.net

Dr. Rick Maxey
Superintendent
Horry County Schools
335 Four Mile Road
Conway, SC 29526

Re: Case No. 11-23-1350
Horry County Schools

Dear Dr. Maxey:

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 Horry County Schools (the District). The Complainant alleged that the District discriminated against students in its elementary schools on the basis of disability during the 2022-23 school year by refusing to grant excused absences when students were absent due to medically-prescribed non-District provided (i.e., independent) physical, occupational, or speech therapy provider appointments.

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. Because the District receives federal financial assistance from the Department of Education and is a public entity, 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 District and interviewed District staff. Before OCR completed its investigation, the District 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.

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Facts

The Complainant asserted to OCR that the District has been refusing to grant excused absences and imposing attendance consequences, including truancy actions, on elementary school students who miss school to attend independent physical, occupational and speech therapy sessions. In support of her assertion, the Complainant provided to OCR a letter sent by a principal to an elementary school student's parent in Fall 2022. In the letter, the principal explained the District's attendance policy; stated that the District would not accept further excusal notes from the student's independent therapy providers; and would enforce state truancy requirements if the student continued to miss school to attend independent therapy appointments.

The District's attendance policy, which is provided to parents during online registration in advance of each school year, includes information regarding absences to attend independent therapy appointments. The policy states:

“If a parent chooses to use [an outside] provider ... we respectfully ask that the services be provided outside of the school day so that it will not interfere with his/her academic success.... [I]f it is absolutely necessary to remove your child from school for the therapy appointments, we strongly recommend that the days/times during the school week are alternated from week-to-week so your student is not missing large amounts of time in one particular class.... [W]e want to work collaboratively with you to provide service for your child; however, South Carolina's attendance requirements and truancy guidelines will be enforced.... If a student misses the same instructional time for 3 consecutive days/weeks, the therapy notes will be unexcused.”

The District trains administrative staff and principals in advance of each school year on this aspect of the attendance policy. The training materials indicate that students should not be “habitually absent” to attend any form of independent therapy; and, if they are, staff should, when appropriate, “hold a re-evaluation review meeting to consider the need for additional evaluations to determine if therapy is needed in the school setting.”¹ The training materials provided to OCR do not reference referring for evaluation students not already identified as eligible for special education or related services. However, the District's Executive Director of Federal Programs explained to OCR that school staff who learn of a student's repeated absences due to independent therapy appointments should take appropriate action to refer the student for an evaluation and convene a meeting to determine whether the student is eligible to receive special education and/or related services, including in-school therapy if appropriate.

The District identified 24 students at ten different elementary schools whose repeated absences to attend independent therapy appointments during the 2022-2023 school year prompted District action, including a conference with a school administrator; a warning letter to the family regarding

¹ District trainings contemplate that for students attending independent therapy who have been deemed eligible to receive special education and/or related services, a shortened school day or excused absences may be appropriate in order to ensure the provision of a free appropriate public education.

the District's attendance policy with respect to missing school to attend independent therapy appointments; and/or referral for truancy actions.² The Executive Director explained to OCR that there is no attendance code to note that an absence was to attend an independent therapy appointment; however, the Executive Director stated that the 24 students identified by the District were likely absent to attend recurring independent therapy appointments. Of the 24 students, 17 had an Individualized Education Program (IEP) or Section 504 plan. According to documentation provided by the District, the District did not evaluate or re-evaluate 15 of these students (ten of whom were previously identified as students with a disability) to determine whether they required any, or any additional or different, special education or related services, despite their repeated absences for recurring therapy appointments.

Legal Standards

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. Implementation of a Section 504 plan developed in accordance with Section 504's procedural requirements is another 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.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement. 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, 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 school district fails to comply with the procedural requirements of Section 504, a student's IEP, or a student's Section 504 plan, 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.

² Some of these students had ten or fewer absences (including tardies and early dismissals), while about a dozen of the students had 20 or more absences, including five students with 20 to 50 unexcused absences.

Analysis

Based on the information gathered thus far, OCR determined that the District has a policy applicable to all students, regardless of disability status, restricting excused absences for school missed to attend independent therapy appointments. OCR has concerns that in implementing this policy in its elementary schools, the District did not appropriately consider information suggesting that some students missing school to attend independent therapy appointments may have required special education related services in order to ensure the provision of a FAPE. Specifically, OCR has concerns that the District may have failed to evaluate or re-evaluate students with repeated absences to attend independent therapy appointments, in accordance with its policy and training, which potentially resulted in a denial of a FAPE for these students.

On September 12, 2023, the District agreed to implement the enclosed Resolution Agreement, which when fully implemented, will address the evidence obtained and the allegation investigated. OCR will monitor the District's implementation of the agreement until the District 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 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 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 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 District's cooperation in the resolution of this complaint. If you have any questions, please contact Ravan Austin at 202-987-1291 or Ravan.Austin@ed.gov or Sara Clash-Drexler at (202) 987-1386 or Sara.Clash-Drexler@ed.gov, the OCR attorneys assigned to this complaint.

Sincerely,

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

Enclosure

cc: Kenneth Generette, Counsel at KGenerette@horrycountyschools.net