



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 29, 2016

Dr. Beverly Emory
Winston-Salem/Forsyth County Schools
P.O. Box 2513
Winston-Salem, NC 27102-2513

RE: OCR Complaint No. 11-15-1036
Resolution Letter

Dear Dr. Emory:

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 November 5, 2014 against Winston-Salem/Forsyth Public Schools (the District) and, specifically, XXXX (School). OCR investigated whether, during the 2013-2014 and 2014-2015 school years, the District and the School discriminated against students on the basis of a disability by excluding exceptional students assigned to self-contained special education classes from activities and other settings (specifically, physical education, recess, lunch, art, music, and field trips) with general education students.

OCR is responsible for enforcing 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 a disability in any program or activity receiving Federal financial assistance from the Department. OCR also has jurisdiction to investigate complaints under 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, regardless of whether they receive Federal financial assistance from the Department.

Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

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 IEP developed in accordance with the Individuals with Disabilities Education Act is one means of

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meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

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 or her nondisabled peers to the maximum extent appropriate to the needs of the student with a disability. The Section 504 regulation, at 34 C.F.R. § 104.37, requires school districts to afford students with disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities. Furthermore, school districts must ensure that students with disabilities participate in nonacademic and extracurricular services and activities with students without disabilities to the maximum extent appropriate to the needs of each student with a disability.

Factual Background

In addition to traditional classrooms and curriculum, the School has two Exceptional Children's Multiple Abilities Program (EC MAP) classrooms that are designed to provide a functional curriculum and serve students with a range of cognitive disabilities, including autism and other intellectual disabilities in grades Kindergarten through the Fifth grade. These students all receive special education and related services pursuant to an Individualized Education Program (IEP).

During various points during the 2013-2014 and the 2014-2015 school years, between 18 and 20 students within the School had IEPs which required that they receive certain educational and/or related services for a portion of the school day in a separate setting from their non-disabled peers. These students were assigned to an EC MAP classroom. The IEPs for each of these students also identified the following: the nonacademic and extracurricular services and activities the student must participate in to access the general curriculum; and whether those services and activities should be provided in a special education setting or a general education setting with the students' non-disabled peers. These services and activities included music, art, physical education, lunch, recess, and field trips.

During the 2013-2014 school year only, specifically from September 2013 through April 2014, the Complainant was a probationary teacher in an EC MAP classroom. In an email dated February 24, 2014, the School Principal advised the District that, since September 2013, the Complainant failed to ensure that a student in her classroom participated in nonacademic and extracurricular services, such as lunch and recess, pursuant to the student's IEP. The Principal explained that the student's IEP team discovered this fact during a meeting held on February 5th to discuss the student's Functional Behavioral Assessment and Behavior Intervention Plan. The Principal further noted that the Complainant explained that she did not know the student's IEP required the services. According to the Principal, on the same day, she advised the Complainant to immediately ensure that the student received those services. However, as of February 24th, the Complainant continued her failure to comply with the student's IEP.

In an email dated February 26th, the Principal advised the Complainant that she must comply with the student's IEP immediately, the District had many resources available to assist her, and she would continue to make suggestions for her improvement. The Principal further noted that the Complainant's failure to comply with this directive, in addition to another directive, could result in disciplinary action against the Complainant, including a recommendation for dismissal.

In an email dated April 15th, the parent of an exceptional student assigned to the Complainant's EC MAP classroom advised the Principal that the School "removed [her son] from interacting with typical children on the playground," despite a contrary mandate in his IEP. In the District's narrative

response, the District asserts that the School investigated the parent's claim and determined that the student was not removed from interacting with his non-disabled peers during recess.

On or about April 21st, the Principal recommended a non-renewal of the Complainant's contract due to her failure to implement a student's IEP as written, among other issues. The Principal gave the Complainant the opportunity to resign before May 2nd, in lieu of a non-renewal of her contract. Ultimately, the Complainant did not resign and the Winston-Salem/Forsyth County Schools Board of Education did not renew the Complainant's contract.

Analysis

The Complainant alleged that students receiving special education in the School's EC MAP classes, particularly those in her class, were not permitted to attend music class, art class, physical education, and field trips with their non-disabled peers. She further alleged that in late March or early April 2014, School administrators gave her entire class a recess period separate from their non-disabled peers. The Complainant alleged that some of her students had IEPs which required that they attend these activities with their non-disabled peers.

For the following reasons, OCR has preliminary concerns that the District and the School may have failed to take necessary steps to ensure that exceptional students with IEPs requiring their participation in activities and other settings with their non-disabled peers continuously participated in those activities and settings.

First, OCR's review of the IEPs for students in EC MAP classes during the 2013-2014 school year reveals that at least 10 of those students should have been participating in lunch and/or recess with their non-disabled peers. Yet, as noted above, six months into the school year, the District and the School learned that the Complainant repeatedly failed to permit a student to attend lunch and recess with his non-disabled peers in direct violation of his IEP. The District and School learned this fact only after the student's IEP team discovered it during a meeting. During an interview with OCR on December 16, 2014, the Complainant admitted that she often did not allow students in her EC MAP classroom to attend lunch with their non-disabled peers because of their sensory issues. Thus, it appears that the Complainant, a probationary teacher during that school year, was either unaware of the mandates in her student's IEPs or unilaterally and intentionally disregarded them for a significant period of time without a detection from the School or District. With respect to either scenario, the District and/or School may have failed to provide proper training to the Complainant or put mechanisms in place to ensure that she complied with the mandates in her students' IEPs.

Second, after the District and the School learned of the Complainant's failure to comply with the mandates in one student's IEP, they advised the Complainant to comply immediately and that the District has many resources available to assist her. There is no evidence that the District or the School ensured that the Complainant consulted those resources. There is also no evidence that the District or the School sought to determine whether the Complainant or any other School staff failed to implement the IEP mandates of all the students assigned to EC MAP classes or even the Complainant's class. Indeed, less than two months after the District and School learned that the Complainant had not complied with a student's IEP for six months, a parent reported that her son was removed from participating in recess with non-disabled students despite a contrary mandate in his IEP. OCR reviewed that student's IEP and confirmed that it does mandate his participation in recess in a "regular class/activity." In the District's narrative response, it contends that the School investigated the parent's complaint and determined that the student was not removed from recess with his non-disabled peers.

The District did not report when or how the School conducted its investigation and made its determination.

Conclusion

Pursuant to Section 302 of OCR’s *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on August 9, 2016 which, when fully implemented, will resolve the allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information discussed above that was obtained during OCR’s investigation, and are consistent with applicable law and regulation. OCR will monitor the Division’s implementation of the Agreement until the Division is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

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, or participates in an OCR proceeding. 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 Division’s cooperation in the resolution of this complaint. If you have any questions, please contact Kimberly Conway, the OCR attorney assigned to this complaint, at 202-260-0991.

Sincerely,

/S/

Kristi R. Harris
Supervisory Attorney, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXX