



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

October 13, 2015

Mark Garrett, Superintendent
McDowell County Schools
P.O. Box 130
Marion, North Carolina 28752

RE: OCR Complaint No. 11-15-1208
Letter of Findings

Dear Superintendent Garrett:

The purpose of this letter is to inform you of our disposition of the above-referenced complaint that was filed with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education, on April 17, 2015 against McDowell County Schools (the District). The Complainant filed the complaint on behalf of her daughter (the Student), who attended the District's XXXX School (the School) during the 2014-2015 school year. The Complainant alleged that the District discriminated against the Student on the basis of disability XXXX by:

1. On February 27, 2015, terminating her Section 504 Plan at a Section 504 meeting without having notified the Complainant of that meeting, resulting in the Complainant's failure to attend that meeting;
2. During the Spring 2015 semester, failing to promptly and properly evaluate her for and provide her with appropriate special education and related aids and services (e.g., in an appropriate Section 504 Plan), including behavioral support and intervention services, resulting her inability to regularly attend school;
3. On March 24, 2015, filing a truancy charge against her despite the fact that her absences were disability-related;
4. On or about April 13, 2015, threatening her with an additional truancy charge because she had left a class despite the fact that she had done so to seek disability-related assistance from the School guidance counselor; and
5. During an April 22, 2015 Individualized Education Program (IEP) meeting, failing to consider a March 2015 diagnosis and report on her disabilities,

resulting in the District's failure or refusal to provide her with appropriate regular and special education and related aids and services.

OCR enforces 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 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) 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, it is subject to the provisions of the above laws and we have jurisdiction over it. Because the Complainant alleged discrimination under the above laws, we have jurisdiction over the allegations.

What follows is a discussion of the legal standards applicable to, and our findings and conclusions regarding, the allegations.

Allegation 1: The District discriminated against the Student on the basis of disability by, on February 27, 2015, terminating her Section 504 Plan at a Section 504 meeting without having notified the Complainant of that meeting, resulting in the Complainant's failure to attend that meeting.

The legal standards governing our consideration of allegation 1 (which are the same as the standards that will be discussed in connection with allegation 2, below) do not require that a parent be invited to or present at a Section 504 meeting. Consequently, assuming that a Section 504 meeting took place on February 27th (the District takes the position that there was no such meeting on that date), the District was not required to invite the Complainant to or notify her of that meeting. However, we note that the Complainant provided input on the issue of whether the Student continued to qualify for special education and related aids and services at the December 7, 2014 Section 504 meeting.

Consequently, we find that there is insufficient evidence to find the District in violation of Section 504 or Title II with respect to allegation 1. However, we note that, had we found in the Complainant's favor regarding this allegation, the District would have been required to provide the same remedy as the District has agreed to provide in connection with allegation 2 -- consideration of the Student for and potentially the provision of compensatory or remedial education services for the 2014-2015 school year.

Allegation 2: The District discriminated against the Student on the basis of disability by, during the Spring 2015 semester, failing to promptly and properly evaluate her for and provide her with appropriate special education and related aids and services (e.g., in an appropriate Section 504 Plan), including behavioral support and intervention services, resulting her inability to regularly attend school.

The legal standard governing our consideration of this allegation is that Section 504 and Title II require the District to have provided the Student with a free and appropriate public education (FAPE) during the 2014 2015 school year. The FAPE standard requires that school systems provide regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the school systems meet the needs of students without disabilities. OCR's investigation of an allegation that a school system has failed to properly reevaluate a student receiving special education and related aids and services is normally limited to ensuring that the school system complied with the FAPE process requirements of Section 504 relating to reevaluation, placement, and procedural safeguards.

For example, with respect to students with disabilities for whom a school system is providing special education or related aids or services, the school system is required to promptly evaluate evidence indicating that the student may be in need of a change in those aids or services. In doing so, it must: (1) draw upon a variety of sources in the reevaluation process; (2) establish and follow procedures to ensure that information obtained from all sources is documented and carefully considered; (3) ensure that the placement decision is made by a group that includes persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and (4) notify the parent or guardian of his or her due process rights.

The evidence indicates that a Section 504 Plan was in effect for the Student for the period from April 14, 2014 to April 14, 2015. Subsequent to the development of that Plan, the District received a May/June 2014 "Confidential Psychoeducational Report" (the Report) for the Student that it had requested. The Report included findings on the Student's "behavioral-emotional" issues and various recommendations, including the following: (1) consideration of behavioral-emotional issues in assessing the Student's ability to attend classes; (2) "[a]t the very least, a Section 504 Plan should continue;" (3) "tutoring and academic support are still important to offer;" and (4) suggested efforts, including interventions, to address the Student's anxiety. The conclusion of the Report includes a statement that "[t]hese results are good for 12 months."

However, the District did not consider the Report until April 22, 2015 (at which time it evaluated the Student for eligibility for services pursuant to the Individuals with Disabilities Education Act, or IDEA), despite the fact that the Student's existing

2014-2015 Plan did not address any of the recommendations in the Report.¹ For example, although the District conducted a Section 504 reevaluation meeting for the Student on December 9, 2014, it failed to consider the Report at that meeting. In the District's July 3, 2015 narrative response to OCR, it stated that:

The reason the 504 team did not consider the May/June Confidential Psychoeducational Report is because the 504 team did not include . . . (EC teacher at the school), nor anyone else who was in the June 9, 2014 EC meeting. (see Exhibit 1(c)) Therefore, the 504 team was unaware that in the closed EC file in the EC Coordinator's office was a May/June Confidential Psychoeducational Report. The Report was in the closed EC file rather than the child's school file to protect the child's right to confidentiality since EC services were declined by the parents at the June 9, 2014 meeting because they did not want the child placed based on Serious Emotional Disability.

The District is putting a plan in place that will notify any future 504 team of any assessment that is in a closed EC file while still protecting confidentiality so no 504 team in the future will go forward without all of the data concerning the child.

The above reason is an inadequate basis on which to find that the District's failure to reevaluate the Student for a change in Section 504 aids or services in light of the Report did not constitute a violation of Section 504 or Title II.

Based on the above discussion, we find that the District is in violation of Section 504 and Title II with respect to allegation 2 because of its failure to promptly and properly reevaluate the Student for a change in Section 504 aids or services following its receipt of the Report.

To address OCR's compliance concerns regarding allegation 2, the District has signed a Resolution Agreement pursuant to which it agrees to: (1) offer the Complainant the opportunity to have the District consider the Student for compensatory or remedial education services for the 2014-2015 school year; (2) if requested by the Complainant,

¹ The Report was considered by the District during a June 9, 2014 meeting to determine whether the Student was eligible for aids or services pursuant to the IDEA. In the District's July 3, 2015 narrative response to OCR, it indicated that the IDEA team considered the Report and offered the Complainant aids and services for the Student pursuant to the IDEA, but that the "services were declined by the parents at the June 9, 2014 meeting because they did not want the child placed based on [the] Serious Emotional Disability" IDEA category.

consider the Student for such services; and (3) if the Student is found eligible for them, promptly provide her with them.

We will monitor the District's implementation of the Agreement to ensure that it fully complies with it.

Allegations 3 and 4 (truancy)

During a June 5, 2015 telephone interview, the Complainant informed OCR staff that she was withdrawing allegations 3 and 4 because they were resolved, as a local court had purportedly ruled in her favor concerning the Student's alleged truancy. Based on the Complainant's statements, OCR finds that allegations 3 and 4 have been resolved. Therefore, because these allegations raised no systemic issues, we are closing our investigation of them effective the date of this letter.

Allegation 5: The District discriminated against the Student on the basis of disability by, during an April 22, 2015 Individualized Education Program (IEP) meeting, failing to consider a March 2015 diagnosis and report on her disabilities, resulting in the District's failure or refusal to provide her with appropriate regular and special education and related aids and services.

The legal standard governing our consideration of allegation 5 is the same as the FAPE standard discussed in the above analysis of allegation 2. The FAPE requirement that is most relevant to this allegation is that school systems must establish and follow procedures to ensure that information obtained from all sources is documented and carefully considered.

In its July 3rd narrative response, the District stated that, in evaluating and reevaluating students with disabilities for aids and services, it follows "Policies Governing Services for Children with Disabilities" (July 10, 2014),² a document issued by North Carolina's Department of Public Instruction. The primary sections governing special education evaluations are NC §§1503-2.5 through 2.7, the latter of which includes the following provision.

(c) Procedures for determining eligibility and educational need.

- (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under NC 1500-2.4, and the educational needs of the child, the LEA must--

² At <http://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/policies-children-disabilities.pdf>.

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered.

NC §1503-2.7(c). We find that these procedures include the same standard as the above FAPE standard.

However, we need not analyze whether the District followed its procedures. In its July 3rd narrative response, at pages 1 & 2, the District stated that:

On April 22, 2015 a meeting was held. At this meeting the parents were informed that [the Student] met the criteria and she could be placed in special education and served with the eligibility of Serious Emotional Disturbed (SED). The parents again declined to place the child into the special education program. The parents replied that they did not want her to be placed in special education but would like the school to provide a 504 plan. The school offered to write the 504 plan at that meeting, but the parents refused, requesting a 504 meeting at a later date. The parents stated that they would like more information before their child was placed into special education.

In the Complainant's July 8, 2015 email rebuttal, she confirmed the District's above assertions by stating that:

On April 22, 2015 we did meet with the School and chose not to place the Student in EC at that time. When we shared results of [the] diagnosis with the team they would not consider XXX diagnosis and only would place SED. During that meeting [the EC Coordinator] stated she wished to call meeting to a close at 5:30 due to her needing to leave at that time. I did not want to be rushed to sign 504 plan or anything else in a rush.

The above statements by the Complainant and the District indicate that the District offered but the Complainant declined placement of the Student in "EC" at the April 22nd meeting, that is, the Complainant declined special education and related aids and services at that meeting. We therefore need not determine whether or not the District followed its above procedures and considered "a March 2015 diagnosis and report on" the Student's disabilities or whether any failure to do so resulted in the District not providing the Student with appropriate special education and related aids and services,

as the Complainant declined such aids and services at that time. However, we note the Complainant's statement that she "shared results of [the] diagnosis with the team," indicating that the diagnosis was considered by the team at the meeting.

Consequently, we find that there is insufficient evidence on which to find the District in violation of Section 504 or Title II with respect to allegation 5.

Based on the above findings and the enclosed Resolution Agreement, we are closing our investigation of this case effective the date of 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.

Please be advised that the District may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Please note that, 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, to the extent provided by law, information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about this letter or the outcome of this complaint, please contact Peter Gelissen, the OCR attorney assigned to this case, at (202) 453-5912 or peter.gelissen@ed.gov.

Sincerely,

/S/

Peter Gelissen for
Dale Rhines
Program Manager
District of Columbia Office
Office for Civil Rights