



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 30, 2016

Scott Baker, Ed.D.
Superintendent
Spotsylvania County Public Schools
8020 River Stone Drive
Fredericksburg, Virginia 22407

Re: OCR Complaint No. 11-16-1267
Resolution Letter

Dear Dr. Baker:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on March 29, 2016 against Spotsylvania County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at the XXXX School¹ (the School). The Complainant alleges that the Division discriminated against the Student on the basis of disability. Specifically, the Complainant alleges the following:

Allegation 1: The Division denied the Student a free appropriate public education (FAPE) when, between XXXX the Division stopped payment to the School the Student was attending (a private placement), which resulted in a change in placement for the Student when he lost his enrollment status; and

Allegation 2: The Division does not have Section 504 Grievance Procedures.

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 Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

¹ The Faison School is a private school that offers evidence-based programming for individuals with Autism and related challenges.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division and interviewed the Complainant. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's assertion with respect to Allegation 1. Additionally, OCR identified a compliance concern with respect to Allegation 2. The Division has agreed to resolve the concerns through the enclosed resolution agreement.

Background

The Student is identified as a student with a disability XXXX; during the 2015-2016 school year, the Student attended the School². According to the Complainant, on February 2, 2016, she informed the XXXX.³ The feeding program would begin on February 22nd and last approximately 8 weeks. By email, dated February 2nd, the Case Manager confirmed her discussion with the Complainant regarding the XXXX program. The email also indicates that the Case Manager suggested home based services for the Student, but the Complainant declined the services. During an interview with OCR, the Complainant confirmed the discussion regarding the provision of educational services for the Student and added that she ultimately declined the provision of services because she felt that the Student would need time to adjust to the feeding program. According to the Complainant, if the Student adjusted to the program, she would reconsider educational services.

According to the Complainant, on or around February 16th, the School's Program Director informed her that the Case Manager had contacted the School and told them that the Division was not going to fund the Student's placement at the School while he was in the feeding program. Because of the lack of payment, School staff informed the Complainant that the Student would be unenrolled and placed on a wait list for re-enrollment. On February 18th, the Complainant emailed the Case Manager regarding her concerns about the Student's placement and the provision of FAPE. By email dated, February 19th, the Case Manager requested a meeting with the Complainant to discuss the concerns. The Complainant confirmed that she was not able to meet with the Case Manager, due to the timing of the request, but she was able to deliver a copy of her emailed concerns to the Case Manager.

On February 23rd, the Student began the feeding therapy program. On March 3rd, the Case Manager emailed the Complainant inquiring whether the Student was able to attend the School for a partial day. On March 10, 2016, the Complainant responded that the Student was unable to return to the School for a partial day. On March 16th and 21st, the Case Manager emailed the Complainant, informing her that the School was offering that the Student continue with an applied behavioral analysis program while waiting for an opening which they anticipated would be in June 2016. The emails also requested an Individualized Education Program (IEP) meeting.

On or about March 21st, the Division was notified, by the Student's psychologist, that it was not possible for the Student to attend school while in the therapy program due, in part, to the

² According to the Student's Individualized Education Program, dated October 22, 2015, the least restrictive environment in which the Student could be educated was a separate private school placement.

³ The therapeutic feeding program placement was the unilateral decision of the Complainant to address the Student's medical needs and not the result of an Individualized Education Program team decision.

intensity of the treatment and the Student's ability to adjust to the feeding program. It is not in dispute that the Student did not receive educational services while in the feeding program. On April 15th, the Student finished his feeding program. On April 18th, the Student returned to the School and resumed receiving the same educational services he received prior to his entrance into the feeding program. On this same day, the Student's IEP team, including the Complainant, met. According to the Complainant, the IEP remained unchanged since the Student returned to the same placement as before his entrance into the feeding program.

Allegation 1: The Division denied the Student a free appropriate public education (FAPE) when between February 16, 2016 and April 18, 2016, the Division stopped payment to the School the Student was attending (a private placement), which resulted in a change in placement for the Student when he lost his enrollment status.

Legal Standards & Analysis

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 Improvement Act is one means of 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 a FAPE to the same extent required under the Section 504 regulation.

In this case, OCR finds insufficient evidence of a violation with respect to Allegation 1. The Complainant has alleged that the Student was denied a FAPE because the Division stopped payment for his private placement while he was in the feeding program. It is not in dispute that the Complainant unilaterally un-enrolled the Student from the School due to non-payment for the time he was enrolled in the feeding program. It is also not in dispute that within a few weeks after the Student entered the therapeutic feeding program on February 23rd, the Student's physicians determined that the Student could not receive educational services due to the intensity of the program. Furthermore, both the Complainant and the Division confirm that once the Student completed the program on April 15th, he was able to return to the School and continue to receive the same services he was receiving prior to his entrance into the feeding program. Thus, OCR finds that although the Division did not pay for the Student's continued placement at the School while he was attending the feeding program, the evidence confirms that the Complainant chose to place the Student in the therapy program, thus making it impossible for him to receive educational services. OCR further determined that once released from the feeding program, the Student returned to the School in the same placement required by his IEP. Therefore, OCR finds no evidence that the Student was denied a FAPE during the time period at issue, or that the un-enrollment from the School resulted in a change in placement. Accordingly, OCR will take no further action with respect to Allegation 1.

Allegation 2: The Division does not have Section 504 Grievance Procedures.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires recipients that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public recipients that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

OCR determined that contrary to the Complainant's assertions, the Division has Section 504 grievance procedures, which can be found in Board Policy J Number JB (the Policy).⁴ OCR determined that the procedures provide notice to students, parents, and employees of the procedure, including where complaints may be filed. They also provide for an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; and include designated and reasonably prompt timeframes for the major stages of the complaint process. Moreover, the Policy provides an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Notwithstanding, OCR has some concerns with the grievance procedures. Specifically, the procedures do not indicate their applicability to complaints alleging discrimination carried out by employees, other students, or third parties. Additionally, although the procedures do indicate that the complainant is to receive written notice of the outcome of the complaint, there is no provision that similar notice be provided to the accused. Finally, only the complainant has appeal rights. Thus, based on the above, OCR finds that the Division's grievance procedures are not in full compliance with Section 504 or Title II. In order to resolve this compliance concern, the Division voluntarily agreed to take corrective actions outlined in the enclosed Resolution Agreement (Agreement). OCR will monitor the implementation of the Agreement to ensure that it is fully implemented.

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

⁴ The Division's grievance procedures can be found at <http://www.boarddocs.com/vsba/scs/Board.nsf/Public#>. These procedures are specific to students. Grievance procedures for employees are located under a different title and can also be located on the Division's website.

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 regarding this letter, please contact Tracey Solomon, the OCR investigator assigned to this complaint, at 202-453-5930 or Tracey.Solomon@ed.gov or Kendra Riley, the OCR attorney assigned to this complaint, at 202-453-5905 or Kendra.Riley@ed.gov.

Sincerely,

/S/

David Hensel
Supervisory Attorney, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Jason H. Ballum, Esq.