



U.S. DEPARTMENT OF EDUCATION
P.O. BOX 14620
WASHINGTON, DC 20044-4620
Telephone: (202) 786-0500; Facsimile: (202) 208-7797; TDD: (202) 208-7741
E-mail: OCR.DC@ed.gov

OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, North Carolina, South Carolina, Virginia

January 8, 2007

Patrick T. Andriano, Esq.
Reed Smith, LLP
Riverfront Tower
901 East Byrd Street, Suite 1700
Richmond, VA 23219-4068

Re: Complaint No: 11-06-1147
Resolution/Closure Letter

Dear Mr. Andriano:

The purpose of this letter is to inform you of the results of our investigation of the above-referenced complaint, which was filed on March 27, 2006 with the District of Columbia Office, Office for Civil Rights (OCR), U.S. Department of Education (Department). The Complainant alleges that Gloucester County Public Schools (the Division) discriminated against the Student on the basis of her disabilities (peanut and treenut allergies, or PTAs) during the 2005/2006 school year by denying her a free and appropriate public education (FAPE), that is, regular or special education and related aids and services that are designed to meet her needs as adequately as it meets the needs of students without PTAs, specifically, by failing to timely develop and implement a Section 504 or other Plan that adequately addresses her PTA-related needs and ensures a safe educational environment for her.

As we informed the Division in our prior letter, OCR is responsible for enforcing certain Federal civil rights statutes and regulations, including Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, 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, which prohibit discrimination on the basis of disability by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the Division is a recipient of Federal financial assistance

Our Mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

from the Department and a public entity, we have jurisdiction over it pursuant to Section 504 and Title II. Because the Complainant alleges discrimination under these laws, we have jurisdiction over the Allegation.

In making our determinations concerning this complaint, we evaluated the information provided by the Complainant and the Division, and conducted telephone interviews with the Complainant, Division staff, you and Kathleen Mehfoud, Esq. What follows is a discussion of our factual findings, concerns and legal conclusions regarding the Allegation.

Issue

As stated above, the Complainant alleges that the Division denied the Student FAPE by failing to timely develop and implement a Section 504 or other Plan that adequately addresses her PTA-related needs and ensures a safe educational environment for her. The Division contends that it was not required to provide the Student with a Section 504 or other Plan because she is not an individual with a disability, that is, because she is not eligible for a Section 504 or other Plan under Section 504 and Title II. In light of the Division's contention, we will address the issue of whether the Division, in finding the Student to be ineligible under Section 504 and Title II, denied the Student FAPE.

Legal Standards

Under the Section 504 regulation, the Division is required to provide a student with disability with FAPE, that is, regular and/or special education and related aids and services that are designed to meet the student's needs as adequately as it meets the needs of students without disabilities. We interpret Title II as imposing similar requirements.

OCR's investigation of a complaint alleging that a school division has failed to provide a student with FAPE is normally limited to ensuring that the school division has complied with the process requirements of Section 504 and Title II relating to educational setting, evaluation and placement, and procedural safeguards. For example, in evaluating and placing a student with a disability, a school division is required to: (1) draw upon a variety of sources in the evaluation process; (2) establish procedures to ensure that information obtained from all sources is documented and carefully considered; and (3) ensure that each placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. OCR does not usually investigate the substance of individual placement and other educational decisions made by a school division, but rather ensures that such decisions are made consistent with the above process requirements.

However, the regulatory analysis of the FAPE provision of the Section 504 regulation (34 CFR § 104.33), under "Subpart D-Preschool, Elementary, and Secondary Education," provides that:

It is not the intention of the Department, *except in extraordinary circumstances*, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education. [emphasis added]

Consequently, OCR may review the result of individual placement and other educational decisions when it finds that "extraordinary circumstances" are present.

Analysis

In the following discussion, we will analyze: (1) whether the Division complied with the above FAPE process requirements in finding the Student to be ineligible for a Section 504 or other Plan; (2) whether there are "extraordinary circumstances" present; and, if so, (3) whether the "result" or substance of the Division's eligibility decision was consistent with Section 504 and Title II.

(1) Whether the Division complied with the above FAPE process requirements in finding the Student to be ineligible for a Section 504 or other Plan.

The first FAPE process requirement is that the Division must have drawn upon a variety of sources in the evaluation process. The Division conducted a Section 504 eligibility meeting on February 24, 2006. Documentation indicates that the Division drew upon information from the following various sources in connection with this meeting and the evaluation of the Student: medical reports and letters from the Student's doctor; the student's health care plan; School records; and observations by, and/or input and documentation from, the School principal, the School Section 504 Chairperson (and Assistant Principal), the School counselor, the School nurse, the Student's teacher, a paraprofessional that works in the Student's classroom, and the Complainant.

The second FAPE process requirement is that the Division must establish procedures to ensure that information obtained from all sources is documented and carefully considered. Although requested, we have not received information from the Division

concerning its establishment of such procedures, and have been unable to locate such procedures on the Division's website. However, on its website (at <http://gets.gc.k12.va.us/sped/GlossaryofTerms.htm#Free>), the Division indicates that it adheres to the requirements of the "Regulations Governing Special Education Programs for Children with Disabilities in Virginia" in making determinations concerning special education and related services. These requirements appear in Title 8, Chapter 8 of the Virginia Administrative Code (VAC). We find that these requirements (particularly those at 8 VAC 20-80-56), even though not established by the Division, ensure that information obtained from all sources is documented and carefully considered when evaluating students to determine their eligibility to receive special education and related services. We also find, based on the Division's submissions, that it followed these procedures.

The third FAPE process requirement is that the Division must ensure that the placement (or ineligibility) decision is made by a group of persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options.

Documentation (the February 24, 2006 "Section 504 Eligibility Report") indicates that the determination that the Student was ineligible for Section 504 services was made by the School principal, the School Section 504 Chairperson (and Assistant Principal), the School counselor, the School nurse, the Student's teacher, and a paraprofessional that works in the Student's classroom, and that the Complainant was present during that determination. We find that these individuals were knowledgeable about the Student, the meaning of the evaluation data, and the placement options.

Based on the above discussion, we find that the Division complied with FAPE process requirements in finding the Student to be ineligible for a Section 504 or other Plan.

(2) Whether there are "extraordinary circumstances" present that support a substantive OCR review of the result of the Division's determination that the Student was ineligible for Section 504 services.

In analyzing disability cases such as this one, we have looked at the nature and severity of the disability and the likelihood, nature and severity of the harm that could result from the school division's failure to provide a student with a disability with Section 504 services. When a school division's decision that a student is ineligible for Section 504 services could result in the death or serious illness of the student, there is a basis for finding that the case involves "extraordinary circumstances" that support a substantive OCR review of the Division's decision.

The evidence in the file includes two letters written by the Student's doctor. In a January 8, 2006 letter, the doctor stated that the Student's PTAs "could be life-threatening". In a February 6, 2006 letter, the doctor added that:

... [the Student] is extremely allergic to peanuts and tree nuts. These allergies can cause anaphylaxis, which is a life threatening condition. Symptoms from anaphylaxis can include itching, hives, difficulty breathing, swelling, closure of the airway, vomiting, diarrhea, drop in blood pressure, and can even result in death, as evidenced by the 500 people per year in the United States who die from allergic reactions to food.

....

[The Student's] reactions are so severe that she has developed hives from being kissed on the cheek by someone who ate peanut butter. She has reacted after handling peanut butter cookie dough, even though she didn't ingest it. She has also reacted after eating cheese from a salad bowl that previously contained a dressing with walnuts in it. I'm sure you are aware of the recent [incident involving a] Canadian girl with [a] peanut allergy who died from anaphylaxis after kissing her boyfriend, who had eaten peanut butter earlier in the day. Thus, it is important to take these potential reactions seriously.

The evidence also includes:

1. 'Meeting Minutes' (for a February 8, 2006 meeting) in which the Student is described as having "a life-threatening food allergy", and which were signed by six Division staff persons, including the School Section 504 Chairperson (and Assistant Principal), the School nurse and the Student's teacher; and
2. The Student's "Individualized Health Care Plan", in which the Student is characterized as having '... a severe allergy to peanuts/treenuts which can be life-threatening', and which was signed by two Division staff persons -- the School Section 504 Chairperson (and Assistant Principal) and the School nurse.

Based on the above evidence, we find that the Division's decision that the Student is ineligible for Section 504 services could result in the death or serious illness of the Student, and that this case therefore involves "extraordinary circumstances" that support a substantive OCR review of the result of that decision.

(3) Whether the “result” or substance of the Division’s eligibility decision was consistent with Section 504 and Title II.

Based on the evidence discussed above, we have concerns regarding the consistency with Section 504 and Title II of the “result” or substance of the Division’s determination that the Student is ineligible for Section 504 services. These concerns are also based on the fact that the evidence from the Student’s doctor was not contradicted by any other evidence, and that the neither the evaluation team members nor anyone with whom they consulted had qualifications approaching those of the Student’s doctor to diagnose the nature and severity of the Student’s PTAs and the likelihood, nature and severity of the harm that could result from the Division’s failure to find the Student eligible for Section 504 services.

Resolution

To address OCR’s concerns, the Division has signed the enclosed Voluntary Agreement, which includes a provision pursuant to which the Division will re-evaluate the Student to determine whether she is eligible for services under Section 504 and Title II, and, in doing so, will comply with the 504 process requirements, e.g., it will draw upon a variety of sources, document and carefully consider the information obtained from all sources, and ensure that the decisions about the Student are made by a group of persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options. The Agreement also provides that, if the Division finds that the Student is *ineligible* for services under Section 504 and Title II, it will provide OCR with documentation of its decision. Finally, the Agreement provides that, if the Division finds that the Student is *eligible* for Section 504 services, it will provide OCR with a draft 504 Plan that complies with the requirements and regulations under Section 504 and Title II. We note that one of these requirements is the FAPE requirement, which requires that the Division provide the Student with regular or special education and related aids and services that are designed to meet her needs as adequately as it meets the needs of students without PTAs), and that it timely develop and implement a Section 504 or other Plan that adequately addresses her PTA-related needs and ensures a safe educational environment for her. We also note that we have provided the Complainant and the Division with several samples of Section 504 Plans in the event the Division finds the Student to be eligible for Section 504 services.

Based on the above findings, concerns, and conclusions, and the enclosed Voluntary Agreement, we are closing our investigation of this complaint effective the date of this letter. However, we will monitor the Division’s implementation of the Voluntary Agreement to ensure that it fully complies with it and thereby addresses the concerns identified above.

We remind the Division that it may not harass, intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of OCR case resolution, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of personal privacy.

We appreciate your cooperation in the resolution of this complaint. If you have any questions regarding this letter or this complaint, please contact Ms. Rita Bhanot, the OCR investigator assigned to this case, at (202) 786-0543 or rita.bhanot@ed.gov.

Sincerely,

Sharon Solomon
Team Leader
District of Columbia Office

Enclosure

cc: Howard B. Kiser, Superintendent
Gloucester County Public Schools