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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

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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

