



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS -- REGION VII

October 2, 2014

XXXX XXXX

Attorney

XXXX, XXXX, X XXXX

XXXX XXXX XXXX, XXXX XXXX

XXXX, XXXX XXXX

Re: OCR Docket # 07141125

Dear XXXX XXXX:

On April 8, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received this complaint alleging discrimination on the basis of disability against the Dibble Public Schools (District), Dibble, Oklahoma. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve allegations 1 and 3. For the reasons set out below, we have determined there is insufficient evidence to conclude that the District discriminated against the complainant's son as alleged in allegation 2 of this complaint.

Specifically, the Complainant alleged the District discriminated against his son on the basis of disability by:

1. failing to conduct a manifestation determination prior to a significant change in placement when his son was suspended from school in April 2014;
2. by disciplining him more harshly than students without disabilities for incidents occurring on February 19, February 24, and April 1, 2014; and
3. failing to provide him regular or special education and related aids and services designed to meet his individual educational needs, resulting in the denial of a free appropriate public education.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

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As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

In the remainder of this letter, the Complainant is referred to as “the Complainant” and the complainant’s son is referred to as “the Student.” To protect individuals’ privacy, the names of employees, students, and other parties are also not used in the letter.

OCR applies a preponderance-of-the-evidence standard to determine whether evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

OCR investigated the Complainant’s allegations against the District. OCR reviewed information the Complainant provided in his complaint and OCR conducted telephone interviews with the Complainant on April 21, May 6, May 7, May 13, June 26, August 21, and August 27, 2014. OCR received documents and information from the District on July 7, 2014, and conducted interviews with District staff members on September 3, 2014. OCR carefully considered all of the information obtained. OCR’s determination regarding the applicable legal standards, findings of fact, and the analysis and conclusion regarding allegation 2 are set forth in this letter.

### **Allegations 1 and 3**

Prior to the completion of OCR’s investigation, the District submitted a signed Agreement (copy enclosed) on October 1, 2014, that, when fully implemented, will address allegations 1 and 3 of the complaint. The Agreement requires the District to: send a letter to the Complainant stating that within five days of receiving the Complainant’s consent to evaluate, the District will begin an evaluation of the Student to determine his eligibility to receive regular or special education and/or related aids and services pursuant the Individuals with Disabilities Education Act (IDEA) or Section 504, with the evaluation to include a functional behavior assessment (FBA) for use in developing an effective positive behavioral intervention plan (PBIP) for the Student; convene a team of persons knowledgeable about the Student to determine whether the Student’s actions on April 1, 2014, were caused by or had a direct and substantial relationship to the Student’s disability, and depending on that determination, determine whether the Student is entitled to educational services for any educational loss the Student suffered from April 1, 2014, through the end of the 2013-14 school year; draft and publish a notice of nondiscrimination in accordance with the implementing regulations of Section 504, Title II, the Age Discrimination Act of 1975 (Age Act), and Title IX of the Education Amendments Act of 1972 (Title IX) and a complaint and/or grievance procedure to provide for prompt and equitable resolution of complaints alleging discrimination, harassment, and retaliation on the bases of race, color, national origin, disability, sex, and age. Please consult the Agreement for further details.

OCR considers allegations 1 and 3 resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

### **Allegation 2**

The Complainant alleged the District discriminated against the Student on the basis of disability by disciplining him more harshly than students without disabilities for incidents occurring on February 19, February 24, and April 1, 2014.

### **Legal Standard**

The regulations implementing Section 504 and Title II prohibit recipients of Federal financial assistance and public entities from discriminating against students on the basis of disability. Recipients may not subject a student to different treatment based on disability in any matter related to the student's receipt of any service or other benefit under the recipient's educational program. *See*, 34 C.F.R. § 104.4(a) and (b); 28 C.F.R. § 35.130(a) and (b).

To determine whether a recipient discriminated against a student on the basis of disability, OCR applies a different treatment analysis. First, OCR examines whether a *prima facie* case of discrimination exists. To establish a *prima facie* case of discrimination in this case, OCR must find that the District treated the Student differently than similarly situated students without a disability. If OCR finds a *prima facie* case of discrimination exists, it must then determine whether the District has articulated a legitimate, nondiscriminatory reason for treating the Student differently. If the District has articulated a legitimate, nondiscriminatory reason for treating the Student differently than similarly situated students without a disability, OCR cannot find that the District discriminated against the Student on the basis of disability unless OCR determines the reason the District provided for the different treatment is merely a pretext, or a cover-up, for unlawful discrimination.

### **Findings of Fact**

OCR investigated whether the District treated the Student differently by disciplining him more harshly than students without disabilities for incidents occurring on February 19, February 24, and April 1, 2014.

Prior to the three incident dates identified by the Complainant, the Student received the following disciplinary referrals during the 2013-14 school year:

<b>DATE</b>	<b>Offense</b>	<b>Discipline</b>
August 27, 2013	Disrespectful to teacher	APP
October 7, 2013	Tardies	Lunch detention
October 22, 2013	Refusal to follow directions, disrespectful, dress code	Student counseled
October 23, 2013	Dress code violation	Alternative Placement Program (APP)
October 24, 2013	Refused APP	Two days Out of School Suspension (OSS)
October 28, 2013	Shooting paper strips across the room	Four days lunch detention
November 1, 2013	Public display of affection	APP
November 7, 2013	Late for APP	Additional day of APP
November 7, 2013	Using cell phone in APP; disrespect	4 days APP
November 12, 2013	Refusal to attend APP	10 days OSS
November 26, 2013	Public display of affection	Discipline unknown
December 3, 2013	Dress code, refusing to following directions	Three days lunch detention
December 18, 2013	Dress code violation	Student counseled
January 13, 2014	Disruptive	APP Express
January 16, 2014	Public display of affection; Refused APP	Two days OSS
January 24, 2014	Tardy	One day lunch detention
January 24, 2014	Walked out of class	Discipline unknown
January 30, 2014	Refused direction	Discipline unknown
February 12, 2014	Refused to do work, disruptive, refused APP	Two days OSS

In addition to in-school suspensions and detentions, the Student had 16 days of out-of-school suspension from October 24 through February 14, 2014. The Student also received several referrals for in-school suspension. The District's in-school suspension placement is called Alternative Placement Program (APP). Students may be placed in APP for any suspendable offense. Students have the opportunity to receive full credit on assignments while in APP. Students that opt out of APP or refuse to follow the rules during APP receive an out-of-school suspension for twice the amount of the original number or remaining number of days of APP. APP Express is a variation of APP wherein a student serves APP or in-school suspension for a specific class hour, for example, during the remainder of a 50-minute class period, but not for the remainder of the student's school day.

Although the Complainant originally identified February 19, February 24, and April 1, 2014, as the incident dates for which the Student was disciplined differently, OCR determined the three offenses occurred on February 18, February 19, and April 1, 2014. The February 18, 2014 incident (Incident 1) was not reported to the principal until February 19, 2014, the same the day the Student was disciplined for an incident occurring on that date (Incident 2). The Student received a 10-day suspension on February 24, 2014, for Incident 1 that occurred February 18, 2014. The final incident included in the Complainant's allegation occurred on April 1, 2014 (Incident 3).

### Incident 1

On February 19, 2014, a student disciplinary referral for the Student was completed by the principal for threatening another student during lunch on February 18, 2014. The referral form states the following:

*Student suspended for 10 days (beginning on February 24, 2014). Threatening to beat up another student. Told the other student he was going to fight him and also called him a [expletive].*

The principal told OCR a student and his parent reported the February 18, 2014 incident to her on February 19, 2014. The principal took their information and interviewed other student witnesses. Based on the witness accounts, she determined that the Student threatened his classmate as reported. The Student was given a 10-day suspension beginning February 24, 2014, and was not allowed to return to school until March 11, 2014. The suspension did not begin until February 24, 2014, because the Student went home on February 19, 2014, after second hour due to Incident 2. The Student was absent February 20 and 21, 2014.

### Incident 2

On February 19, 2014, a student disciplinary referral for the Student was completed by the Student's reading teacher for disrespect to a school official, inappropriate action/language and refusal to follow directions/instructions. The referral form states the following:

*Student sent home for the day for refusing APP Express. He was punching [another student] – asked him to stop – went to put my hand on him “Don't touch me” When I touched him he hit my hand.*

OCR interviewed the reading teacher who confirmed the Student hit her hand while she was asking him to stop hitting another student. According to student statements provided by the District, the Student and another student were playing with a basketball in the classroom. The reading teacher sent the Student to APP Express, but the Student refused to go. She sent him to the office for refusing to go to APP Express and she also wrote on the referral that he had hit her. According to the referral form, the Student was sent home from the

office for refusing to go to APP Express. The Student received no further discipline for Incident 2.

### Incident 3

On April 1, 2014, the Student's English teacher referred him to the office for threatening another student during class. The referral form states the following:

*Student suspended for the remainder of the school year. Telling a student they can meet after school to settle this.*

The English teacher told OCR that the Student and another student (Student 2) were threatening a third student (Student 3). Student 2 was staring at Student 3 and the English teacher asked Student 2 to stop staring. She said Student 2 was intimidating Student 3 by staring at him. Student 3 asked Student 2 what he was staring at and Student 2 responded, "You." The Student told Student 2 that they could settle the issue with Student 3 after school. Student 2 continued to stare at Student 3. All three students were sent to the office. The English teacher said the Student and Student 2 were intimidating and threatening Student 3.

Upon receiving the referral, the principal brought the Student and Student 2 into her office individually and asked them what had occurred. The principal told OCR that while Student 2 was forthcoming about what had taken place in the classroom, the Student told the principal he would not speak to her and it was a lie that he and Student 2 had threatened Student 3. The principal said the English teacher heard and verified the threat, so she suspended the Student and Student 2. The principal told OCR that she disciplined the Student and Student 2 for making a threat because the Student and Student 2 were telling Student 3 they were going to fight him after school.

The principal said she suspended the Student and Student 2 based on the conduct and a review of their previous discipline. She said she looks at each disciplinary incident and evaluates each one. She said if students do not show improvement over the course of the year, she has to consider that and progress with stricter discipline. She said the Student and Student 2 had previous discipline incidents and bullying and intimidation is something the District takes very seriously. The Student had also already served a 10-day out-of-school suspension for threatening another student on February 18, 2014. Student 2 was also suspended for the April 1, 2014 incident for the remainder of the school year. Student 2 has not been identified by the District as a student with a disability. According to the referral forms, the number of days suspended for both students was 34 days.

### Comparators

The District provided OCR documentation to show that, in addition to the Student and Student 2, three other students were disciplined in a similar manner as the Student for similar

offenses during the 2013-14 school year. These students will be referred to as Students 3, 4, 5. None of these students have been identified by the District as students with a disability. Student 3 bullied another student when a message with an expletive was sent out about another student with a photograph of Student 3 making an inappropriate gesture to the other student on February 14, 2014. Student 3 received an out-of-school suspension for the remainder of the school year, effective March 4, 2014.

Student 4 threatened to fight another student on April 14, 2014. Student 4 told the other student that if he had something to say he needed to say it to her face and said she would skip the softball game and meet him at a bonfire party to settle the issue. Student 4 was suspended for the remainder of the school year (22 days).

Student 5 threatened to fight another student after class on April 7, 2014. According to the student referral form, the other student had called Student 5 names that she could not remember. Student 5 was suspended for the remainder of the school year (31 days).

### **Analysis and Conclusion**

To investigate the Complainant's allegation that the District discriminated against the Student on the basis of his disability by disciplining him differently, OCR examined whether a *prima facie* case of disability discrimination exists. To do so, OCR first examined the discipline the Student received for Incidents 1 and 2.

For Incident 1, the Student received a 10-day out-of-school suspension for threatening another student. For Incident 2, the Student was only sent home for the remainder of the day for refusing APP Express. Finally, for Incident 3, the Student was suspended on April 1, 2014, for the remainder of the school year for threatening another student during class.

At the time of Incident 3, the Student had already received a 10-day out-of-school suspension for threatening another student. The principal explained that she reviews each offense and considers previous discipline incidents when making determinations about increasing the level of discipline. Importantly, the Student and Student 2 received identical discipline for Incident 3.

OCR determined that the District imposed similar discipline of non-disabled students who threatened their classmates. While the Student was suspended for 34 days for the threat he made in Incident 3, Students 3, 4 and 5 were suspended for more than 31 days, 22 days and 31 days respectively. They were all suspended for the remainder of the school year at the time of the incident for bullying another student or threatening to fight with another student.

OCR concludes that a preponderance of the evidence does not support a finding that the District discriminated against the Student on the basis of disability when it imposed discipline for Incidents 1, 2, or 3. The Student received a 10-day out-of-school suspension

for the threat he made on February 18, 2014. In light of the three examples of threatening behavior resulting in out-of-school suspension for the remainder of the school year given to Students 3, 4, and 5, the discipline imposed on the Student for Incident 1 was not different or more harsh than the discipline imposed on students without disabilities for the same or similar offenses. The discipline imposed upon the Student for Incident 2 was minimal. The Student received the same discipline as Student 2 for Incident 3 and was not disciplined differently. Additionally, OCR compared the discipline the Student received to three other students who were disciplined for a similar offense, and found that the discipline imposed for those three students was similar to that imposed for the Student. The Student was not disciplined differently than similarly situated Students without a disability, and the facts do not support a *prima facie* case of discrimination.

OCR concludes that a preponderance of the evidence does not support a finding that the District discriminated against the Student on the basis of disability. Consequently, OCR is closing allegation 2 as of the date of this letter.

As noted above, OCR considers allegations 1 and 3 resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

The determinations discussed in this letter are not intended and should not be construed to pertain to any compliance issues under the regulations implementing Section 504, Title II, or any other statute enforced by OCR that may exist but are not specifically addressed herein.

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 District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another 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. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Equal Opportunity Specialist, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at [XXXXX.XXXXX@ed.gov](mailto:XXXXX.XXXXX@ed.gov).

Sincerely,

/s/ Joshua Douglass

Joshua Douglass  
Supervisory Attorney

Enclosure

cc: Janet Barresi  
State Superintendent of Public Instruction