

Robert Malay
Superintendent
School Administrative Unit # 29
193 Maple Avenue
Keene, NH 03431

Re: Case No. 01-15-1237
School Administrative Unit #29, Chesterfield School District

Dear Superintendent Malay:

This letter is to inform you that the U.S. Department of Education, Office for Civil Rights (OCR) is closing its investigation of the above-referenced case that was filed against the School Administrative Unit (SAU) #29, Chesterfield School District. The Complainant alleged that the Chesterfield School District (District) discriminated against his son (Student) based on his disability,¹ when it denied him an equal opportunity to participate in all school-sponsored extracurricular activities/events, including XXXXXX, XXXXX, and XXXXXX, during spring 2015. The Complainant also alleged that the District denied the Student a free appropriate public education (FAPE) when it failed to provide extended school year (ESY) services/tutoring during summer 2015 as required by his Individualized Education Program (IEP). As explained below, prior to OCR completing its investigation, the District requested to resolve the complaint by entering into the enclosed voluntary resolution agreement (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is subject to the requirements of Section 504 because it receives financial assistance from the U.S. Department of Education, and it is subject to the requirements of Title II because it is a public entity operating an elementary and secondary school system.

OCR investigated the following legal issues:

¹ The Student has a history of epilepsy characterized by three different types of seizures.

1. Whether the District discriminated against the Student on the basis of disability by failing to provide him an equal opportunity to participate in, and/or denying him the benefits of, the District's school-sponsored extracurricular activities/events (e.g., dances, trips, and sports), in violation of 34 C.F.R. §§ 104.4(a) and (b), 104.34(b) and 104.37(a) and (c), and 28 C.F.R. § 35.130.
2. Whether the District denied the Student a FAPE by failing to implement the Student's IEP, specifically provisions calling for ESY services/tutoring, in violation of 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130.

Summary of Preliminary Investigation

OCR reviewed documents provided by the District and Complainant, including the District's Section 504 policies and procedures, the Student's IEP, and correspondence between District staff and the Complainant regarding the Student. OCR also interviewed the Complainant and District staff, including the Local Educational representative, Principal, Special Education Teacher/Case Manager, School Nurse, Paraprofessional/ESY Instructor, and XXXXX coach. On January 13, 2016, prior to OCR obtaining additional information to complete its investigation, the District requested to engage in a voluntary resolution pursuant to Section 302 of OCR's Case Processing Manual.

Issue 1: Nonacademic Services

Legal Standards

The regulation implementing Section 504, at 34 C.F.R. §§ 104.37(a) and (c), requires a school district to provide a qualified student with a disability an opportunity to benefit from its nonacademic and extracurricular activities in a manner that affords an equal opportunity to participate in such activities. Districts must determine which modifications and aids and/or services are necessary for a student on a case-by case basis, making an individualized determination about the student's needs. When making this determination, districts should consider the functional limitations of the student with a disability and how the modifications, aids or services address that limitation in a way that allows the student to access the extracurricular activity. Districts should engage in an interactive process with parents/guardian/students who request modifications, aids and/or services, and should give significant consideration to their requests, because the parents/guardians/students are most familiar with the disabilities at issue and can provide relevant information about what modifications, aids or services may be most effective.

A district is not obligated to provide such modifications, however, if doing so would result in a fundamental alteration in the nature of the service, program, or activity; or if doing so would cause an undue financial and administrative burden after considering all resources available for use by the school district in the funding and operation of the service, program, or activity. Only the head of the district or designee (i.e., another school official with authority to make budgetary and spending decisions) can make this decision, and must accompany it with a written statement explaining why the specific modifications, aids or services at issue would cause a fundamental alteration or undue burden. The recipient/school then bears the burden of proving these elements

in any OCR investigation. Based on OCR's experience, such a defense would rarely prevail. Moreover, even if a district determines that specific or requested modifications, aids or services would result in a fundamental alteration or undue burden, the school district must then determine if alternative modifications, aids or services exist that would permit the student's equal participation but not pose a fundamental alteration or pose an undue burden. If such alternatives exist, the district is obligated to provide such alternative modifications to the student. OCR interprets the Title II implementing regulation, at 28 C.F.R. § 35.130, to be consistent with these Section 504 obligations.

Preliminary Concern(s)

While the information obtained by OCR did not indicate that the Student missed any school XXXXXX or XXXXX XXXXX during spring 2015, OCR identified conflicting information as to the extent of the Student's participation in XXXXX XXXXXXXXXX and XXXXX. The District contended that it would be an undue burden for it to provide the requisite modifications, aids and/or services to the Student during all non-academic and extracurricular activities, including the XXXXX team. OCR identified a potential concern as to whether the District was able to demonstrate that providing the requisite modifications, aids and/or services to allow the Student to participate in every XXXXX practice or meet constituted an undue burden, as required by 34 C.F.R. §§ 104.4(a) and (b), 104.34(b) and 104.37(a) and (c), and 28 C.F.R. § 35.130. OCR did not complete its assessment of this issue before the District requested to engage in a voluntary resolution pursuant to Section 302 of OCR's Case Processing Manual.

Resolution

Prior to OCR completing its investigation and making any findings, the District agreed to address this allegation by determining and developing a plan for providing the modifications, aids and/or services that are necessary for the Student to participate in all non-academic and extracurricular activities, including the spring 2016 XXXXX team. SAU #29 also agreed to review the policies and procedures of each of its school districts regarding the inclusion of students with disabilities in extracurricular activities and consider whether each member district has an appropriate process for determining how students with disabilities can participate in such activities. The District further agreed to provide training to certain administrators and staff regarding the District's obligations to provide students with disabilities an equal opportunity to participate in non-academic and extracurricular services and activities.

Issue 2: FAPE

Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. An appropriate education is defined as one which includes the provision of regular or special education as well as related aids and services which have been designed to meet the individual needs of the student with a disability, and which have been developed in accordance with the procedural requirements of §§ 104.34 through 104.36, pertaining to educational setting, evaluation, placement and procedural rights. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. Unlike non-academic services and activities, discussed

immediately above, a district may not deny FAPE services on the basis of fundamental alteration or undue burden.

If OCR finds that a district has not implemented an IEP by failing to provide some or all of the services listed, OCR examines a variety of information to determine whether the failure resulted in a denial of a FAPE, including but not limited to the extent and nature of the missed services, and any effort by the district to compensate for the missed services. If OCR finds that the failure to implement the student's IEP resulted in a denial of a FAPE, OCR will conclude that the district has discriminated against the student based upon the student's disability, in violation of Section 504 and Title II. Although the regulation implementing Title II does not contain specific requirements like those set forth in the regulation implementing Section 504, OCR generally interprets Title II to require no less than is required under Section 504.

Preliminary Concern(s)

During its investigation and before reaching any compliance determination, OCR found that the District planned to retain a Licensed Practical Nurse to provide the requisite modifications, aids and/or services to the Student during the ESY program. The Complainant raised concerns about the use of a Licensed Practical Nurse, because the School had consistently interpreted the Student's Seizure Action Plan to require a Registered Nurse to respond to the Student's seizures. The District did not reach an agreement with the Complainant on the appropriate nursing protocol for the summer program, and the Student did not receive ESY services/tutoring in 2015. OCR identified potential concerns as to whether the District fully assessed and determined the appropriate medical services to be provided to the Student during the ESY program (despite the Complainant's disagreement) that were necessary to provide a FAPE, as required by 34 C.F.R. §§ 104.4(a) and (b), 104.34(b) and 104.37(a) and (c), and 28 C.F.R. § 35.130.

Resolution

Prior to OCR completing its investigation and making any findings, the District agreed to address the Complainant's FAPE allegations. Specifically, the District has agreed to assess the Student's current performance and determine the appropriate amount of compensatory services it will provide to the Student to address the loss of ESY services for the period from July to August 2015.

Conclusion

OCR finds that the resolution offered by the District is aligned with the Complainant's allegations and with the information obtained by OCR. In addition, the resolution offered is consistent with Section 504 and Title II. OCR will monitor the District's implementation of the Agreement, and will notify the parties in writing of the monitoring closure, once it determines that the District has satisfied the terms of the Agreement. If the District fails to comply with the terms of the Agreement, OCR will resume its investigation.

The matters addressed in this letter are not intended and should not be construed to cover any other issues regarding the District's compliance with the regulations implementing Section 504, Title II, or the other laws enforced by OCR that may exist but are not discussed here. This letter sets forth OCR's determination in this individual OCR case. This letter contains fact-specific

investigative findings and dispositions of this individual 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 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. The Complainant may have the right to file a private lawsuit regarding the matters raised in this case, whether or not OCR identified compliance concerns.

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, OCR will seek to protect all personal information to the extent provided by law that, if released, could constitute an unwarranted invasion of privacy.

OCR thanks the District for its assistance in resolving this matter. If you have any questions regarding this letter and/or OCR's investigative process, please feel free to contact Civil Rights Attorney Abra Francois at (617) 289-0142 or by email at Abra.Francois@ed.gov. Please refer to the complaint number noted above (01-15-1237) in any future telephone or written contact with OCR.

Sincerely,

Diane M. Henson
Regional Director

Enclosure

cc: Jeanne M. Kincaid
Drummond Woodsum