



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

December 16, 2021

Dr. Jacqueline Coe
Superintendent of Schools
By email: jacqueline.coe@sau24.org

Re: Complaint No. 01-17-1187
SAU #24

Dear Dr. Coe:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education, Office for Civil Rights (OCR) received against SAU #24, which OCR will refer to as the District. The Complainant alleged that the District discriminated against his son, whom OCR will refer to as the Student, on the basis of his disability, by denying him a free appropriate public education. In particular, the Complainant alleged that:

- 1) In XXXXXXXXXXXXXXXXXXXXXXXX, the District suspended the Student for more than 10 days without conducting a manifestation determination and that when the District did conduct a manifestation determination, it failed to convene a group of individuals knowledgeable about the Student and did not consider evaluative data (Allegation 1).
- 2) During the XXXXXXXXX school year, the District failed to implement provisions in the Student's Section 504 plan regarding: counseling for social and emotional support, providing behavioral expectations and reminders, and contacting the Student's parents with any academic or social issues (Allegation 2).
- 3) During the XXXXXXXXX school year, the District failed to evaluate the Student, despite having agreed to evaluate the Student in the beginning of the school year (Allegation 3).

As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement.

Jurisdiction

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance from the U.S. Department of Education. OCR also enforces Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12131 *et seq.*, 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

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financial assistance from the U.S. Department of Education. Because the District receives federal financial assistance from the U.S. Department of Education and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education to each qualified student with a disability in its jurisdiction. 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. 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 free appropriate public education to the same extent required under the Section 504 regulation.

a. Evaluation and Placement

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

b. Reevaluation and Manifestation Determinations

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to reevaluate a student with a disability before any significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement.

A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the

same manner as it disciplines students without disabilities. If a school district finds that the student’s disability caused the misconduct, the district may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student’s current educational placement.

c. Implementation of a Student’s Plan

In investigating a denial of a free appropriate public education under Section 504, OCR first looks at the services to be provided as written in a student’s plan or as otherwise agreed to by the student’s team. If OCR finds that a district has not implemented a student’s plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a free appropriate public education.

Summary of Preliminary Investigation

During the investigation, OCR reviewed documents provided by the Student’s parents and the District and interviewed the Student’s parents. Before OCR completed its investigation, the District expressed a willingness to resolve the complaint.

Background

The Student was enrolled in the XXXXX grade at XXXXXXXXXXXXXXXXXXXXXXXX School during the XXXXXXXX school year. The Student has a diagnosis of XX XXXX. The District found the Student eligible under Section 504 at the beginning of the XXXXXXXX school year. XX XX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

a. XXXXXXXXXXXXX Section 504 Meeting and Consent to Evaluate

The Student’s mother told OCR that the Student started having some behavioral problems in XXXXXXXXXXXXXXX, so, before the start of XXXXXXXXXXXXXXX, she met with the School’s Section 504 Coordinator to discuss implementing supports for him. During that meeting on XXXXXXXXXXXXXXX, they developed a Section 504 plan for the Student, and the Student’s mother provided written consent to evaluate the Student for special education services. The signed consent form describes the evaluation as “[s]creening for XX”¹ The Student’s mother told OCR that the District was supposed to conduct testing for XX

¹ OCR notes that the signed consent form is dated XXXXXXXXXXXXXXX. However, both parties reported to OCR that the team met and the Student’s mother provided written consent on XXXXXXXXXXXXXXX.

The District reported to OCR that, later in the day, the School Psychologist called the Student's mother and described for her the scope of anticipated testing,
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XX The District reported that during their conversation, the Student's mother explicitly stated that she no longer consented to the Student being evaluated. The Student's mother denies the District's account and asserts that she did *not* revoke consent for the District to evaluate the Student.

b. The Student's Section 504 Plan

The Section 504 plan, which took effect on XXXXXXXXXXXXX, called for several accommodations, including for the School to provide “access to the counseling center for assistance with social/emotional support.” The plan also required the Student’s teachers to provide the Student with “behavioral expectations and reminders” and “discuss with him privately [] after he has settled down,” as well as contact his “parent with any academic or social issues.”

The Student's parents told OCR that there were instances where the Student had behavioral issues and his teachers treated the incidents as disciplinary matters, instead of sending him to the counseling center or notifying them, as required by the Section 504 plan. The Student's parents reported to OCR that, for example, on XXXXXXXXXXXXXXXX, the Student made an inappropriate comment to another student XXXXXXXXXXXXXXXXXXXXXXXX, and his teacher referred him to after-school detention. The Student's mother learned about the detention from the Student. When she emailed his teacher to get more information, the teacher wrote that when he spoke with the Student about the comment, the Student "conceded it was wrong and agree[d] to the detention." The Student's mother told OCR that the issue was never addressed with guidance counseling.

The Student received an out-of-school suspension XX (discussed more below). The Student's mother provided to OCR an email chain between her and the Section 504 Coordinator regarding the Student's transition back to school following his suspension. In the email chain, the Section 504 Coordinator reported that the Student was doing well in all of his classes except for XXXXXXXX. She explained that the Student's behavior "has regularly needed redirecting" and he "seems to be looking for affirmation from his peers." She also noted that the XXXXXXXX teacher "has sent [the Student] to the XXXXXXXXXXXXXXXXXXXXXXXX in the past but it is low level disruption" and that it was "[p]robably more related to XXXXXXXX." The Section 504 Coordinator noted that she had since instructed the teacher to refer the Student to her for any behavioral issues.

The Student's parents also reported to OCR that, on XXXXXXXX, the Student's XXXXXX teacher made the Student leave the classroom for acting out. According to the Student's parents, the Student had to wait in the hallway, and after class, the teacher told him that he needed to stop his "attention seeking" behavior.

The District disputed the allegation that the District did not implement the Student’s Section 504 plan. Regarding the District’s obligation to provide “access to the counseling center for assistance with social/emotional support,” the District reported to OCR that, on XXXXXXXXXXXXXXXX, the School Psychologist met with the Student to provide counseling. During that meeting, the Student reportedly stated that he did not want to meet with a counselor and explained that he was “in a better place” than in the previous school year. On XXXXXXXXXXXXXXXX, the School Psychologist emailed the Student’s father about their session and reported that the Student did not feel as though he needed counseling at this point but agreed to seek help should that change. The Student’s father thanked her in response.

The District noted to OCR that the Section 504 plan states that the Student's parents will "contact the school counselor directly with any social/emotional concerns" and that the Student himself will "attend counseling as arranged by the school counselor." The District reported that the School Psychologist did not hear further from the Student and that the parents did not contact the Section 504 Coordinator about any social or emotional difficulties.

The District further asserted that it complied with the plan’s provisions requiring teachers to “provide behavioral expectations and reminders” and “contact [his] parent with any academic or social issues.” The District represented that the Student worked well with his teachers, and that, in general, he did well academically. The District further asserted that the Student was not involved in any disciplinary incidents with the exception of the XXXXXXXXXXXXXXXX suspension; neither was he sent out from class nor did he display any significant behavioral issues in class. The District also provided OCR copies of several emails between the Student’s teachers and parents in which they discuss the Student’s progress after his suspension.

c. XXXXXXXXXXXXXXX Incident

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XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, the Section 504 Coordinator informed the District’s administration that the Student was eligible and receiving services under Section 504, thus triggering the need to convene a Section 504 team meeting to determine whether the Student’s misconduct was a manifestation of his disability.

On the XXXXXXXXXXXXXXXXXXXXXXXX, the Principal called the Student’s parents and invited them and the Student to attend a manifestation determination hearing the next morning, which would be the 10th day XXXXXXXXXXXXXXXXXXXXXXXX,” according to the District. The Student’s parents told the Principal that they wanted the Student’s private therapist to participate in the meeting, but that the therapist could not attend on such short notice.

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In response, the Principal asked whether they would be attending the hearing or would like to postpone. At XXXXXXXX., the Student’s father emailed the Principal that they could not contact the Student’s therapist, and, therefore, needed to postpone until she could be available.

d. XXXXXXXXXXXXX Manifestation Determination Hearing

On XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX the District convened the Student’s Section 504 team without the Student or his parents. The District reported to OCR that the team “reviewed the details of the XXXXXXXXXXXXXXXX incident, [] closely assessed all available evaluative information and the implementation of the Student’s 504 plan, and conclude[ed] that the misconduct was not a manifestation of the Student’s disabilities.”

The Student’s parents told OCR that, at XXXXXXXX., the Section 504 Coordinator called to notify them of the team’s determination. That evening, the Section 504 Coordinator emailed the Student’s parents a manifestation determination checklist and meeting notes.

The checklist states that the team determined that (1) the Student’s conduct was not “caused by” nor had “a direct and substantial relationship to [the Student’s] disability” and further that (2) his conduct was not “the direct result of the [D]istrict’s failure to implement the 504 plan.”

The meeting minutes state that while the parents were not present, “[t]he team knew the [S]tudent well and understood the behaviors of XXXXXXXXXXXXXXXX.” The attendees listed are the Section 504 Coordinator, the Special Education Coordinator, the School Psychologist, and a regular education teacherXXXXX. The minutes state that the team reviewed the Student’s Section 504 plan and note that the School Psychologist offered counseling XXXXXXXXXXXXXXXX, but that the Student declined. The minutes indicate that the team considered the Student’s educational performance and behavioral history. The minutes also state that the School Psychologist “presented the features of” XX and that the team concluded that “his disabilities did not cause or have a direct relationship to him XX

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Following the manifestation determination, the District offered the Student's parents the option of re-convening the Section 504 team to consider the family's and therapist's input. The District reported that the family refused its offers. The Student's parents explained to OCR that they wanted to appeal the team's determination (not "re-do" the meeting), and that they further declined the offer because they wanted their son to be evaluated first under IDEA.

The Student's parents informed OCR that after the manifestation determination, they arranged and paid for the Student to receive an independent evaluation, and that they made a referral for special education to the District in XXXXXXXXXXXXXXXX. The District subsequently placed the Student on an IEP.

Analysis

Allegation 1: Whether the District denied the Student a FAPE by failing to conduct an evaluation prior to a discipline-related significant change in placement, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35 and the Title II implementing regulation at 28 C.F.R. § 35.130.

From the investigation to date, OCR is concerned that the District failed to reevaluate the Student prior to a significant change in placement. Specifically, the evidence shows that the Student was excluded from school because of his behavior for more than 10 consecutive days before the District conducted a manifestation determination.

[illegible]

The evidence gathered to date suggests that the District administrators initially involved in the Student's removal were unfamiliar with the Section 504 requirement to conduct a manifestation determination.

[illegible]

This lack of familiarity with Section 504 appears to have resulted in the delayed planning and scheduling of the manifestation determination. According to the parents, the Student's private therapist was unable to attend the hearing because of the late notice, and they declined to attend without her present. The District acknowledged to OCR that it shared the parents' concern regarding the timing of the manifestation determination meeting and felt that if the family or the Student's therapist could further inform the manifestation determination, then the District would consider the information. The District also noted that following this experience, it took steps to improve its practices around Section 504 disciplinary matters, including training all District administrators on the discipline requirements of Section 504.

To complete its investigation, OCR would need to gather additional data and interview the District staff who attended the XXXXXXXXXXXX manifestation determination hearing regarding the team's deliberations, the information considered, and their knowledge of the Student, the meaning of the evaluation data, and the placement options. OCR would also need to interview District staff and the Student's parents about the District's offers to reconvene the Section 504 team, as well as the parents' request to appeal the team's original determination.

Allegation 2: Whether the District denied the Student a free appropriate public education by failing, during XXXXXXXXXXXX school year, to implement certain aspects of the Student's Section 504 plan, specifically, provisions regarding: counseling for social and emotional support, providing behavioral expectations and reminders, and contacting the Student's parents with any academic or social issues, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130.

Based on OCR’s investigation to date, OCR has a preliminary concern that the District may not have fully implemented certain aspects in the Student’s Section 504 plan during the XXXXXXXX school year. For example, there is some evidence, as detailed above, that District staff failed to contact the Student’s parents regarding behavioral issues, and, in some instances, sent the Student out of class instead of providing “behavioral expectations and reminders.” OCR notes, however, that some of the plan’s provisions lack specificity, such that the District’s obligations under the plan are not entirely clear (e.g., provide “access to the counseling center for assistance with social/emotional support (school counseling center)”).

To complete its investigation, OCR would need to gather additional data and interview District staff about their implementation of the Student's Section 504 plan. If a failure to implement were found, OCR would then need to determine the nature of and reason for the failure, any measures taken that would mitigate it, and what impact that failure had on the student.

Allegation 3: Whether the District denied the Student a free appropriate public education by failing to timely evaluate the Student, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35 and the Title II implementing regulation at 28 C.F.R. § 35.130.

OCR does not have sufficient evidence at this time to make a compliance determination with respect to this allegation. It is undisputed that the Student's mother provided written consent to have the Student evaluated at the beginning of the XXXXXXXX school year; and that the District did not conduct an evaluation of the Student. However, there is a factual dispute regarding whether the Student's mother revoked consent to evaluate.

To complete its investigation, OCR would need to interview District staff about their conversations with the Student's mother regarding evaluations of the Student. OCR would also need to conduct a rebuttal interview of the Student's mother.

Conclusion

As noted above, prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the complaint. OCR will monitor the District's implementation of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District'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 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. OCR would like to make you aware that individuals who file complaints with OCR 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 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, assists, or participates in a proceeding under a law enforced by OCR. 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.

Sincerely,

Michelle Kalka
Compliance Team Leader

Enclosure

cc: Allen Kropp, Esq. (*by email*: akropp@dwmlaw.com)