



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

February 18, 2020

Superintendent Lisa A. Howard
By email: lhoward@winthrop.k12.ma.us

Re: Complaint No. 01-19-1322
Winthrop Public Schools

Dear Superintendent Howard:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Winthrop Public Schools (the District). The Complainant alleged that the District discriminated against the students in Winthrop High School's (School's) XXXXXXXX (XXX program) on the basis of disability. Specifically, the complaint alleged that during the 2019-2020 school year, the School XXXXXX students in the XXX program XXXXXXXX, which is XXXXX the XXXX than the School XXXXX other students. 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 (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 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 Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 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 financial assistance from the Department. Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

OCR investigated the following issue:

- Whether the District is discriminating against students in the XXX program by XXXXX in the XXXXX than students in regular education classrooms XXXX, and by denying them a free appropriate public education as a result of the XXXXX, in violation of 34 C.F.R. § 104.4(a)-(b), 34 C.F.R. § 104.35, and 28 C.F.R. § 35.130.

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

Summary of Preliminary Investigation

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

The XX program was initially created in the XXXX school year as a XXXX for students who are experiencing issues of XXXXX, and XXXXXX. While initially the XXX program enrolled only XXXX students, it grew in size to include XXXX students during the following school year. Currently, there are XXXX students enrolled in the XXX program for the 2019-2020 school year. XXX students receive instruction both in regular education classes, and within the XXXX, and can use the XXX XXX for additional XXXX as needed throughout the school day.

During the 2019-2020 school year, XXXX in the District were from XXXXX. However, XXX program students were XXXX to XXXXXXX during the 2019-2020 school year, and of the XXX students enrolled in the XX program, at least XXX of the XXXX students are being XXXXX.

In its data response, the District asserted that while the XXX on XXX is “XXXX” for XX students, an XX student may opt to XXX at XXX with the support of XX program staff as needed. However, email correspondence provided by the District stated that XXXX are “a XXX of the XXX” and that XX program staff are not available from XXXX.

There does not appear to be any reference to an XXX “XXX” in the XXX program description, mission statement or XXX program brochure provided to parents at the 2019-2020 school open house. In addition, with one exception, there was no indication from the notes/minutes of XXX students’ spring 2019 Individualized Education Program (IEP) team meetings that the IEP teams discussed any reason – educational or otherwise – for XXXXX, nor did any of the XX program students’ IEPs indicate that they required a XXXXX.

In offering an educational justification for XXXX program students XXXXX, the District indicated that during the XXX school year, “After considering data, staff hypothesized that XXXXX might help students meet their goals for both XXXX and XXXX” and asserted that XXXX “did prove to be motivating for students and helped students meet their set of goals.” The District further indicated that IEP meetings were held initially to discuss an XXXX, and that proposed IEP amendments for an XXXX were accepted. However, after the XXXX school year, XXX came to be viewed as a XXX of the XXX and were not explicitly noted in the students’ IEPs.

OCR subsequently requested that the District clarify the nature and source of the data staff were using to formulate their hypothesis that XXXXX could be beneficial for XXX students. The District informed OCR that XXX program staff were basing their hypothesis on their observational data and provided OCR with a numerical rating scale that they used to measure student progress in the areas of focus, participation, task completion and appropriate behavior. According to the District, XXX program staff saw a trend of student’s ratings declining as the week progressed, and they hypothesized that XXXXX might help motivate the students to earn higher ratings, and that this approach was successful. In addition, the District informed OCR that the District is currently working with an educational consultant who is evaluating and providing feedback on the XXX program.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. 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 FAPE to the same extent required under the Section 504 regulation.

In investigating a denial of a FAPE 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 FAPE.

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.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, when there is information suggesting that a student's educational program is not meeting the student's individual needs, such as a significant decline in the student's grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student's IEP or placement are necessary.

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the students less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Preliminary Analysis

OCR's review of the District's data response raised a preliminary concern that the District was not in compliance with Section 504 and Title II regulations when it followed a practice of XXXXX during the 2019-2020 school year, thereby failing to provide this group of students with

an XXXXX as the students in the general education classes, without making individualized decisions that this was necessary for the needs of specific students, or providing another legitimate nondiscriminatory justification. Although a XXXXX may be appropriate if it is necessary to ensure FAPE, that decision must be based on each student's individual needs, not applied to an entire class. If some students need to XXXX due to their disabilities, the decision should be made individually by their IEP and Section 504 teams. Moreover, if the IEP/Section 504 Plan of an individual student specifically states that no XXXX is required, then the District should implement that student's IEP/Section 504 Plan. Finally, OCR noted a preliminary concern that the XXXX may have constituted a significant change in placement for XXX students without the District having first conducted the required re-evaluation for each affected student, as required by Section 504.

Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, District counsel 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. 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 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,

/s/

Adrienne M. Mundy-Shepard
Chief Attorney

Enclosure

cc: XXXXXXXXXXXXXXX