



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

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REGION IV
ALABAMA
FLORIDA
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April 6, 2017

Via U.S. & Electronic Mail

XXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXX

Brevard Public Schools
2700 Judge Fran Jamieson Way
Viera, FL 32940

Re: OCR Complaint # 04-17-1073

Dear XXXXXXXXXXXX:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the complaint filed against the Brevard Public Schools (District), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District discriminated the Student, as follows:

1. The District failed to implement the Student's Individual Education Plan (IEP) for the XXXX school year by not allowing the Student to XXXX, as provided for in his IEP.
2. The District failed to modify the Student's IEP for the XXXXX school year after a XXXX test showed him XXXXXXXX.
3. The District denied the Student access to the tryout for the XXXX team for the XXXX school year.

OCR investigated the complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; and, Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether the District denied the Student a free appropriate public education (FAPE) when it failed to implement the Student's IEP for the XXXX school year by: (a) XXXXXXXX, as provided for in his IEP, and (b) failing to modify the Student's IEP based on his XXXXX, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b)(1), and the Title II implementing regulation at 28 C.F.R. § 35.130(a).

2. Whether the District discriminated against the Student on the basis of his disability by denying him access to the tryouts for the XXXX team for the XXXX school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130(a).

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. In reaching a determination in this matter, OCR reviewed documents submitted by the Complainant and the District, and interviewed the Complainant and District employees.

Based on its investigation, OCR has determined that the evidence is insufficient to support a finding that the District denied the Student access to the tryouts for the XXXXX team, in noncompliance with Section 504/Title II. OCR is administratively dismissing the allegation that the District failed to modify the Student's IEP based on his XXXXX. Last, prior to OCR's completion of its investigation of this complaint as to the failure to implement a provision of the Student's IEP, the District offered to voluntarily resolve this allegation of this complaint.

Legal Standards

Failure to Implement/Denial of FAPE

The Section 504 regulation at 34 C.F.R. § 104.33(a) and (b) requires a recipient to provide each qualified person with a disability within its jurisdiction a FAPE regardless of the nature or severity of the handicap. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Improvement Act is one means of meeting the standards established by the regulation for provision of a FAPE. The Title II implementing regulation is interpreted consistently with the standards set forth in the regulation implementing Section 504 in this regard.

The School's failure to implement aids, services, accommodations, or modifications identified in the IEP of a student with a disability may deny the student a FAPE and, thus, violate Section 504 and Title II. Yet, not every failure to implement an aid, service or accommodation/modification in an IEP automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the student's ability to participate in or benefit from a school School's services, programs and activities.

Title II offers no greater protection than Section 504 with respect to the complaint allegations; therefore, OCR investigated this complaint applying the Section 504 regulations.

As set forth in Appendix A, Subpart D of the Section 504 regulation, it is not the intent of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the process requirements of Section 504. The appropriate forum for raising these concerns is through the impartial due process hearing procedures in the District.

Different Treatment

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified student with a disability shall, on the basis of their disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Section 504 implementing regulation at 34 C.F.R. § 104.4(b) provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) Deny a qualified student with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified student with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) Provide a qualified student with a disability an aid, benefit, or service that is not as effective as that provided to others; (iv) Provide different or separate aid, benefits, or services to students with disabilities or to any class of student with disability unless such action is necessary to provide the student with a disability with aid, benefits, or services that are as effective as those provided to others; (v) Aid or perpetuate discrimination against a qualified student with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity; (vi) Deny a qualified student with a disability the opportunity to participate as a member of planning or advisory boards; or (vii) Otherwise limit a qualified student with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Analysis and Conclusion

Issue 1(a): Denial of FAPE for Failure to Modify IEP

Whether the District denied the Student a FAPE when it failed to modify the Student's IEP based on his XXXXXXXX.

The Complainant alleged that the School conducted a XXXXXX test on the Student, and it showed him XXXX level. He further alleges that the School should have changed his IEP based on his grades and the testing results that show him XXXX level. Also, the School should have seen that the Student was not XXXXX and modified his IEP accordingly.

A review of the Student's current and previous IEPs and the IEP Committee Notes showed that the District repeatedly and continuously revised and modified the Student's IEP. At an IEP meeting held on XXXXX, the IEP Team discussed the Student's XXXXXXXXXXXX. The IEP Team developed accommodations for the Student.

Next, the IEP Team held an IEP meeting on XXXXX, because the Complainant expressed his concerns about the Student's XXXXX. The IEP Team revised and increased the Student's accommodations.

At the IEP meeting held on XXXXX, the IEP Team revised and modified the Student's accommodations to increase the related aids and services he would receive for the XXX school year. At an IEP meeting held on XXXXX, the IEP Team changed the Student's XXXXX. Then on XXXX, the IEP Team discussed changing the Student's XXXXX. They also discussed changing another XXXXXX. The IEP Team, which included the Complainant, also discussed other placement options and the Complainant agreed to the changes. The Team also discussed that the Student was not allowed to XXXX.

At an IEP held on XXXX, the Team reviewed an XXXXX chosen by the Complainant. The Team cross-referenced the accommodations and goals in the Student's current IEP. The Team discussed the Student's progress in XXXXX.

Appendix A, Subpart D at 34 C.F.R. Part 104, provides that except under extraordinary circumstances, which do not apply here, the Department does not review the results of individual placements or assess the appropriateness of pedagogical decisions so long as the recipient complies with the procedural requirements of the Section 504 regulation concerning identification and location, evaluation, and due process procedures. Disagreements regarding the appropriateness of services or placement decisions are subject to the due process requirements of the Section 504 regulation at 34 C.F.R. § 104.36. These procedures include the right to an impartial hearing on the matter in dispute.

Based on the foregoing, OCR has determined that the Complainant's allegations concern individual educational and placement decisions. Pursuant to Section 110(d) of OCR's Case Processing Manual (CPM), OCR will close a complaint if the complaint allegations are foreclosed by OCR policy determinations, such as, OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons convened pursuant to Section 504, or to refrain from assessing the appropriateness of pedagogical decisions.

Because these allegations involve educational decisions regarding whether the Student's placement in certain classes and the interpretation of test results, the proper forum for resolving the conflicts regarding an IEP Committee's placement decisions is a due process hearing. The hearing would be conducted under the Individuals with Disabilities Education Act. OCR is therefore dismissing the issue of whether the District denied the Student a FAPE when it failed to modify the Student's IEP based on XXXXXXXX.

Issue 1(b): Denial of FAPE for Failure to Implement

Whether the District denied the Student a FAPE when it failed to implement the Student's IEP for the XXXXX school year by not allowing the Student XXXXXXXX, as provided for in his IEP.

Prior to OCR's completion of its investigation of this complaint, the District offered to voluntarily resolve the allegations of this complaint. Set forth below is a summary of the

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evidence obtained thus far that supports resolution of this complaint through the proposed resolution agreement.

Summary of the Evidence

During an IEP meeting held in XXX, the IEP Team discussed that one of the Student's strengths, which led to better performance, was the XXXXXX; whereas, the Student's challenges included XXXXX. As a result, the IEP Team added a provision in the Student's XXXX IEP, which required his teachers to provide him XXXX or allow him to use XXXX.

Prior to an IEP meeting held on XXX, the Student's teachers indicated via email that they gave the Student XXXXX. Then at the XXX meeting, the IEP Team addressed issues related to the implementation of the XXX provision. The Student was using his XXXXXXXX.

In later emails, some teachers continued to raise the issue of the implementation of the XXXX provision. The Student was using his XXXXXXXX; he was using his XXXX. The Student did not use this accommodation in two of his classrooms.

The IEP Team eventually removed the XXXXXX provision from the Student's IEP because it was causing the Student to XXXXXXX. The District provided him with an XXXXXXXX. There is no access to XXXXX. The District also provided him with a laptop computer.

The evidence shows that the Student was to be permitted to use his XXXX; however, the evidence thus far shows that there was inconsistent practice with his teachers. OCR would have to interview the Student's remaining teachers to determine if they allowed the Student to use his XXXX and to determine if the Student was harmed as a result of not being able XXXXX.

Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved at any time when, before the conclusion of an OCR investigation, the recipient expresses an interest in resolving the complaint and signs a Resolution Agreement that addresses the complaint allegations. In such circumstances, the provisions of the Resolution Agreement will be aligned with the complaint allegations or the information obtained during the investigation and will be consistent with applicable regulations.

Based on the foregoing, OCR accepted the District's request to resolve the concerns, regarding the implementation of the XXXXX provision in the Student's IEP. On April 5, 2017, OCR received the enclosed signed Resolution Agreement (Agreement) which, when fully implemented, will resolve this issue. OCR will monitor the implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II, as it relates to the implementation of the cell phone provision in the Student's IEP.

Issue 3: Different Treatment

Whether the District discriminated against the Student on the basis of his disability by denying him access to the XXXXX tryouts.

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Factual Findings and Analysis

To determine whether a prima facie case of different treatment exist, OCR examined (a) whether the Student, who is a member of a protected class, was subjected to the adverse action that is alleged; and (b) whether there was a similarly situated student(s) that the District treated more favorably.

Protected Class

The evidence clearly shows that the Student was a member of a protected class because he was given an IEP for his disability (XXXXXXXXXX). The evidence however, does not establish that an adverse action occurred for which the Student was treated differently than his similarly situated peers.

Adverse Action

The evidence showed that the Student was initially not allowed to participate in the tryouts for the XXXXX team held on XXXX, because he failed to XXXXX. However, the District allowed the Student to participate in the XXXXX tryouts held on XXXXXX.

The evidence showed that XXXX other students were not allowed to tryout because they failed to XXXX. The evidence also showed that each of the students who were permitted to try out on XXXX, timely XXXXX. Due to confusion regarding the XXXX, the evidence shows that the School Administrators decided to conduct a second tryout for the XXXX team XXXX later. The XXXX students referenced above, who like the Student failed to XXXX, participated in the XXXXX, and one of these students made the XXXX team after the second tryouts. School Administrators personally notified the Complainant via email and voicemail that the Student could participate in the second tryouts, despite his XXXXX. However, the Complainant admitted that the Student voluntarily chose not to participate in the second tryouts. OCR also noted that of the XX students selected for the XXXX team, two had an XXXXX.

To constitute different treatment under Section 504 and/or Title II, an official or representative (agent or employee) of a Recipient must have treated someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient. To make this determination, OCR considers whether the alleged different treatment or adverse act caused lasting and tangible harm; merely unpleasant or transient incidents usually are not considered adverse.

The evidence showed that the Student was ultimately given an opportunity to try out for the XXXX team despite his failure to XXXXX, but he voluntarily declined. Therefore, OCR finds that the evidence does not support that the Student suffered an adverse act. In addition, the evidence does not support the allegation that the District treated the Student differently than his similarly situated peers without disabilities. Instead, the evidence showed that the District treated all of the students who XXXXXX the same for both the first and second tryouts. The evidence also showed that the District permitted all individuals, regardless of disability, who

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XXXX to try out for the team on XXXX. Since a prima facie case of discrimination cannot be established, there is no need for the District to articulate a legitimate, non-discriminatory reason for its action, or for OCR to examine whether this reason are a pretext for discrimination.

Conclusion

Based on the foregoing, OCR finds insufficient evidence to support the allegation that the District discriminated against the Student on the basis of his disability by denying him access to the tryouts for the XXXXXX team.

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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions about this complaint, please contact XXXXX, Senior Attorney, at (404) 974-XXXX, or the undersigned at (404) 974-XXXX.

Sincerely,

XXXXXXXXXX
Supervisory General Attorney

Enclosure

cc: XXXXXXXXXXXXXXXXXXXX