



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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August 19, 2015

Ms. Jill Louters
Superintendent
New Rockford-Sheyenne Public School District 2
437 1st Ave North
New Rockford, ND 58356

Re: OCR Docket # 05-15-1150

Dear Ms. Louters:

This is to notify you of the disposition of the referenced complaint filed against the New Rockford-Sheyenne Public School District 2 (District) on February 25, 2015, alleging discrimination based on disability (XXXXXXXXXXXXXXXXXXXX). Specifically, the complaint alleges that the District is denying Student A, a student at the District's XXXX XXXXXX, a free and appropriate public education (FAPE).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 - 12134, and its implementing regulation at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits 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.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the District, including relevant District policies and procedures, and interviewed the Complainant.

Prior to the conclusion of OCR's investigation, the District requested to resolve the allegation that it discriminated against Student A, based on his disability by failing to provide XXX with a FAPE during the 2014-15 school year. Additionally, OCR identified a compliance concern with respect to the District's Section 504 policies and procedures (hereafter referred to as Policies), and has determined by a preponderance of the evidence that the District's Policies are not compliant with the Section 504 and Title II regulations. Specifically, OCR determined that the District fails to comply with the requirements of Section 504 with respect to its notice of non-discrimination, non-discrimination policies, grievance procedures, evaluation and placement procedures, and procedural safeguards. The reasons for this determination are set forth below.

Applicable Legal Standards

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

Discrimination generally

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Section 504 Coordinator

The Section 504 and Title II regulations, at 34 C.F.R. § 104.7(a) and 28 C.F. R. § 35.107(a), respectively, require that recipients and public entities of a certain size designate at least one person to coordinate its efforts to comply with Section 504.

Notice of Non-Discrimination

The Section 504 regulation at 34 C.F.R. § 104.8 requires recipients to notify participants, beneficiaries, applicants, employees and unions or professional organizations holding collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of disability in violation of Section 504. If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the nondiscrimination policy. The regulation implementing Title II at 28 C.F.R. § 35.106 requires a public entity to make available to applicants, participants, beneficiaries, and other interested parties information regarding the provisions of Title II and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such a manner as the head of the entity finds is necessary to apprise such persons of the protections against discrimination assured them by Title II.

Grievance Procedures

The Section 504 and Title II regulations, at 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b), respectively, require that recipients and public entities of a certain size adopt and publish grievance procedures “for the prompt and equitable resolution of complaints alleging any action prohibited by this part.”

OCR has identified a number of elements in evaluating whether a recipient’s grievance procedures provide for the prompt and equitable resolution of complaints of discrimination and harassment. These include:

- notice to students and employees of the grievance procedures, including where complaints may be filed, as well as contact information for the recipient’s Section 504 coordinator, including name, address and telephone number;
- adequate definitions of prohibited harassment, with specific examples and an explanation that the procedures apply to complaints alleging discrimination and harassment carried out by employees, other students, or third parties;
- provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and individual(s) accused of discrimination to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the major stages of the complaint process;¹
- written notice to the parties, complainant and individual(s) accused of discrimination, of the outcome of the complaint; and
- an assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

FAPE

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The implementation of an individualized education plan (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of providing FAPE.

¹ OCR evaluates on a case-by-case basis whether the resolution of disability discrimination complaints is prompt and equitable. OCR has noted that, based on its experience in typical cases, there is a 60-calendar day timeframe for investigations.

Evaluation, Placement, and Procedural Safeguards

Pursuant to the Section 504 regulation at 34 C.F.R. § 104.35, a recipient must conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35 (b), of any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(b) requires that a recipient establish certain standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education and/or related services. The Section 504 regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

The Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.” Compliance with the procedural safeguards of the IDEA is one means of meeting this requirement.

District Policies and Procedures

OCR was unable to locate any of the District policies described below on its website.²

Notice of Non-discrimination

The District’s Student Handbook informs the District community that the District prohibits discrimination on the basis of disability. The Handbook refers to the District’s non-discrimination policy, which is not available in the Handbook or online. The Handbook states that individuals with questions about discrimination may contact the Superintendent. The Handbook also lists OCR-Chicago’s address.³

Section 504 Coordinator

Although District Policy AAC, described below, identifies the Superintendent as the “nondiscrimination coordinator,” this information is not published on the District’s website

² <http://www.newrockford-sheyenne.k12.nd.us/>.

³ <http://www.newrockford-sheyenne.k12.nd.us/files/2012/04/revised-st.handbook5.pdf>

nor is it included in the Student Handbook. Further, neither the District’s website nor the student handbook identifies the District’s Section 504 coordinator.

Non-discrimination Policy and Grievance Procedures

District Policy AAC prohibits discrimination and harassment against students with disabilities by students, employees and third parties. The non-discrimination policy also prohibits retaliation against individuals who file a complaint or participate in an investigation. The non-discrimination policy states that the District will conduct investigations of reports of discrimination or harassment and it identifies potential sanctions for persons found to have engaged in discrimination or harassment. District policy AAC sets forth the grievance and complaint procedures that the District follows in responding to reports of discrimination or harassment. The grievance procedures provide: notice to students and employees of the procedure, including where complaints may be filed, an adequate, reliable, and impartial investigation, designated and reasonably prompt timeframes for the major stages of the complaint process, written notice of the outcome of the complaint to the complainant and individual(s) accused of discrimination. However, the policy does not contain an assurance that the District will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. Further, although the grievance procedures require the person conducting the investigation to speak to witnesses, the procedures do not specifically provide the complainant and individual(s) accused of discrimination the opportunity to present witnesses and other evidence.

Evaluation, Placement, and Procedural Safeguards

The District states that when a parent requests a Section 504 plan, the parent meets with the District’s Section 504 coordinator (it explains the Section 504 coordinator is Co-Principal B) to develop a written Section 504 plan, which is signed by the parent and coordinator. The District states that after the plans are developed they are provided to a student’s teachers.

District Policy AACA states that for the purposes of identification, evaluation, or educational placement of a child under Section 504, the District will provide a parent or guardian with “notice, an opportunity to examine relevant records, an impartial hearing with an opportunity to participate and/or be represented by counsel, and a review procedure.” Policy AACA further provides that other complaints concerning Section 504 may be filed using the District’s discrimination and harassment grievance procedure (AAC-R), or through state or federal law.

District Policy FDE states that the District “complies with Section 504 requirements.” Policy FDE further states that for the purpose of its compliance with Section 504, the District is a member of the East Central Center for Exceptional Children (ECCEC), a cooperative that provides special education services to districts throughout North Dakota, and that the District

adopts the ECCEC policies, including the ECCEC’s procedural safeguards. The ECCEC policy on procedural safeguards states that it “adheres to the policies, standards, and procedures as set forth in *Guidelines: Procedural Safeguards: Prior Notice and Parental Consent Procedures* (1999) and *Procedural Safeguards in Special education for Children and Parents*. The ECCEC policy does not identify the author of these publications, link to them, or provide further detail about these publications.

Factual Background

During the 2014-15 school year, Student A was a XXXXX XXXXX student at the District’s XXXX XXXXXX (School). Student A has XX XXXXXX XXXXXX XXXXXXXXXXXX that causes him to be more XXXXX XX XXXXXXXXXXXX XXX XXXXXXXX. The District created a plan for Student A on March 14, 2011, when XX was in XXXX XXXXX, after Student A XXX XXXXXXX X XXXXXXXXXXXX XXXXXXX XX XXX XX X XXXXXXX XX XXX XXXXXXXXXXXX.⁴

On September 11, 2014, the District convened a team to revise Student A’s plan. The District drafted the September 2014 plan on a document titled “School Individualized Health Care Plan,” which does not document the team members in attendance, the information considered, or whether the District’s notice of procedural safeguards was provided to the Complainant. Although the Complainant signed the September 2014 plan, it is not clear from the document whether the Complainant attended the meeting where it was prepared. The District’s Section 504 Coordinator did not sign the Plan, even though the District reported to OCR that the Section 504 Coordinator is required to sign Section 504 Plans created for District students. There is no documentation indicating that the District provided the Complainant with a copy of its procedural safeguards.

The September 2014 plan identifies Student A’s XXXXXXXXXXXX and provides the following academic adjustments: (1) extra time to complete homework or tests when Student A’ XXXXXXX XXXXXXXXXXXX XXXX XX XXXXXXX; (2) teachers will make arrangements to help Student A with school work XXXX XXXXXXX; and (3) teachers will modify or shorten assignments when Student A XXXXX XXXXXXXXXXXX XXXX XX XXXXXXX. In November 2014, the District modified the September 2014 plan to include an additional academic adjustment that allowed for Student A to complete work in the principal’s office if XX XXXX XXXXXXX. In March 2015, the District again modified Student A’s plan to include an additional academic adjustment that allows Student A XX XX XX X XXXXXXX XXXXX, XXXX XX XXX XXXXXXXXXXXX XXXXXXX, XX XX XXXXX XXXXXXXXXXXX. None of the modified Plans were signed by the Section 504 Coordinator.

During the 2014-15 school year, Student A XXXXXXX XXXXXXXXXXXX XXXXXXX XX XXXXXXX. The District’s records indicate that through the first three quarters of the school

⁴ It is not clear if this is the first Section 504 plan created for Student A.

year Student A XXX XXXXXX XXXXX XXXX, XXXXXXXXXXXX XX XXX XXXX XX XXX. At some point during the school year,⁵ Co-Principal A drafted an undated and unsigned letter XX XXXXXXXXXXX XXXXX XXXXXXXXXXX. The letter informed XXX XXXXXXXX that Student A was on a Section 504 plan because of XX XXXXXXXX XXXXXXXX XXXXXXXXXXXX that causes XXX to XXX XXX and that, at the time the letter was written, Student A had XXXXXXXX XX XXXX XX XXXXXXXX. Co-Principal A’s letter informs XXX XXXXXXXX XXXXXXXX XXXXXXXX that “I believe that [Student A] does get XXXX XXXXXXXX but I also believe that XX XXXXXXXX XXXXX XXXXXXXX XX XXXX XX XXXXXXXX XX XXXXXXXX XXX XXXX XX XXXXXXXX.” Co-Principal A does not offer any explanation for his beliefs. The letter also states that Student A “falls behind in his school work XXXX XX XXXXXXXX XXXXXXXX.”

The District informed OCR that on February 23, 2015, it contacted North Dakota’s Department of Public Instruction regarding Student AXX XXXXXXXXXXX, but does not state the nature of the conversation. The District also states that it contacted Eddy County Social Services on March 9, 2015 regarding Student XXX XXXXXXXXXXX.

The District provided no documentation that teachers or other school officials implemented the accommodations in Student A’s 2014-15 Plans. The Complainant told OCR that the District has not provided the academic adjustments specified in Student A’s Plans.

Analysis

Prior to the conclusion of OCR’s investigation, the District requested to resolve the allegation that it discriminated against Student A, based on XXX disability by failing to provide XXX with a FAPE during the 2014-15 school year.

With respect to the District’s Section 504 policies and procedures, specifically, the District’s designation of a Section 504 coordinator, notice of non-discrimination, non-discrimination policy, grievance procedures, evaluation and placement procedures, and notice of procedural safeguards (collectively, District Policies), OCR determined that the District’s Policies do not comply with section the Section 504 regulation in several respects. First, they are not widely publicized and therefore do not provide adequate notice as required by 34 C.F.R. §§ 104.7(b) and 104.8. For example, the District Policies, including its notice of non-discrimination, are not available on the District website or in the District handbooks, with the exception of the non-discrimination policy, an abridged version of which is published in the Student Handbook.

Further, although the District indicated that it has adopted the ECCEC’s policies, including the ECCEC’s procedural safeguards, the ECCEC policy on procedural safeguards simply references another policy (*Guidelines: Procedural Safeguards: Prior Notice and Parental*

⁵ The District states that on January 14, 2015, it informed Student A that XX XXX XXXXXXXX XX XXX XXXXXXXXXXX.

Consent Procedures (1999) and *Procedural Safeguards in Special education for Children and Parents*), but fails to provide the details of these procedural safeguards, including the protections they afford parents and how to locate the policies themselves. Accordingly, OCR has determined that the District has failed to adopt and publish standards for the evaluation and placement of students who, because of disability, need or are believed to need special education and/or related services, as required by the Section 504 regulation at 34 C.F.R. § 104.35(c), and further failed to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure,” as required by 34 C.F.R. § 104.36.

Finally, none of the District Policies identify the District’s Section 504 Coordinator, as required by 34 C.F.R. §§ 104.7(a) & 104.8(a), and 28 C.F.R. § 35.107(a), and the District’s grievance procedures do not expressly provide the parties the opportunity to present witnesses and evidence during the complaint investigation or adjudication process and do not contain an assurance that the District will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate, as required by 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b).

Therefore, after carefully considering all the evidence, and for the reasons noted above, OCR finds that the District’s Policies do not comply with the Section 504 and Title II regulations.

To resolve the complaint allegation and the above-described Section 504 and Title II compliance determinations, the District agreed to enter into a resolution agreement (the Agreement) with OCR on August 17, 2015. The provisions of the resolution agreement are aligned with the complaint allegation and the compliance concern identified by OCR, and they are consistent with the applicable regulations.

OCR will monitor the District’s implementation of the Resolution Agreement until the District is in compliance with the statutes and regulations at issue in this case. The full and effective implementation of the Resolution Agreement will address all of OCR’s Section 504 and Title II compliance findings. OCR looks forward to receiving the District’s first monitoring report, which is due by October 15, 2015.

This concludes OCR’s investigation of the complaint and 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.

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 individual may file a complaint alleging such treatment. The Complainant may also 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. 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.

We wish to thank you for the cooperation extended to OCR during our investigation. In particular, we thank Joseph Wetch, Counsel, for his assistance throughout OCR's investigation. If you have any questions, please do not hesitate to contact Tom Okawara by phone at 312-730-1597, or by e-mail at Tom.Okawara@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

cc: Joseph Wetch, Counsel
Enclosure