



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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January 20, 2023

Kristen Weikle
Superintendent
McLean County Unit District No. 5
Sent via email only to weiklek@unit5.org

Re: OCR Docket #05-22-1513

Dear Superintendent Weikle:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), completed its investigation of the complaint filed against McLean County Unit District No. 5 (District), which OCR received on July 27, 2022, alleging discrimination on the basis of disability. Specifically, the complaint alleges that the District discriminates on the basis of disability against students in the Colene Hoose Elementary School's (School) Behavioral and Emotional Support Team Program (BEST Program), a special education program, by providing them shortened school days.

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 its investigation, OCR reviewed data provided by the District and interviewed the Complainant and District staff. Based on the information provided during OCR's investigation, OCR has determined that the evidence established the District violated Section 504 and its implementing regulations, at 34 C.F.R. §§ 104.4(a) and 104.33(a) and (b)(1)(ii), when it provided a shorter school day for students with disabilities in the BEST Program than it provided to nondisabled students without making individualized determinations about each student's educational need for a shortened school day. OCR also identified compliance concerns regarding the provision of a free appropriate public education (FAPE) with regard to academic and nonacademic educational settings to ensure the students in the BEST program are able to participate to the maximum extent appropriate with their nondisabled peers. The basis for OCR's determination is set forth below.

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

On January 20, 2023, the District voluntarily entered into a resolution agreement (Agreement), which commits the District to take specific steps to address the identified Section 504 violations and areas of concern.

Legal Standards

The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined the Title II regulations applicable to the issues raised in this complaint do not provide greater protection than the applicable Section 504 regulations. Therefore, OCR has applied the relevant Section 504 standards in its analysis of this complaint.

The Section 504 regulation, at 34 C.F.R. § 104.4(a), states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department. The Section 504 regulation, at 34 C.F.R. § 104.4(b)(1)(i)(ii) and (iv), states a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others; or provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others.

The Section 504 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 FAPE to each qualified disabled person 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), 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 disabled persons as adequately as the needs of nondisabled persons are met and are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36. The implementation of an individual education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of providing an appropriate education under Section 504.

The Section 504 regulation, at 34 C.F.R. § 104.34(a)-(b), requires a recipient to educate each qualified disabled person with persons who are not handicapped to the maximum extent appropriate to the needs of the disabled person. Further, in arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 34 C.F.R. § 104.37(a)(2), a recipient must ensure that disabled persons participate with nondisabled persons in such activities and services to the maximum extent appropriate to the needs of the disabled person.

The Section 504 regulation, at 34 C.F.R. § 104.35(c), states that, in interpreting evaluation data and making placement decisions, the recipient must 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, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The Section 504 regulation, at 34 C.F.R. § 104.36, sets forth procedural safeguards the District is required to have in place in connection with the development of educational plans, including the opportunity for an impartial hearing. A due process procedure consistent with the IDEA is one means of meeting the Section 504 requirements related to evaluation and procedural safeguards.

Facts

The School serves approximately 403 students in Kindergarten through fifth grade. The School operates the BEST Program for students in Kindergarten through fifth grade who require a smaller environment with direct social-emotional and behavioral instruction, small group and individualized instruction, and staff trained in de-escalation strategies. The District's Special Education Director told OCR that all students enrolled in the BEST Program have IEPs, and the program serves students with a variety of disabilities, including XXXXXXXXXX.¹ The District's Special Education Administrator told OCR that a total of 31 students in grades K-5 were enrolled in the BEST Program during the 2021-2022 school year, and a total of 21 students were enrolled during the 2022-2023 school year.

The Special Education Administrator told OCR that the District's elementary schools commence the school day at 7:45 a.m. and are dismissed at 2:30 p.m.; however, the BEST Program commences the school day at 7:45 a.m. and is dismissed at 2:00 p.m. She further informed OCR that the District's elementary school students receive 2,025 minutes of bell-to-bell minutes per week, and 1,775 minutes of instructional minutes per week, while BEST Program students receive only 1,875 minutes of bell-to-bell minutes per week, and 1,750 instructional minutes per week. The Special Education Administrator also told OCR that BEST Program students' instructional time includes 25 minutes of lunchtime social skills instruction per day. The Special Education Administrator stated that BEST Program students receive 150 fewer bell-to-bell minutes per week and 25 fewer instructional minutes per week than their nondisabled peers.

The District's Assistant Superintendent told OCR that students in the BEST Program are dismissed 30 minutes earlier than other District students because they have sensory, social, and developmental, or other health issues that make it difficult for them to be in the hallways at the end of the day with other students. The Assistant Superintendent stated that BEST Program staff believed the heavy flow of traffic at the 2:30 p.m. dismissal time would result in behavioral outbursts for BEST Program students. The Special Education Administrator told OCR that, during her periodic check-ins with BEST Program staff, teachers gave positive feedback regarding the BEST Program's early dismissal and lunchtime instruction, sharing that they believed it was "very positive and beneficial" for BEST Program students. However, District staff acknowledged that the decision for the early dismissal was made at some point many years ago and the practice has continued.

¹ The Assistant Superintendent told OCR that all BEST program students are eligible for bus transportation as a related aid and service, that the BEST Program buses operate on a different schedule than the buses for the District's general education programs, and that BEST Program students do not ride the bus with their nondisabled peers.

The Special Education Administrator told OCR that, around July 2022, she and the Director of Special Education had a “casual conversation” regarding preparations for the 2022-2023 school year and confirmed with the new Principal that the BEST Program would continue to dismiss at 2:00 p.m. and that BEST Program students would continue to receive lunchtime instruction. OCR reviewed a July 13, 2022 e-mail from the Special Education Administrator to the incoming Principal, copying the Director of Special Education, that confirmed the District’s decision to continue these practices during the 2022-2023 school year which stated, in part: “Buses for [BEST Program] students will arrive at 2. This early dismissal is possible due to the paid 6th assignment BEST teachers work over lunch... [BEST Program students] IEPs should continue to reflect 1875 minutes.” The Special Education Administrator told OCR the District has not formally reevaluated the effectiveness of, or need for, the early dismissal for BEST Program students.

The Assistant Principal, who attends all BEST Program IEP meetings, informed OCR that the bell-to-bell and instructional minutes are documented on each BEST Program student’s IEP; however, the IEP teams do not discuss or make individualized determinations concerning instructional minutes for each student and that, per policy, all BEST Program students have an early dismissal at 2:00 p.m. and receive instructional time at lunch. OCR reviewed BEST Program IEPs and confirmed there were no notes or comments in the IEP documents to indicate any individualized determination or justification for a shortened school day, for lunchtime social skills instruction, or for the student’s need to be separated from their nondisabled peers during transition periods such as when they arrive to school and the start of the school day. OCR also confirmed that no BEST Program students were dismissed at 2:30 p.m. or received the same bell-to-bell or instructional minutes received by their nondisabled peers.

Regarding lunchtime, the Assistant Principal informed OCR that the District provides all BEST Program students with social skills instruction during their 25-minute lunch period in order to ensure the students would receive additional instructional minutes in light of the earlier dismissal time. The Assistant Principal further informed OCR that BEST Program student IEP teams did not make individualized determinations concerning whether each student required social skills instruction during lunchtime in lieu of non-instructional time provided to their nondisabled peers, but the content of the social skills instruction provided to BEST Program students was individualized pursuant to each student’s needs. The Assistant Principal informed OCR that all BEST Program students also receive 25 minutes of recess as well as periodic, “individualized” breaks throughout the school day. The Special Education Administrator told OCR that BEST Program students have “behavior challenges” and require additional supervision pursuant to their Behavior Intervention Plans (BIPs). OCR’s review of the BEST Program student IEPs indicates most students have lunch listed under “special education outside the general education classroom.” OCR’s investigation confirmed the District made the decision to provide BEST Program students with lunchtime instruction to account for their shortened school day, and that no individualized determinations were made as to whether each student required such instruction.

The District’s Assistant Superintendent informed OCR that, as of December 2022, the District has begun taking steps in anticipation of lengthening the school day for the BEST Program by changing the dismissal time from 2:00 p.m. to 2:30 p.m. The District’s Assistant Superintendent

further told OCR the District would need to schedule IEP meetings for its BEST Program students to address the change in the school day and the needs of the student, but the District had not considered whether students would require compensatory services because of a denial of FAPE due to the shortened school day or social skills instruction during lunch.

Analysis and Conclusion

The evidence established the District operated the BEST Program for students with disabilities on a shortened school day as compared to their nondisabled peers. The BEST Program's school day commences at 7:45 a.m. and dismisses at 2:00 p.m., while all other District elementary students commence their day at 7:45 a.m. and are dismissed at 2:30 p.m. The evidence further established the District decided to provide social skill instruction to all BEST Program students during their 25-minute lunch period to account for missing instructional minutes. However, even considering this additional instruction time, BEST Program students receive 25 fewer instructional minutes per week and 150 fewer bell-to-bell minutes per week than their nondisabled peers. Therefore, the District did not provide BEST Program students with disabilities the same access to the District's educational program, services, and activities, including bell-to-bell and instructional minutes, as their nondisabled peers.

The evidence further established that the District did not provide students a FAPE when it did not follow procedures required by Section 504, and when it provided BEST Program students with a shortened school day based on generalized concerns regarding BEST Program students having "behavioral outbursts" if they were dismissed with their nondisabled peers rather than considering the individualized needs of each student. The evidence established the District did not convene a meeting with a group of persons knowledgeable about each BEST Program student to make an individualized determination regarding the student's needs as to the appropriate length of the student's school day, including both bell-to-bell and instructional minutes, or the need for social skills instruction during lunch. Further, the evidence established the District did not consider the student's individualized need and ability to interact with nondisabled peers when making determinations about the student's instructional minutes during lunch time and other transition periods throughout the school day.

Based on the above, OCR has determined that the District did not comply with the Section 504 implementing regulations, at 34 C.F.R. §§ 104.4 and 104.33(a) and (b)(1)(ii).

The District executed a resolution agreement (Agreement) that, when fully implemented, will address the identified violations and compliance concerns. The Agreement requires the District to provide the same access to the District's educational program, services, and activities, including the same bell-to-bell and instructional minutes per school day, as their nondisabled peers; requires the District to convene IEP meetings for all BEST Program students who attended during the 2021-2022 and/or 2022-2023 school year(s) to make an individual determination regarding the student's needs as to the appropriate length of the student's school day, whether they received a FAPE, and whether the student requires compensatory and/or remedial services; and requires the District to provide training to specified District administrators and special education staff regarding Section 504 and Title II, including the District's obligation to provide students with disabilities a FAPE in accordance with 34 C.F.R. §§ 104.33-104.36. OCR will

monitor the implementation of the agreement until the District is in compliance with its terms and the statute(s) and regulation(s) at issue in the case.

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.

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.

The complainant may file a private suit in Federal court, whether or not OCR finds a violation.

We wish to thank you and your staff for your cooperation and courtesy during our investigation. In particular, we would like to thank Ms. Kristen Charkow and Ms. Teri Engler, counsel for the District. If you have any questions, please contact Elisabeth Gusfa, Civil Rights Attorney, at (312) 730-1621 or by email at elisabeth.gusfa@ed.gov.

Sincerely,

Melissa Howard
Supervisory Attorney

Enclosure