



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

230 SOUTH DEARBORN ST., 37th FLOOR
CHICAGO, IL 60604

REGION V
ILLINOIS
INDIANA
IOWA
MINNESOTA
NORTH DAKOTA
WISCONSIN

September 25, 2023

Ms. Monica Kelsey-Brown
District Administrator
Brown Deer School District
8200 N. 60th Street
Brown Deer, WI 53223

Sent by email only: mkelsey-brown@browndeerschools.com

OCR Docket No. 05-23-1449

Dear Ms. Kelsey-Brown:

This letter is to notify you of the determination made by the U.S. Department of Education (Department), Office for Civil Rights (OCR) regarding the complaint filed against Brown Deer School District (District) alleging discrimination on the basis of disability. More specifically, the complaint alleged that the District discriminated against Student A on the basis of suspected disability when it failed to evaluate him for special education and related services in the 2022-2023 school year.

OCR enforces 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 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of federal financial assistance and public entities, respectively. 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 documents provided by the Complainant and the District. Prior to OCR completing its investigation, the District expressed an interest in resolving the complaint pursuant to Section 302 of OCR's *Case Processing Manual*. OCR determined that a resolution agreement is appropriate in this case because OCR's investigation has identified concerns that can be addressed through a resolution agreement. A summary of OCR's investigation to date, determinations and the resolution agreement follows.

Applicable Legal Standards

The regulation implementing Title II 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 such entity.

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 Section 504 implementing 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, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance. The Section 504 regulation, at 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iv), provides in relevant part that a recipient shall not deny a qualified individual with a disability an aid, benefit, or service or provide such aid, benefit or service to an individual that is not equal to or is different from that provided to others because of the individual's disability.

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 appropriate public education 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 implementing regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as regular or special education and related aids and services that: (i) are designed to meet individual educational needs of individuals with a disability as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). Implementation of an individualized education program (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this standard. 34 C.F.R. § 104.33(b)(2).

The Section 504 implementing regulation at 34 C.F.R. § 104.35(a) states that a recipient shall conduct an evaluation of any person 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 person in regular or special education and any subsequent significant change in placement.

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 Complainant told OCR that for a few years Student A has missed a significant amount of school. The Complainant explained that Student A complained every morning that he was not feeling well and would not go to school. The Complainant also said that he suspected Student A had mental health issues. In response to OCR's request as to why Student A had not been referred for an evaluation, the District responded with the statement that the Complainant had not requested an evaluation of Student A to determine if he was in need of special education or related services. The Complainant removed Student A from school in the 2022-2023 school year

on January 30, 2023. Prior to the Complainant removing Student A from the District, Student A had accumulated eighty-one unexcused absences for the 2022-2023 school year. District officials made two home visits to check on Student A.

In addition, in 2021 a therapist contracted by the District provided Student A with therapy services to assist with his anxiety. At that time, the Therapist working with Student A recommended to the District that Student A attend a day treatment program until he was able to attend school regularly. The description for one of the programs she recommended indicates that the program was a “day treatment program for children with significant behavior and mental health issues.” The District provided no evidence that it followed up with the Therapist or Student A’s parents to discuss whether Student A’s anxiety and erratic school attendance necessitated an evaluation to determine if Student A was a student with a disability in need of services.

Documentation provided by the District included records from Student A’s file. Those records confirm that for several years Student A has been absent for a significant amount of time and that the family was referred for truancy. Those records also show that Student A’s chronic absenteeism caused the District to involve the school social worker and school safety resource officer (SRO). OCR reviewed email documentation indicating the Social Worker and SRO visited the family in fall of 2022 and referred them to Child Protective Services. An October 24, 2022, email from the District registrar to the middle school principal and Social Worker states the student had a history of attendance issues the previous school year due to reported medical issues. The emails indicate the Social Worker and SRO visited the family on two occasions in fall of 2022 and spoke with Student A’s parents but did not speak with the student. Although they discussed the option of Student A attending virtual school and provided information to the parents on enrolling the student in an official “home school” option. The records do not indicate consideration of the need to evaluate the student under Section 504 to determine if his diagnosed anxiety was contributing to his absenteeism.

District policy 2260.01A – prohibits discrimination on the basis of disability as well as provides procedures for the identification, evaluation and placement of students who are suspected of having a disability.¹ The policy identifies the building principal as the building’s Section 504 coordinator. District policy also provides that “[a]nnually, the District will undertake efforts designed to identify and locate every qualified person with a disability residing in the District who is not receiving a public education, and notify the person and their parents of the District's duties and responsibilities under Section 504.” In addition, the District’s Administrative Guideline manual states that referrals for a Section 504 evaluation may be made by anyone at anytime and specifically states referrals can be made by parents or teachers.²

Conclusion and Resolution Agreement

OCR determined that it is appropriate to resolve the complaint allegations in accordance with Section 302 of the CPM because OCR has identified concerns that can be addressed through a resolution agreement.

¹ <http://go.boarddocs.com/wi/sdbd/Board.nsf/goto?open&id=CKHGR944FCD7>

² <http://go.boarddocs.com/wi/sdbd/Board.nsf/goto?open&id=CAYQQX6A54FF>

Based on the information gathered in OCR's investigation thus far, OCR has concerns that the District did not initiate an evaluation of Student A to determine whether he was a student with a disability in need of special education and related aids and services even though it had a recommendation from a District-contracted social worker that Student A should be enrolled in a day treatment program because of anxiety which contributed to his erratic school attendance. In addition, Student A's attendance at school had been very inconsistent over several school years and the District was aware that some of the attendance issues were related to medical issues. OCR also has concerns that the District did not adhere to its own policies for the evaluation of students who have or are suspected to have a disability.

When fully implemented, the resolution agreement will address the evidence obtained and all of the allegations investigated. OCR will monitor the implementation of the agreement until the recipient is in compliance with the terms of the agreement and the statute(s) and regulations(s) at issue in the case.

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 another 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 privacy.

The Complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

OCR would like to thank Ms. Erica Ramos for her cooperation during OCR's investigation. OCR looks forward to working with the District during the monitoring of the Resolution Agreement. If you have any questions about this letter, you may contact Susan Johlie, Attorney, at Susan.Johlie@ed.gov.

Sincerely,

Dawn R. Matthias
Team Leader

Enclosure