



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VII
KANSAS
MISSOURI
NEBRASKA
OKLAHOMA
SOUTH DAKOTA

August 17, 2017

XXXXXX XXXXXX, General Legal Counsel
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XXXXXX XXXXXX XXXXXX, XXXXXX XXXXXX XXXXXX XXXXXX
XXXXXX XXXXXX, XXXXXX XXXXXX-XXXXXX

Re: Docket # 07151179

Dear Ms. XXXXXX:

On May 14, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Blue Valley Unified School District (U.S.D.) #229 (District), Overland Park, Kansas, alleging discrimination on the basis of disability. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve this complaint.

Specifically, the Complainant alleged after she informed the District that she wanted to request a due process hearing regarding her daughter's Section 504 plan, she was informed by the District she had to first go through the District's internal grievance process before her request for a due process hearing would be considered.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. The Title II regulation at 28 C.F.R. § 35.134 prohibits retaliation.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

In the remainder of this letter, the individual who submitted the complaint is referred to as "the

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

Complainant” and her daughter is referred to as “the Student.” To protect individuals’ privacy, the names of employees, witnesses, and other parties also were not used in the letter.

Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.33 requires a recipient to provide a free appropriate public education (FAPE) to each qualified person with a disability within its jurisdiction, regardless of the nature or severity of the person’s disability. A FAPE is regular or special education and related aids and services that: (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements pertaining to educational setting, evaluation and placement, and procedural safeguards at 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The regulations implementing Section 504 at 34 C.F.R. § 104.35 contains specific requirements concerning evaluation and placement, and procedural safeguards. The Section 504 regulation at 34 C.F.R. § 104.36 requires school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons with disabilities, 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 an opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.

Neither Title II nor its implementing regulation contain a specific provision regarding impartial due process hearings, however, the Title II implementing regulation at 28 C.F.R. § 35.103, provides that it “shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.” OCR, therefore, interprets Title II consistently with Section 504.

Preliminary Investigative Findings

The Student, who attended XXXXX grade in the District during the 2010-11 school year, had a medical diagnosis of XXXXX XXXXX, a condition that causes individuals to have XXXXX XXXXX XXXXX of XXXXX (XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX). As a result, the Student was directed by her physician to XXXXX XXXXXXXX to obviate the risk of XXXXX XXXXX XXXXX.

According to the Complainant, during the 2010-11 school year, the Student’s first grade classroom teacher often forgot to remind the Student to eat her snack during the day. The Student incurred a number of medical complications and a hospitalization due to the missed snacks. Additionally, when explaining to the Student’s classmates why the Student was permitted to eat when other students were not, the first grade teacher told them if the Student did not eat she would die. After hearing this comment, the Complainant stated the Student developed a fear of coming to school. The Student expressed to the Complainant that she was afraid to go to school because of a fear that she would miss her snack, causing her to die.

On February 16, 2011, the Complainant, her spouse and District staff met to determine the Student's eligibility for special education and related aids and services because of her disability. Following an evaluation, the Student was found eligible for such aids and services which were memorialized in a written plan (Section 504 plan).

OCR reviewed the initial evaluation report that noted the Student's "medical condition requires her to have regular snacks, ability to use the bathroom as needed and an individual health plan." The Student's Section 504 plan included many specific components for implementation by the nurse, teachers and other staff to effectively manage the Student's medical condition and ensuring the provision of a FAPE to the Student including: parent will provide a snack to be administered twice daily two hours after meal time; bathroom breaks as needed, as requested by the Student; Student will be sent to the nurse if she voices and physical complaints; teachers will send the Student to the nurse should they notice any unusual symptoms; nurse will go to or call the classroom at snack time as a reminder to that the Student eat her snack; and should there be a scheduling change, the Student will continue to have her snack at the appropriate time.

According to the Complainant, at the initial meeting to develop the Student's Section 504 plan, she and her spouse requested the inclusion of a provision stating that the school nurse must choose the Student's classroom teacher (hereinafter: school nurse placement provision). They felt that provision was important in light of the complexity of the Student's care and the history of difficulties caused by a teacher who was ill-equipped to deal with the medical and social implications of the Student's condition. The Complainant recalled seeing the provision typed onto the plan at the meeting. Therefore, when she signed the finalized copy of the plan soon after the meeting, she believed that the school nurse placement provision was included.

The District denies that the school nurse placement provision was ever included in the Section 504 plan. According to the District, the building principal consults with the nurse regarding medically fragile children, however teacher assignment decisions are ultimately left to the principal's judgment and discretion; consequently, the provision was not included in the Student's Section 504 plan.

OCR reviewed every Section 504 plan that was in place for the Student for the 2011-12, 2013-14 and 2015-16 school years, as well as documents related to implementation for the 2014-15 school year, none of which contained the school nurse placement provision.¹

According to the Complainant, she first became aware that the Student's 504 Plan did not contain the school nurse placement provision and that none of the prior plans contained the provision on March 11, 2015, during a 504 plan meeting for the next academic year. Prior to the March 11, 2015, meeting, the Complainant believed this provision was on all of the Student's Section 504 plans. The Complainant told OCR that she did not read the documents closely and assumed the documents accurately reflected what had been discussed at the initial meeting.

¹ The District and the Complainant were unable to locate the Student's Section 504 Plan for the 2014-15 school year. However, both parties confirm that a plan was in place for that school year and the District provided documentation of its implementation of the plan for the 2014-15 school year.

According to the Complainant, during the March 11, 2015 meeting with the Principal, and in a subsequent telephone conversation and email correspondence with the Executive Director of School Administration, the Complainant requested a due process hearing as well as a copy of the District's procedural safeguards statement. OCR reviewed the emailed exchange, and noted the Executive Director responded to the Complainant that same day noting that "[t]here is actually a grievance process you need to follow that would precede any hearing[.]" and supplying the Complainant with a copy of the District's grievance policy and a notice of parent and student rights.

Throughout the rest of March, April and the beginning of May 2015, the Complainant corresponded with school personnel regarding obtaining copies of all the Student's Section 504 Plans since the initial eligibility meeting. On May 14, 2015, the Complainant filed the instant complaint.

At the time that the Complainant requested a Section 504 due process hearing, the District operated pursuant to procedures set forth in its 504 Procedures Manual (updated 2010-2011) and its Notice of Parent and Student Rights, as follows:

504 Procedures Manual

Grievance Procedures

For issues pertaining to Section 504 which cannot be resolved at the building level, a grievance procedure is provided. Students who are denied eligibility for a 504 plan or who are not satisfied with the contents of a 504 plan, may contact the Section 504 Coordinator, who will reconsider the decision. The Grievance Form is to be completed and sent to the Section 504 Coordinator within five (5) school days of the decision being appealed. The review by the Section 504 Coordinator may include a meeting with the student, a meeting with other members of the 504 team, as appropriate, and a review of the file and supporting documentation. The Section 504 Coordinator may also meet with other district staff members who have information about the student. Based on this review, the Section 504 Coordinator will make a determination in writing to grant or deny the appeal.

If a student is not satisfied with the Section 504 Coordinator's decision, the student can request review by an impartial hearing officer. This request must be in writing, state the reasons for the appeal and be made within five (5) school days of the Section 504 Coordinator's decision. The district will arrange for an independent hearing officer to hear the appeal. The student is entitled to have his or her parents or guardians participate in the hearing and be represented by counsel.

If either the district or the student is not satisfied with the hearing officer's decision, there is a right to appeal to federal court. Parents can also lodge a complaint with the Regional Office of Civil Rights at any point during the grievance process or subsequent appeals.

Notice of Parent and Student Rights

(Relevant Portions)

- File a grievance related to decisions or actions regarding your student's identification, evaluation, services or placement:

Kansas Office for Civil Rights
U. S. Department of Education
8930 Ward Parkway, Suite 2037
Kansas City, MO 64114
816-268-0550
e-mail address: ocr.kansascity@ed.gov

- Request an impartial due process hearing through the district's grievance procedure related to decisions or actions regarding your student's identification, evaluations, educational program or placement. You and the student may take part in the hearing and have an attorney represent you. Hearing requests must be made to the district ADA/Section 504 Coordinator listed below.

During the pendency of this complaint, the District updated its 504 Procedures Manual (updated March 31, 2017) and its Notice of Parent and Student Rights, as follows:

504 Procedures Manual

Impartial Due Process Hearing Procedure

Parents are entitled to an impartial due process hearing with respect to actions relating to the identification, evaluation or placement of their student. The Request for Due Process Hearing form is to be completed and sent to the Section 504 Coordinator at [redacted] or faxed to [redacted]. A hearing will be scheduled as soon as practicable, on a date established by the hearing officer. The student is entitled to have his or her parents or guardians participate in the hearing and to be represented by counsel at his/her own expense. If either the district or the student is not satisfied with the hearing officer's decision, there is a right to appeal to federal court.

Grievance Process

A grievance procedure is provided to address issues not eligible for the impartial due process hearing which cannot be resolved at the building level. The Grievance Form is to be completed and sent to the Section 504 Coordinator within five (5) school days of the decision being appealed. The review by the Section 504 Coordinator may include a meeting with the student and/or parent(s), meetings with school staff, as appropriate, and a review of the file and supporting documentation. Based on this review, the Section 504 Coordinator will make a determination in writing to grant or deny the appeal. The

determination will be issued promptly and is final.

The grievance procedure may also be used to address identification, evaluation or placement issues, if parents desire. If the grievance process is elected to address any of these issues, parents retain their right to an impartial due process hearing. The impartial due process hearing procedure will not be considered an appeal of the 504 Coordinator's determination of the grievance. Issues relating to the identification, evaluation or placement can be presented to the hearing officer, even if not raised in the grievance procedure.

Department of Education -- Office for Civil Rights

Parents can file a complaint with the Regional Office of Civil Rights with respect to Section 504 matters. Contact information is found in the Notice of Parents and Student Rights.

Notice of Parent and Student Rights

(Relevant Portions)

Parents of disabled student have the right to:...

- file a complaint related to decisions or actions by the district:

United States Department of Education Office for Civil Rights
One Petticoat Lane
1010 Walnut Street, Suite 320
Kansas City, MO 64106
Telephone: (816) 268-0550

- request an impartial due process hearing regarding their student's identification, evaluations, educational program or placement. The parent and the student may take part in the hearing and have an attorney represent them, at their cost. Hearing requests must be made to the district ADA/Section 504 Coordinator listed below.
- file a grievance to address issues not eligible for an impartial due process hearing which cannot be resolved at the building level. The grievance procedure may also be used to address identification, evaluation or placement issues, if parents desire. The Grievance Form is to be completed and sent to the Section 504 Coordinator within five (5) school days of the decision being appealed. The review by the Section 504 Coordinator may include a meeting with the student and/or parent(s), meetings with school staff, as appropriate, and a review of the file and supporting documentation. Based on this review, the Section 504 Coordinator will make a determination in writing to grant or deny the appeal. The determination will be issued promptly.

Resolution

Prior to OCR's completion of its investigation, the District expressed an interest in engaging in resolution negotiations pursuant to Section 302 of the *Case Processing Manual*.²

On August 17, 2017, the District submitted a signed Resolution Agreement (Agreement) that, when implemented, will fully address the allegation of this complaint.³

OCR considers the allegation of this complaint resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, we will close the complaint. If the District fails to carry out the Agreement, OCR may resume investigating the complaint.

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 Complainant 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 personal privacy.

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.

If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXX@ed.gov.

Sincerely,

Anne Bradley
Acting Supervisory Attorney

Enclosure

² The *Case Processing Manual* is available on OCR's website at <http://www.ed.gov/about/offices/list/ocr/docs/ocrspm.html>.

³ The Complainant told OCR she enrolled her children in a different school district; therefore, no individual remedy is included in the resolution agreement.