



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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KANSAS
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May 18, 2017

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Re: Docket # 07161172

Dear Ms. XXXXX:

On April 22, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint alleging discrimination on the basis of disability by your client, the Shawnee Mission School District, Shawnee Mission, Kansas (District). This letter is to confirm that the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve the complaint.

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 (FFA); and
- 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.

As a Recipient of FFA 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>.

OCR investigated whether the District discriminated against the Student on the basis of his disabilities when the District:

- 1) failed to provide the Student access to the school building's resource and support services, and by not providing the option of completing assignments on paper as opposed to computer and orally as opposed to written when appropriate as required by his Section 504 plan; and
- 2) failed to evaluate the Student prior to the change of placement arising from the numerous in-school suspensions which restricted the Student from his teachers, coursework,

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lunchroom, and access to other students.

On July 19, 2016, OCR sent notification letters to the Complainant and the District, including a data request to the District. On May 10, 13, and November 10, 2016, OCR conducted telephone interviews with the Complainant. On September 19, 2016, the Complainant and the District participated in the Early Complaint Resolution process, which was unsuccessful. On September 26 and 30, 2016, the District provided a response to OCR's data request. Prior to conducting interviews of District employees, on January 5, 2017, the District expressed to OCR an interest in engaging in resolution negotiations pursuant to Section 302 of OCR's *Case Processing Manual*.¹

ALLEGATION 1

OCR investigated whether the District failed to provide the Student access to the school building's resource and support services, and to the option of completing assignments on paper as opposed to computer and orally as opposed to written when appropriate as required by his Section 504 plan

Legal Standard

To be afforded protection under the regulation implementing Section 504, a person must be an individual with a disability. The Section 504 regulation at 34 C.F.R. § 104.3(j)(1) defines a person with a disability as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. The Title II regulation at 28 C.F.R. § 35.104 defines an individual with a disability as a person who has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or is regarded as having such an impairment. The regulation defines a qualified individual with a disability as an individual with a disability who, with or without reasonable modification to rules, policies, or practices, meets the essential eligibility requirements for the receipt of services or for participation in programs or activities provided by a public entity.

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) requires recipients of FFA that operate a public elementary or secondary education program, such as the District, to provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the individual's disability. The regulation implementing Section 504 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). As stated in the Section 504 regulation at 34 C.F.R. § 104.33(b)(2), a school district may satisfy its obligation to provide an appropriate education to a student with a disability by implementing an individualized education program (IEP) developed

¹ OCR's *Case Processing Manual* is online at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

for the student in accordance with the Individuals with Disabilities Education Act (IDEA). The process requirements of the regulation implementing Section 504 at 34 C.F.R. §§ 104.32, 104.35, and 104.36 contain specific requirements concerning identification and location, evaluation and placement, as well as due process procedures. The regulation at 34 C.F.R. § 104.32 requires school districts to annually identify and locate qualified students with disabilities within their jurisdiction who are not receiving a public education and provide notice to their families of the district's obligations under Section 504.

A school district's failure to implement key aids, services or accommodations/modifications identified in the IEP or Section 504 plan of a student with a disability may deny the student a FAPE and, thus, violate Section 504 and Title II. However, not every failure to implement an aid, service or accommodation/modification in an IEP or Section 504 plan will result in a denial of a FAPE. 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 district's services, programs and activities. Except in extraordinary circumstances, OCR does not review educational decisions about the appropriateness of specific aids and services identified in a student's IEP or Section 504 plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

Under 28 C.F.R. § 35.103, the Title II regulation does not set a lesser standard than that under Section 504. Accordingly, OCR interprets the Title II regulation to require public entities to provide a FAPE to students with disabilities to the same extent as is required under the Section 504 regulation. Under the Title II regulation at 28 C.F.R. § 35.171(a)(3) OCR uses its Section 504 procedures to investigate and analyze Title II complaints.

To determine whether discrimination on the basis of disability occurred, OCR looks at whether the preponderance of evidence establishes that, 1) the District receives FFA from the Department; 2) the Student is a qualified individual with a disability; 3) the District's employees knew or had reason to suspect that Student was an individual with a disability who needed special services or related services; 4) the District failed to provide the Student special education and/or related services designed to meet her individual educational needs; and 5) the District's failure to provide Student special education and/or related services designed to meet her individual educational needs as adequately as the needs of nondisabled students are met denied her a FAPE.

Preliminary Facts

OCR interviewed the Complainant on May 10, 13 and November 10, 2016, by telephone. The Complainant told OCR that the Student's Section 504 plan ensures that he has access to all building resources. The Complainant told OCR there were two Board Certified Behavior Analysts (BCBA(s)) who worked at the Student's school but the Student did not have appropriate access to the BCBAs as required by his Section 504 plan. The Complainant told OCR the Student has a history of severe behavior outbursts including yelling, cursing and threatening and that this behavior may escalate if he is isolated.

The Complainant told OCR that she was unaware of the BCBAs until the last three weeks of the

school year. After she complained about the Student's in-school-suspensions, the Student was provided access to one of the BCBA's. The Complainant told OCR that the BCBA who worked with the Student told her that she was unaware that the Student had a Section 504 plan until then.

The Complainant told OCR that she had an oral agreement with the District to withhold computer access from the Student but the District failed to withhold computer access from the Student. The Student's Section 504 plan directed that the Student should complete homework assignments on paper rather than on the computer. The Complainant told OCR the Student never received homework during in-school-suspension and therefore the portion of his Section 504 plan that deals with completing his homework assignments on papers was not applicable to him.

The Student's educational records show that the District evaluated the Student to determine if he was eligible for special education services pursuant to an Individualized Education Program (IEP) as reflected on the October 26, 2015 initial evaluation report. The report states that the District determined the Student was a child with a disability but did not qualify for special education services pursuant to an IEP. The District provided the Complainant with written notice of a Section 504 team meeting held on November 9, 2015, which resulted in the Student's Section 504 plan (dated November 19, 2015). The Student's Section 504 plan includes the following supports:

- Extended time on assignments and assessments as needed;
- Shortened assignments as needed to show mastery. Homework assignments need to be paper copies with supporting material as student will not have internet access at home. Student will not lose points for last assignments as long as they are turned in by the end of the quarter;
- Student may meet with school counselor or school social worker as needed;
- Student may utilize building wide behavior supports as needed;
- Student may be seated in the least distractible environment by the teacher as needed;
- Parents will utilize skyward/google classroom to follow Student's progress in class and to track any missing assignments; and
- Parents will email teachers weekly and teachers will respond notifying parents of any long term projects or assignments.

The District responded in a letter dated February 24, 2016, to the Complainant's request that the Student be evaluated for an IEP. The District's letter asked the Complainant to submit any updated data she had to the Student's multidisciplinary team to consider when determining whether the Student is eligible for an evaluation.

The Student's psychologist sent the District a letter dated March 1, 2016, explaining the Student's needs and requesting the school provide more accommodations and therapeutic support for him.

Resolution of Allegation 1

Prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy

enclosed) on May 18, 2017 that, when fully implemented, will address Allegation 1 of the complaint. The Agreement requires the District to convene a multidisciplinary team to determine whether the Student's suspensions were a manifestation of his disability and, if so, ensure that any information related to disciplinary incidents in which the Student was involved at the School during the 2015-16 school year will not be used detrimentally against the Student. The District will also determine whether the Student suffered any educational loss due to a failure to fully implement the Student's Section 504 plan and, if so, whether the Student should receive compensatory education services.

In addition, the Agreement requires the District to provide training to District staff regarding compliance with Section 504 and Title II and the District's Section 504/Title II policies. Please consult the Agreement for further details.

ALLEGATION 2

OCR investigated whether the District failed to evaluate the Student prior to the change of placement arising from the numerous in-school suspensions which restricted the Student from his teachers, coursework, lunchroom, and access to other students.

Legal Standard

The Section 504 regulation 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 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 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 development and implementation of an individualized education program (IEP) or Section 504 Plan is one means by which FAPE may be provided.

The Section 504 regulation at 34 C.F.R. §104.35(a) requires a recipient to conduct an evaluation in accordance with the requirements of 34 C.F.R. §104.35(b) 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 initial placement of the person in regular or special education, and any subsequent significant change in placement. OCR's interpretation of this requirement is that an exclusion of more than 10 days (e.g., a suspension or expulsion) is a significant change in placement. Therefore, in order to implement discipline that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student in accordance with the provisions of 34 C.F.R. §104.35.

A series of suspensions that are each ten days or fewer may also constitute a significant change in placement. The determination of whether a series of suspensions creates a pattern of exclusion that constitutes a significant change in placement must be made on a case-by-case basis taking into consideration factors including: (1) the length of each suspension; (2) the proximity of the suspensions to each other; and (3) the total amount of time the student is suspended.

Where a proposed suspension or expulsion would constitute a significant change in placement, after providing notice, a school district must conduct a reevaluation of the student. The school district must first obtain information to determine whether the behavior in question is caused by or related to the student's disability. A group of persons who are knowledgeable about the student and the meaning of the evaluation data must make the determination about whether the student's behavior in question is caused by or related to the student's disability. This determination is often referred to as a "manifestation determination." Because the manifestation determination is part of a FAPE-required reevaluation, a parent has the right to contest the determination.

If the group responsible for the manifestation determination decides that the behavior that resulted in misconduct is a manifestation of the student's disability, the proposed suspension or expulsion for the student's behavior would be on the basis of the student's disability. Section 504 prohibits long-term suspension (more than 10 days) or an expulsion for behavior caused by or related to the student's disability. The group responsible for placement decisions must then decide if the student's current placement is appropriate. The school district must comply with the Section 504 requirements applicable to placement, including tailoring the decision-making about services and setting to the individual student's behavior, caused by or related to the student's disability. Consideration of whether the current placement is appropriate necessarily includes whether the school implemented the student's current Section 504 plan, including by providing services required by the plan to address the student's behavior. To the extent that the group determines that there are additional services necessary to provide FAPE to the student and that those services would also enable the student to be in the regular education setting, the school is responsible for ensuring that the student receives these services. To the extent that the group determines that placement in the regular education environment with supplementary aids and services cannot be achieved satisfactorily, the school must nonetheless place the student so that she or he is educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability. The student's parent can contest the placement decision through the District's due process procedures.

Preliminary Facts

OCR interviewed the Complainant on May 10, 13 and November 10, 2016, by telephone. The Complainant told OCR the Student has a history of severe behavior outbursts including yelling, cursing and threatening and that this behavior may escalate if he is isolated.

The Complainant told OCR that the Student began to receive frequent suspensions in the 6th grade. The Complainant told OCR the Student was twice hospitalized in a psychiatric hospital for five-day stays during the spring of 2016. From January of 2016 until the last three weeks of the 2016 school year, the Student was placed in the in-school-suspension/recovery room time for

his behavior outbursts and while there, the Student was denied access to teachers, teaching material, the lunchroom and other students. The Complainant told OCR when the Student was assigned to in-school-suspension, she would drop him off at school and he would sit in a separate room for the entire day while doing coursework and eating lunch. The Complainant told OCR that the Student complained to her that the teacher assigned to watch him in the room was unable to answer his questions and he failed every course during the time he was assigned to in-school-suspension.

The Complainant told OCR that she began complaining to the District about the Student's in-school-suspensions in January of 2016 and requested they reevaluate the Student for an IEP. The Complainant told OCR that in February of 2016 she requested that the school place the Student back in the classroom, but he remained in in-school-suspension. The Complainant told OCR that she never met with the District to discuss the Student's in-school suspensions.

The Complainant told OCR that there was no meeting or hearing held to discuss the in-school-suspension. The Complainant told OCR she was told the Student must earn the right to be able to go back to class and the lunchroom. The Complainant told OCR that the Student has returned to class, but is behind academically and socially due to the long period of isolation from the classroom.

OCR reviewed the Student's attendance record between August 12, 2015, and May 23, 2016. The Student received in-school suspension in the student recovery room for more than 10 consecutive days from February 4, 2016- February 18, 2016. The Student also received in-school suspension from February 25, 2016 through April 8, 2016 that resulted in him being removed from the regular classroom periodically.

The District reevaluated the Student to determine whether he should receive special education pursuant to an IEP and prepared an April 6, 2016 initial evaluation report. The report states the following:

- The Complainant originally requested an IEP in May 2015 but the Student was determined ineligible for special education services.
- The District created a Section 504 plan for the Student in November 2015 to address his diagnosis of Oppositional Defiance Disorder and Attention Deficient Hyperactivity Disorder.
- The Student had 14 office referrals between November 12, 2015, and March 30, 2016. The Student received five referrals for disruption, four referrals for disrespect, three referrals for language, and two referrals for insubordination.
- The Complainant requested another special education evaluation as a result of the increase in instances of negative school behaviors and a significant change in the Student's mental health status.
- The Student was admitted to a psychiatric hospital on January 26, 2016, and returned to school on February 1, 2016. The Student was again hospitalized on February 19, 2016 through February 24, 2016.
- The Student received support from a District social worker on five occasions between February 8, 2016 and March 30, 2016, and received support from a special education

teacher during his time in an alternate setting as he transitioned from the psychiatric hospital back to school.

- On March 21, 2016, the Student transitioned from the in-school suspension/recovery room to a classroom in the same building as the BCBA. The Student attended two classes per day and earned the chance to attend an additional class period beginning March 21, 2016.
- During the 2015-16 school year, the Student had access to guidance counselor and the ability to use a “hot pass” in order to leave the classroom as needed.

The Student’s psychologist sent the District a letter dated April 13, 2016, recommending the Student receive services related to his Autism Spectrum disorder while in an academic setting and potentially seek out alternatives to the public school setting. The Student’s psychologist also recommended that the Student receive a consistent environment with a low teacher to student ratio and few social distractions from peers in order to be successful. The psychologist recommended that the Student participate in a social skills group to help him develop skills to better navigate social situations with staff and peers.

The District determined that the Student was eligible for special education and drafted his initial IEP, dated April 26, 2016, which includes a Behavior Intervention Plan (BIP).

The Complainant and the District attended mediation and reached a mediation agreement on May 13, 2016. The mediation agreement included the following provisions related to the Student’s education:

- Addition of an IEP goal to include maintaining a “C” average;
- Change criteria for goal one to use a rubric, parents requested this data be collected in the first two weeks of the Fall 2016 school year;
- Weekly communication via phone or email with both parents and student regarding academic and behavior progress will be added as an accommodation; and
- The IEP team will have monthly meetings to include the BCBA and/or Behavior Consultant (in the event the BCBA is unavailable) this will be added to supplementary aides and services section of the proposed IEP.

Resolution of Allegation 2

Prior to the completion of OCR’s investigation, the District submitted a signed Agreement that, when fully implemented, will address Allegation 2 of the complaint. The Agreement requires the District to convene a multidisciplinary team to determine whether the Student’s suspensions were a manifestation of his disability and, if so, ensure that any information related to disciplinary incidents in which the Student was involved at the School during the 2015-16 school year will not be used detrimentally against the Student. The District will also determine whether the Student suffered any educational loss due to a failure to fully implement the Student’s Section 504 plan and, if so, whether the Student should receive compensatory education services.

In addition, the Agreement requires the District to provide training to District staff regarding compliance with Section 504 and Title II and the District’s Section 504/Title II policies. Please

consult the Agreement for further details.

OCR considers the allegations of your 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, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR is committed to prompt and effective service. 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,

/S/ Earlene Gordon

J. Earlene Gordon
Supervisory Attorney

Enclosure

cc: Dr. Randy Watson
Commissioner of Education (via email)