



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

ONE PETTICOAT LANE
1010 WALNUT STREET, SUITE 320
KANSAS CITY, MO 64106

REGION VII
KANSAS
MISSOURI
NEBRASKA
OKLAHOMA
SOUTH DAKOTA

December 1, 2017

Dr. Kelly Glodt, Superintendent
Pierre School District
211 South Poplar Ave.
Pierre, SD 57501
Kelly.Glodt@k12.sd.us

Re: Pierre School District
OCR Case Number 07-16-1216

Dear Dr. Glodt:

On May 27, 2016, the U.S. Department of Education, Office for Civil Rights (OCR) received a complaint against Pierre School District (District), Pierre, South Dakota, 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.

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.

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>.

OCR investigated your allegations that the District discriminated against the Complainant's son (Student) on the basis of disability by denying him a free and appropriate public education (FAPE) when it:

1. failed to identify and evaluate the Student as a student with a disability in violation of 34 Code of Federal Regulations (CFR) §104.32 et. seq.;

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

2. implemented a significant change in placement without first evaluating the Student when it suspended the Student from school for more than ten school days without determining whether the conduct for which he was disciplined was a manifestation of his disability, in violation of 34 CFR §104.32 et. seq; and
3. required the Student’s parent to pay for and obtain a risk assessment and psychiatric evaluation before the Student could return to school, in violation of 28 C.F.R. § 35.130(f).

Prior to the conclusion of the investigation, the District submitted a signed Resolution Agreement (Agreement) November 30, 2017, (copy enclosed) that, when fully implemented, will resolve the allegations.

In the remainder of this letter, your client is referred to as “the Complainant.” To protect individuals’ privacy, the names of employees, witnesses, and other parties also were not used in the letter.

During the investigation, OCR considered documentation the Complainant and the District submitted, including contemporaneous emails and records, District policies and procedures, and the Student’s attendance records, evaluations and assessments. OCR interviewed the Complainant, the Director of Special Services (Director), the elementary school principal (Principal), the special education teacher (SPED Teacher), the 5th grade general education teacher (Gen. Ed. Teacher), the guidance counselor (Guidance Counselor), the Student’s STAT team advocate (Advocate), and the school resource officer (SRO).

Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.3(j) 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 Section 504 regulation at 34 C.F.R. § 104.3(l)(2) defines a qualified person with a disability for elementary and secondary educational services as a disabled person of an age during which nondisabled persons are provided such services.

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

The Section 504 regulation at 34 C.F.R. § 104.35 requires school districts to evaluate 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 or any subsequent significant

change in placement. This regulation also states when interpreting evaluation data and making placement decisions, school districts must draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, and ensure that placement decisions are made by a group of persons knowledgeable about the person with disabilities, the meaning of the evaluation data, and the placement options.

A school district's failure to implement key aids, services, or accommodations/modifications identified in a Section 504 plan or IEP for a student with a disability may deny the student a free appropriate public education and, thus, violate Section 504 and Title II. OCR reviews the evidence to determine whether a student's needs were determined on an individualized basis, whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation, and whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Not every failure to implement an aid, service, or accommodation/modification in a Section 504 plan automatically constitutes a denial of an appropriate education. 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 Section 504 plan as long as a school district complied with the procedural requirements of the Section 504 regulation.

The Title II regulation does not set a lesser standard than the standard established under the Section 504 regulation. Accordingly, OCR interprets the Title II regulation to require public entities to provide a free appropriate public education to a person with a disability 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 Title II complaints.

Preliminary Investigative Findings

The Student is a thirteen-year-old male diagnosed with unspecified depressive disorder, conduct disorder, attention deficit hyperactivity disorder, anxiety, and reactive attachment disorder.

The Student spent the 2013-14 school year at Volunteers for America (VOA), a residential treatment facility for children and adults with disabilities in Sioux Falls, South Dakota. The Student was discharged from VOA at the end of the 2013-14 school year, and was subsequently enrolled in the District for the 2014-15 school year.

The Principal told OCR that when a parent/guardian comes to enroll a student in the District, the parent/guardian is required to complete an enrollment packet and one of the documents in the packet is a request for records from the student's prior school. When the records come in, the Principal reviews them and takes any appropriate actions based on them. According to the Principal, the Student's records from VOA indicated the Student had an individualized education plan (IEP) for a time, but had tested off the IEP and was no longer receiving special services at the time of his discharge. The Principal stated this piece of academic history was added to the Student's individual tracking record so that his teachers in the District could monitor him closely

for any signs that he was beginning to struggle again. The Principal also stated that if relevant information is excluded from the written record due to privacy concerns, he typically shares it verbally with teachers, but did not state a specific recollection of doing so in this case.

OCR reviewed the documents the District received from VOA, and noted that in addition to the IEP, VOA supplied the District with progress notes indicating the Student's diagnoses of ADHD and ODD.

According to the Principal, the Student presented fairly well both behaviorally and academically at the start of the 2014-15 school year. Academically, he performed at the B/C level throughout the year. As the year progressed, he began to exhibit some negative behaviors. The Counselor told OCR those behaviors included conflict on the playground (e.g. altercations with other students) and non-compliance in the classroom (e.g. refusal to do work). OCR reviewed the four discipline referral forms in the Student's file from the 2014-15 school year. The documented incidents included the following behaviors: hitting, spilling another student's lunch, inappropriate language, bringing a lighter to school and refusal to do work.

According to the Principal and the Advocate, the Student's fourth grade teacher attempted different strategies to deal with his behaviors. She sought help from the student-teacher assistance team (STAT team) when his behaviors persisted despite her efforts. The Principal stated that the STAT team is comprised of teacher representatives from each grade level, a counselor, two special education staff members and occasionally the Principal. The Director of Special Services stated that STAT team members are trained in and utilize the Masonic Model Student Assistance Program.¹

According to documentation OCR reviewed, the STAT team first reviewed the Student's case on September 9, 2014. At that time, his teacher told the STAT team that the Student "will not ask for help, gives up easily, [has] no peer relationships, [is] disrespectful, appears unhappy, [takes] no responsibility of actions, [and is] lethargic." In keeping with the STAT team's methodology, at that initial meeting, a fifth grade teacher was appointed to serve as the Student's case manager/advocate (Advocate). According to the Advocate, her role was to gather information about the Student that would help the team come up with interventions that had not yet been tried by the teacher. The Advocate sent a letter to the Complainant to gather information, and also had the Student's teachers complete questionnaires. The Advocate presented her findings at the next meeting, and both the Advocate and the Counselor stated that during the remainder of the school year, the STAT team assisted the classroom teacher in developing a behavior plan for the Student, monitored the effectiveness of the plan and adjusted it as necessary. The plan included modifying the amount of work the Student needed to complete, use of some Love and Logic[®] techniques and motivating the Student through a system of rewards. According to the Counselor, Principal and Advocate, a special education teacher who was a member of the STAT team also

¹ According to the Director, the Masonic Model emphasizes understanding why students may struggle and helps teachers and other staff recognize different signs of struggle; it stresses the importance of the in-school relationship between staff members and the student, as well as an understanding a student's family dynamics; and it helps staff learn possible interventions and strategies and emphasizes the importance of building a list of agencies in the community as a possible resource. The Director stated about half of the District's teachers and staff members have received Masonic Model training over the last ten years. Some of those who have received the trainings have also received refresher training.

volunteered her planning time in order to provide the Student with 1:1 daily support; this intervention was effective, and the Student and the special education teacher formed an extremely positive relationship. According to the Counselor, the STAT team did not address the Student's behaviors on the playground (e.g. conflict and language) as those were not academic issues. According to the Principal, the STAT team briefly discussed referring the Student for evaluation for an IEP or Section 504 plan, but did not want to do so before seeing if the STAT team interventions worked. The Counselor and Advocate recalled a short discussion of possible referral for an IEP, but did not recall any discussion regarding referring the Student for a Section 504 plan; they stated the referral for an IEP was not made because the Student was performing at grade level academically, when his behaviors did not interfere. District witnesses told OCR that during the remainder of the year, the Student had some better days and some worse days, but overall, it seemed that the interventions in place were working. The Student was not referred for evaluation at any point during the 2014-15 school year.

According to the Advocate, the Student grew in size substantially over the summer break; at the start of the 2015-16 school year he was over 5'4 and had gained weight. A number of District witnesses told OCR that after a brief period at the beginning of the year, the Student began displaying aggressive behavior (e.g.: "getting in your face, pushing on you a little, sometime flipping furniture") and increased non-compliance in the classroom. His language also became more inappropriate (e.g.: "swearing, some sexual talk that is not acceptable, mouthy, defiant"). These changes began in mid-September 2015 and gradually escalated.

OCR reviewed the eight discipline referral forms added to the Student's discipline file from September 9, 2015 through November 9, 2015; in those forms, the Student's escalating behaviors are evident. During that two month time period, the Student received four in-school suspensions (ISS) and four days of out-of-school suspension (OSS) in connection with his behaviors.

The Gen. Ed. Teacher stated that initially, when the Student's behaviors began to escalate, she tried to work with him to see if he could self-regulate. When that was unsuccessful, she wrote a behavior plan with him. OCR reviewed the behavior plan, dated October 27, 2015. The plan was based on a points system, where the Student earned points for following the teacher's instructions. In the plan, the Student and Gen Ed. Teacher included an array of rewards the Student could earn if he met his points threshold for the day. The plan stated that the Student would roll a die in order to choose from the array of rewards. The Gen. Ed. Teacher stated she is not a member of the STAT team, but attended one STAT meeting in early 2015-16 to present the Student and try to get some ideas from the team members.

The Gen. Ed. Teacher stated that after implementing the behavior plan, the Student's behaviors worsened. He was consistently swearing out loud in class, lying on the floor refusing to do work, refusing to go to other classes like PE, and acting up when he earned points through his behavior plan if he rolled a non-preferred reward. The Gen. Ed. Teacher added that the Student's physical aggression also increased. She explained that because the Student is larger in size relative to his peers, all he needed to do was stand up and move his arms around to make others around him feel threatened; she also recalled on incident where she was trying to keep him in the classroom and the Student physically pulled her part-way down the hallway. In an email dated November 9, 2015, to the Principal, Counselor, SRO and the Advocate, the Gen. Ed.

Teacher described the Student's behavior that day and noted:

I truly have no idea what we should do to fix this situation... but I do know that I am not trained/equipt to deal with a student with his needs and I think I can safely say neither is our school.

According to the Principal, the Student's behavior peaked on November 18, 2015. The behavior incident report and multiple District witnesses described the incident as follows: The Student bullied another student on the playground prior to the start of the school day. When a District staff member came to speak with the Student about his behavior, the Student initially denied it, using disrespectful language, and stated that the other student had bullied him. The District staff member then confirmed what happened with another student who was involved, and returned to the Student to confront him about it. At that point, the Student began using profane language, refused direction from the staff member, and pushed the staff member when he tried to stop the Student from re-joining the other students. The Principal was called to deal with the Student. When he arrived, the Student was already in the school building. There was another class walking in the hall and the Principal was concerned that the Student would hurt other students. Therefore, the Principal told the Student he needed to go to the office and used his hand to physically guide the Student there. The Student began to walk, but then stopped. After beginning to walk again, the Student stopped a second time, and when prompted to continue, he punched the Principal twice. When they reached the office, the Student began throwing items off one of the secretaries' desks and almost tipped over the printer. The Principal called the SRO for assistance. When the SRO arrived, the Student agreed to sit down but refused to speak with her. The SRO told OCR that the Student refused to go with his uncle, who arrived to pick him up. Ultimately the SRO took him to the Pierre Police Department so he would be out of the school and could not cause another incident. The Student's grandmother picked him up from there.

The Principal stated that assaulting a staff member results in an automatic three day suspension, so he initially suspended the Student for three days. However when he, the Counselor, the SRO and her advisor, the Gen. Ed. Teacher, the Complainant and the Student's grandmother met shortly after the incident they decided that the Student would not return to school until he underwent a risk assessment. The Principal told OCR the Student was only formally suspended the first three days; after that, the parties agreed he would not return pending the risk assessment, but he was not officially suspended.

The Counselor explained the risk assessment was necessary as everyone was concerned that the Student's behavior had deteriorated to the point that he was a threat to himself and others. The District told the Complainant that it was his responsibility pay for the risk assessment. Capital Area Counseling (CAC) conducted the risk assessment over six days in November and December, and completed the written report on December 9, 2015.

The District reviewed the risk assessment on December 11, 2015, at a meeting attended by the Principal, Gen. Ed. Teacher, Advocate, CAC evaluator, two others from CAC, the Complainant and the Student's grandmother. At the meeting, the CAC evaluator went through the risk assessment findings and shared his recommendation that the Student be evaluated by a

psychiatrist to determine the appropriate way to assist the Student. According to the Principal, as a team, they decided to follow the advice of the CAC evaluator and told the Complainant the Student could not return to the District until the Student received a psychiatric evaluation.

The Principal told OCR he helped the Complainant arrange an appointment for a psychiatric evaluation of the Student at the Avera Medical Group in Sioux Falls, which is a distance of over three hours by car from the District. The District paid for the Complainant and the Student's transportation to and from Sioux Falls. The Complainant told OCR that his insurance paid for most of the evaluation, but he spent \$20 on the insurance copay. The psychiatric evaluation, dated February 24, 2016, was eight lines long. It stated:

The above named patient is/was seen at our clinic by Alauldeen H. Ali, MD, RES and was given the diagnoses of Unspecified Depressive Disorder, Conduct Disorder, Attention Deficit Hyperactivity Disorder, Anxiety unspecified, and Reactive Attachment Disorder. The general treatment plan is to have the child continue with medication management to relieve symptoms to improve functionality with daily activities. Please call Avera Medical Group University Psychiatry Associates at (---) --- - ---- with any questions or concerns.

Multiple District witnesses told OCR that the psychiatric evaluation they received was not what the District expected. The Gen. Ed. Teacher told OCR the evaluation did not provide any helpful information. The Principal told OCR he had been expecting a lot more information in terms of how the District could help the Student. The Principal reached out to the psychiatrist by phone to get more information. He ended up speaking with an associate from the psychiatrist's office who explained the evaluation took under two hours and the one page report was all that would be generated.

In late February or early March, the Principal, Counselor, Gen. Ed. Teacher, Complainant and the Student's grandmother met to review the psychiatric evaluation and discuss options for the Student's return to school. A few days later, the Principal met with just the Complainant and the Student's grandmother to present the educational plan for the Student's return. As part of the plan, the Student would come to school for only half a day. The Principal explained that since the Student tended to struggle the most in the less structured classes which took place in the afternoon (e.g. PE and music), implementing a half day schedule was intended to help the Student by minimizing his time in the less structured environment. In addition, the Gen. Ed. Teacher told OCR that the Student helped the PE teacher instead of attending recess in order to provide him with structure during an otherwise unstructured time. Behaviorally, the Counselor and Gen. Ed. Teacher told OCR it was decided that if the Student did not follow directions, he would receive one reminder and if he chose not follow that reminder, he would be sent to the back of the room after which he would be sent to a different classroom or referred to office. The District included a counseling session for him once a week. The team also created a schedule where the Student moved from classroom to classroom so he was not with any one teacher for the whole morning. According to the Principal, he does not have a record that the idea of referring the Student for a 504 plan or an IEP was discussed at that time.

The Student returned to school on March 11, 2016. The Principal, Gen. Ed. Teacher and Counselor told OCR that initially, he seemed to do better on the modified schedule. On April 11, 2016, however, he had a behavioral incident where he tripped children on the playground and threatened a staff member, cursing her and telling her he would be waiting for her at her car after school to beat her. As a result, he was initially suspended for five days. The Principal told OCR that after consulting with the SRO officer, the Counselor and other, he followed up the five day suspension with a long-term suspension of the Student for the remainder of the school year.

The Principal told OCR that during the summer before the 16-17 school year, the Student was evaluated for an IEP after the Complainant's advocate requested one. As a result of the evaluation, the Student was found to be a student with a disability and classified as under the category of Other Health Impairment.

Voluntary Resolution Agreement

Prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy enclosed) on November 30, 2017 that, when fully implemented, will address the allegation of this complaint. The Agreement requires the District to reevaluate the Student, consider the evaluation at a Section 504 meeting, provide the Student with academic tutoring and/or other services, reimburse the Complainant for expenses incurred in obtaining the risk assessment and psychiatric evaluation, and conduct training in the Student's elementary and middle school on Section 504 as it applies to students with interfering behaviors.

OCR considers this case resolved as of the date of this letter. OCR 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 its investigation or take other action.

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.

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 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.

OCR is committed to prompt and effective service. If you have any questions, please contact, XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or at (877) 521-2172 (telecommunications device for the deaf), or by email at elana.simha@ed.gov.

Sincerely,

Anne Bradley
Acting Supervisory Attorney