



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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OKLAHOMA
SOUTH DAKOTA

December 3, 2021

SENT VIA EMAIL

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Re: Rapid City Area Schools 51-4
OCR Case Number: 07161898

Mr. XXXX:

On August 23, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against the Rapid City Area Schools 51-4 (District) alleging disability discrimination. This letter is to confirm that the District has voluntarily entered into an agreement to resolve Allegation 1 of the complaint, and to inform you that OCR is dismissing Allegations 2 and 3 of the complaint.

On October 16, 2017, OCR notified the District that OCR was opening this complaint for investigation. OCR opened for investigation the following allegations:

- 1) Whether the District discriminates against students with disabilities by systemically denying them a free appropriate public education (FAPE) by:
 - a. failing to identify and conduct timely evaluations of students suspected of having dyslexia and other disabilities, including using Response to Intervention (RTI) strategies to delay or deny identification and evaluation of those students, in violation of 34 C.F.R. §§104.31-104.36, 28 C.F.R. § 35.103(a), and 28 C.F.R. § 35.130(b)(1)(ii) and (iii); and
 - b. imposing a cap on the number of students who can receive RTI services and be evaluated for dyslexia and other disabilities, in violation of 34 C.F.R. §§104.31-104.36, 28 C.F.R. § 35.103(a), and 28 C.F.R. § 35.130(b)(1)(ii) and (iii).
- 2) Whether the District retaliated against your client (Complainant) because of her advocacy efforts for South Dakota House Bill 1198,¹ by increasing the monitoring of your client's

¹ Based on information obtained by OCR, the Complainant's advocacy efforts for South Dakota House Bill 1198

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performance, providing negative performance evaluations, requiring a contract with specific provisions on May 4, 2016, and engaging in retaliatory harassment in the workplace, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. 35.135.

- 3) Whether the District retaliated against the Complainant because of her advocacy efforts for South Dakota House Bill 1198, and because she filed an internal discrimination and harassment complaint with the District on May 16, 2016, by not renewing her contract as XXXX XXXX in the spring of 2017, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. 35.135.²

Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, prohibit discrimination on the basis of disability by recipients of federal financial assistance. The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, and prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. OCR has Section 504 enforcement jurisdiction over recipients of federal financial assistance from the Department.

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, prohibit discrimination on the basis of disability by public entities. The Title II regulation, at 28 C.F.R. § 35.134, contains a prohibition against retaliation. OCR has Title II enforcement jurisdiction over public school districts.

Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II. Additional information about the laws OCR enforces is available at <http://www.ed.gov.ocr>.

Allegation 1 (Systemic Allegations)

To date, OCR has reviewed numerous documents submitted by the Complainant and the District concerning the systemic allegations in this complaint, and has conducted interviews of three District teachers, including the Complainant, and the former Director of Special Education at the District, who was employed from June 2017 to June 2020 (Former Director). A summary of the evidence obtained to date is set forth below. To protect individuals' privacy, the names of employees, witnesses, and other parties were not used in the letter.

The District has been implementing for several years a District-wide, multi-tiered system of supports (MTSS) program that includes interventions focused on the academic and behavioral needs of students in each grade level. During the Complainant's tenure as an Instructional

included attempts to ensure that South Dakota law was aligned with the Individuals with Disabilities Act (IDEA) and other federal laws regarding the obligations of South Dakota school districts to provide child find and evaluation processes for students suspected of having dyslexia, and appropriate services to students with dyslexia.

² After the Complainant filed an OCR complaint on August 23, 2016, OCR obtained supplemental information in April 2017 pertaining to the Complainant's allegation that her contract was not renewed, which OCR has included as part of her complaint allegations.

Support Teacher (IST) at South Park Elementary School (South Park) in the District, the District's MTSS program was reflected in a written document referred to as the RTI Matrix.

The RTI Matrix included three tables - one table each for the areas of literacy, math, and behavioral/emotional. In each table were three RTI tiers of intervention. For each tier, the RTI Matrix identified the following four areas: 1) Instruction or Intervention, 2) Data Collection, 3) Data-Based Decision Rule for Tier Transition (Transition Column), and 4) Tier Transition Meeting/Parent and Staff Involvement.

The Complainant and other teachers at South Park confirmed that the RTI process had three tiers. The Complainant told OCR that Tier I involved students receiving curriculum content in the regular classroom without intervention. She said Tier II was RTI support, and Tier III was referring students for a special education evaluation. Another teacher provided testimony consistent with this explanation of the RTI tiers.

The standards utilized by the District to transition students from the literacy Tier I (classroom curriculum) to literacy Tier II (small group intervention of 3 or fewer students) were as follows:

- The data-based decision rule for Tier II transition is a below-basic score on the text reading level (TRL) and Spelling Inventory portions of the Literacy Assessment. Some grade levels may have no students who are below basic in both TRL and spelling inventory.
- If the number of below-basic students is greater than can reasonably be accommodated in Tier II, the lowest 5% of below-basic students per grade level who do not already receive Tier III (Special Education) services are selected for Tier II transition.
- Students transitioning to Tier II services must have attendance history, vision and hearing screening completed.

The math transition standards for moving from Tier I to Tier II were as follows:

- The data-based decision rule for Tier II transition is the lowest 5% on the District's Math Screener.
- The lowest 5% of students per grade level who do not already receive Tier III (Special Education) services are selected for Tier II transition.
- Students transitioning to Tier II services must have attendance history, vision and hearing screening completed.

The behavioral/emotional transition standard for moving from Tier I to Tier II was an excessive amount of office discipline referrals (ODR). What qualified as an excessive amount was determined by each school based on its unique circumstances.

Transition from Tier II (small group intervention) to Tier III (referral for special education testing/evaluation) was based on a “dual discrepancy” standard for all three areas (literacy, math, and behavioral/emotional) after an RTI team/Tier II Transition meeting determination. With respect to literacy, a student must have been “below basic” as measured by the literacy assessment (first discrepancy), and failing to make progress with a research-based intervention that was implemented with fidelity (second discrepancy). With respect to math transition from Tier II to Tier III, a student must have been in the lowest 5% as measured by the Math Screener (first discrepancy) and failed to make progress with a research-based intervention that was implemented with fidelity (second discrepancy). Transition to Tier III for behavioral/emotional issues involved continuing to meet the criteria for Tier II intervention (first discrepancy) and failing to respond to a research-based intervention that was implemented with fidelity (second discrepancy).

The Complainant and other South Park teachers told OCR that of the “lowest 5%” of students, only three of those students (or sometimes four students) were selected for each Tier II RTI group for literacy and math per grade. Therefore, regardless of how many students were in the lowest 5% of below-basic for literacy, or the lowest 5% for math, there was a cap of 3 to 4 students in each Tier II group who would receive RTI services. For struggling students who did not make the initial 5% cut, or who were in the lowest 5% but were not selected for the Tier II group because it was full, they received regular classroom instruction without RTI intervention, or they received limited help, such as assistance with a missed lesson, or help staying on task for a math game. One teacher stated to OCR that if more than 5% of students were eligible for RTI Tier II support, she would talk to the principal to see which students would get RTI support.

Data and progress for students in the Tier I regular classroom were not documented by the IST teachers. In order to be considered for a special education evaluation in the literacy, math, and behavioral/emotional areas, students at the District had to be receiving RTI Tier II services and not be progressing, according to teachers interviewed by OCR. Therefore, it appears participation in the RTI Tier II intervention was a requirement for consideration for a possible special education evaluation in the areas of literacy, math, and behavioral/emotional, and if students were not receiving Tier II services they were not considered for a special education evaluation.

According to the Complainant and other South Park teachers, the initial 5% limitation of students, and the cap of three students (sometimes four) for Tier II literacy and math groups per grade, resulted in the denial or delay of special education evaluations and services for other students. For instance, since some struggling students were not placed in Tier II for RTI services because they were above the 5% limit, or they were in the bottom 5% but above the 3-student cap for the Tier II group, they were never considered for a special education evaluation, or they were delayed in receiving RTI services and a special education evaluation.

Even those students who were in the lowest 5% and were selected for a Tier II literacy or math group per grade could be denied or delayed a special education evaluation, according to the Complainant and other South Park teachers interviewed by OCR. One teacher told OCR that RTI

Tier II services for students did not start until October of each academic year because they had to test and assess the students first at the beginning of the academic year. Therefore, they did not meet to discuss whether students needed to be tested for special education (for transition to Tier III) until beginning in March of each academic year, and parents were never present for these meetings, contrary to the written parental participation requirement in the RTI Matrix. The teacher also stated to OCR that if they did not test students for special education services by the end of the academic year, then the students would automatically be kept in RTI the next academic year.

Another teacher said there were no cut scores to exit students from RTI Tier II services in math. She said she looked for students trending upward for three consecutive data points, but there were no cut scores to determine adequate progress. She said they kept most if not all students in the RTI groups. She also said they had a transient population, so some students just left, and they would replace them with students in the grade level who were eligible for RTI Tier II services.

Based on interview statements from the Complainant and another teacher, there was another cap on the number of students who could be considered for a special education evaluation by the RTI team, even if students were not making progress during RTI Tier II services. They said that in the 2016 spring semester the IST teachers listed 13 students to move forward to the RTI team for consideration for a special education evaluation (transition to Tier III). However, a special education teacher at South Park told the IST teachers that the school did not have the resources or the time to evaluate all of these students, so they would have to prioritize the students who were most in need or most at risk for failure. They said the special education teacher told them they could only bring 3 to 5 students forward for testing for special education. Therefore, the remaining students had to wait for an evaluation even though they had data points indicating they needed to be tested for special education. The teacher told OCR some of the students were exited from RTI services while she was an IST teacher, but it did not happen often. She said they had students in RTI services for multiple years. The Complainant said she was not able to bring any students forward for a special education evaluation in 2015. In addition, a former teacher told OCR only one of her nine struggling students, whose parents had requested special education referral meetings at the beginning of the 2015-16 school year, was eventually referred for testing.

The Former Director stated to OCR that he is not sure why the 5% limitation was used by the District. He told OCR he believed that the District was trying to focus on Tier II, but people were trained that if you did not make the 5% cut, the student did not get intensive interventions. He said he believed the students not in the lowest group were actually getting some interventions.

The Former Director said he discontinued the 5% rule shortly after he was hired at the District in June 2017. He said he saw the problem with the 5% rule, and he fixed it the first day. He said he never got the sense there were intentional delays by staff, and some delays were caused because the District's sites were overworked.

The Former Director was assigned to investigate the systemic allegations contained in this complaint after OCR issued its notification letter to the District. He said he interviewed all the District school psychologists and interventionists, and some of the school administrators, but

they were not formal interviews. He said he did not interview the Complainant, who was a teacher in the District at that time, and he does not recall writing a report of findings.

The Former Director stated to OCR that he revised the District's RTI program for literacy (the RTI² program), which the District began implementing in August 2017.

The RTI² Handbook does not contain any 5% limitation on the number of students who can receive RTI interventions. However, the Former Director said he did not have an opportunity to revise the RTI program for math before he left the District, and the RTI program for behavioral/emotional issues was assigned to the District's Positive Behavioral Interventions and Supports (PBIS) Coordinator, who revised the PBIS program.

Based on information and testimony received by OCR, it does not appear that discontinuation of the 5% limit was conveyed in writing to all District staff,³ nor was there District-wide training, or a revision of the District's policies or procedures, including Section 504/Title II or IDEA policies and procedures (aside from forms), to specifically clarify that the 5% limitation for Tier II RTI services was discontinued.

The Former Director confirmed that the District had not attempted to identify any students who were suspected of having a disability, but who may have been denied or delayed in receiving an evaluation for special education because of the bottom 5% limitation on students for RTI Tier II services in the areas of literacy and math, or because of the cap on the number of students who could be placed in each RTI group, or the alleged cap on the number of students receiving RTI Tier II services who could be referred to the RTI team for consideration of a special education evaluation.

OCR interviewed the District's current Director of Special Services who stated that it will take approximately a year to get all the data, since the District needs to cull information from approximately 14,000 students in Skyward, the District's student electronic database, as well as individual files in the District's RTI electronic library in Sharepoint. She said the District may need to build new programs to search for the requested data and run several custom reports, which she said is very cumbersome.

On February 25, 2020, the District submitted to OCR additional information, including a written statement entitled *OCR Resolution Agreement Proposal*, by the Former Director, which sets forth past practices of the District pertaining to interventions, screening, evaluating, and placing students. The document describes procedures in the RTI² program that the District said it began implementing in August 2017. In that document, the Former Director explained that, prior to August 2017, the District was using an RTI model based on the 80%, 15%, and 5% model to place students in benchmark, strategic, and intensive groups for instruction. The District changed the program so that it no longer provided reading intervention to what was allegedly only the bottom 5% of students. Instead, intervention materials would be based on the student's data

³ While the Former Director stated to OCR that he sent newsletters with language about elimination of the 5% rule, the District has not yet provided OCR with a copy of those newsletters and it is unclear who received them.

points to an instructional need.

Another change made was to require each District building's IEP team to conduct a pre-multidisciplinary review meeting with the parent/guardian, or other individuals seeking to have the student evaluated, to make the determination to test based on a team decision and not a predetermination by staff. Regardless of the action taken by the team, the parent/guardian is part of the decision, given verbal and written notice of the proposed or rejected actions, and is given copies of their South Dakota Parental Rights in case they want to appeal the proposed or rejected actions on the part of the team.

With respect to the District's screening process, the Former Director stated the District now uses Acadience/DIBELS as its universal screening assessment and progress monitoring tool. These regular reading measurements on students are discussed regularly at building and grade level meetings by staff.

Prior to the completion of OCR's investigation, the District asked to resolve Allegation 1 of the complaint pursuant to a resolution agreement in accordance with Section 302 of OCR's *Case Processing Manual* (CPM), which is available online at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>. OCR determined it would be appropriate to resolve Allegation 1 because OCR had identified concerns that could be addressed through a resolution agreement. On November 24, 2021, the District submitted a signed resolution agreement (Agreement) (copy attached) that, when fully implemented, will address Allegation 1 of the complaint.

The Agreement provides that the District will immediately discontinue any practice or policy of imposing a cap on the number of District students who can be identified and evaluated for suspected learning disabilities, including any cap on the number of referrals from teachers, parents, or others, and the receipt of RTI services. Additionally, the Agreement requires the District to ensure that students enrolled at each District school who are suspected of having a learning disability under Section 504 and Title II are appropriately and timely identified, referred, evaluated, placed, and served based on their individualized educational needs. The District has also agreed to review and revise its policies, and provide training to District administrators and staff.

Finally, the Agreement requires the District to review the educational records of students who attended the District from August 2015 to present and were referred for an initial evaluation but never evaluated, or whose evaluation was inappropriately delayed, and to determine whether such students should be provided compensatory services. Please consult the Agreement for further details.

OCR considers Allegation 1 of this complaint resolved effective the date of this letter. OCR will monitor the District's implementation of the Agreement. When OCR concludes the District has fully complied with the terms of the Agreement, OCR shall close this case.

Allegations 2 and 3 (Individual Retaliation Allegations)

With respect to Allegations 2 and 3 of the complaint, OCR confirmed that the District XXXX XXXX XXXX XXXX XXXX XXXX and the District conducted anti-retaliation training for District administrators on March 10, 2020. In addition, during a telephone conference with the Complainant and her attorney on April 8, 2020, the Complainant stated that XXXX XXXX XXXX XXXX.

CPM Section 108(k) states that OCR will dismiss complaint allegations when OCR obtains credible information indicating that the allegations raised by a complainant are currently resolved. Based on the information and documentation provided by the District and the Complainant, OCR has determined that Allegations 2 and 3 of this complaint have been resolved. Therefore, OCR will take no further action with respect to Allegations 2 and 3, and OCR is dismissing Allegations 2 and 3 pursuant to CPM Section 108(k), effective the date of 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. A 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 that individual filed a complaint or participated in the complaint resolution process. If this happens, that individual may file a complaint with OCR 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, it 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.

If you have any questions, please contact XXXX XXXX, Attorney, at (816) 268-XXXX (voice), or XXXX XXXX, Attorney, at (816) 268-XXXX (voice), or (877) 521-2172 (telecommunicationsdevice for the deaf), or by email at XXXX XXXX XXXX XXXX.

Sincerely,

/s/

Kimberly Lynch
Program Manager, Region VII

Attachment