



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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**REGION VII**  
KANSAS  
MISSOURI  
NEBRASKA  
OKLAHOMA  
SOUTH DAKOTA

May 7, 2018

*Sent via email only to Jon.Meyer@k12.sd.us*

Mr. Jon Meyer, Superintendent  
Waverly School District  
319 Mary Place  
Waverly, South Dakota 57201

Re: Waverly School District  
OCR Case Number: 07-17-1261

Dear Superintendent Meyer:

On September 5, 2017, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Waverly School District (District), Waverly, South Dakota, alleging discrimination on the basis of disability. This letter is to confirm that the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve the complaint.

OCR investigated whether the District discriminated against the Complainant's son (the Student) based on the Student's record as a qualified individual with a disability in violation of 34 C.F.R. § 104.4 by treating the Student differently in the open enrollment process when it rescinded its prior acceptance of the Student's application.

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 the provisions of Section 504 and Title II.

To protect individuals' privacy, names of employees and other parties were not used in the letter.

## **Legal Standard**

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issue raised in this complaint do not provide greater protection than the applicable Section 504 regulations and has, therefore, applied the relevant Section 504 standards in its analysis of this allegation.

In order to establish a finding of a violation of different treatment under Section 504, OCR must determine that the Student was treated differently than similarly-situated students in a way that limited the Student's opportunity to participate in or benefit from a recipient's program or activity, and that either the recipient cannot articulate a legitimate, nondiscriminatory reason for the different treatment or that the recipient has articulated a legitimate nondiscriminatory reason for the different treatment, but the reason is pretext for discrimination. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with established policies and practices and whether there is any other evidence of disability discrimination. Disability discrimination may be established by direct evidence that a decision to exclude a student from a program was based on his or her disability, or circumstantially, by evidence that a student with disabilities was treated differently from similarly situated students without a disability.

## **Background**

The South Dakota enrollment options program, commonly referred to as "open enrollment," permits any South Dakota student in kindergarten through grade twelve to open enroll in any nonresident public school district in South Dakota serving the student's grade level. The process and procedures for open enrollment are set forth in state statute at South Dakota Codified Law (SDCL) §§ 13-28-40 through 13-28-47. Additional procedures are applicable when a student in need of special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA) applies for open enrollment in a nonresident district.

According to the South Dakota Department of Education, generally, when a student in need of special education and related services seeks to open enroll in a nonresident district, the nonresident district must obtain and review all relevant student education records and communicate directly with the student's parent/guardian and representatives of the student's resident district regarding the student's special education or related service needs. If the nonresident district confirms through its records review and communications that it can provide the student an appropriate instructional program, facilities, and transportation, if necessary, the nonresident district is to process its acceptance of the application. If the nonresident district cannot confirm that it can provide the student an appropriate instructional program, facilities, and transportation through its records review and communications, the nonresident district is required to initiate a joint Individualized Education Program (IEP) team meeting consisting of representatives from both the resident and nonresident districts to make such determination.

Further, state statute provides that a request to transfer a student in need of special education and related services may only be denied by the nonresident in accordance with standards set by the local school board regarding “capacity of a program, class, grade level, and school building operated by the board and the pupil/teacher ratio” or if the joint IEP team determines that the nonresident district cannot provide an appropriate instructional program and facilities, including transportation, to meet the student’s needs. If a nonresident district accepts a request to transfer from a student in need of special education and related services, the nonresident district is responsible for providing the student a free appropriate public education. Discrimination based on race, gender, religious affiliation, or disability in the open enrollment process is expressly prohibited in SDCL § 13-28-44.<sup>1</sup>

All students seeking to open enroll must complete the South Dakota Open Enrollment Application, a one-page form created by the South Dakota Department of Education (SD DOE) and available on the SD DOE’s website. Under the section heading “Student Information” on the application is the question “does this student have an IEP?” followed by the statement “If ‘yes,’ please note that transfer of special education student requires a combined placement meeting, so allow ample time by submitting open enrollment application as early as possible.” Upon review of the application the non-resident district is to complete the “Non-Resident District Approval/ Disapproval” section, indicating whether the application was approved or disapproved, and, if applicable, the reason(s) the application was disapproved.

During the 2016-17 school year, the Student was enrolled in another nonresident South Dakota school district and received special education and related services for a XXXXX XXXXX XXXXX through an IEP. The Student’s January 21, 2017 IEP provided for XXXXX, XXXXX, and XXXXX XXXXX special education and related services for XXXXX and XXXXX. Prior to the conclusion of the 2016-17 school year, the district discontinued the provision of special education and related services pursuant to the Student’s IEP following the Complainant’s revocation of parental consent.

Paragraph redacted.

During its investigation, OCR requested all student open enrollment applications received by the District during the 2016-17 and 2017-18 school years. The District provided OCR copies of 33 open enrollment applications from students seeking to enroll in the District in the 2017-18 school year. Five of these applications were submitted to the District by the Complainant on behalf of XXXXX XXXXX XXXXX XXXXX XXXXX. In response to the question regarding whether or not the student had an IEP at the time of application, 23 applicants indicated that the student did not have an IEP and two applicants indicated that the student did have an IEP. Eight applicants did not provide a response to this application question. Excluding the five applications submitted by the Complainant, all applications for open enrollment in the 2017-18 school year indicate they were approved by the District.

For the 2016-17 school year, the District provided copies of 40 applications of students seeking to open enroll in the District. In response to the question regarding whether or not the student had an IEP at the time of application, 34 applicants indicated that the student did not have an IEP and

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<sup>1</sup> See <http://doe.sd.gov/ofm/openenrollment.aspx> for additional information.

four applicants indicated that the student did have an IEP. Two applicants did not provide a response to this application question. Three applications were not approved by the District; all other applications indicate that they were approved by the District.

## **Resolution**

On February 12, 2018, the District expressed to OCR an interest in engaging in resolution negotiations pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*.<sup>2</sup>

Prior to the completion of OCR's investigation into the complaint, the District submitted a signed Agreement (copy enclosed) on May 7, 2018, that, when fully implemented, will address the complaint allegation. Pursuant to the Agreement, the District will develop internal guidance to ensure that its locally-adopted open enrollment process and procedures is consistent with the parameters set forth under state statute and does not have the effect of unlawfully discriminating against students with disabilities. Additionally, the District will provide an assurance to the Complainant that the District will follow all applicable federal and state laws and local policy in processing any open enrollment application submitted on the Student's behalf in the future. Please consult the Agreement for further details.

OCR considers the complaint allegation 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 its investigation.

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, please be advised that individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of 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 X. XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXXX@ed.gov.

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<sup>2</sup> The *Case Processing Manual* is available on OCR's website at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Sincerely,

/s/

Kelli Douglas  
Supervisory Attorney

Enclosure