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August 1, 2017

Ms. Erin Kane, Interim Superintendent
Douglas County School District
620 Wilcox Street
Castle Rock, Colorado 80104

Re: Douglas County School District
OCR Case Number: 08-15-1276

Dear Ms. Kane:

We have concluded our investigation of the above-referenced complaint filed on June 19, 2015, against Douglas County School District (the District), alleging discrimination on the basis of disability. Specifically, the complainant alleged that during the 2014-15 school year, the District denied the her son (the student) a free appropriate public education (FAPE) by subjecting him to exclusionary timeouts with no compensatory instruction (Allegation 1), failing to provide compensatory instruction for the instruction missed during the his sensory breaks (Allegation 2), and failing to complete a functional behavioral assessment (Allegation 3).

We conducted an investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities funded by the U.S. Department of Education; and Title II of the Americans with Disabilities Act and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. The District is subject to Section 504 and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

During the investigation, we reviewed documentation provided by the District and the complainant. We also interviewed the complainant and District staff. With regard to Allegations 1 and 2, OCR found insufficient evidence to conclude that the District discriminated as alleged. With regard to Allegation 3, we find that the preponderance of the evidence supports that the District violated Section 504 and Title II. This letter explains our findings. We thank the District for entering into a Resolution Agreement, which when fully executed, will resolve our compliance concerns.

Background Information

During the 2014-15 school year, the student attended XXX grade at a school in the District. The student was identified as a student with a disability in the fall of XXXX and began receiving services through an Individualized Education Program (IEP) that was completed on XXX, 2015. During the time period relevant to the allegations, the student's placement was in general education at least 80% of the time. He received special education inside the general education

classroom, as well as the related services of social skills development and occupational therapy. The student has a Behavior Intervention Plan (BIP) as part of his IEP.

Allegation 1: Exclusionary timeouts

The complainant alleged that the District denied the student a FAPE by subjecting him to exclusionary timeouts with no compensatory instruction.

Factual findings

OCR reviewed documentation for each incident that resulted in the student spending time in the office for behavioral issues during the 2014-15 school year. The documentation included office referrals, incident reports, and emails. We found this occurred nine times. Four of the incidents occurred during the lunch period or recess; they did not result in missed class time and would not implicate a need for compensatory services.

The remaining five incidents are summarized here:

Date	Description
November 11, 2014	The student slapped an educational assistant during the Specials period; took space in the office with the assistant principal for the remainder of the period
November 12, 2014	The student was throwing objects in the room and threw a pillow at the teacher; took space in the office for 10 minutes during Read Aloud time
April 16, 2015	The student sat at his seat and kept swearing; took space in the office for 30 minutes; completed some classwork and served as a helper; the teacher described this not as a punishment, but as a time to regroup to return to class
April 21, 2015	The student spit on a friend at lunch and had a “foul mouth” during literacy; took space in the office for 20 minutes
May 12, 2015	The student used foul language toward the teacher; took space outside of class with the social worker (not in the office), and returned to re-engage in the class activity

The total amount of time involved in these five incidents is estimated to be 2-3 hours. The District describes the time in the office as “taking space.” The student’s BIP addressed the student’s need to take space. For example, the BIP suggests that to reduce overstimulation, the teacher should create an area in the classroom where student has room to take space: (i.e., quiet corner, small desk, or identified area), and offer choices of where to go to take space. It also indicated that the student should know a good location in each classroom where he could take space if needed. The BIP further explains that when it seems like the student’s “engine is running high,” he should be prompted to take space or use a calming strategy. “Take space” is described as where the student steps aside and tries to calm himself.

The descriptions of taking space in the BIP seem to contemplate this as an activity that would occur within the classroom; there are multiple references to having a good location in each classroom for the student to take space, and no references to taking space in the office or outside of the classroom.

OCR's interviews indicate that the student took space inside the classroom when needed. The complainant described an area with a beanbag chair that was used for this purpose. The school psychologist asked the Specials teachers to designate an area in their rooms as well.

Analysis and conclusions of law

OCR considered this allegation from a variety of perspectives. First, we considered whether sending the student out of the classroom to take space represented a failure to implement the student's IEP or BIP, which could be a violation of the Section 504 regulation at 34 C.F.R. §104.33. While we find that the BIP does not specifically contemplate taking space outside the classroom, neither does it prohibit this as a strategy. The evidence shows that this strategy was used infrequently, and as a supplement to the other strategies in the BIP. The student still had the opportunity to take space within the classroom as needed, and was only sent out of the classroom when the other strategies were unsuccessful. We do not find a failure to implement the student's IEP or BIP.

We next considered whether the student was subjected to a pattern of exclusion which would have required the District to re-evaluate the student pursuant to the Section 504 regulation at 34 C.F.R. §104.35(d). Typically, a re-evaluation is required for disciplinary exclusions of more than ten days, or for shorter disciplinary exclusions that together exceed ten days. A pattern of very brief disciplinary exclusions, such as being sent to time out in the office, could trigger the re-evaluation requirement if the cumulative time was more than ten school days. However, the evidence shows that the total amount of time the student was in office time outs during the entire school year was under three hours. This is not a disciplinary exclusion that would require the District to conduct a re-evaluation.

We also considered the complainant's contention that the District should have provided compensatory education for the time the student was subject to these time outs. The District contends that because these time outs were instances of "taking space" pursuant to the student's BIP, they were actually part of the student's education. While it is not clear to OCR that this is what occurred, even if we assume these time outs were disciplinary in nature and not part of the BIP, we nevertheless find that there is no requirement under Section 504 for compensatory services when a student is subject to classroom discipline.

As a result, we conclude that there is insufficient evidence to find that the District discriminated against the student as alleged in relation to office timeouts.

Allegation 2: Sensory breaks

The complainant alleged the student should have received compensatory instruction for the time he spent taking sensory breaks, which were provided pursuant to his IEP and BIP, which resulted in a denial of FAPE.

Factual findings

The student's initial IEP, dated XXX, 2015, included a provision for "scheduled breaks/movement breaks as needed." The IEP was amended on XXX, 2015, at the parent's request, to specify that 2-3 sensory breaks would be offered each day, reflecting her concern that the breaks were not being provided consistently. The District provided OCR copies of schedules used at different points during the school year that show three scheduled breaks for the student each day, taken with an educational assistant or other staff member; additionally, the classroom teacher provided two movement breaks for the whole class each day. The occupational therapist provided OCR with a list of "heavy motor" activities that the student could select during the breaks, such as going on the swings, jumping rope, or throwing a heavy ball. The student's IEP does not address whether the student required additional instruction to compensate for the time he was away from class for sensory breaks.

Analysis and conclusions of law

The District argued to OCR that these breaks were part of the student's educational program, and not a removal from the educational environment. We agree. While the student was outside of the regular education classroom for a period of time each day, he was participating in an activity that the IEP team determined was necessary for him to receive FAPE. As a result, we conclude that there is insufficient evidence to find that the District discriminated as alleged with regard to providing sensory breaks.

Allegation 3: Retaliation

The complainant alleged that the District failed to complete a new Functional Behavioral Assessment (FBA) when she requested one, which resulted in a denial of FAPE.

Factual findings

The District first completed a Functional Behavioral Assessment and implemented a Behavior Intervention Plan for the student during the 2013-14 school, before the student was identified as having a disability. In 2014-15, following the student's XXXX, the District evaluated the student, determined he was eligible for an IEP, and developed and implemented an IEP.

The student has a BIP as part of his IEP. The IEP identifies the following sources of information that were used in his FBA: "record review, observations, staff interviews, input/recommendations from [hospital providers], parent input, and anecdotal reports." The BIP identifies three targeted concerning behaviors: non-compliance of adult requests; physical aggression; and disruptive behavior. The BIP identifies strategies for addressing the targeted

behaviors. Additionally, the student's Evaluation Report includes a description of classroom observations by the special education teacher and the school psychologist, as well as parent and teacher interviews. The Evaluation Report also includes results of behavioral assessments, specifically the Behavior Assessment System for Children, second edition, conducted in XXX 2014.

The evidence shows that the District evaluated the student in the area of behavior prior to adopting his IEP and BIP on XXX, 2015.

The complainant requested a new FBA to be completed in an email dated April 29, 2015. The complainant told OCR she requested a new FBA because the previous FBA was over a year old, from XXX. She said the psychologist said she thought we needed a current one. The school psychologist denied to OCR that she told the complainant they needed a new FBA. The psychologist told us in the interview that an FBA was conducted as part of the student's initial special education evaluation in XXX 2014; she incorporated information from the complainant, his team at XXX, and members of the IEP team. This information was used to develop the BIP.

We asked the psychologist why the complainant requested a new FBA. She responded that she did not know. She stated that the complainant had asked earlier about the information used for the BIP, and that she let the complainant know where she could find that information. The psychologist stated that at first she wasn't under the impression that the complainant actually wanted a new FBA, but that she had forgotten that there was one. This is supported by an email from the school psychologist to the complainant dated May 7, 2015; "I received an email from [the special education coordinator] that you wanted us to complete an FBA for [the student]. We have an FBA in place which we used to complete his behavior plan. Data collection is an ongoing process as part of that FBA – we use things like his daily behavior log and daily sensory log as part of this data. I did a formal observation this afternoon and have informal observations from working with [the student]. It still appears as though the same triggers identified in the FBA summary portion of his behavior plan are related to his behaviors (adult requests, attention seeking, work avoidance, etc.). I have attached his BIP again for your reference. I will go in and do another observation next week to compare against what I saw today. We have been tracking his behaviors and keeping data so that in the fall we can use this information as well as data taken in his second grade classroom to update and make formal changes to his BIP based on the new environment." At that point the complainant responded that she hadn't signed consent forms for data collection, so the data was not valid, and demanded to sign a consent form for a new FBA.

There was internal discussion between school staff and District-level staff about the need for a new FBA and whether new permission forms were required. The District had the complainant sign a permission form for a new FBA on May 11, 2015. Following the complainant's request for a new FBA, the school psychologist conducted two additional behavior observations on May 6 and May 14, and also consulted with the classroom teacher about the student's behavior. The psychologist told OCR she concluded that the function of the behavior had not changed; she believed that the plan was for the student to start in the new classroom in the fall, and they could look at how he was functioning at that point, and the plan could be revised as needed. She did not complete a new FBA as requested by the complainant.

The next fall, the complainant expressed to the new school psychologist that she wanted a new FBA and BIP. The new psychologist responded that she did not see a need at this time because the plan in place was working, and he was on track to have the BIP removed completely at his annual review.

Analysis and conclusions of law

We considered whether the District's failure to conduct a new FBA process at the complainant's request constitutes a failure to evaluate the student. OCR finds that the District evaluated the student's behavioral and emotional needs during the initial evaluation period in Fall 2014. The District conducted behavioral assessments, classroom observations, teacher and parent interviews, and reviewed the recommendations of outside treatment providers. This information was used to develop a BIP for the student. While the District may not have used a specific form titled "Functional Behavioral Assessment," Section 504 does not require the use of any particular form or assessment. The regulation at 34 C.F.R. § 104.35(c) requires that districts draw from a variety of sources in the evaluation process. The District did so in this case.

The Section 504 regulation at 34 C.F.R. § 104.35(d) require periodic re-evaluations, which is generally interpreted to mean at least every three years, or more often if conditions warrant. Conditions warranting earlier re-evaluation may include a change in a student's behavior or performance that would indicate a need for a change in services. An earlier re-evaluation may also be conducted at the request of a parent or teacher. However, Section 504 does not confer on parents an absolute right to evaluation or re-evaluation on demand. If a district declines to conduct an evaluation requested by a parent, pursuant to 34 C.F.R. § 104.36, the district must provide the parent with notice of the decision and of the procedural safeguards which allow the parent to challenge the District's decision not to evaluate.

The complainant's request for a new FBA on April 28, 2015, was a request for a re-evaluation. While the District is not required to conduct a re-evaluation based solely on a parental request, if the District disagrees that a student requires an evaluation it must provide the parent with notice of its decision and of the procedural safeguards pursuant to the Section 504 regulation at 34 C.F.R. § 104.36. In this case, rather than notifying the complainant that it would not re-evaluate the student as requested by the complainant, the District delayed making a decision. The school year ended 30 days after the complainant's request, and on August 28, 2015, 18 days into the next school year, a new school psychologist told the complainant that the requested evaluation would not be provided. The complainant was not notified of this decision through any formal means such as a Prior Written Notice, and she was not notified of her right to challenge the decision not to conduct the re-evaluation.

As a result, we find that the preponderance of the evidence shows that the District discriminated with regard to its failure to notify the complainant and provide procedural safeguards relating to its decision not to reevaluate the student's behavioral needs.

Conclusion

We brought the violations identified during this investigation to the District's attention for resolution. On August 1, 2017, the District entered into a Resolution Agreement to resolve our compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the violations found in this case.

This concludes our investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. We are closing the investigation of this complaint effective the date of this letter and will monitor the District's implementation of the Agreement.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Additionally, 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.

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.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions about this letter you may contact me at (303) 844-5942. You may also contact the attorney assigned to this case, XXX XXX, at (303) 844-XXXX, or XXX.XXX@ed.gov.

Sincerely,

/s/

Sandra J. Roesti
Supervisory Attorney

cc: Will Trachman, Esq., General Legal Counsel

Enclosure