



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 29, 2016

Dr. Stephen Cook, Acting Superintendent
Douglas County School District
620 Wilcox Street
Castle Rock, Colorado 80104

Re: **Douglas County School District**
Case No. 08-16-1218

Dear Dr. Cook:

On May 5, 2016, the U.S. Department of Education, Office for Civil Rights (OCR), informed you that it had initiated an investigation of the above-referenced complaint alleging Douglas County School District, through xxxxxxxxxxxxxxxxxxxx, discriminated on the basis of disability.

Specifically, the complaint alleged that the District failed to provide Student A a free, appropriate, public education (FAPE) when it (1) failed to implement Student A's Individualized Education Program (IEP) and Behavior Intervention Plan (BIP); and (2) failed to evaluate Student A prior to placing her xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 106, which prohibits discrimination on the basis of disability by recipients of Federal Financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, 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 these laws. Accordingly, OCR has jurisdiction over this complaint.

On August 11, 2016, prior to the conclusion of the investigation, the District requested to resolve the case pursuant to Section 302 of the *Case Processing Manual*. After careful consideration of the complaint allegations, as well as the information collected during the investigation, OCR determined that it was appropriate to resolve the allegation.

Applicable Legal Standards

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

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

Discrimination generally

The regulation implementing Section 504 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 Title II implementing regulation at 28 C.F.R. § 35.130(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 public entity, or be subjected to discrimination by any public entity.

FAPE

The Section 504 implementing 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 free and appropriate public education (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 implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of providing FAPE.

The Section 504 regulations, at 34 C.F.R. § 104.34, require school districts to place a student with a disability in the regular educational environment operated by the district unless the district demonstrates that educating the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Evaluation, Placement, and Procedural Safeguards

Pursuant to the Section 504 regulation at 34 C.F.R. § 104.35, a recipient must conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35 (b), of any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(b) requires that a recipient establish certain standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education and/or related services. The Section 504 regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Section 504 and its implementing regulations do not specify a time frame for evaluating a student believed to be in need of special education and related services.

OCR applies a standard of reasonableness for the completion of the evaluation process. In determining whether a recipient provided a timely evaluation, OCR is informed by the regulations implementing the IDEA, as compliance with IDEA is one means of complying with Section 504. The IDEA regulations state, at 34 C.F.R. § 300.301(c)(1)(i), that an evaluation must be completed within 60 days unless the state sets a different deadline. Colorado provides 60 days to complete an evaluation.

The Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.” Compliance with the procedural safeguards of the IDEA is one means of meeting this requirement.

Factual Background

Student A began the 2015-16 school year at the xxxxxxxxxxxxxxxxxxxx (School), x xxxxxxxx xxxxxxxxxxxxxx xxx xxxxxxxx, as a xxxxx grade student. She did not have an IEP or 504 plan at the beginning of the school year.

At the beginning of the 2015-16 school year, the Complainant emailed Student A’s teacher (Teacher A) to express concern that Student A may be xxxxxx xxxxxx xxxxxxxx. Teacher A did not refer the Complainant to the School’s Psychologist or Special Education teachers or provide the Complainant with information about how to seek an evaluation. Instead, Teacher A had a discussion with the Psychologist in the School hallway seeking suggestions about helping Student A.

On September 17, 2015, the Complainant contacted the District’s Special Education Coordinator xxxxxxxxxxxxxxxxxxxxxx (Coordinator), who emailed the School Principal and Psychologist indicating that the Complainant had been requesting help from School teachers and administrators regarding Student A’s xxxxxxxx, xxxxxxxx xxxxxxxx, xxx xxxxxxxxxxxxxx. In addition, the Coordinator mentioned that the Complainant had requested an evaluation and that teachers had referred her to xxxxxxxxxxxxxxxxxxxxxx, rather than initiating the School’s evaluation procedures. The Coordinator stated that she was “concerned that the [School] staff might not be aware of [the District’s] child-find obligation, and ... am hoping that they have made a referral to special education.” The next day, the District’s Director xxxxxxxxxxxxxxxxxxxxxx (Director A) emailed the Principal offering training and support to the School in scheduling and completing the evaluation, noting that “it appears that there is a very long wait at xxxxxxxxxxxxxx to get her evaluated.”

The Principal denied, in a September 18, 2015 email to the Coordinator, that the Complainant had requested an evaluation prior to September 17, 2015. Rather the Principal told the Coordinator, via email, that the Complainant had requested that Student A change classrooms, which the Principal had arranged.

the Coordinator to express concern that Student A's "XXXXXXXXXX XXXXX XXXXX XXXXXX" XXXX XX XXXXX XXXXX XXXXX XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXX.

The team met on January 29, 2016, to discuss the creation of a BIP and the School's "XXXXXX XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX." In addition to the Complainant, Student A's father, School staff, and the Coordinator attended the January 29, 2016 team meeting. On February 3, 2016, the team created a BIP that included several strategies to assist Student A when she xxx XXXXXXXXXXX, XXXXXXX, XXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXXXXXXXXX. The team also initiated a XXXXXXXXXXXXXXX XXXX XXXXXXXXXXXXXXX XXX XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX, XXXXXXXXXXX, XX XXXXXXXXXXX.

On February 1, 2016, after the IEP meeting but before the School created Student A's BIP and xxx, the Coordinator emailed the School Principal to express concern that, in addition to Student A, two other students were shown to have a need for an xxx and/or BIP but had not been provided one by the School. The Coordinator stated that she "want[ed] to make sure we are in compliance about this." In addition, the Coordinator offered to come to the School to provide training for School staff.

According to the Complainant, she was concerned with Student A's safety after Student A had fled the School and XXXXXXXX XXXXXXXXXXXXXXX on unspecified dates in February 2016. The Complainant asserted that to address her concern she went to the School on February 15, 2016, to observe Student A. According to the Complainant, many teachers did not implement Student A's BIP. The Complainant told OCR that she XXXXXXX XXXXXXXXXXX XXXX XXX XXXXXXX XXXXX XXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX XXXXXXX XX XXX XXXXXXXXXXX XXXXX XXXXXXXXXXXXXXX XXXXXXX XXX XX XXXXXXX.

On February 16, 2016, the Complainant contacted the Coordinator to express her concern about the School's implementation of Student A's BIP. The Coordinator contacted the Principal to request that the School convene an IEP team to review the BIP. The Principal asserted that School staff had implemented the BIP and stated further that it was not working. The Principal also informed the Coordinator that she believed that Student A had a "XXXX XXXXXXX," XX XXXXXXX XXX XXXXXXXXXXX XX Student A's XXXXXXXX XXXXXXXXXXXXXXX. In response to the Principal's statements about the BIP, the Coordinator informed the Principal that the District would need to change and improve the BIP if it is not working.

The School held a meeting on February 16, 2016 to amend Student A's BIP. According to the Complainant, the Principal was "incredulous" at the meeting that Student A's XXXXXXXX XXXXXXX XXXXXXX XXXXXXX XXXXXXX XXXX X XXXX XXXXXXX. In addition, the Complainant asserts that the School Psychiatrist stated that the School "has other students that need to be supported and I'm not sure why we are dedicating this much support to Student A." Finally, the Complainant asserts that the Principal stated at the meeting that the School might not be able to provide FAPE to Student A because of the severity of her disabilities. Meeting minutes prepared by the Coordinator corroborate the Complainant's assertions.

After the meeting, Teacher C "edited" the January 29, 2016 IEP, a notice of an IEP meeting, the BIP, and the xxx in the School's electronic system. The Coordinator reminded Teacher C that the February 17 meeting was to consider only changes to the BIP, and not an IEP review. In

addition, the Complainant asserts that the Principal called her after the meeting and again asserted that the School might not be able to provide FAPE to Student A because of the severity of her disabilities and that the Coordinator was “forcing” the School to accommodate Student A rather than find a more appropriate placement for her.

The School held another meeting on February 23, 2016, to review Student A’s IEP. The Coordinator’s minutes of that meeting reflect that the Complainant did not feel comfortable returning Student A to the School and the meeting focused on providing xxxxxxxxxxx xxxxxxxx to Student A. The February 23 IEP identified the least restrictive environment (LRE) as the general education classroom for at least 80% of the school day, providing services for Student A including xxxxxx xxx xxxxxx xxxxxxxxxxxxxx both in and outside the general education classroom, speech and language therapy, and specialized instruction in math and phonics in the general education classroom. However, Student A did not return to the School based on the Complainant’s concerns. The District offered to enroll Student A in her neighborhood school, which the Complainant declined.

According to the Complainant, the School did not xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxxxxxx xxx xxx xxxxxxx. Emails shortly after the February 23, 2016 IEP meeting between the Complainant and School and District staff indicate that the School proposed providing services to Student A xx x xxxxxxxxxxxxxxxxx; xxxxxxx xxx xxxxxx xxx xxx xxxxxx that services were provided. The emails also indicate that the District had yet to complete the xxxxxx evaluation. Similarly, a March 10, 2016 email from the District’s Director of Personalized Learning (Director B) indicated that School staff were uncomfortable providing services to Student A xx xxx xxxxxxx xxxxxxxxxxx xxx xxxxxxxxxxx xxx xxxxxxxxxxx xxx xxxxxxx xxx xxxxxxx xxxxxxxxxxx. It is not clear from the email and other documentation provided by the District whether any services were provided to Student A after February 16, 2016.

The documentation provided by the District and the Complainant does not indicate the entirety of the IEP team’s discussion about Student A’s needs and necessary special education and related services necessary to meet those needs. In addition, the documentation provided by the District and the Complainant does not indicate the day-to-day implementation of Student A’s IEPs or whether School staff observed that the IEPs were not effective in meeting Student A’s needs.

Analysis

Prior to the conclusion of OCR’s investigation, the District requested to resolve the allegation that it discriminated against Student A, based on her disability (xxxxxx), when it failed to provide her a free, appropriate, public education (FAPE) during the 2015-16 school year in that it: (1) did not implement her Individualized Education Program (IEP) and Behavior Intervention Plan (BIP); and (2) did not evaluate her prior to placing her xxxxxxx xxxxxxxxxxx xxxxxxx. In considering the District’s request to resolve the allegation, OCR took into account the complaint allegation, the evidence gathered to date, and the additional information that would be necessary to complete the investigation.

The Complainant identified Student A as a student who is believed to be in need of special education and related services no later than September 17, 2015. The District completed an evaluation by November 2, 2015 (46 days after the request) and created an IEP by November 20, 2015 (64 days after the request). However, despite the facts that the evaluation indicated that Student A may have xxxxxx and that the IEP identified Student A as having a xxxxxxxx xxxxxxxx xxxxxxxxxxxxxx, the November 2015 IEP provided only 40 minutes of speech therapy per week and did not have any goals related to xxxxxxxx xxxxx xxxxxxxxxxxxxxxx. Moreover, the District did not seek consent to conduct a xxxx xxxxxxxx xxxxxxxxxxxxxxx for Student A until January 4, 2016, and the record does not indicate whether it was completed by or after February 24, 2016.

Although the District completed an evaluation of Student A within 60 days of the Complainant's request for an evaluation, the record does not make clear whether the evaluation was sufficiently comprehensive to identify all of Student A's educational needs, particularly in light of the fact that the initial evaluation conducted by the School's psychologist indicated that Student A may have xxxxxx and the record does not make clear whether the District ever formally evaluated Student A for xxxxxx or considered Student A's xxxxxx in drafting IEPs for her.

Moreover, the evidence further indicates that the School revisited Student A's IEP in December 2015, January 2016, and February 2016 and created a BIP in February 2016. Email correspondence between the Complainant and School staff suggests that the Complainant and School staff believed that revisions to the IEPs and BIP were necessary because the IEPs and BIP were not proving to be effective in addressing Student A's needs; however, the emails and other documentation provided by the District do not provide specific detail about particular needs of Student A that were not addressed by the IEPs or BIP.

Although the District asserts that it implemented the IEPs and BIPs that were in place, the Complainant disputes the District's assertion, and the documentation provided by the District does not demonstrate that any of the IEPs were implemented. Further, on its face, the frequent revision of Student A's IEP and the creation (and suggested revision of) Student A's BIP suggests that the implementation of the IEP from November, 20 2015 through February 16, 2016 was not sufficient to provide Student A with a FAPE. OCR would need to review additional documentation, including narrative statements from Student A's teachers, Student A's disciplinary records, and academic records, as well as conduct interviews with Student A's teachers to determine whether the Student A's IEPs and BIPs were implemented and whether the IEPs and BIPs were believed to be sufficient when drafted to provide Student A with a FAPE.

In addition, the Complainant asserts that the District did not continue to implement the IEP or provide Student A with services specified by the IEP after February 16, 2016, xxxx xxxxxxxxxxxx xx xxxxxxxx xxxxxxxx xxx xxxxxx. The Complainant and the District dispute the facts that led to the decision to provide Student A with instruction and special education services xxxxxxxx xxx xxx xxxxxx and dispute whether such services were provided.

Finally, School staff commented that they were not able to meet Student A's needs in the School, which the Complainant asserts led to Student A's inability xx xxxxxxxxxxxx xx xxxxxxxx xx xxxxxxxx xxxxxx xxxxxxxxxxxxxxxx xxxxxx. The staff comments, coupled with the alleged failure to create an IEP that adequately met Student A's needs suggests that the School may have excluded Student

A based on her disability from participation in the School's programs, services, or activities in violation of 34 C.F.R. §104.4(a), that the School possibly did not provide Student A with a FAPE in violation of 34 C.F.R. §104.33, and that the School may have been unwilling to serve Student A in the regular education environment, in violation of §104.34. OCR would need to conduct further investigation in order to determine if these suggested and alleged concerns rise to the level of a violation.

At the time of the District's request to voluntarily resolve the allegations raised by this complaint, OCR had not completed its investigation.¹

Based on the evidence gathered to date, and the additional information that would be necessary to complete the investigation, OCR determined that it was appropriate to resolve the complaint allegation prior to completing the investigation. The District agreed to enter into a resolution agreement (the Agreement) with OCR on August 29, 2016, which, when fully implemented, will resolve the alleged discrimination with respect to 34 C.F.R. §§ 104.4(a), 104.33, 104.34, and 104.35 and 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii) which were at issue in the complaint. The provisions of the Agreement are aligned with the complaint allegation, the issues investigated, and are consistent with applicable law and regulations.

OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in this case. The full and effective implementation of the Agreement will address the alleged discrimination with respect to Section 504 and Title II. OCR looks forward to receiving the District's first monitoring report, which is due by September 30, 2016.

This concludes OCR's 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. 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.

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 individual may file a complaint alleging such treatment. The Complainant may also file a private suit in federal court whether or not OCR finds a violation.

¹ In order to complete the investigation and make a determination in this case, OCR would need to interview School and District staff, including Teachers A, B, and C, the Principal, the School Psychologist, the Coordinator, Director A, and Director B. OCR would also need to review additional documentation, including documentation related to the day-to-day implementation of Student A's IEP, the materials considered in creating Student A's IEPs, and School staff's observation of the manifestation of Student A's disability in the classroom, to determine whether the District's evaluation of Student A was sufficiently comprehensive to identify all of her educational needs (34 C.F.R. §104.35), whether the District implemented Student A's IEPs (34 C.F.R. §104.33), and whether the IEPs and BIP were sufficient to provide Student A with FAPE (34 C.F.R. §104.33). In addition, OCR would require additional documentation from the District or conduct interviews with District staff to determine whether the District provided Student A with special education services after February 16, 2016 or whether the acts that led to Student A's xxxxxxxx xxxxxx xxxxxxxxxx violated 34 C.F.R. §104.4(a) or §104.34.

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.

We wish to thank you for the cooperation extended to OCR during our investigation. If you have any questions, please do not hesitate to contact Patrick Alexander by phone at 303-844-3473, or by e-mail at Patrick.Alexander@ed.gov.

Sincerely,

Sandra J. Roesti
Supervisory Attorney

Enclosure