



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

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October 4, 2016

Superintendent Tom Boasberg
Denver Public School District
Emily Griffith Campus
1860 Lincoln St., 12th Floor
Denver, CO 80203

Re: Denver Public School District
OCR Case Number: 08-16-1274

Dear Superintendent Boasberg:

We are writing to advise you of the resolution of the above-referenced complaint that was filed with our office against Denver Public School District (District). The Complainant alleged that the District discriminated on the basis of disability. Specifically, the Complainant alleged that the District discriminates by not providing resources to students with disabilities placed in the Affective Needs Center Program (AN Center) at McAuliffe International School (School) that are comparable to the resources that the District provides to similarly situated non-disabled students. Additionally, the Complainant alleges that the “level system” as implemented in the AN Center results in individual students’ individual education programs (IEPs) not being implemented.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulation Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit 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 these laws and regulations.

During our investigation, we interviewed the Complainant and reviewed documentation and other evidence provided by the Complainant and the District. During the course of our investigation, the District indicated its desire to voluntarily enter into an agreement to resolve the allegations pursuant to Section 302 of our *Case Processing Manual*. We reviewed this request and determined that it was appropriate to enter into an agreement without completing a full investigation. This letter details our factual findings, the status of our investigation prior to receiving the District’s request to enter into an agreement to resolve the allegations in this case, and the reasons for our determinations that an agreement pursuant to Section 302 of our *Case Processing Manual* was appropriate in this case.

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

Procedural Background

The following procedural background is relevant to both allegations. OCR received this complaint from [X – phrase redacted – X] on behalf of a student on April 2016, containing the two allegations ultimately opened for investigation, among others. [X – paragraphs redacted – X]

Allegation 1: Resource Comparability

The Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), provide 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 Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities.

Under 34 C.F.R. §104.4(b)(5) and 28 C.F.R. §35.130(b)(4), a recipient school district may not, in determining the site or location of facilities, make selections with the effect of excluding individuals, denying them benefits, or subjecting them to discrimination on the basis of disability. Selections also may not be made with the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the service, program, or activity with respect to disabled individuals.

The Complainant alleged that the AN Center was located in a room with just desks and no windows and utilized no materials other than the character curriculum.¹ The District responded that for the 2016-17 school year, the AN Center will move into the largest classroom in the building. It will receive new furniture, has two offices attached, and a de-escalation room will be located down the hall. The District's documents state that AN Center students "have a full schedule of general education classes with the exception of Mathematics which will be located in the AN Classroom using a computer software program that meets students at their individual levels. A student is only removed from the general education setting for core content areas (ELA [English and Language Arts], Science, and Social Studies) if an alternate educational setting is required due to student request . . . or by exhibiting consistent serious behavior infractions identified within the Copper Level . . . If a student's time in the general education setting is less than what has been identified in the student's IEP, the IEP team will meet to discuss and form a new Behavior Intervention Plan to better support the student or, if necessary, hold an IEP meeting to discuss appropriate [least restrictive environment]."

Therefore, to reach a determination under our facility location analysis, OCR would need further investigation to establish the location of, and the furniture and curriculum used by, the AN Center for the (previous) 2015-2016 school year and to compare those to the location, furniture, and curriculum provided to similarly situated students. OCR would need further investigation to determine if the previous location, furniture, and curriculum materials had the effect of excluding AN Center students, denying them benefits, or subjecting them to discrimination on the basis of

¹ OCR understood the Complainant to use the term "character curriculum" to refer to curriculum related to behavioral development.

disability; or if the selection was made with the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the service, program, or activity with respect to AN Center students. OCR would need to conduct at least one site visit to make this determination. OCR would also need further investigation, likely in the form of supplemental data requests and interviews, as to who was involved in selecting the previous location, furniture, and curriculum materials and as to the purpose behind, and the effect of, those selections.

Allegation 2: Failure to Implement Individual IEPs

The regulation implementing Section 504 at 34 C.F.R. § 104.33 requires recipients that operate a public elementary or secondary education program or activity to provide a free appropriate public education to each student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the student's disability. Section 504 defines a student with a disability as a student who has a physical or mental impairment that substantially limits a major life activity. Section 504 defines "appropriate education" as the provision of regular or special education and related aid and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this regulatory requirement. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

In addition, under 34 C.F.R. §104.4(b)(4) a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that: (i) have the effect of subjecting qualified disabled individuals to discrimination on the basis of disability; or (ii) have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity for individuals with disabilities. The Title II regulations contain a similar provision applicable to public entities, at 28 C.F.R. §35.130(b)(3). In this type of case, OCR must establish whether there has been a disproportionate denial of opportunity to benefit from a program and determine if this is due to a neutral policy, process, or practice. If a disproportionate denial can be established, we assess whether the evidence establishes that the recipient's policy, process or practice is educationally necessary. Even if the policy, procedure, or practice is determined to be necessary, discrimination may still be occurring if there is a less discriminatory alternative that the recipient does not use that would meet the recipient's important educational goal.

The Complainant alleged that the AN Center uses a defined system where students earn privileges, first in Special Education then in General Education. It is a one-size-fits-all system. Students assigned to the AN Center have five behavior goals, under which they earn points and a reward at end of each day (the better the behavior, the better the reward). Once students maintain an acceptable level of behavior in the Special Education classroom, they earn privileges outside the classroom, such as eating lunch with typically developing peers, and then they can keep building on that, towards for example a gym class or elective, and eventually the privilege

is ultimately to be in the General Education classroom. The Complainant alleged that AN Center students have no access to General Education at all and that the way the AN Center is implemented, the individual terms of their IEPs are not implemented. As students earn privileges, their IEP is not amended, and it is not until the majority of their day is in General Education that they may have an IEP meeting. But students can lose their privileges very quickly without a process (*e.g.*, the Complainant knew of a student who was slap-boxing and sent back to Level 1).

The District's data response contradicted these allegations. The District's data response identifies 11 students who were placed in the AN Center, all of whom had a disability and all of whose IEPs (according to the District) required placement in the AN Center. This data is corroborated by the District's documents that generally describe the AN Center, which state that "students may only be placed in or removed from the Program through an IEP meeting after an evaluation and a determination that the student requires a significant change of placement to receive FAPE." Thus, according to the District, only students with IEPs, and only students whose IEPs require placement in the Center, are placed in the Center. Documentation from the District states that, once placed in the Center, students have access to general education and any changes come with an IEP meeting: "All students will have a full schedule of general education classes with the exception of Mathematics which will be located in the AN Classroom using a computer software program that meets students at their individual levels. A student is only removed from the general education setting for core content areas (ELA (ELA [English and Language Arts], Science, and Social Studies) if an alternate educational setting is required due to student request . . . or by exhibiting consistent serious behavior infractions identified within the Copper Level . . . If a student's time in the general education setting is less than what has been identified in the student's IEP, the IEP team will meet to discuss and form a new Behavior Intervention Plan to better support the student or, if necessary, hold an IEP meeting to discuss appropriate [least restrictive environment]." The District also asserts that students have access to academic, non-academic, and extracurricular activities depending on their IEPs and accommodations. The District explains that the privileges system is not tied to general education or other access, but to rewards such as game time, a weekly school supply store, and a monthly outing.

Therefore, OCR would need further investigation as to the 11 individual students placed in the AN Center. OCR would need to request and review the IEPs for these 11 students, and interview staff and any willing parents concerning access to general education, non-academic, and extracurricular activities (both generally in the program and in individual student's cases). This information would be relevant as to whether the District failed to implement individual students' IEPs under a traditional failure to implement analysis, and it would also be relevant to a methods of administration analysis, looking at whether the methods that the District used to administer the AN Center had discriminatory effect. OCR would need to analyze this information to reach a determination as to whether the AN Center resulted in a disproportionate denial of opportunity and whether that was due to a neutral policy, process, or practice; and if so, whether that neutral policy was educationally necessary; and even if necessary, whether there is a less discriminatory alternative. As to educational necessity, OCR would need to interview administrators and the AN Center teacher to learn and evaluate the educational reasons behind

the AN Center. OCR would also need to interview similar staff to assess whether there is a less discriminatory alternative.

Conclusion

We thank the District for being willing to voluntarily address the issues raised by the Complainant. A copy of the signed Resolution Agreement is enclosed for your records. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports demonstrating that the terms of the Agreement have been fulfilled. We will provide written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR's investigation of this 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. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and will send a letter to the District, copied to the Complainant, stating that this case is closed.

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.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law.

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.

Thank you for the courtesy and cooperation you and your staff, especially XXX, extended to us during the investigation of this case. If you have any questions, please contact XXX, Attorney, at XXX or by email at XXX, or me at XXX or XXX.

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

Enclosure

cc (w/enclosures): XXX, Deputy General Counsel, Denver Public School District

cc (w/o enclosures): Honorable Katy Anthes - CDE