



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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June 13, 2017

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: 08-17-1174

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 and race. Specifically, the Complainant¹ alleged that the District discriminated by (1) failing to timely and appropriately evaluate the Student for disability-related services; (2) failing to properly implement the Student's transfer individualized education program document (IEP) dated August 22, 2016². Additionally, she alleges that the District treated the Student and five other minority male students with disabilities differently on the basis of their race and disability by assigning them to a separate classroom, thereby (3) affording them an opportunity to participate in or benefit from an aid, benefit, or service that was not equal to that afforded others; and (4) providing them with an aid, benefit, or service that was not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 and its implementing regulation at 34 Code of Federal Regulations Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities that receive Federal financial assistance from the U.S. Department of Education (Department); Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; 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.

¹ The Complainant is an Advocate who filed the complaint on behalf of the parent of a student (Student) for whom she serves as an Advocate.

² Note that OCR is not sanctioning this document as one that complies with the non-discrimination laws that OCR enforces.

During our investigation, we interviewed the Complainant and reviewed 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.

I. Legal Standards

A. Alleged Failure to Evaluate

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, 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 these requirements. 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.

Section 104.35(a) regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

B. Alleged Failure to Implement IEP

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the

needs of non-disabled students are met, 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 these requirements. 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.

C. Alleged Different Treatment on the Basis of Disability

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual 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)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

- afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; or
- provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

D. Alleged Different Treatment on the Basis of Race

Under the Title VI regulations at 34 C.F.R. §100.3(a) and (b), a school district may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1) states that a school district may not, directly or through contractual or other arrangements, on the basis of race, color or national origin:

- deny an individual any service, financial aid or other benefit;
- provide an individual any service, financial aid or other benefit that is different, or is provided in a different manner, from that provided to others;
- subject an individual to segregation or separate treatment in the receipt of any service, financial aid, or other benefit;
- restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit;

- treat an individual differently in determining whether he or she satisfies any admission, enrollment, eligibility or other requirement which must be met to receive any service, financial aid, or other benefit; or
- deny an individual an opportunity to participate, or afford an opportunity to participate which is different from that afforded others.

To determine whether a student has been discriminated against on the basis of race, color, or national origin under Title VI, OCR looks at whether there is evidence that the student was treated differently than students of other races, colors, or national origins under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the student's race, color, or national origin.

E. Evidentiary Standard

In examining evidence gathered from the Complainant and the District, OCR uses a "preponderance of the evidence" standard. Simply stated, this means that OCR must conclude, based upon the evidence gathered and reviewed during our investigation, the District's actions more likely than not constitute a failure to comply with Section 504/Title II when viewed in light of our legal standards.

II. OCR's Investigation

It is undisputed that the Student transferred from another school district to the XXX grade at DPS's Whittier ECE-8 School (School) at the start of the 2016-2017 school year. It is also undisputed that the Student had an IEP in his previous school district, but the parties dispute when the District learned of that previous IEP. The Complainant alleged that the Student's mother informed the District on August 22, 2016 of the previous IEP; the District contended that it did not learn of the IEP until mid-September 2016, when School staff approached the Student's mother about behavioral issues they had identified.

It is undisputed that once the District learned of the Student's previous IEP (by mid-September at the latest), School staff rejected it because it "d[id] not meet Colorado standards" and drafted instead a transfer IEP document. The Complainant alleged that this was done on August 22, 2016, but that the document was an incomplete IEP that did not comply with the Individuals with Disabilities in Education Act (IDEA) (or otherwise comply with Section 504 or Title II) and that a re-evaluation was required but did not timely follow this document. The Complainant provided a three-page document titled IEP with a "Transfer Date" of August 22, 2016 in support of her allegations. The District asserted that this document was begun in October 2016, after School staff learned of the Student's previous IEP, that it was a complete IEP that did comply with the IDEA (and thus Section 504 and Title II), and that an evaluation timely began in December 2016, after a delay occasioned in part to the Student's suspension for behavioral issues in early November. The District provided a longer IEP document containing the three

pages the Complainant provided plus five more, and the District also provided an email in which School staff sent this document to the Student's mother in early October. The events that occurred in the period between October and December are unclear at this stage of OCR's investigation. The Complainant alleged that the social work services required under the transfer IEP document did not begin until late September or early October. The District's documentation comported with this start date, but by its version of events, the IEP was not drafted (and thus services were not required) until this time period.

As to the Student's classroom assignment, it is undisputed that not long after the start of the school year, in approximately September 2016, the Student's classroom assignment was changed. The Complainant alleged that the Principal made a unilateral change of placement and assigned the Student and five other minority male students with disabilities in grades XXX, XXX, and XXX to a separate classroom, where those students were not afforded an opportunity to participate in academic, nonacademic activities and/or converse with same age non-disabled peers. According to the Complainant, the reassignment was a significant change in placement made without an evaluation, eligibility/IEP meeting, prior written notice, or procedural safeguards. The Complainant alleged that the conditions in this class were different, and inferior, to those of other classrooms in the School. Specifically, staff rotated to this class, rather than vice versa as with other classes. The Complainant expressed concern about different curriculum in this classroom and the Student's lack of progress in literacy in particular. Further, the Complainant alleged that the implementation of a "level system," by which students in the classroom earned lunch and recess (*i.e.*, time with non-disabled peers), may have affected, and put the School out of compliance with, the least restrictive environment mandated in the Student's IEP. Finally, the Complainant alleged that, even by the School's telling, behavioral reasons drove the classroom assignment, and this should have triggered an evaluation or re-evaluation for the Student (and others). Both sides provided information relating to behavioral incidents from the Student. Both sides agree that in January 2017, after the Complainant became involved and after she filed with OCR, the Student was moved to a larger classroom cohort containing some female students.

In response to the allegations related the Student's classroom assignment, the District first pointed to Colorado Department of Education demographic statistics showing that 97.1% of the School's students identify as a minority, and thus any classroom would necessarily be majority minority students. The District then contended that the Student's placement did not change, but "his classroom assignment changed to a different cohort group and classroom due to conflict and behavior concerns." The District described a "unique classroom assignment practice" at the School, although it provided conflicting information as to the reasoning behind this practice. Specifically, the District explained that the practice was based on identified academic needs and peer relationships, but it pointed to a written document sent to parents that explained that students will have two teachers with different teachers for subjects "to provide . . . a focused curriculum to improve . . . achievement." The District contended that the class initially contained nine students, but it had winnowed to six by the end of the semester, due to three students leaving the District for various reasons. Of the six, only two (the Student and one other) received special education. The District provided the Student's class schedule for the school year, but it does not reflect any changes throughout the three trimesters of the year.

The District asserted that the Student's class was not segregated or treated differently as compared to other classes regarding academic opportunities and nonacademic activities; that the class rotated just as others did to specials, small groups, lunch and recess, with the special education teacher and related service providers "pushing in" to provide services; that curriculum was provided to his class as it was to others in the School; and that the Student's placement was not changed, nor was his school day significantly different, outside of the specialized education and related services dictated in his IEP, from his general education peers.

Some documents provided by the District indicate that the Student's classroom was, at the very least, identifiable and treated as a separate group. For example, several emails among School staff refer to the class as the "TBD group" or "boys class." Emails among School staff between August 29 and November 29, 2016 indicate that individual students were kept from recess and sent to the auditorium instead, and that on or around September 8, 2016, per an email from the Principal, this practice changed in some way, to be more individualized so as to discipline the "top offenders." Similarly, documents provided by the District show that multiple parents of students in the Student's class expressed concern about the classroom assignment, including to District-level staff, and that at least four of the six students, including the Student, sought administrative transfers out of the School (all of which were denied). Also relatedly, documents provided by the District establish that District-level staff, including an Instructional Superintendent, reached out to the School principal in November and conducted a school observation in December, following notification of the parents' concerns.

Although OCR has already received voluminous amounts of evidence, in order to reach compliance determinations for each of the allegations, OCR would need to interview multiple school and District staff as well as parents of other students assigned to the Student's class. At this stage, OCR has determined that it is in both the District's and Complainant's interests to resolve the allegations through a Resolution Agreement.

III. 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 Title VI, Section 504, 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 me at XXX.

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

Enclosure: Resolution Agreement

cc (w/enclosure): XXX, District Deputy General Counsel

cc (w/o enclosure): Honorable Katy Anthes, Colorado Department of Education