



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

August 25, 2017

Superintendent Ed Smith
Pueblo School District 70
24951 Highway 50 East
Pueblo, CO 81006

Re: Pueblo School District 70
OCR Case Number: 08-17-1217

Dear Superintendent Smith:

On February 28, 2017, we received a complaint alleging Pueblo School District 70 (District) discriminated on the basis of disability. Specifically, the Complainant alleges that the District discriminated on the basis of disability when her daughter's (Student's) application to XXX (Charter) was denied.

We investigated this allegation under 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 by recipients of 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 the requirements of these laws and regulations.

In the investigation, we considered information provided by the Complainant, documents submitted by the District, and the District's response to the complaint.

We found that the District violated Section 504 and Title II as alleged. The reasons for our finding are below.

Legal Standard

Section 504 at 34 C.F.R. § 104.4(a) and Title II at 28 C.F.R. § 35.130 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.

In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged injured party with a disability, whether it followed its policies and procedures for taking such action and whether similarly situated individuals without disabilities were treated differently. If the alleged injured party was treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Relevant Facts

The Complainant alleged that the District discriminated on the basis of disability when her daughter's (Student's) application to XXX was denied.

The Student first applied for admission to the Charter for the 2015-16 school year; she was subsequently placed on the waitlist on September 17, 2015, and has been on the waitlist ever since. At the time she applied, the Student was explicitly asked on the application materials whether she had an Individualized Education Program (IEP) or Section 504 Plan and, if so, to include this as part of her application.¹

According to the District, students are offered enrollment based on the date of their application and any preferred enrollment categories, including residence in the District, children of Charter staff, and siblings of current Charter students. All students who have not yet been offered enrollment at the Charter (such as the Student) have either not made it to the top of the waitlist for their grade level or the Charter's special education team has determined that a Free Appropriate Public Education (FAPE) in the least restrictive environment could not be provided at the current time.

During the 2015-16 and 2016-17 school years, approximately 220 students from grades K-12 applied for admission to the Charter. Of those 220 students, 17 had an IEP (including the Student) and 2 had a Section 504 Plan. About 70 of the 220 students were enrolled at the Charter during the 2016-17 school year. Of those 70 students, only 1 student with a Section 504 Plan was enrolled, and only 1 student with an IEP was enrolled. The Student and her two siblings were denied enrollment at the Charter, being placed on a waitlist.

Analysis

In our different treatment analysis, the alleged action that the District took against the Complainant was to place the Student on the waitlist. We next determine whether the District followed its policies and procedures. The District followed its policies, which required applicants at the time to submit any IEPs or Section 504 Plans as part of their application package, which would then be used for evaluation. The explicit use of IEPs or Section 504 Plans as part of the application process is in itself problematic, particularly when the District's policies and procedures resulted in only 2 students out of 70 enrolled students having a Section 504 plan or IEP during the 2016-17 school year.

¹ During the course of its investigation in April 2017, OCR obtained a copy of the application form from the Charter's website which explicitly requires applicants to submit their IEP or 504 plan if applicable. OCR also took a screenshot of application instructions from the Charter's website which asks applicants to submit their IEP or 504 plans as part of their application package. The District informed OCR that in May 2017 it removed this particular application form from its website and changed the application instructions webpage omitting any references to submission of IEP or 504 plans per legal advice. In its data response to OCR about its application materials, the District mentioned that it is in the process of revising and finalizing these forms and processes. As of the date of this letter, the District has not shared these finalized materials or processes with OCR.

Furthermore, the Student was placed on the waitlist on September 17, 2015. Of the 32 enrolled 6th graders at the Charter, at least 7 students entered the waitlist after September 17, 2015 and were therefore a lower priority than the Student on the waitlist. Nevertheless, these 7 students were offered a spot in the 6th grade class before the Student. None of these 7 6th grade students had sibling or staff priority and none of them had a 504 Plan or an IEP. The difference between these 7 students and the Student is that the Student had an IEP and these 7 students did not. We find that the Student was treated differently on the basis of disability, by use and effect of the Charter's policies and procedures that limit the admission of students with disabilities to the Charter. Accordingly, the revocation of the Student's enrollment and admission to the School is different treatment on the basis of disability, and is a violation of Title II and Section 504 as alleged.

Conclusion

In summary, we found evidence to establish that the District discriminated as alleged. The District has entered into the attached Resolution Agreement to address the violation of Section 504 and Title II. OCR will monitor the implementation of the Agreement. We will keep the Complainant apprised of monitoring activities related to this case. When the Agreement is fully implemented, all allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations and the case will be closed. A failure to implement the Agreement according to its terms would require us to reopen the case for further proceedings.

This letter addresses only the issue identified in this complaint and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504, Title II, or other Federal civil rights laws in any other regard. 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 official and made available to the public.

This concludes our investigation of this complaint. Accordingly, we are closing the investigation of this complaint effective the date of this letter.

Please note that the Complainant may have the right to file a private suit in federal court regardless of whether OCR finds a violation. This letter sets forth OCR's determination in an individual case.

As noted previously, the Department of Education regulations prohibit the District from intimidating, harassing, or retaliating against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR. Additionally, the District is reminded that, should the Complainant decide to pursue enrollment again at the Charter in the future, which is her right similar to any other parent or guardian, the District is legally obligated to consider the application in a non-discriminatory and non-retaliatory manner as required by the civil rights statutes that OCR enforces.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will protect

personal information to the extent provided by law, which if released, could constitute an unwarranted invasion of privacy.

Thank you for the District's cooperation during the course of the investigation. Should you have any questions regarding this letter, please contact Jason Sinocruz, x-sentence redacted-x. I can be reached at XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure

Cc: Katy Anthes, Colorado Commissioner of Education

Charley Trechter, District General Counsel

Dustin Sparks, Charter General Counsel