



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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September 12, 2018

Dr. Thomas S. Tucker
Superintendent
Douglas County School District Re 1
620 Wilcox Street
Castle Rock, CO 801041739

Sent via email to XXXX

Re: Douglas County School District
OCR Case Number: 08-18-1285

Dear Superintendent Tucker:

On March 19, 2018, we received a complaint alleging Douglas County School District (District) and XX (School) discriminated on the basis of disability. Specifically, the complaint alleged that the District and School failed to implement the Student's Individualized Education Program (IEP) during the 2017-2018 school year when it failed to provide adaptive seating; failed to provide all occupational therapy (OT) hours; failed to provide adult supervision during recess, as described in the IEP; and provided a more restrictive placement by providing a dedicated aide when the IEP did not include one.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. 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.

During our investigation we reviewed documents provided by the Complainant and the District and conducted interviews with the Complainant. Prior to the completion of OCR's investigation, the District agreed to resolve the issues raised in this investigation pursuant to Section 302 of OCR's Case Processing Manual (CPM). Below is a discussion of our review of the complaint allegations, the relevant facts, the legal requirements, and our determinations.

Background

During the 2017-2018 school year the Student was enrolled in XX at the District. The Student entered the school year with an IEP under the disability category of XX. The Student has been diagnosed with XX (i.e. orthopedic/physical disabilities) and the District identified speech/language needs, visual motor delays, and academic delays.

On February 3, 2017 the School drafted an IEP for the Student, which was later amended in part on March 3, 2017. Both the initial IEP and its amendment were drafted while the Student attended a different school within the District. The Student attended the School from the start of the 2017-2018 school year, on August 7, 2017, until December 11, 2017 when the Complainant removed the Student from the School and District.

The Student's IEP provided for the following relevant services and accommodations: adaptive seating for all table-top activities including snack time to allow the Student to reach the table with her feet; Occupational Therapy (OT) services for 120 minutes per month; and to ensure her safety on the playground, the Student needs an adult continuously supervising her and within close proximity to provide stand-by assistance on the playground equipment. The Complainant alleged that the District did not fully implement the services and accommodations listed above, and in addition provided the Student with a dedicated aide though the IEP did not require one. The provision of the dedicated aide, the Complainant alleged, limited the Student's independence and created a more restrictive environment than required by the IEP.

Alleged Failure to Implement the Student's IEP

Legal Standard

The Section 504 regulations at 34 C.F.R. § 104.33(a) requires that the District provide a free appropriate public education to each qualified student with a disability that is in the District's jurisdiction, regardless of the nature or severity of the student's disability. The regulations at 34 C.F.R. § 104.33(b) states that the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities, and that the implementation of an IEP is one means of providing an appropriate education.

Analysis

Adaptive seating

The Complainant stated in an interview that in order to ensure that the Student was able to successfully transition to the School, she spoke with the School at the start of the 2017-2018 school year about the requirements of an adaptive seat. The chair needed to allow the Student to access table-tops with her feet, in the same manner that her non-disabled peers could access table-tops with their hands. The Complainant explained that the School provided an option of two chairs, neither of which allowed the Student to independently access table-tops and that there was a mutual understanding that the School would order an appropriate chair that met the Student's needs. The Complainant stated that in November of 2017, the School provided an appropriate adaptive chair, from a company called Flaghouse, which allowed the Student to independently access the table-top in her classroom, though she was still not able to access the table-top in the cafeteria. The Complainant requested that the School provide an appropriate chair for the cafeteria. The Complainant was unaware whether a second chair was purchased because she pulled the Student out of the District on December 11, 2017.

In the District's response it asserted that at the start of the 2017-2018 school year the School arranged for the purchase of stools and chairs to meet the Student's needs and that throughout the semester the School worked to provide seating to meet the Student's needs and provided adjustments as needed. The District provided receipts for its purchases. The earliest receipt indicated that on August 22, 2017 it purchased a 30 inch Fitness Aerobic Step Exercise Stepper Platform which was shipped on the same date. On November 2, 2017 the District purchased a kitchen stool and the receipt indicated an estimated delivery date of November 9, 2017. Another receipt was for a November 3, 2017 purchase of a large First Class Chair from Flaghouse, along with a large mobility base. The receipt indicates that the items were shipped on November 9, 2017. Also on November 3, 2017, the District purchased one large seat cushion that was shipped on November 5, 2017. Finally, the District purchased a second Flaghouse chair on November 20, 2017.

Emails between the Complainant and School indicate that there was ongoing discussion about finding an appropriate adaptive seat for the Student. It appears that the seats that were tried were either at the wrong height or did not allow the Student to be close enough to the table-tops. Both parties eventually settled on the Flaghouse chair as meeting the Student's needs. The District's response did not indicate when the Flaghouse chairs were provided for the Student's use but according to the shipment dates on the initial chair's receipt, the first chair would have been provided after November 9, 2017. An email dated November 30, 2017 between the School and Complainant discussed possible seating solutions for the cafeteria, which would mean that the second Flaghouse chair was not provided prior to November 30.

Since the District did not provide the Student with an appropriate adaptive seat until after November 9, 2017 we must conclude that the District failed to implement the Student's IEP, with respect to this accommodation, from August 7, 2017 through at least November 9, 2017.

OT Services

The Student's IEP included 120 minutes per month of OT services. An amendment to the IEP dated March 3, 2017 specified that OT services would be delivered outside of the classroom. The District provided the occupational therapist's service log, which recorded the amount of time the therapist spent on the Student, the location, and a summary of what the therapist observed or the services provided.

The log contained three entries for August of 2017. Each entry recorded 30 minutes of OT time for a total of 90 minutes, or 30 fewer minutes than required by the IEP.

September of 2017 consisted of four entries. The first entry was for 0 minutes with the therapist noting that the reason the Student was not seen was because of a holiday. The remaining three entries each recorded 30 minutes of OT time for a total of 90 minutes. Two of the entries note that services were delivered inside the classroom. A third entry does not describe where services were delivered or what was worked on, only that objectives were continued. In total the therapist provided 30 fewer minutes than required by the IEP.

There were five entries for October of 2017. Two of the entries were for 0 minutes. The therapist noted in one of those entries that the Student was not seen because it was fall break; for the second entry she noted that it was a planning day. Two other entries were for 30 minutes each, the Student was seen inside the classroom then at lunch. A fifth entry was for 60 minutes and it was described as a lunch observation with the Complainant. The therapist recorded 120 minutes of OT services but it is unclear whether any OT services described by the IEP were provided during the 60 minute session that was described as a lunch observation with the Complainant.

November of 2017 included six entries. Three entries were for 0 minutes. The therapist noted that the Student was not seen on two occasions because the Student was absent and on a third occasion because it was not a scheduled school day. The three remaining entries were for a total 110 minutes. They were comprised of a 60 minute session, a 30 minute session, and a 20 minute observation at lunch. The 110 minutes reflect a shortfall of 10 minutes of service. It is also unclear if any OT services described by the IEP were provided during the one 20 minute session that was described as an observation at lunch.

December of 2017 included two entries, each for 0 minutes. The reason given for not seeing the Student was because the Student was absent. The second entry was on the day that the Complainant pulled the Student from the School and District.

During the school year the Complaint asked the School to provide a schedule of when the Student received her related services. In an email to the Complainant on November 15, 2017, the occupational therapist explained that she would see the Student at varied times and in varied places. It would sometimes be for 30 minutes in class while the class was working on writing, or 30 minutes outside of class while the class was in large group time on the floor, or for 20 minutes either during lunch or recess. According to the dates in the OT service log each entry was for a Monday, except for three entries that were on a Friday.

The District's position is that it is not required to provide related services on days when the Student would have been provided services if not for a school holiday, fall break, a teacher's planning day, or student absence. We disagree with this position. The Section 504 regulations require a District to implement the services that are written into a Student's IEP. The Student's IEP required the District to provide her with 120 minutes of OT services outside of the classroom, every month. The record indicates that save for three instances, the therapist only attempted to see the Student on Mondays. There is no indication in the record that the therapist attempted to see the Student on a different day when a holiday fell on a Monday, as they often do, or if there was a teacher planning day, or if the Student was absent.

We do not agree that a student only has one opportunity a week to receive the related services she or he needs, pursuant to an IEP, and that the student forfeits its services should its singular opportunity fall on a holiday, teacher planning day, or absence, particularly when these instances are outside of a student's control. Additionally, several entries in the therapist's log indicated that services were provided inside the classroom, which was contrary to what was required by the Student's IEP. On March 3, 2017 the Student's IEP was specifically amended so that delivery of OT services would change from inside the classroom to outside the classroom. Finally, there

were at least two entries, totaling 80 minutes that were described as observations and it was not clear whether the services described in the IEP were provided.

Accordingly, we must conclude that the District failed to fully implement the Student's OT services while she was in attendance at the School during the 2017-2018 school year.

Supervision on the Playground

The Student's IEP required the District to provide the Student with continuous supervision while on the playground and within close proximity to provide stand-by assistance while the Student was on the playground equipment. The Complainant alleged that there were at least half a dozen instances when the Student experienced falls on the playground, during the fall semester of the 2017-2018 school year. The falls, the Complainant alleged, were because the District failed to provide the supervision required by the IEP.

The District asserted that adult supervision was consistently provided throughout the fall semester of the 2017-2018 school year. The District further asserted that the Complainant and School engaged in email communication about the Student's needs and how to address them on the playground. The District further stated that it did not document or otherwise record who provided supervision while the Student was on the playground.

A series of emails between the Complainant and School on August 30-31, 2017 referenced a fall that the Student experienced on the playground. Subsequent emails referenced the creation of a Safety Monitor Health Care plan. It is unclear if the plan was finalized and/or implemented; the District did not provide the plan before it agreed to enter into an agreement.

Without interviews of the School staff that provided supervision of students while they were on the playground we do not have enough information to make a final determination about whether the School failed to provide the Student with continuous supervision while on the playground and within close proximity to provide stand-by assistance, as indicated in her IEP.

Provision of a Dedicated Aide

The Complainant alleged that the District provided the Student with a dedicated aide even though her IEP did not require one. The complainant alleged that the aide the District provided did many things for the Student that she is able to do on her own and impacted her ability to be independent. As non-exhaustive examples she noted removing the Student's shoes, wiping the Student's feet before lunch, and handing the Student items that she would normally be able to reach on her own. This, the Complainant alleged, resulted in a more restrictive environment than intended by the IEP.

The District asserted that the Student received specialized assistance for her occupational therapy needs, communication, social/emotional wellness, and physical motor development, in accordance with the accommodations listed in her IEP. The District acknowledged that the parent raised concerns during the school year that the aide was doing too much for the Student and that the Student's independence was not being encouraged. The District explained that it

attempted to schedule an IEP meeting to discuss the Complainant's concerns but that the Complainant removed the Student from the District before a meeting could be held.

The Student's IEP does include the following accommodations: removing the Student's shoes and socks upon arrival to ensure accessibility to classroom materials with her feet; provide assistance to ensure safety during emergency drills; and provide assistance with managing clothing and hygiene during toileting. Therefore, if an aide provided the aforementioned assistance to the Student it would be in accordance with her IEP. However, the record also indicates that on April 20, 2017 the District submitted a "Student Specific Resource Allocation Request" for the 2017-2018 school year. This appears to lend support for the Complainant's position that the District provided the Student with a dedicated aide even though her IEP did not include one.

Without interviews of School staff, including any aide assigned to the Student, we do not have enough information to make a final determination about whether the District provided the Student with a dedicated aide when her IEP did not require one, and thus created a more restrictive setting than the IEP intended.

Conclusion

We find that the District did violate Section 504 of the Rehabilitation Act of 1973 when it failed to provide appropriate adaptive seating and all occupational therapy hours in accordance with the Student's IEP. Further interviews were needed in order to make final determinations regarding the remaining allegations: whether the District failed to provide adult supervision on the playground and whether it created a more restrictive placement by providing the Student with a dedicated aide when the IEP did not include one.

Further interviews were not conducted because during our investigation and before we made final findings regarding all complaint allegations, the District expressed a willingness to resolve the complaint. The District agreed to train School staff on the implementation IEPs and Section 504 plans, the provision of all related services required by IEPs and Section 504 plans, and the provision of LRE. The District also agreed to provide 180 hours of compensatory education either as actual OT services or a monetary amount equal to the fair market hourly rate of a qualified OT. Finally, the District agreed to reimburse the Complainant the tuition paid for the Student to attend the School from August through November of 2017.

A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, this allegation will be resolved consistent with the requirements of Section 504 of the Rehabilitation Act of 1973, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement. We will provide the Complainant with copies of our monitoring letters.

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 send a letter to the District, with a copy 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.

Under the Freedom of Information Act, we may release this document, related records, and correspondence upon request. If OCR receives a request, we will protect personal information to the extent provided by law.

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

Thank you for the District's cooperation and attention to this matter, and for the assistance of Ms. Wendy Jacobs. If you have any questions, please contact XX, at XX. I can be reached at (303) 844-6083.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Copy of Resolution Agreement

CC: Wendy Jacobs, Deputy General Counsel, Douglas County School District
Kathy Anthes, Commissioner, Colorado Department of Education