



UNITED STATES DEPARTMENT OF EDUCATION
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June 25, 2019

Dr. Sandra Smyser, Superintendent
Poudre School District
2407 LaPorte Avenue
Fort Collins, CO 80521

Sent via email to ssmyser@psdschools.org

Re: Poudre School District
OCR Case Number: 08-19-1133

Dear Superintendent Smyser:

We have completed our investigation of the above-referenced complaint, filed on December 28, 2018. The complaint alleged that the Poudre School District (District) at XX (School) discriminated on the basis of disability and engaged in retaliation. Specifically, it alleged that the School failed to implement the Student's existing Section 504 plan after he transferred into the District, failed to complete an evaluation, and engaged in retaliation when it removed the Student's modified attendance schedule.

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. Additionally, individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports or is insufficient to support the conclusion.

During the investigation we carefully considered information provided by the Complainant and data submitted by the District. We also conducted interviews with the Complainant and the following staff members from the School and District: the Head of School, the Student's

classroom teacher, the School's special education teacher, the School's speech and language therapist, the School's occupational therapist, the School's school psychologist, and the School's former office manager. Prior to the completion of OCR's investigation, the District agreed to resolve the issues that were raised in this investigation pursuant to Section 302 of OCR's Case Processing Manual (CPM). Below is a discussion of our review of the relevant facts, the complaint allegations, the legal requirements, and our determinations.

Factual Background

During the period relevant to the complaint, the Student was 7 years-old and in the third grade. He began the 2018-2019 school year enrolled at XX (GVA), a member of the XX school district. While at GVA, the Student was found eligible for a Section 504 plan. We reviewed a Section 504 evaluation determination dated February 14, 2018 and a Section 504 plan (Plan) drafted by GVA on August 16, 2018.

The Plan included 24 separate accommodations that addressed the following areas of difficulty:

- Inflexibility and behavioral rigidity – related to Autism Spectrum Disorder.
- Difficulty with sustained focus due to CANS (childhood acute neuropsychiatric symptoms), and Autism Spectrum Disorder.
- [Student] has difficulty sustaining focus for testing.
- Social language and reciprocal communication.

On August 23, 2018, the Complainant transferred the Student to the School.¹

The parties agree that during the enrollment process the Complainant informed the Head of School that she was enrolled in Colorado's Address Confidentiality Program (ACP). Due to her enrollment in the ACP, the Complainant requested that the School not contact GVA to obtain the Student's educational records. Instead, the Complainant agreed to forward the School a copy of the Student's educational records through the ACP process. During an interview, the Head of School explained that because it was the first time he had encountered the ACP, he consulted with the District's records department who informed him that the School should remove any barriers to enrollment. As a result, the School enrolled the Student without a copy of the Student's educational records.

The District's position is that the only documents the Complainant provided during the Student's enrollment was an enrollment packet, given to her by the School. The Head of School asserted that he did not receive the Student's educational records, including the Plan, until sometime in December of 2018, when the Complainant emailed them to him. We reviewed an email dated November 30, 2018 from the Complainant to the Head of School, where she provided several records, including the Plan. The Complainant confirmed during a rebuttal interview, that she emailed the School the Student's educational records, including the Plan, on November 30, 2018.

¹ The Student is currently enrolled at the District but not at the School.

She also reported that she made a request for ACP to forward records from GVA to the School, sometime in December.

However, the Complainant explained that her production of records in November and December were additional copies of records that she hand-delivered to the School's office manager during the Student's enrollment. The Complainant provided an email from the office manager dated August 23, 2018 where she was asked to provide all paperwork to the School by the following day. The Complainant asserted that she followed through with the request and that the August 23rd email proved that she provided the Plan by August 24, 2018. Additionally, the Complainant alleged that she informed the Head of School, during the enrollment process, that the Student had a Section 504 plan at GVA. She further alleged that the Head of School told her that because the School already met the needs of each child, and the Student was able to access his environment, he did not believe that the Student needed a Section 504 plan.

We interviewed the office manager, who had since left her position with the School. She did not recall specifics but explained that in her role she sent out and collected enrollment packets, contacted schools to obtain educational records of transfer students, collected documents provided by parents during enrollment, and filed all documents in a student file. She stated that she would have placed any documents provided by the Complainant during the enrollment process, in his student file. She did not remember what documents, if any, the Complainant provided.

The Head of School confirmed that he spoke to the Complainant about the Plan and the accommodations it included. He also confirmed that he told the Complainant that it seemed as if the accommodations included in the Plan were the same accommodations afforded to all students at the School and that a Section 504 plan was not necessary in order to obtain them. The Head of School acknowledged that without an evaluation he did not know if the Student needed additional or different accommodations after transferring into the School, but he stated that he was waiting to receive records from the previous school before conducting an evaluation.

During an interview with the classroom teacher she stated that before the Student began attending her class, she was given documents to review. Those documents indicated that the Student had a diagnosis of autism and that the family was enrolled in the ACP. She recalled that the documents were from other schools and other states but not from GVA. She said that in September of 2018 the Complainant informed her via email that the Student had a Section 504 plan from GVA. The teacher said she passed that information to the Head of School but did not know how or if it was addressed. In December of 2018, the Head of School provided her with a copy of the Plan from GVA.

We interviewed the School's special education teacher, speech and language therapist, occupational therapist, and school psychologist because they were part of the School's evaluation team and considered the Complainant's December 7, 2018 request to evaluate the Student for

special education eligibility.² During interviews, each evaluation team member reported that they had not received a copy of the Student's Plan. They explained that they do not have any involvement in Section 504 evaluations or in drafting Section 504 plans, at the School. The Head of School did not recall whether he provided the evaluation team with a copy of the Plan. He stated, however, that a Section 504 plan is not a document that the evaluation team would typically review or take into consideration when determining whether to evaluate a student.

The Head of School stated that as the School's Section 504 Coordinator, he determines whether a Student requires a Section 504 plan. In making that determination he is informed by the Response to Intervention (RTI) process, whether a disability exists or is presumed, whether the Student was making adequate academic growth, and had access to the classroom. He further explained that a Section 504 meeting would include himself, the parent, and generally, the classroom teacher.

The Complainant also alleged that she signed consent for GVA to conduct a special education evaluation during the 2018-2019 school year. The District's position is that it never received a copy of the consent to evaluate. The Head of School asserted that the first time the Complainant informed him that she signed a consent to evaluate, at the previous school, was in December of 2018, when she made a request that the School evaluate the Student. He further asserted that he never received a copy of a previously signed consent to evaluate. The other staff members we interviewed also denied ever receiving a previously signed consent to evaluate. During a rebuttal interview, the Complainant clarified that she was not sure if she ever provided the GVA consent to evaluate form to the School.

The Complainant's final allegation was that the District engaged in retaliation when it removed the Student's modified attendance schedule, in response to the Complainant's request for a special education evaluation. The Complainant made a request for a shortened schedule on September 27, 2018. The request was for the Student to be released two hours early on Tuesdays and Thursdays so that he could attend behavior therapy sessions. On November 28, 2018, the Complainant made an additional request, that the Student be allowed to miss school every day beginning at 12:30 PM. The Head of School reported that he allowed the excused absences while he obtained guidance from the District. He asserted that he communicated that to the Complainant. When the District advised him that he could not modify a student's schedule unless it was medically necessary to do so, he informed the Complainant that he could no longer excuse the Student's absences. He also informed the Complainant that after the winter break, the Student would be required to attend a full day of school, otherwise he would have to disenroll him from the School. During a rebuttal interview the Complainant acknowledged that the Head of School informed her that he would only excuse the Student's absences until December of 2018, while he waited to receive direction from the District about her request for a modified schedule.

² On December 17, 2018 the District notified the Complainant that it would not conduct an evaluation because the evaluation team determined that there were no academic, communication, or social concerns in the academic setting. The response did not address whether there was a need for a Section 504 evaluation.

Alleged Discrimination on the Basis of Disability, Free Appropriate Public Education

Legal Standard

The Section 504 regulations at 34 C.F.R. §104.32 states that school districts shall: (a) undertake to identify and locate every qualified student with a disability residing in the school district's jurisdiction who is not receiving a public education; and (b) take appropriate steps to notify students and their parents or guardians of the school district's duty under this subpart.

The Section 504 regulations at 34 C.F.R. §104.35(b) states that school districts shall establish standards and procedures for the evaluation and placement of students who need or are believed to need special education or related services which ensure that:

- (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
- (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
- (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

Allegation I

Whether the District discriminated on the basis of disability when it failed to implement the Student's existing Section 504 plan after he transferred into the District in August of 2018.

Analysis

The Head of School acknowledged that the Complainant informed him during the enrollment process that the Student had an existing Section 504 plan that was drafted by his previous school. The classroom teacher stated that prior to the Student attending her classroom, she reviewed documentation that indicated that he had been diagnosed with autism. Additionally, in the enrollment packet the Complainant indicated that the Student had Autism Spectrum Disorder and was receiving Applied Behavior Analysis from the Center for Autism and Related Disorders and working on social communication. That information was sufficient for the District to identify the Student as a qualified student with a disability that needed or may need special education or related instruction.

The District's position was that it did not receive a copy of the Student's Section 504 plan until December of 2018. However, the District was not obligated to implement the same plan that the Student had at his previous school. It could have implemented the same plan, but it was not

required. What the Section 504 regulations do require is that the District, having been informed of the Student's disabilities and that he had been found eligible for a Section 504 plan, should have evaluated the Student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determined which educational program was appropriate for the Student. While both parties agree that the Head of School and the Complainant discussed the Section 504 plan the Student had at his previous school, the structure of the classroom, and how the classroom's structure may provide some of the accommodations the Student needed, that conversation did not meet the requirements of an evaluation per 34 C.F.R. 104.35. Additionally, once the District did receive the Student's Plan, in December of 2018, the District still did not evaluate the Student or demonstrate that it implemented the Plan.

The investigation indicates that the District violated Section 504 of the Rehabilitation Act of 1973 when it failed to evaluate the Student after learning that he was a qualified student with a disability and after it received a copy of his Section 504 plan.

Allegation II

Whether the District discriminated on the basis of disability when it failed to conduct a special education evaluation after the Complainant informed the District that she provided consent for an evaluation at another school district during the same school year.

Analysis

The parties disagree as to when the Complainant informed the District that she had previously signed a consent to evaluate. The Complainant asserted that she informed the Head of School during enrollment, while the Head of School reported that he was not informed until December of 2018, when the Complainant made a request for the School to evaluate the Student. The District indicated that it never received a copy of the previously signed consent to evaluate, and the Complainant was not sure if she ever provided it to the District or School. During our investigation OCR did not receive a copy of the consent to evaluate.

In order to further investigate this allegation, we would have had to interview staff from the previous school to determine whether the Complainant indeed signed consent to evaluate during the 2018-2019 school year. We would have also had to interview staff from the ACP to determine which documents were forwarded to the School and when they were forwarded. However, before conducting further interviews, the District expressed a willingness to enter into a 302 Agreement.

Alleged Retaliation

Legal Standard

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in

the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. an individual experienced an adverse action caused by the recipient; and
2. the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and
3. there is some evidence of a causal connection between the adverse action and the protected activity.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

If all elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

Analysis

The Complainant alleged that the School retaliated in response to her request for a special education evaluation by removing the Student's modified attendance schedule. The Complainant requested a modified schedule on September 27, 2018, then requested a further modification on November 28, 2018. She requested an evaluation on December 7, 2018. Both parties agree that the School agreed to the modified schedule on a temporary basis while the School received guidance from the District about the Complainant's request. When the School received guidance from the District it communicated it to the Complainant in December of 2018 and informed her that after the winter break, in January of 2019, the Student would have to attend a full day of school.

The alleged adverse action is the School's removal of the Student's modified schedule. However, the Complainant knew that the schedule was temporary, while the School waited to hear whether it could accept the Complainant's request on a permanent basis. Once the School learned that it could not accept the Complainant's request, it informed the Complainant that the Student would have to start attending school for a full day, in January of 2019. In addition, because the School informed the Complainant in December of 2018, the decision did not impact any of the dates where the Complainant had already requested an excusal. Since we did not find that the Complainant experienced an adverse action, we find insufficient evidence that the District engaged in retaliation.

Conclusion

This concludes OCR's investigation of the complaint. We found sufficient evidence to substantiate the allegation that the District discriminated on the basis of disability when it failed to implement the Student's Section 504 plan. We found insufficient evidence to substantiate the

allegation that the District engaged in retaliation. We did not reach a determination regarding the District's alleged failure to complete an evaluation that the Complainant consented to at a prior school district during the same school year that the Student transferred into the District. Prior to the completion of OCR's investigation, the District agreed to resolve the issues of this investigation pursuant to Section 302 of OCR's Case Processing Manual. Accordingly, to resolve the issues of this investigation, the District agreed to train staff and administrators at the School on identifying students who need or are believed to need special education or related services; the legal requirement to provide a free appropriate public education (FAPE) to students with disabilities; standards and procedures for Section 504 evaluations and placements; standards and procedures for drafting Section 504 plans; and providing parents and guardians with their procedural safeguards. The District further agreed to evaluate the Student to determine whether he needs an Individual Education Program or Section 504 plan and invite the Student to reenroll at the School.

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, 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.

Please note a complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Please also 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 another complaint alleging such treatment.

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 has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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 your attention to this matter, and for the assistance of Mr. Robert Montgomery. If you have any questions or concerns about our findings, you may contact XXX, the attorney assigned to this complaint, at XXX. You may also contact me at (303) 844-6083.

Sincerely,



Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Copy of Resolution Agreement

cc: Robert Montgomery, Semple, Farrington, Everall & Case, P.C., attorney for the District (via email); Katy Anthes, Commissioner, Colorado Department of Education