



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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July 19, 2019

Peter Hilts, Chief Education officer
Falcon School District 49
10850 East Woodmen Road
Peyton, Colorado 80831

via email only to XXXX@XXXX

Re: **Falcon School District 49**
OCR Case 08-19-1181

Dear Mr. Hilts:

We write to inform you of the resolution of the above-referenced complaint, filed on XXXX, 2019, with the Office for Civil Rights (OCR) of the U.S. Department of Education ("Department"), against Falcon School District 49 ("District"), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District, at Rocky Mountain Classical Academy ("School"):

- failed to re-evaluate her son ("Student") in a timely manner;¹
- treated the Student differently on the basis of disability (*i.e.*, no longer allowed him to attend the School after his area of eligibility and/or services changed); and
- failed to implement his individualized education program (IEP) after XXXX, 2019.

We found a preponderance of evidence to support violation findings for the allegations. During our investigation, we identified three additional violations of Section 504 and Title II:

- the District took disciplinary action against the Student that resulted in significant changes in placement without first reevaluating the Student and affording him due process procedures (*i.e.*, suspended the Student for more than ten school days before conducting a manifestation determination);
- the District took disciplinary action against the Student that resulted in significant changes in placement without first drawing upon information from a variety of sources (*i.e.*, did not consider at his manifestation determinations that the Student was suspected of having and in the process of being evaluated for an emotional disability); and
- the District made another placement decision (*i.e.*, unenrolled him from the School and District) without first complying with procedural requirements.

The reasons for our conclusions are set forth in this letter.

¹ During our evaluation, it became clear that the pertinent issue was whether the District *evaluated* the Student for a different or additional disability, not whether the District *re-evaluated* the Student, in a timely manner.

Upon being advised of the violation findings, the District entered into a Resolution Agreement (“Agreement”) to resolve the issues. A signed copy of the Agreement is attached with this letter.

I. JURISDICTION

OCR is responsible for enforcing: Section 504 of the Rehabilitation Act of 1973 (“Section 504”), and its implementing regulations, at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination based on disability in any program or activity operated by recipients of Federal funds from the Department; and Title II of the Americans with Disabilities Act of 1990 (“Title II”), and its implementing regulations, at 28 C.F.R. Part 35, which prohibit discrimination based on disability by public entities, regardless of whether they receive Federal financial assistance. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

II. INVESTIGATION

Our investigation focused on obtaining the evidence necessary to determine whether the District complied with Section 504 and Title II. Specifically, our investigation consisted of:

- requesting and reviewing documents and information from the Complainant;
- requesting and reviewing documents and information from the District and School;
- interviewing the Complainant;
- interviewing District staff, including a special education coordinator (“Coordinator”)² and a school psychologist (“Psychologist”);³ and
- interviewing School staff, including the principal (“Principal”), assistant principal (“Assistant Principal”), dean of students (“Dean”), and K-4 special education team lead/teacher (“Teacher”).⁴

III. EVIDENTIARY STANDARD

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.

IV. LEGAL STANDARDS

The Section 504 regulations, at 34 C.F.R. Section 104.33, require recipient 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

² The Coordinator was the School’s assistant principal during the 2017-2018 SY. During the 2018-2019 SY, he was the special education coordinator for the District’s charter and alternative schools.

³ The Psychologist is no longer employed by the District.

⁴ The Teacher was employed by the District, but worked at the School on a full-time basis. The Teacher is no longer employed by the District.

are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of Sections 104.34-36 pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and 35.130(b)(1)(ii)-(iii), to require public school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

a. Evaluation

Section 104.35(a) of the Section 504 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. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. Under Section 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. A recipient school district violates Section 504 when it knows or has reason to suspect that a student has a disability, and needs special education or related services, but the recipient fails to initiate the evaluation process or unreasonably delays conducting an evaluation.

b. Different Treatment

Under the Section 504 regulations, at 34 C.F.R. Section 104.4(a)-(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. Section 35.130(a)-(b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. Section 104.4(b)(1), and 28 C.F.R. Section 35.130(b)(1), a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

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 individuals without disabilities 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.

When charter schools, like any other public school, make an educational placement decision about a student with a disability, the decision must be made in compliance with the Section 504 FAPE requirements. In most instances, a charter school's proposal to disenroll an enrolled student with a disability constitutes a significant change in placement and triggers the recipient's duty to conduct a

reevaluation. Under Section 504, educational placement decisions must be made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. For example, it would be a violation of Section 504 for a charter school administrator to unilaterally make an educational placement decision, or to make a unilateral change of placement.

c. Failure to Implement

Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the FAPE requirements of Section 504 and Title II. A recipient school district's failure to implement a student's IEP is typically a violation of Section 504 and Title II.

V. FACTS

The School is a K-8 public charter school in the District. Pursuant to a contract, the District administers and is responsible for the special education program at the School, including staffing (*e.g.*, school psychologists, special education teachers and case managers, and related services providers). According to data from the Colorado Department of Education, during the 2017-2018 SY, students with disabilities were 2.85% of the School's total student population compared to 10.18% of the District's total student population.⁵ The Principal told OCR that the only students with disabilities who the School is "set up" to serve are students with learning disabilities.

The Student and Complainant are domiciled in XXXX District XX ("District XX"). Pursuant to the District's "Inter-District Choice/Open Enrollment" policy (JFBB), the Complainant enrolled the Student in XXXX at the School in XXXX.

a. Background (Pre-XXXX, 2018)

During the 2016-2017 SY, the Student was XXXX grade at the School. The Student had numerous disciplinary incidents, including:

- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]

⁵ Notably, Springs Ranch Elementary School, a District school that is less than one mile from the School, had a student population that was 14.47% students with disabilities; and Horizon Middle School, a District school that is less than four miles from the School, had a student population that was 10.99% students with disabilities. See CO Dept. of Educ., School View Data Center, www.cde.state.co.us/schoolview.

His disciplinary consequences included a phone call home, lunch duty, missing recess, spending time in the office, being sent home early, and out-of-school suspension.

During the 2017-2018 SY, the Student was in XXXX grade at the School. The Student had an IEP for a speech or language impairment (SLI). The Student had numerous disciplinary incidents, at least four of which resulted in out-of-school suspension (OSS). For example:

- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]
- [XXXX – redacted – XXXX]

The School repeatedly attempted disciplinary interventions for the Student. For example:

- On XXXX, 2017, the School initiated a response to intervention (RtI) plan for the Student based on concerns about his behavior. Documents from the plan read, “[W]e are concerned with [the Student]’s behavior at this time. ... It appears that [the Student] has a hard time keeping control of himself during transitions and less structured activities[.]”
- On XXXX, 2018, the School again initiated an RtI plan for the Student based on concerns about his behavior. Documents from the plan read, “[The Student] has a hard time controlling himself especially during transitions or activities with less structure.”
- On XXXX, 2018, [XXXX – redacted – XXXX]. The School conducted a risk assessment of the Student. A school counselor emailed the Complainant to express concerns about the Student’s behavior.
- On XXXX, 2018, the School convened an RtI plan review meeting. The Student was on “Tier 2.” Records from the meeting read, “[The Student] needs to continue to learn how to self monitor his self control.” The School also determined it would maintain the Student’s existing behavior plan and would “follow up about IEP for added supports in regards to behavior” for the “2018-19 school year.”

During an interview with OCR, the Coordinator reported that, during the 2017-2018 SY, when he was an assistant principal at the School, he requested that a District school psychologist consider evaluating the Student to determine if “he needed anything further” due to the Student’s behavioral problems. According to the Coordinator, the school psychologist declined to evaluate

Student on XXXX, 2019, the School issued eight out-of-school suspensions to the Student, for a total of 21 school days. See Figure 1.

Figure 1: Out-of-school suspensions issued to the Student during the 2018-2019 SY

Date of OSS	# of School Days	Date of OSS	# of School Days
XXXX, 2018	1	XXXX, 2018	2
XXXX, 2018	3	XXXX, 2018	3
XXXX, 2018	1	XXXX, 2018	5
XXXX, 2018	1	XXXX, 2019	5

The District held manifestation determinations for the Student on XXXX, 2018, XXXX, 2018, and XXXX, 2019. At the Student’s XXXX, 2018 manifestation determination, the “Teacher Observations” section read:

[The Student] has a very hard time controlling himself. [The Student] will often come into the room yelling or singing. The songs are not appropriate (“do you want to see my pencil, Diarrhea”). Throughout the day when he is asked to complete a task or follow specific instructions he will yell “No” or “I don’t care” repeatedly. He will also make grunting noises often during the day. {The Student} also will tap or hit his private parts. He will be very physical with the other students in class. For example, he will put his hands on other student’s throats, holding them by their neck, pinning them down onto tables or the floor, hitting students with his fists and chasing them around the room. He has also thrown things at other students and caused injuries to those students. When addressed by an adult or asked to take a break, he will often shut down and refuse to leave an area or take a break. Other students are often unsure of how to act or behave around him – which is unsettling as a teacher. Kids and other teachers feel like they are on pins and needles with him, never knowing how he will react.

The “Other Relevant Information Considered” section read:

Given the significant behavior difficulties that [the Student] has been demonstrating this year, the Special Education Team discussed and planned to propose having a re-evaluation to include a Functional Behavior Assessment and Behavior Intervention Plan in order to identify and better address [the Student]’s educational needs. This Manifestation Meeting occurred before the team had an opportunity to start the re-evaluation process.

At the Student’s XXXX, 2018 and XXXX, 2019 manifestation determinations, the “Teacher Observations” sections of the paperwork were identical to the sections in the XXXX, 2018 manifestation determination paperwork. The School relied solely on the Student’s XXXX, 2018 IEP and determined the Student’s conduct was not a manifestation of his SLI.

School staff continued to express concerns about the Student's behavior and attempt behavioral interventions. For example:

- On XXXX, 2018, the Dean emailed the School's counselor ("Counselor") and Assistant Principal, "[The Student] just got suspended for his eighth day. I think *we need to see about adding behavioral supports to his IEP* as well as a short term behavior plan." (emphasis added). The Assistant Principal replied, "I think *we asked for that earlier in the year. We definitely need to revisit it.*" (emphasis added). During an interview with OCR, the Dean said that he did, in fact, ask the Psychologist about adjusting the Student's IEP.
- On XXXX, 2018, School staff met with the Complainant about behavioral interventions for the Student.
- On XXXX, 2018, the School initiated an RtI plan for the Student due to his behaviors. The Student was still on "Tier 2." The plan stated, "[The Student] is a XXXX grade student with an IEP for speech/language, however, we are concerned with [Student]'s behavior at this time. This behavior is a continuation of observed behavior *over the last few school years.*" (emphasis added)
- XXXX, 2018, School staff met with the Complainant about behavioral interventions for the Student.
- On XXXX, 2018, the Psychologist observed the Student in class. The following day, the Psychologist emailed School staff (the Principal, Assistant Principal, Dean, etc.), "I am glad we met today to discuss ways to support [Student]'s behavioral difficulties. ... Given that he demonstrates inappropriate behaviors in the bathroom, I would suggest that he is supervised when in the bathroom or goes to the bathroom when there is no one else in there. I would also suggest that he is always in an adult's line of sight if there is concern regarding inappropriate touching."
- On XXXX, School staff met with the Complainant in order to adjust the Student's behavior plan to be more effective.
- On XXXX, 2018, the Student's XXXX teacher emailed School staff that the Student was "constantly needing to leave music class" and that "normal tactics" were not working with the Student.

c. Evaluation Process

On XXXX, 2018, School and District staff met with the Complainant to discuss the Student's behaviors and evaluating the Student. During interviews with OCR, staff indicated that the Complainant agreed with the need to evaluate.

On XXXX, 2018, the Coordinator emailed District and School staff:

I wanted to share some of the conversation that [the Dean] and I had following [the Student]'s meeting with mom and some of the concerns that [the Dean] shared as well as myself in regards to the timeliness for evaluations and in particular around [the Student].

We did discuss that if we get consent from [the Student]’s mom soon, then the realistic expectation to complete the process would be the week or two prior to Winter Break, that it would not be able to be completed earlier than that. [The Dean] agreed and shared that he did not mean an expedited process, just that he wanted to pursue the consent as soon as possible given the severity of behaviors and the possible Manifestation Determination if [the Student] is to be suspended again. We also discussed the timeline of MTSS referrals and how the process within the building is able to maintain supports and work with the timeliness of MTSS referrals and how the process within the building is able to maintain supports and work with the timeliness of referrals so as not to stack evaluations on top of each other, however, when a student has the proper interventions and tiered supports in place, then it is our duty to move forward in a timely manner, which can be discussed between the teams so that we can continue to provide our services and complete sufficient evaluations for every child that is referred for special ed evaluations.

Regarding the email, the Coordinator clarified, during an interview with OCR, that there was a backlog of students at the School who needed to be evaluated and that he was essentially telling School staff that they could not unreasonably delay special education evaluations because students were in the multi-tiered system of supports (MTSS) process.

On XXXX, 2018, the Assistant Principal emailed District and School staff, “[Teacher] shared with me on Friday that she will be sending out that Consent for Evaluation on XXXX. The team will get the necessary testing/analysis completed before break, but have the meeting as we return that first week of XXXX.”

On XXXX, 2018, the Complainant emailed the Dean and Principal, “I have not received the documentation required to begin the reevaluation for [the Student]’s IEP[.]” The Principal replied, “This will be coming from the SPED department and should be sent home to you in the next couple of days. ... We will begin the process as soon as that paperwork gets back to us.”

On XXXX, 2018, the Teacher emailed the Complainant the consent form for evaluation. The Psychologist surmised that there was a delay in sending the consent form to the Complainant because sending it earlier could have triggered the 60-day timeframe to complete the evaluation (under State regulations), thereby making the evaluation deadline fall on a date when the District was on winter break. The Psychologist explained that if the deadline occurred during winter break, then the District would have had to finish the process before winter break, and consequently, would have had less than the full 60 calendar days. The Dean told OCR that School staff were frustrated by how long the District was taking to send the Complainant a consent for evaluation form. The Principal told OCR that the School asked the District to send the consent for evaluation form sooner and implied that sending the form took too long.

On XXXX, 2018, the Complainant provided the School a signed consent for evaluation form (dated XXXX, 2018).

On XXXX, 2018, the Teacher emailed District and School staff, “We received Consent Friday for [the Student]. His 60 day deadline is XXXX, 2019.”

In XXXX 2018 and XXXX 2019, the School and District took steps to evaluate the Student. Specifically:

- On XXXX, the Woodcock Johnson Test of Achievement IV was completed.
- On XXXX, the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) was completed.
- On XXXX, the “STAR Assessment” was completed.
- On XXXX, the “social developmental history” was completed, the speech-language observation took place, and the Behavior Assessment System for Children – 3rd Edition was completed.
- On XXXX, the Student’s class grades were provided.
- On XXXX, the “clinical assessment of articulation and phonology” was completed.

An IEP team meeting was scheduled for XXXX, 2019; however, due to weather, the meeting was re-scheduled for XXXX, 2019. Then, the IEP team meeting that was supposed to occur on XXXX, 2019 had to be moved to the following day because the School had not yet completed the speech-language assessment.

On XXXX, 2019, the Coordinator emailed the Director, “[The Student] definitely needs AN [affective needs] supports of some kind and lots of adult support. [The School] has thrown lots of adult support at him and still can’t keep him from throwing kids against walls!” The Director replied, “Your team should have enough to make a determination that [the School] cannot provide the appropriate supports.”

On XXXX, 2019, the Dean emailed the Complainant that the Student could not return to School until the evaluation and IEP team meeting were completed. The Assistant Principal emailed the Complainant the same on the following day.

On XXXX, 2019, the School convened an IEP team meeting for the Student. The team found the Student eligible for special education under “serious emotional disability” as the primary area of eligibility and “other health impairment” as the secondary area of eligibility, and developed a new IEP to reflect that determination. Records from the meeting, including the evaluations and IEP, note that the Student has problems with inattention, hyperactivity, aggression, defiance, anger, bullying, self-control, negative emotionality, following requests from adults, and peer relations. The records read, “His behaviors are also characteristic of a Conduct Disorder and Oppositional Defiant Disorder.” Prior to the IEP team meeting, pursuant to the Student’s XXXX, 2018 IEP, the Student received only XX minutes per month of special education (speech/language therapy). Per the new IEP, the Student would receive: (a) XXXX, XX-minute sessions per week of mental health services; (b) XX minutes per week of special education inside a special education classroom; and (c) XX minutes per week of special education inside of a general education classroom. His time in the general education environment would be XX%, and his time in the general education environment would be XX%. Staff explained to OCR, during interviews, that the XX minutes per week would have been a one-on-one paraprofessional with the Student.

On XXXX, 2019, the Complainant had a phone conference with the Principal, Dean, and Coordinator to discuss the Student’s placement. According to the District’s narrative response to OCR:

During this conference, the Special Education Coordinator, Principal, and [Dean] shared with [the Complainant] that [the Student]'s needs and services required substantially more supports than the special education team at [the School] was able to provide at this time. [The Complainant] was then told that she would need to enroll at her neighborhood school ... in Colorado Springs School District XX as this is [the Student]'s home school based on the family's current address of resident. The team recognizes that this decision was made outside of the IEP meeting and should have been discussed during the meeting held on XXXX, 2019.

During an interview with OCR, the Principal confirmed that he told the Complainant that the Student could not return to the School and that she should enroll the Student as his neighborhood school in District XX. Staff who were interviewed indicated that the Student could no longer attend the School because he needed more services than the School could provide.

On XXXX, 2019, the Student's grandmother emailed the Principal, "In not letting [the Student] return to school is violating [the Student]'s right to an education."

On XXXX, 2019, the Director told the Coordinator, via email, to include in the prior written notice for the XXXX, 2019 IEP team meeting:

2. After the IEP team determined the level of support need for the student, the offer of FAPE was a more restrictive setting with adult support inside and outside of the classroom. This level of support is not part of [the School's] service delivery model.
3. considered trying to support [the Student] at [the School], but due to the unsafe behaviors outlined in the IEP present levels, he needs a school that would provide the program to address his emotional disability[.]⁶

...

Due to the extent of [the Student]'s education needs 80% or greater in the classroom was chosen by [the Student] as they do not have programming for 40-70% or <40%.

The Coordinator replied, "I will also be including [in the prior written notice] the Charter Law for not having to add additional support etc."

On XXXX, 2019, the Student's grandmother emailed the Principal, "This is the second request for homework, make up work and/or Tudor [sic]. It is my understanding that [the School] and [District] are still responsible for [the Student's] education."

On XXXX, 2019, the Principal emailed the Coordinator, "We will be sending home some work for [the Student] so that he is not missing out on too much until the change of placement happens."

⁶ Notably, the evidence shows that the IEP team did not actually discuss this point; thus, it should not have been added to the prior written notice.

On XXXX, 2019, the Complainant met with the Director and Coordinator. The Director and Coordinator reiterated to the Complainant that the Student was no longer allowed to attend the School or any other District setting. After the meeting, the Coordinator emailed the Principal:

[The Complainant] challenged us in the fact that she had not signed off on the IEP, however [the Director] shared with her that it's the team's recommendation for [the Student's] needs and supports and that she doesn't sign off on it. She really kept challenging the fact that we weren't providing services and school until she enrolled him at the new school, which we spent about an hour looking through law to show that the district and school of residence would have to provide a continuum of services but when it's a choice enrollment the [administrative unit] does not unless the kid lives in district boundaries. She said the district didn't enroll him at the new school or help with this transition, which we again said it was her job to do this, had he lived in boundaries, we would have provided that support to her as it would have been a transition to one of our schools and programs. ... I don't know what her next move is, but I hope it's enrolling [the Student] so he can get back in school and get the supports.

On XXXX, 2019, the Coordinator emailed the Assistant Principal, "She said to send a letter to mom stating that School of Choice has been revoked due to the identified needs on his IEP exceeding the supports provided by the special education department at [the School], which is a mild to moderate needs program. [The Student]'s inability to access his education without consequences is above and beyond the amount of support able to be provided at [the School]." According to the Coordinator, the letter was never written or sent.

On XXXX, 2019, the Complainant enrolled the Student in his neighborhood elementary school in District XX.

On XXXX, 2019, the Student attended his first day of school in District XX. The Student missed ten school days between the end of his OSS and his first school day in District XX.

Neither the School nor the District provided educational services to the Student after XXXX, 2019.

VI. ANALYSIS

a. Failure to Evaluate the Student in a Timely Manner

The Complainant alleged that the Student needed or was believed to need special education or related aids and services because of an emotional disability, but that the District failed to evaluate him in a timely manner. The key question is whether the District should have evaluated the Student between his evaluation on XXXX, 2018 and his evaluation on XXXX, 2019.

We found a preponderance of evidence that the District failed to evaluate the Student in a timely manner once it had constructive notice that the Student may need special education or related services for an emotional disability. The evidence included the following:

- The Principal told OCR that the Student has had behavioral issues since “at least in first grade,” that the Complainant expressed concerns about the Student possibly having a different or another disability “early on with the suspensions,” that the Complainant and School had expressed concerns about the evaluation process timeframe,
- The Student had at least ten disciplinary referrals during the 2016-2017 SY.
- The Student had at least 14 disciplinary referrals from the beginning of the 2017-2018 SY to XXXX, 2018.
- The Student had at least 22 disciplinary referrals from XXXX, 2018 to XXXX, 2019, which resulted in eight out-of-school suspensions, for a total of 21 school days.
- The Student was in RtI or MTSS, at least off-and-on, for over 18 months before he was evaluated.
- During the 2017-2018 SY, the Coordinator (then an assistant principal at the School) requested that a District school psychologist evaluate the Student due to his behaviors. The Assistant Principal also said that, during the 2017-2018 SY, School staff suggested an evaluation of the Student for a behavioral disability.
- At the Student’s XXXX, 2018 RtI review meeting, School staff determined that they would “follow up about IEP for added supports in regards to behavior” for the “2018-19 school year.”
- On XXXX, 2018 – more than six months before the Complainant was sent a consent for evaluation form – the Dean emailed the Counselor and Assistant Principal, “I think we need to see about adding behavioral supports to [the Student’s] IEP as well as a short term behavior plan.” The Assistant Principal replied, “I think we asked for that earlier in the year. We definitely need to revisit it.”
- The Student’s RtI plan that was initiated on XXXX, 2018 noted that the Student’s behavior was “a continuation of observed behavior over the last few school years.”
- The Teacher told OCR that “there was talk” of the Student needing a new IEP before the XXXX, 2018 meeting that initiated the evaluation process. Additionally, the Assistant Principal told OCR that, before XXXX, 2018, School staff had reached out to District staff regarding an evaluation of the Student due to behavioral issues.
- Twenty-nine days elapsed between when School and District staff met with the Complainant about evaluating the Student and when the Teacher sent the Complainant a consent form. The Dean told OCR that School staff were frustrated by how long the District was taking to send the Complainant a consent for evaluation form. The Principal told OCR that the School asked the District to send the consent for evaluation form sooner and implied that sending the form took too long.

b. Different Treatment of the Student Based on Disability

The Student was treated differently than students without disabilities, resulting in the denial or limitation of services, benefits, or opportunities. The Student was not allowed to continue as a student at the School and the District did not allow him to continue as a District student in any other District school, despite the decision being made in the middle of the school year. The District acknowledged in its narrative response that, on XXXX, 2019, the Coordinator, Principal, and Dean told the Complainant that the School was not equipped to handle the Student’s disability-related needs and services. The narrative response reads, “[The Complainant] was then told that she would

need to enroll at her neighborhood school” in District XX. Additionally, on XXXX, 2019, the Coordinator emailed the Assistant Principal, “send a letter to mom stating that School of Choice has been revoked due to the identified needs on his IEP exceeding the supports provided by the special education department at [the School], which is a mild to moderate needs program. [The Student]’s inability to access his education without consequences is above and beyond the amount of support able to be provided at [the School].”

In contrast, during interviews with OCR, School staff indicated that two School students without disabilities were expelled during the 2018-2019 SY, and one ultimately received a deferred expulsion. Pursuant to District Policy JKD-R/JKE-R (“Suspension/Expulsion of Students”) students facing expulsion are entitled to notice, a hearing, and an appeal. Additionally, pursuant to District Policy JFK (“Education/Executive Director of Individualized Education”), expelled students are entitled to continue receiving educational services.⁷ Specifically, Policy JFK reads, “Upon request of a student or the student’s parent/guardian, the district shall provide educational services deemed appropriate for any student expelled from the district. ... Educational services provided by the district shall be designed to provide a second chance for the student to succeed in achieving an education.”

The District did not provide a nondiscriminatory reason for its actions. According to the Coordinator, after School and District staff told the Complainant that the Student could no longer attend any District school, the District’s Executive Director of Individualized Education told the Coordinator and Director that the District should have offered to place the Student at another District school. Additionally, the Principal told OCR that, given his past experiences, he thought that the Student would remain in the District until at least the end of the school year. The Psychologist told OCR that, despite the services specified in the XXXX, 2019, she expected the Student to remain in the District. The Teacher, Dean, and Assistant Principal each told OCR that they did not know why the Student could not attend another placement in the District after the XXXX, 2019 IEP team meeting.

Therefore, we found a preponderance of evidence that the District’s actions were based on the Student’s disability, and thus, the District subjected the Student to discriminatory different treatment.

c. Failure to Implement the Student’s IEP

Neither the School nor the District implemented the Student’s IEP after his five-day OSS ended on XXXX, 2019. The discriminatory different treatment (see Section VI(b) above) and improper change in placement (see Section VII(c) below) did not relieve the District of its duty to implement the Student’s IEP. Therefore, we found a preponderance of evidence that the District denied the Student a FAPE after XXXX, 2019.

⁷ The School’s Parent Student Handbook read, “Potential expulsion procedures are handled in conjunction with [the District] and follow their due process systems, as per [the School]’s contract with [the District].”

VII. OTHER VIOLATIONS: LEGAL STANDARDS, EVIDENCE, AND ANALYSIS

During our investigation, we identified three additional violations of Section 504 and Title II by the District.

a. Failure to Conduct Manifestation Determinations in a Timely Manner

The Section 504 regulations, at 34 C.F.R. Sections 104.35(a) and 104.36, prohibit a school district from taking disciplinary action that results in a significant change in the placement of a student with a disability without reevaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to act consistently with the Section 504 regulations in disciplining students with disabilities.

The exclusion of a student with a disability from his or her program for more than ten consecutive school days, or for a total of ten or more cumulative days under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, school districts must evaluate whether the misconduct was caused by, or was a manifestation of, the student's disability. If so, the school district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for students without disabilities.

The School out-of-school suspended the Student for one school day on XXXX, 2018, three school days on XXXX, 2018, one school day on XXXX, 2018, one school day on XXXX, 2018, and two school days on XXXX, 2018. Therefore, by the end of XXXX 2018, the Student had been suspended for a total of eight school days during the 2018-2019 SY.

On XXXX, 2018, the Student had a behavior incident. On XXXX, 2018, the School out-of-school suspended him for three school days: XXXX X, X, and X. The days were his ninth, tenth, and eleventh school days of OSS during the 2018-2019 SY. The School held a manifestation determination at 3:30 p.m. on XXXX X – one school day *after* the significant change in placement.

On November 15, 2018, the Student had a behavior incident. On XXXX, 2018, the School out-of-school suspended him for five school days: XXXX X, X, X, X, and X.⁸ The days were his twelfth, thirteenth, fourteenth, fifteenth, and sixteenth school days of OSS during the 2018-2019 SY. The School held a manifestation determination at 3:30 p.m. on XXXX 28 – four school days *after* the significant change in placement.

On XXXX, 2019, the Student had a behavior incident. On XXXX, 2019, the School out-of-school suspended him for five school days: XXXX X, X, X, X, and X. The days were his seventeenth, eighteenth, nineteenth, twentieth, and twenty-first school days of OSS during the 2018-2019 SY. The School held a manifestation determination at 9:30 a.m. on XXXX, 2019 – two school days *after* the significant change in placement.

⁸ Thanksgiving break was November 19-23, 2018.

In short, the District out-of-school suspended the Student for a total of more than ten cumulative school days without conducting a manifestation determination or, at least, considering whether the out-of-school suspensions demonstrated a pattern of exclusion. Therefore, we found a preponderance of evidence that the District violated Section 504 and Title II by taking disciplinary action against the Student that resulted in significant changes in placement without first reevaluating the Student and affording him due process procedures.

b. Failure to Consider Suspected Disability in Manifestation Determinations

The Teacher, Principal, Psychologist, and Coordinator told OCR that, at all three manifestation determinations for the Student, the team considered *only* the Student's SLI area of eligibility. The Teacher explained to OCR that the team "did not have a choice" because the Student did not yet have a new IEP.

However, the manifestations occurred on XXXX, 2018, XXXX, 2018, and XXXX, 2019 – *after* the Student was in the process of being evaluated for, and suspected of having, an emotional disability. The group making a manifestation determination must consider *all* relevant information that is recent enough to afford an understanding of the student's behavior. During interviews with OCR, the Psychologist and Coordinator acknowledged that not considering the Student's suspected emotional disability was an error. Therefore, we found a preponderance of evidence that the District violated Section 504 and Title II by taking disciplinary action against the Student that resulted in significant changes in placement without first drawing upon information from a variety of sources.

c. Failure to Comply with Procedural Requirements for a Change of Placement

Section 104.35(c) of the Section 504 regulations requires that placement decisions (*i.e.*, decisions about whether any special services will be provided to the student and, if so, what those services are) 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.

On XXXX, the Principal, Dean, and Coordinator notified the Complainant, via phone, that the Student could no longer attend the School or any other District school. In other words, District staff unilaterally changed the Student's placement. In its narrative response, the District acknowledged such action was improper, writing:

The team recognizes that this decision was made outside of the IEP meeting and should have been discussed during the meeting held on XXXX, 2019. Subsequent trainings and conversations have taken place with the Special Education Coordinator, Principal, Assistant Principal, and Special Education teacher to understand how and when any change of placement and determination of a student's Least Restrictive Environment needs to be documented and discussed within the context of the IEP Team meeting.

Additionally, during interviews with OCR, staff confirmed that the conversation and decision to remove the Student from the School and District occurred outside of the IEP team meeting. Therefore, we find that the District violated Section 504 and Title II by making a placement decision that was not: (a) made by a group of persons knowledgeable about the student, the evaluation data, and the placement options; and (b) based on information from a variety of sources, with information from all sources being carefully considered and documented.

VIII. CONCLUSION

We thank the District for being willing to voluntarily address the violations found. A copy of the signed Agreement is attached. This concludes OCR's investigation of this complaint. The case is now in the monitoring phase.

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. We will provide the Complainant with a copy of our monitoring letters.

The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the Agreement is fully implemented the issues will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations; and OCR will close this case and send a letter to the District, copied to the Complainant, stating that this case is closed. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter 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.

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 regardless of whether OCR finds a violation.

Individuals filing a complaint or participating in an investigation are protected by Federal law against harassment, retaliation, or intimidation.

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 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 extended to us during the investigation. If you have any questions, please contact the attorney assigned to this case, Jason Langberg, at (XXX) XXX-XXXX or XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory Attorney

cc: Nancy Lemmond, Individualized Education Executive Director
Cullen McDowell, Principal
Katy Anthes, Colorado Commissioner of Education