



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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June 9, 2020

Amanda Sutherland, Interim Superintendent  
Central Consolidated School District  
PO Box 1199, Highway 64, Old High School Road  
Shiprock, NM 87420

Sent via email to [sutha@centralschools.org](mailto:sutha@centralschools.org)

Re: Central Consolidated School District  
OCR Case Number: 08-20-1130

Dear Superintendent Sutherland:

This is to notify you of the disposition of the above-referenced complaint that OCR received on December 12, 2019, alleging that the Central Consolidated School District (District) discriminated against a Student on the basis of her disability. Throughout this letter, OCR refers to the Student's parent as the Complainant.

OCR investigated whether the District discriminated against the Student based on her disability when it:

- (1) Failed to conduct an evaluation on or about xxxxxxxx for a student suspected to be in need of special education or related services;
- (2) Failed to implement the Student's 504 plan, which led to the Student engaging in behavior that resulted in the use of restraint on or about xxxxxxxx;<sup>1</sup>
- (3) Changed the Student's placement on or about xxxxxx, and again on xxxxxx, when it first suspended her pending an expulsion without holding a manifestation determination and when it second placed her in an alternative school setting without following the placement procedures set forth in 34 C.F.R. 104.35;
- (4) Did not provide FAPE after the xxxxxxxx changes of placements when the Student's teachers did not provide assignments or other instruction in the alternative placement; and
- (5) Did not provide procedural safeguards during the 2019-20 school year prior to team meetings or changes of placement.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal

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<sup>1</sup> During the course of OCR's investigation, OCR learned that the Complainant did not dispute the basic underlying facts surrounding the restraint, but rather asserted that an inadequate Section 504 plan and a failure to implement the existing 504 plan led to the restraint. Generally, OCR does not review the results of individual placement or other educational decisions. Therefore, OCR examined whether the District implemented the Student's existing 504 plan.

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financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, 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.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the District. In addition, OCR interviewed District staff. OCR determined that there was insufficient evidence to conclude that the District discriminated against the Student as alleged in allegations 1, 2 and 5.

In a May 12, 2020 email, OCR discussed potential compliance concerns related to allegations 3-4 and discussed resolution options with District counsel. On May 20, 2020, District counsel informed OCR that the District would like to enter a resolution agreement with regard to allegations 3-4 pursuant to Section 302 of OCR's *Case Processing Manual (CPM)*. OCR carefully reviewed the documentation provided by the District and the Complainant and determined that resolution agreement for allegations 3-4 pursuant to Section 302 was appropriate. The District returned a signed agreement on June 4, 2020.

The bases for these determinations are set forth in this letter.

## **Background**

In December 2018, when the Student was a xxxx-grade student enrolled at xxxxxxxx School (School), the District created a 504 plan to address the Student's disabilities, at that time and in that plan, identified as xxxxxxxxxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxxxxxxxxx. The 504 plan also noted that the Student received xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. The District revised the plan in February 2019 to indicate that the Student had been diagnosed with xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and to include additional accommodations.

On or around the onset of the 2019-20 school year, the Complainant contacted the District to request further modification to the Student's 504 plan. On August 13, 2019, the Complainant provided the School Principal a letter from the Student's pediatrician. The letter noted that the Student "is suffering from xxxxxxxxxxxxxxxxxxxxxxx," and that the pediatrician, the Student's xxxxxxx, and the Complainant believed that a 504 plan was necessary for the Student. On Xxxxxxxx 5, 2019, the Complainant wrote to the Principal, the District Superintendent, and the District's Special Education Services Director (Director) notifying them that the Student had been diagnosed with xxxxxxxxxxxxxxxxxxxxxxx. The Complainant requested a 504 plan for the Student. The Complainant told OCR that she sought additional modifications to the existing 504 plan because of experiences of the Student over the summer, to further describe the xxxxxx that the Student experiences, and to more fully inform staff in the School of the Student's disability and plan.

The District convened a 504 team meeting on Xxxxxxxx 12, 2019. The District summary of the Xxxxxxxx 12 meeting indicates that the Complainant provided documents from the Department



procedural safeguards were provided to the Complainant but that the Complainant told District staff that she was aware of her rights.

On XXXXXXXX 7, 2019, there was a disciplinary incident involving the Student. The Principal told OCR that he investigated a conflict between the Student and another student (Student A). According to the Principal, Student A told him that the Student had threatened her during lunch. In a narrative summary of the investigation, the Principal stated that when he asked the Student about the conflict, she acknowledged that she had threatened to beat up Student A because Student A had kissed her boyfriend and told the Principal that he should be “glad” she hadn’t followed through on her threat. The Principal stated that he sent the Student to the front office and went to check on Student A, who had left the School through an exit. Disciplinary documents created immediately after the incident corroborate the Principal’s description of his initial investigation.

The documentation related to the incident provided by the District indicates that upon arriving at the office, the Student struck the Assistant Principal in her head. The Complainant provided a written statement from the Student created as part of a later manifestation determination hearing (MDH) that acknowledges that the Student pushed the Assistant Principal from behind, noting that the Student was angry and that she believed that the Assistant Principal had previously treated her unfairly.

The documentation related to the incident indicates that the Assistant Principal left her office and that the Student began throwing things. The Assistant Principal put the School on a “shelter in place” alert, radioed the Principal and Employee A, who is trained in crisis intervention and restraint. In addition, office staff contacted the Complainant and the police.

According to the Principal, when he arrived at the office, the Student escalated and threw a binder and rocks at him, broke mugs and mirrors in the Assistant Principal’s office, and swung a hammer at the Principal and then threw it with sufficient force that it lodged in wall. The District supplied photographs of the office after the incident that corroborate the description.

The Principal stated that he then tried to restrain the Student as she picked up a screwdriver. The Principal stated that Employee B, a staff member who was also trained in crisis intervention and restraint, arrived shortly thereafter to assist restraining the Student. The Principal stated that when Employee A arrived, he, Employee A, and Employee B were able to remove the screwdriver from the Student’s hand.

The Principal stated that when the Student stated that the physical restraint was hurting her, they released the hold and the Student immediately became aggressive, so was restrained a second time. The Principal stated that the Student again stated that the hold was hurting her, and they again released the hold. After the second release, the Student used a shard of a broken mug to cut Employee A’s leg. The Principal and Employees then restrained the Student a third time until police arrived. The police arrested the Student.

The Complainant does not dispute that the Student engaged in conduct similar to that described by the District but states that the Student felt cornered and trapped during the Principal's discussion of the conflict between the Student and another student in the hallway, with the Assistant Principal in her office, and when the Principal and other School employees placed her in a hold. The Complainant asserts that the situation caused a xxxxxxxx and xxxxxxxx the Student's XXXXX, causing her behavior.

The next day, the District completed a "Long Term Suspension Checklist." The checklist had a box noting whether the student at issue had an IEP. This box was checked "no," and no notation was made that the Student had a 504 plan. The following box asked whether a manifestation determination had been made and it was checked "N/A." The District also sent the Complainant a letter, describing the events that occurred in School A's office and notifying her that an expulsion hearing would be held on xxxxxxxx 16, 2019.

On xxxxxxxx 10, 2019, the Principal alerted the Complainant that the Student would remain out of school until she "had a safe and structured environment." On or around xxxxxxxx 15, 2019, the Complainant contacted the District through counsel, requesting records. After receiving the letter from Complainant's counsel, the District cancelled the xxxxxxxx 16, 2019 expulsion hearing.

On xxxxxxxx 17, 2019, the Principal provided the Complainant and counsel a letter stating in full:

Upon further review of the incident involving [Student] and the request for diagnostic evaluation, the District will consider [Student] as a student who may qualify for receipt of special education services. In that vein, we will be assigning her to [an Interim Alternative Education Setting (IAES)] for causing serious bodily injury to one of the staff persons (head injury) for a period of 45 school days. During that time period, the District will schedule and complete the evaluations requested once "parental consent" is received and within 10 days of placement in IAES schedule and conduct a Manifestation Determination. Once the evaluation(s) are completed, the District will schedule an [eligibility determination team meeting] to determine eligibility for special education services and to develop an IEP and BIP if appropriate. You will be advised of the dates and times of the meetings with adequate notice to allow for attendance of your legal counsel. Placement at IAES will begin on xxxxxx at 7:30 a.m. If transportation is required, please contact my office and we will make arrangements.

The District was unable to make arrangement to transport the Student to the IAES until Monday xxxxxxxx 28, 2019. The Student had medical appointments on xxxxxxxx 28 and xxxxxxxx 29, and first attended the IAES on xxxxxxxx 30, 2019. The Principal acknowledged that between xxxxxxxx 7, 2019, and xxxxxxxx 30, 2019, the School did not provide the Student educational services.

On XXXXXXXX 1, 2019, the District held a manifestation determination hearing. Participants included, the Student, the Complainant, the Student’s Grandmother, the family’s attorney, the Principal, the School Nurse, the School Counselor, the School Psychologist, the School Social Worker, a School Teacher, the District’s 504 Coordinator, and two attorneys for the District.

The manifestation determination decision (Decision) does not make clear what documentation, if any, the District considered during the manifestation determination. The Decision begins by describing the Student’s XXXXXXXX 7 conduct. The Decision notes that the Student disputed that she threatened Student A or that she struck the Assistant Principal, though she acknowledged that she threw a walkie talkie at the Assistant Principal’s back. The Student did not dispute the conduct that occurred in the Assistant Principal’s office.

The Decision also notes that District staff believed both that the 504 plan that was in place was sufficient to meet the Student’s needs and that it had been fully implemented. However, the Decision indicates that the Complainant believed that the 504 plan was not sufficient to meet the Student’s needs, though no specific deficiencies are described. The Decision also indicates that the Complainant questioned why the Student was not provided access to a counselor or nurse when symptoms of XXXXX manifested on XXXXXXXX 7.

Finally, the decision concludes that the Student’s conduct was a manifestation of her disability. In a narrative statement summarizing the Decision, the District asserted that the team determined to continue the Student’s placement at the IAES based upon feedback from the Student’s teachers at the IAES, including review of the Student’s grades and behavior.

Communication between the teacher at the Student’s IAES placement and the Principal, and also between the Complainant and the Principal, indicates that for approximately 3 weeks, there were intermittent difficulties in receiving assignments from some of the Student’s teachers at the School. Although the IAES teacher told OCR that although her communication with the Principal was good and that the teachers generally provided work for the Student, she acknowledged that there was a “slow start” and that there were “glitches” in receiving and returning the Student’s work.

In January 2020 and the conclusion of the School’s semester, the Student transitioned from the IAES placement to another high school within the District. The Complainant and Student did not object to this placement.

### **Legal Standard**

OCR applies a preponderance of the evidence standard to determine whether 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.

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in the complaint do not provide greater protection than the applicable Section 504 regulations. Therefore, the relevant Section 504 standards apply in analyzing the Title II issues raised in the allegations.

### *Allegation 1*

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.

Section 504 does not provide a specific amount of time for school districts to complete an evaluation. However, under the IDEA, an initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation or if the State has established a different timeframe for conducting the evaluation, within that timeframe. OCR generally looks to the IDEA timeline to assess the reasonableness of the time it takes the school to evaluate the student once parental consent has been obtained.

### *Allegations 2 & 4*

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met and are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

### *Allegation 3*

As noted previously, Section 104.35(a) 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. OCR has interpreted Section 104.35(a) to prohibit a district from taking disciplinary action that results in a significant change in the placement of a disabled student without reevaluating the student and affording due process procedures. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to act consistent with the Section 504 regulations in disciplining disabled students.

The exclusion of a disabled student from his or her program for more than ten consecutive 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, districts must evaluate whether the misconduct was caused by, or was a manifestation of the student’s disability. If so, the 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 non-disabled students.

### *Allegation 5*

The Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.” Compliance with the procedural safeguards of the Individuals with Disabilities Education Act (IDEA) is one means of meeting this requirement.

## **Analysis and Conclusion**

### *Allegations 1 and 5*

With regard to allegation 1, the Complainant asserts that the District should have conducted further evaluation after the XXXXXXXX 12, 2019 504 meeting to determine whether the Student was a student in need of special education or related services. OCR notes the following:

- The Complainant did not request an evaluation either before or after the 504 meeting;
- The 504 team discussed the Student’s academic progress and disability during the 504 team meeting on XXXXXXXX 12, 2019, and determined that she needed accommodations

to assist her with XXXXX, xxxxxxxx, and xxxxxxx, but that no further evaluation was necessary;

- The Complainant did not seek a due process hearing regarding that determination; and
- The 504 plan notes that the Complainant did not have any concerns with the plan, nor did the Complainant raise any concerns via email in the month after the 504 plan was created.

With regard to allegation 5, the Complainant and District dispute whether the District provided the Complainant with procedural safeguards at the XXXXXXXX 12, 2019 504 meeting. The Complainant asserts that she was not provided procedural safeguards until XXXXXXXX 1, 2019. Our investigation established:

- A XXXXXXXX 1, 2019 consent for evaluation form indicates the Complainant was provided procedural safeguards on that day. The District's 504 form does not have a similar indicia on its face;
- The 504 meeting summary indicates that the District provided procedural safeguards at the outset of the 504 meeting and the Complainant refused them;
- The Principal and 504 Coordinator both told OCR that the Complainant refused procedural safeguards at the meeting;
- The 504 Coordinator told OCR that she attended every 504 meeting in the District during the 2019-20 school year and it was her regular practice to provide procedural safeguards at the meetings; and
- The District's Section 504 flowchart indicates that parents/guardians should be provided with procedural safeguards when the District considers whether to place a student on a 504 plan.

Although the District could have documented the provision of procedural safeguards and its determination that the Student did not require further evaluation more carefully, there is insufficient evidence for OCR to conclude that the District discriminated against the Student as alleged in allegations 1 and 5.<sup>2</sup>

### *Allegation 2*

The Complainant asserts that the District denied the Student FAPE in that the District did not implement the Student's 504 plan prior to the incident that led to the restraint upon the Student.

OCR found that:

- The Student's 504 plan in place at the time of the incident indicates that the Student would communicate when she needs personal space or to go to Nurse's office as a result of XXXXX, xxxxxxxx, or xxxxxxxx symptoms;

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<sup>2</sup> OCR recommends that the District improve its documentation procedures so that evidence that it provides procedural safeguards when required by the Section 504 regulation at 34 C.F.R. § 104.36 is maintained and easily identifiable.

- During the 504 meeting, the team discussed the Student’s symptoms and the 504 plan describes the Students symptoms to include going “xxxxxx” or “xxxxxxxxx” and not aggression;
- The Student engaged in behavior that threatened School staff, including pushing the Assistant Principal, throwing objects such as hammers, swinging sharp objects such as screwdrivers and coffee mug shards at staff. The Student and Complainant do not dispute that the Student engaged in such behavior; and
- The behavior resulted in the use of restraint lasted approximately 20 minutes in total and was conducted by a person trained in crisis intervention and restraint holds.

OCR concludes that there is insufficient evidence that the District failed to implement the Student’s 504 plan, which in turn caused the Student’s aggressive behavior. The Student’s 504 plan called for the Student to self-advocate when she needed personal space or was experiencing symptoms related to her disabilities. It is undisputed that the Student did not request to see the counselor instead of returning to the Principal or Assistant Principal’s office after the initial conflict with the other student in the hallway.

OCR considered whether the Principal knew or should have known that the Student was experiencing symptoms of her disability that prevented her from self-advocating at the time of the incident. When the Principal approached the Student it would not have been clear to a reasonable person in the Principal’s position that the Student would become xxxxxxxx by a request to wait for him in the office to further discuss the Student’s conflict with the other student. Among other things, the Student had not engaged in previous aggressive behavior; the Complainant had stated at the most recent 504 meeting that the Student does not become aggressive when her XXXXX is xxxxxxxx; and there was no indication in the hallway that the Student would become aggressive.

It is not disputed that when the Student entered the office, she became aggressive, and that when the Principal returned to the office shortly thereafter, the Student had already engaged in behavior that threatened School staff, damaged school property, and posed a continuing threat to the Student herself and other School staff. OCR concludes that there is insufficient evidence to find that the District discriminated against the Student as alleged in allegation 2.

#### *Allegations 3 and 4*

On May 12, 2020, OCR discussed potential compliance concerns regarding allegation 3 and 4 with District counsel. Notably, with regard to allegation 3, OCR observed that the District’s manifestation determination hearing checklist did not alert staff that manifestation determination hearings should be held for students with disabilities who had 504 plans but who did not have IEPs. Moreover, in this case, but for the Student’s counsel’s involvement, the District had scheduled a long-term suspension hearing without first scheduling a manifestation determination hearing. With regard to allegation 4, OCR observed that during the period between Xxxxxxxx 7, 2019, when the Student was first suspended, and Xxxxxxxx 30, 2019, when the Student was first placed in the IAES, the District did not provide educational services to the Student. OCR also

observed that after Xxxxxxxx 30, 2019, there was inconsistent communication between School staff and IAES staff regarding the educational services provided to the Student. The District's delay in assigning the Student to the IAES appears to be caused in part by its initial action of scheduling a long-term suspension hearing instead of a manifestation determination hearing and its effort in arranging transportation for the Student to the IAES. OCR did not interview the Student's teachers from the School nor examine the full extent of the work she completed at the IAES. OCR did observe, however, that the Student's grades improved during placement at the IAES.

On May 20, 2020, District counsel requested to resolve these allegations pursuant to Section 302 of OCR's *Case Processing Manual*. The District returned a signed agreement to OCR on June 4, 2020. The provisions of the enclosed resolution agreement are aligned with the complaint allegations, information obtained by OCR to date in its investigation, and are consistent with the applicable regulations.

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 complainant has a right to appeal OCR's determination with regard to allegations 1, 2, and 5 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.

In addition, OCR will actively monitor the District's implementation of the Agreement regarding allegations 3 and 4 until the District fulfills the terms of the agreement and is in compliance with the statutes and regulations at issue in this case. If the District fails to implement the Agreement as specified, OCR may initiate administrative or judicial proceedings as described in the Agreement or resume its investigation of the initial allegations. A copy of the Agreement is enclosed.

Please 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 Complainant may file another complaint alleging such treatment. In addition, 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, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will protect personal information to the extent provided by law.

If you have any questions, you may contact the attorney assigned to this case, Patrick Alexander, at (303) 844-3473 or [Patrick.Alexander@ed.gov](mailto:Patrick.Alexander@ed.gov).

Sincerely,

Sandra J. Roesti  
Supervisory Attorney

cc: Jacquelyn Archuleta-Staehlin, Counsel, *by email to* [JStaehlin@cuddymccarthy.com](mailto:JStaehlin@cuddymccarthy.com)  
Ryan Stewart, NM Secretary of Education *via email*