



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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*REGION VIII

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May 5, 2023

Via email only

Dr. Pamela Swanson
Superintendent
Westminster Public Schools
PSwanson@westminsterpublicschools.org

RE: OCR Complaint #08211354-Westminster Public Schools

Dear Superintendent Swanson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has resolved the above-referenced complaint filed against Westminster Public Schools (the District). The Complainant alleged that the District discriminated against her son (the Student) based on disability by:

1. Failing to implement the Student's individualized education program (IEP) during the 2020-2021 school year, thereby denying the Student a free appropriate public education (FAPE); and
2. Denying the Complainant's inter-district transfer (IDT) request for the 2021-2022 school year.

On August 17, 2021, OCR opened an investigation into the above allegations under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance. OCR also investigated the allegations under Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it under Section 504 and Title II.

As part of its investigation, OCR reviewed information provided by the Complainant and the District, analyzed data provided by the District, conducted interviews with the Complainant and relevant witnesses from the District, and discussed the allegations with the District and counsel.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Before OCR completed its investigation, the District asked to resolve the allegations under investigation voluntarily pursuant to Section 302 of OCR's *Case Processing Manual* (CPM). Section 302 provides that OCR may resolve a complaint at any time when, before the conclusion of its investigation, the recipient expresses an interest in resolving the complaint and OCR determines that such a resolution is appropriate. OCR determined that a Section 302 resolution was appropriate because the investigation to date identified compliance concerns regarding the issues under investigation, as described below in this letter. By implementing the enclosed Section 302 Resolution Agreement (Agreement), the District will resolve OCR's compliance concerns under Section 504 and Title II.

Legal Standards

Under the Section 504 and Title II regulations, 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 in a program of the recipient.¹ Further, under these regulations, a 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 or afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.

In addition, under the Title II regulations, a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities from equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8). Under the Title II regulations, a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7)(i).

To determine whether a school district has discriminated against an individual on the basis of disability under Section 504 and Title II, OCR assesses whether there is evidence that the school district treated the individual differently than individuals without disabilities under similar circumstances, and whether the different treatment has resulted in the denial or limitation of the district's services, benefits, or opportunities to the individual with a disability. 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 disability discrimination. For OCR to find disability discrimination in the IDT context based on the facts of this case, the preponderance of the evidence must establish that the school district's denial of the IDT request was based on the student's disability and was discriminatory because the different treatment was not justified by a nondiscriminatory reason like the fundamental alteration defense available to public school districts under Title II and Section 504.

¹ 34 C.F.R. §§ 104.4(a) and (b) and 28 C.F.R. §§ 35.130(a) and (b).

The Department’s Section 504 regulations require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. 34 C.F.R. § 104.33. A student with a disability attending a public school district (the home district) with an IEP created by the home district who applies to transfer to another public school district (the receiving district) is not “in the jurisdiction” of the receiving district at the time of the application and thus the receiving district has no FAPE obligation to the student at the time of the application. The Department’s Section 504 regulations define a FAPE as regular or special education and related aids and services that 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 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation, and placement, and due process protections. Districts may implement a Section 504 plan developed in accordance with these requirements or an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) to meet these FAPE requirements. Generally, violations of Section 504, including the Department’s implementing regulations, also constitute violations of Title II because it provides no less protection than Section 504.²

Facts

OCR’s review indicates that the Student resided outside of the District and was enrolled as an IDT student in the District at Skyline Vista Elementary School (School) during the 2020-2021 school year. The Student is a qualified individual with a disability and required an IEP.

Regarding Allegation 1, the Complainant alleges that the District failed to fully implement the Student’s IEP during the 2020-2021 school year. OCR interviewed the District Executive Director of Special Services, the School psychologist, and the District Special Education Coordinator and reviewed data from the District. During the 2020-2021 school year, the Student received homebound services due, at least in part, to COVID-19. According to witness interviews and data reviewed by OCR, the Student received at least 30 minutes a week of speech instruction. Though the Student’s IEP indicated that the services were to be provided remotely, both the Complainant and the District agreed that the Student’s services would be provided in person via one-on-one instruction at a District facility. This incongruity between where the Student was to receive IEP services and where the District actually provided the services to the Student raises a compliance concern to OCR.

Regarding Allegation 2, the Complainant alleges the District denied the Student admission via IDT for the 2021-2022 school year because he required additional services for his disability.³

² See 28 C.F.R. § 35.103(a) (“Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.”).

³ During the 2021-2022 school year, Skyline Vista Elementary ceased operations and became Orchard Park Academy and continues to be referred to as the School in this letter. With this change, the school principal transitioned his position from Skyline to Orchard Park. Additionally, the Complainant wanted the Student to repeat Kindergarten at the new school during the 2021-22 school year.

OCR interviewed the School principal, the School assistant principal, the School psychologist, the District Special Education Coordinator, and the District Executive Director of Special Services regarding the IDT decision-making process. All witnesses agreed that each school principal is the final decision-maker regarding any IDT requests. The principal first determines if there is “space” in the requested grade level for the IDT applicant. If so, and if the IDT applicant has a Section 504 plan or IEP, the principal then consults with relevant educational personnel and service providers to determine if they have capacity on their schedules to provide the necessary services to the applicant. OCR has a concern about this process in that principals may make decisions about which IDT applicants to admit based on the amount or kind of IEP and/or Section 504 services they require without evaluating if securing the necessary services poses a fundamental alteration to the District’s service, program, or activity.

The School principal, the District Special Education Coordinator, and the District Executive Director of Special Services told OCR that the District denied the Student’s IDT because (1) the two Kindergarten classes lacked space for the student at the time of the application and (2) its special education teacher lacked time on her schedule to provide the Student’s IEP services. OCR determined that the District’s two proffered reasons were the actual reasons for the denial. While the first reason, a lack of space in the grade, could be a legitimate nondiscriminatory reason for denying an IDT to a student with a disability, OCR has a compliance concern about the District’s second reason and its effect on the first. Due to the lack of space, the Complainant placed the Student on the waitlist for the Kindergarten class but then the District removed the Student from the waitlist due to the teacher’s lack of time to provide the IEP services. OCR has a concern about removing the Student from the waitlist without exploration of other ways to serve the Student. The District did not consider any alternative or comparable means of providing the IEP services to the Student, including by securing more staff, a private provider, or mutual agreement with his home district. Exploration of such alternatives may have identified a means of providing him with the required services without fundamentally altering the District’s service, program, or activity. In fact, when the District did hire a third Kindergarten teacher and created a third Kindergarten classroom before the start of the 2021-2022 school year, the District then did not consider the Student for an opportunity to transfer to the District because he was no longer on the waitlist.⁴ OCR would need to investigate further to determine if, had the Student remained on the waitlist, the District should have allowed the Student to transfer into the third Kindergarten class under Title II and Section 504 or could have defended a denial of the IDT.

Prior to OCR determining whether the District’s denial of the IDT was justified based on a nondiscriminatory reason, such as the fundamental alteration defense, or violated Section 504 and Title II, the District expressed interest in resolving OCR’s concerns about the IDT allegation under Section 302 of OCR’s CPM, and OCR determined that it was appropriate to do so. The

⁴ To support her allegation that the District denied the Student IDT admission because he required additional disability-related services, the Complainant claimed that the District improperly considered the Student’s IDT status when determining what IEP services to offer him. OCR’s review confirmed that an IEP team member mentioned the Student’s out-of-district residential status at the closing of an IEP meeting in 2020, after the team had created the Student’s IEP for SY 2020-2021. Accordingly, this exchange could not have impacted the IEP team’s determination of what services the Student needed and has no impact on OCR’s analysis of Allegation 2.

District also agreed to resolve OCR's concern about the District's compliance with its recordkeeping obligations under Section 504 based on its inability to produce complete IDT applicant data for the 2020-2021 and 2021-2022 school years. The District told OCR that it keeps records of only IDT applicants admitted to the District, and not for IDT applicants who were denied admission. These records are necessary for OCR and the District to evaluate if schools are denying students IDT transfers for discriminatory reasons.

Conclusion

The District voluntarily signed the enclosed Agreement to resolve OCR's compliance concerns identified in the investigation and discussed above. The Agreement details the specific actions the District will take and the dates for their implementation. When fully implemented, the Agreement will address the evidence obtained and all the allegations investigated to date. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement and the statutes and regulations at issue in the case.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address District's compliance with any other statutory or 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 whether OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), 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, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

If you have any questions about this letter, please contact Mr. Craig Nydick, the attorney assigned to this complaint, by telephone at (303) 844-7104 or by email at craig.nydick@ed.gov. You may also reach me at (303) 844-6086 or via email at michael.todd@ed.gov.

Sincerely,

Michael D. Todd
Supervisory Attorney
OCR Denver Office

cc: Dr. Steve Sandoval
Executive Director of Special Services for Westminster Public Schools
ssandoval@westminsterpublicschools.org
Enclosure