



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 11, 2023

Terry Garcia, Superintendent
Presidio School
1695 East Fort Lowell Road
Tucson, Arizona 85719

by email only to XXXX@XXXX

Re: Presidio School
OCR Case 08-23-1150

Dear Superintendent Garza:

This letter is to notify you of the disposition of the above-referenced case stemming from a complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR) on December 6, 2022. On January 27, 2022, OCR opened an investigation into whether Presidio School (School) discriminated against the Student on the basis of disability. Specifically, the Complainant alleged that the School discriminated against the Student based on disability when, in [redacted content], it subjected him to a disciplinary change in placement without complying with Section 504's procedural requirements.

OCR enforces 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 financial assistance; 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 School is subject to these laws and regulations, and OCR's jurisdiction.

Based on information and records from the Complainant and School, including an audio/video recording of a team meeting for the Student held on [redacted content], and interviews of the Complainant's attorney and the School's Principal/Exceptional Student Services Director (Principal), OCR found, by a preponderance of the evidence, that the School discriminated as alleged.

During the investigation in this case, OCR also identified issues that warrant technical assistance from OCR. The issues and technical assistance are in Section VI below.

I. LEGAL STANDARD

Section 504 prohibits recipients from discriminating against a qualified person with a disability on the basis of disability in their programs and activities, including in connection with policies, procedures, and practices related to student discipline. Section 504 requires schools to evaluate students with disabilities prior to any significant change in a student's placement. In the context of a significant change of placement due to a proposed disciplinary removal, the purpose of the evaluation (known as a manifestation determination) is to decide whether the behavior for which discipline is proposed is based on the student's disability, and, if so, whether changes in the student's placement are required to ensure the student receives free appropriate public education (FAPE). A significant change in placement is an exclusion of more than 10 consecutive school days or a series of short-term nonconsecutive removals that, combined, total more than 10 school days during the school year and create a pattern of removal.

During a manifestation determination, a student's individualized education program (IEP) or Section 504 team determines whether the behavior in question was caused by or has a direct and substantial relationship to the student's disability. The school must provide the team with relevant information from a variety of sources sufficient to enable the team to determine if the student's behavior is based on the student's disability; and must ensure such information is documented and carefully considered.

Informal disciplinary exclusions involve a school removing a student from class or school without invoking the school's disciplinary procedures. An example of an informal exclusion is informing a parent that the school will expel the student if the parent does not agree to transfer the student to another school. Informal exclusions are subject to the same Section 504 requirements as formal disciplinary removals. As with more formal uses of student discipline, when a student is subjected to informal removals that constitute a significant change in placement, the school must comply with the requirements pertaining to evaluation, placement, setting, and procedural safeguards.

Section 104.36 of the Section 504 regulations requires that recipient elementary and secondary schools have a system of procedural safeguards with respect to any action taken by the school regarding the identification, evaluation, or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure. Appendix A for the Section 504 regulations read, "Under § 104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians *before the recipient takes any action regarding the identification, evaluation, or educational placement* of a person who, because of handicap, needs or is believed to need special education or related services" (emphasis added). General notice of due process procedures – publication in a handbook or on a website – does not relieve schools of their responsibility to give timely notice of due process rights when an event occurs for which parents may wish to avail themselves of the due process procedure.

II. FINDINGS OF FACT

a. Background

The Student has been diagnosed with Oppositional Defiant Disorder (ODD) and Attention-deficit/Hyperactivity Disorder (ADHD). He has a history of behavior issues and was twice expelled from preschool. During the 2021-22 (SY), the Student was in [redacted content] at the School, which is a K-12 charter school. On [redacted content], a team found the Student eligible for an individualized education program (IEP), with “Other Health Impairment” as his area of eligibility.

b. 2022-23 SY

The 2022-23 SY began on August 3, 2022. The Student was in [redacted content] at the School. His behavior issues continued. The School documented several behavior incidents between [redacted content] and [redacted content]. For example, on [redacted content], during music class, the Student continually made noise, refused to participate, crawled around on the floor, and disrupted instruction and learning. On [redacted content], he screamed, crawled on the floor, drew on desks, ripped paper, and ran out of the classroom. On [redacted content], he threw books in a classroom. On [redacted content], he punched and slapped a staff member. On [redacted content], he screamed, glued papers to his desk, crawled on the floor, threw paper, and hit a staff member. On [redacted content], the Student crawled on the classroom and hallway floors and threw thumbtacks at a staff member. On [redacted content], he screamed at other students, made noises to distract the class, crawled on the floor, and told a staff member that he was going to tell his mother that the staff member “touched these nuts.”

According to discipline records, on [redacted content], during art class, the Student was making noises, crawling on the floor and popping up to scare other students, throwing crayons, and causing other disruptions. He also poked or stabbed another student in the knee with a pencil, after the student tapped him with a pencil eraser. The other student had scratches and dots where his skin had been punctured. Staff removed the Student from the classroom. The Principal suspended the Student pending an investigation. The Student was out-of-school suspended on [redacted content]. On [redacted content], the Principal notified School staff and the Complainant that the investigation of the incident in art class was complete and a manifestation determination would be scheduled.

On [redacted content], the School held a manifestation determination for the Student. Records provided by the School do not indicate that, before the manifestation determination, the Student was being recommended for a removal of more than 10 school days (e.g., an expulsion). OCR asked the Principal why a manifestation determination was held for the Student. She explained that the School does not schedule manifestation determinations based on the number of school days of disciplinary removals; instead, the School conducts manifestation determinations based on the severity of a student with a disability’s conduct and whether the School is considering an out-of-school suspension for the student. In the Student’s case, the Principal reported, the School held a manifestation because the Student physically injured another student by penetrating his skin with a pencil.

The “Manifestation Determination Hearing” form for the meeting reads, “This manifestation determination is occurring as a result of a change placement due to proposed disciplinary action involving ... [v]oluntary withdrawal from [the School] with a transfer to a self-contained [emotional/behavioral disability] classroom.” OCR also asked the Principal why the School held a manifestation determination, if the Complainant’s withdrawal of the Student from the School was voluntary. The Principal explained that, until the manifestation determination, the Complainant did not want to withdraw the Student and that the language on the form was added during the meeting. Additionally, OCR asked the Principal why the School held a manifestation determination instead of a regular IEP team meeting to change the Student’s placement. She said that the School was following its student handbook. The School’s *Student Handbook* reads, in relevant part, “Students who participate in exceptional education services (e.g., IEPs or 504 Plans) will be suspended until the Discipline Committee can conduct a Manifestation Hearing to determine whether the student’s actions were a result of a choice or his/her disability.”

The Complainant, Principal, three general education teachers, a special education teacher, the Coordinator, the School’s K-5 Director of Curriculum and Instruction, and three representatives from a community agency that serves the Student (Agency) comprised the team that participated in the meeting. The meeting began with a review of the Student’s area of eligibility and diagnoses, conduct on [redacted content], intake appointment with the Agency, IEP goals, grades and assessments, academic and behavioral performance in classes, behavioral interventions attempted by the School, and School’s concerns about the Student’s aggression and impact on safety.

The video recording of the meeting shows that the Principal presented the two questions that needed to be answered for the manifestation determination: whether the conduct in question was caused by or had a direct and substantial relationship to the student’s disability; and whether the conduct in question was the direct result of the School’s failure to implement the IEP. She made the School’s case for answering “no” to both questions. Both “no” boxes were already checked. The Principal said she wanted input from the rest of the team; however, before hearing from the rest of the team, she said the School was recommending that the Student go to a different school – one with a self-contained emotional/behavioral setting. The rest of the meeting was spent discussing a new placement for the Student and the team never circled back to the manifestation determination questions. For the first question, the Principal wrote on the form, “The LEA is unsure about the conduct in question being caused or having a direct result of [the Student]’s disability as the conduct is not in line with typical conduct for a student who is diagnosed with Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder. The conduct in question was almost manic in nature and no antecedents were able to be identified.” For the second question, the Principal wrote on the form, “The LEA implemented all aspects of [the Student]’s IEP”

OCR asked the Principal why the team was unsure of whether the Student’s conduct was caused by or had a direct and substantial relationship to the student’s disability. She explained that the Student had not previously stabbed another student in the knee or physically targeted another student; and he would not explain why he engaged in the behavior. The Principal also said that team members were reluctant to answer the question because the meeting was being recorded and they did not want to imply that the School was an improper placement for the Student. OCR

asked the Principal why she checked “no” if the team was unsure. She responded that there is not a “maybe” box on the form.

During the team’s discussion about placement, the Principal said there are “many unknowns” and “safety concerns” regarding the Student’s behaviors;” the School was “an inclusion model setting,” which was not safe for the Student; and the School’s recommendation was a self-contained emotional/behavioral classroom setting, with more behavioral support, for the Student. The Principal offered to reach out to the Student’s home district to explore self-contained options and to provide the Complainant with additional information about those options. Also, the Principal said, “If it’s a withdraw and transfer, then it’s not an expulsion.” The Principal asked the team if they agreed with the recommendation that the Student withdraw and transfer. All of the remaining School staff (two general education teachers had to return to class to teach midway through the meeting) and the three Agency representatives agreed. The Complainant asked if she had to answer right away. The Principal answered, “No, not necessarily.” They agreed that the Principal would put on the paperwork that the Complainant wanted to answer at another time. Before ending the meeting, the Principal said that the School would move forward with the necessary paperwork for a new placement.

OCR asked the Principal why she suggested a withdraw and transfer to the Complainant. She explained that if the Complainant had not agreed with a change in placement, the School would have considered, and likely pursued, expulsion of the Student. OCR pointed out to the Principal that, at the time, the Student was six-years-old; and in Arizona, students under age seven cannot be expelled. See A.R.S. § 15-843(K)(1). The Principal responded by incorrectly recalling that the Student was seven or eight years old at the time.¹ The Principal further explained to OCR that the School was doing the Student a disservice and a traditional school district would be more appropriate for him. Specifically, she said to OCR (and in the manifestation determination), the Student needed a self-contained setting and could have been in a self-contained setting at the School, but he would have been the only student in that setting. In contrast, the Principal told OCR, a traditional school district could offer the Student a self-contained classroom with other students who exhibit emotional and behavioral issues.

The Principal told OCR that the Complainant was not given a copy of the School’s procedural safeguards at the [redacted content] meeting. The Principal explained that the Complainant had been given the procedural safeguards at the [redacted content] team meeting (188 days earlier), the Complainant knew she could pick up a copy of the procedural safeguards at the School, and the School generally gives procedural safeguards to parents only once per year. The Individuals with Disabilities Education Act (IDEA) section of the School’s *Exceptional Student Services Policies and Procedures* specify that procedural safeguards must be given to parents “at a minimum, upon initial referral for evaluation, each notification of an IEP meeting, reevaluation of the child, and receipt of a request for due process” The “Procedural Safeguards” section of the School’s IDEA policies and procedures reads, “Parents/guardians will be provided with all information relevant to any activity that has been proposed and will be given a means for recourse if agreement cannot be reached. ... A copy of Parental Rights and Responsibilities is provided to all families at the time of the initial evaluation and/or annually thereafter, as long as the student receives special education services.” Finally, the procedural safeguards subsection in

¹ The Student’s date of birth is [redacted content].

the Section 504 section of the School's *Exceptional Student Services Policies and Procedures* reads, in relevant part, "The parent/guardian shall be notified in writing of any school decision concerning the identification, evaluation, and placement of a student. The notice will include information regarding the parent/guardian's right to be notified of actions regarding the student's identification, evaluation, and placement...."

The Student did not return to the School after [redacted content]. After the team meeting on [redacted content], the Principal contacted the District about placing the Student in a self-contained classroom in the District. The following day, the Complainant withdrew the Student from the School. The withdrawal form for the Student is dated [redacted content] and includes a note, "per parent req."

According to the Complainant, after she withdrew the Student, he spent three weeks at home, with no schooling, before starting at a school in a traditional school district.

III. LEGAL ANALYSIS

A manifestation determination was held on [redacted content]. During the manifestation determination, the Student's team discussed the Complainant withdrawing the Student from the School and enrolling him in a school or district that has a self-contained emotional/behavioral setting.

The team was properly constituted – that is, it included a group of people who were knowledgeable about the Student, the meaning of the evaluation data, and the placement options. draw upon information from a variety of sources. The Complainant, Principal, three general education teachers, a special education teacher, the Coordinator, the School's K-5 Director of Curriculum and Instruction, and three Agency representatives participated in the meeting.

Additionally, the team considered information from a variety of sources, including the Principal, Student's teachers, Agency representatives, and Complainant. They discussed the Student's IEP goals, grades and assessments, academic and behavioral performance in classes, behavioral interventions attempted by the School, and School's concerns about the Student's aggression and impact on safety. The Principal documented the information that the team considered at the meeting on a "Manifestation Determination Hearing" form.

However, the School did not provide the Complainant with a copy of its procedural safeguards (also known as due process procedures), even though the meeting was an evaluation of the Student (i.e., manifestation determination) and there was effectively a decision about his placement. The Principal explained that the Complainant had been given the procedural safeguards at the [redacted content] team meeting (188 days earlier), the Complainant knew she could pick up a copy of the procedural safeguards at the School (although the Principal did not specify how the Complainant knew), and the School generally gives procedural safeguards to parents only once per year. The procedural safeguards subsection in the Section 504 section of the *Exceptional Student Services Policies and Procedures* reads, in relevant part, "The parent/guardian shall be notified in writing of *any* school decision concerning the identification, evaluation, and placement of a student. The notice *will include* information regarding the

parent/guardian’s right to be notified of actions regarding the student’s identification, evaluation, and placement ...” (emphasis added).

The School’s policies and procedures requires that procedural safeguards be given to parents “at a minimum, upon initial referral for evaluation, each notification of an IEP meeting, reevaluation of the child, and receipt of a request for due process” and “at the time of the initial evaluation and/or annually thereafter, as long as the student receives special education services.”

Additionally, under the Section 504 regulations, at 34 C.F.R. § 104.36, compliance with the procedural safeguards requirements of the IDEA is one means of meeting this requirement. The IDEA requires that procedural safeguards be given to parents at least one time a *school year*, 34 C.F.R. § 300.504(a), and on the date on which the decision is made to make a disciplinary removal that constitutes a change of placement of a child with a disability, 34 C.F.R. § 300.530(h). Therefore, OCR found that the School failed to comply with its own policies and Section 504’s requirements regarding procedural safeguards.

IV. TECHNICAL ASSISTANCE

OCR identified issues in this case that do not impact OCR’s findings but that nevertheless warrant the provision of technical assistance to the School. The School appears to misunderstand when a manifestation determination is required. Under Section 504, a manifestation determination is required prior to a significant change in placement due to a disciplinary removal. A significant change in placement is an exclusion of more than 10 consecutive school days or a series of short-term nonconsecutive removals that, combined, total more than 10 school days during the school year and create a pattern of removal. Yet, the Principal told OCR that the School conducts manifestation determinations when a student engages in serious conduct and might be excluded.

Additionally, the School’s manifestation determination form: (a) excludes a pattern of removals that total more than 15 school days as a reason to hold a manifestation determination; and (b) implies that any “removal of a student with mental retardation” is a separate reason to hold a manifestation determination, thereby potentially leading students with intellectual or developmental disabilities to be subjected to discriminatory different treatment. See Figure 1.

Figure 1: Screenshot of part of the manifestation determination form for the Student’s [redacted content] team meeting

This manifestation determination is occurring as a result of a change of placement due to proposed disciplinary action involving (check all that apply):	
<input type="checkbox"/>	Removal for more than 10 consecutive school days during this school year
<input type="checkbox"/>	Removal for 11-15 school days that constitutes a pattern
<input type="checkbox"/>	Removal of a student with mental retardation
<input type="checkbox"/>	Unilateral removal for drugs, weapons, serious bodily injury for up to 45 school days in an interim alternative educational setting
<input checked="" type="checkbox"/>	Other: Voluntary withdrawal from Presidio with a transfer to a self-contained EBD classroom.

Also, the School's *Student Handbook* includes incorrect standards for manifestation determinations. It indicates that the purpose of a manifestation determination is "to determine whether the student's actions were a result of a choice or his/her disability." However, the first question to answer in a manifestation determination is whether a student's behavior was caused by, or had a direct and substantial relationship to, the student's disability.

Finally, the School's *Exceptional Student Services Policies and Procedures* reads, "When the disciplinary measures constitute a change of placement (i.e., 10 days of suspension, either consecutive or cumulative, in one school year, long-term suspension, or expulsion) ..." The standard for manifestation determinations is more than 10 school days of removal.

Therefore, OCR encourages the School to update its policies, forms, and practices related to manifestation determinations.

V. CONCLUSION

Upon being advised of the violation finding, the School entered into a Resolution Agreement (Agreement) to resolve the matter. A signed copy of the Agreement is attached with this letter. When the Agreement is fully implemented, the issues will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the School about the status of the Agreement terms. When fully implemented, the Agreement will address the violations identified by OCR. OCR will monitor the implementation of the Agreement until the School is in compliance with its terms and the statutory and regulatory obligations under Section 504 and Title II that were at issue in the case.

This case is now in the monitoring phase. The monitoring of this case will be completed when OCR determines that the School has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the School stating that this case is closed.

This concludes OCR's investigation in this case and should not be interpreted to address the School'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 determinations in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Please be advised that the School 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, 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 extended to OCR during the investigation and resolution of this case. If you have any questions, please contact the attorney assigned to this case, Jason Langberg, at XXXX@XXXX or (XXX) XXX-XXXX.

Sincerely,

/s/

Daniel Contreras
Supervisory Attorney

cc (via email): Jessica Montierth Puls, Principal and ESS Director
(XXXX@XXXX)

Tom Horne, Arizona Superintendent of Public Instruction