



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

February 27, 2018

VIA ELECTRONIC MAIL

Jeff Malan
Superintendent
Barstow Unified School District
551 South Avenue H
Barstow, California 92311

(In reply, please refer to # 09-18-1055)

Dear Superintendent Malan:

On November 2, 2017, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against Barstow Unified School District (District). The Complainant, on behalf of the Student, alleged discrimination on the basis of disability.¹ Specifically, OCR investigated whether the District failed to provide the Student with a free, appropriate public education (FAPE) by failing to (1) implement the Student's Individualized Education Program (IEP) plan and (2) follow adequate placement procedures before changing the Student's placement.

OCR enforces Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction under Title II of the Americans with Disabilities Act of 1990 over disability discrimination complaints filed against public educational entities. The District receives funds from the Department and is a public education entity. Therefore, the District is subject to laws and regulations enforced by OCR.

OCR gathered evidence by interviewing the Complainant and reviewing documents and other information provided by the Complainant and the District. Prior to OCR completing its investigation, the District voluntarily agreed to enter into a Resolution Agreement (Agreement), which when fully implemented is intended to resolve the areas of concern identified by OCR with respect to the issue investigated. This letter summarizes the applicable legal standards, the relevant information gathered during the investigation, and the terms of the resolution reached with the District.

Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide 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 are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in

¹ OCR informed the District of the identities of the Complainant and Student in our letter notifying it of the complaint. We are withholding their names here to protect their privacy.

accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 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 provide a FAPE at least to the same extent required under the Section 504 regulations.

The Section 504 regulations, at 34 C.F.R. §104.35(a), require school districts to evaluate any student who, because of disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. Under subsection (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. Subsection (c) 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 that is carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Section 104.36 requires school districts to provide procedural safeguards for parents and guardians of disabled students with respect to any action 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.

Taken together, the regulations 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 more than 10 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.

Facts Gathered to Date

At the time of the incidents alleged in the OCR complaint, the Student was in the XXXXX grade at a District elementary school (School). OCR reviewed the documentation provided by the District, which included the Student's Individualized Education Plan (IEP) and Behavioral Intervention Plan (BIP). On February XX, 2017, the District conducted the Student's IEP meeting. At the time, he was X years old and XX XXXXXXXXXXXX. According to the IEP, the Student had been previously placed on a Section 504 plan for ADHD. The District found that the Student was eligible for special education services under the

category of “other health impairment” for attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). The District also concluded that the Student’s ADHD and ODD behaviors were influencing low academic achievement scores, and therefore he was not able to receive services at his school of residence. Therefore, the District placed the Student in a highly structured environment at the School. The District’s offer of FAPE was for the Student to receive services in a separate class located at the School once per week for 1680 minutes, with counseling services 14 times per year for 30 minutes. Transportation services were also offered. The District also determined that the Student required the following supplementary aids and supports:

- Phonological awareness activities (e.g. rhyming, alliteration, imitation, songs) in the classroom environment daily for 10-15 minutes;
- Short and simple directions, hourly check-ins to ensure that the Student understood the directions;
- Daily access to play environments with his peers to practice socialization skills; and
- School district staff collaboration trimesterly for 15 minutes.

According to the BIP, the Student caused, attempted, or threatened physical injury and/or physical aggression to peers and adults in the school. The behavior was predicated by unstructured classroom settings and social interactions. The District determined that the Student required a highly structured environment and small group classroom settings to learn social skills, decrease negative behaviors, and learn to self-regulate emotions. The District required the following changes and supports as an intervention:

- The Student should sit near an adult and have a clearly defined work area;
- Allow additional time to complete tasks;
- Provide regularly scheduled breaks;
- Provide a place in the classroom to use relaxation techniques;
- Hands-on learning;
- Modified curriculum to avoid frustration;
- Clear and precise instructions and directions for all activities;
- Tasks broken down into discrete steps and prompts provided though each task; and
- Offer praise as often as possible to build rapport and self-esteem.

In the fall of 2017, the Student began XXXXX grade. Between August XX, 2017 and November X, 2017, District’s student discipline records show that the Complainant was called to the school to remove the student on seven separate occasions. After the final occasion, on November X, 2017, the Complainant removed the Student from the school and based on the information OCR has received to date, he has not returned to school since. The documentation provided by the District does not clearly set forth whether the Student’s BIP had been followed prior to calling the Complainant to remove the Student from the school. The Complainant told OCR in an interview that she removed the Student from the School because she felt they were not following the BIP and were instead resorting to calling her to pick up the Student whenever he misbehaved.

In its narrative response to the complaint, the District stated that it had reached out to the Complainant encourage her to bring the Student back to school, but received no response. On January XX, 2018, the District contacted OCR to report that the Complainant brought the Student to school the previous day. According to the District, the Complainant initially requested a transfer to a different school, and School

site staff explained to her that they would need to first schedule an IEP meeting for the Student in order to change his placement. OCR contacted the District on February X, 2018, and the District confirmed that to date, the Student had not returned to school.

Analysis

Under Section 302 of OCR's Complaint Processing Manual (CPM), OCR complaints may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest and OCR determines that it is appropriate to resolve the complaint with an agreement reached during the course of the investigation.

Prior to the conclusion of this investigation, the District indicated an interest in resolving this matter under Section 302 of the CPM. OCR determined that this complaint was appropriate for resolution under Section 302 because the facts gathered by OCR thus far raised compliance concerns, but OCR needed additional evidence to conclude the investigation and reach a finding. Under Section 504 and Title II, school districts are prohibited 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. Based on the facts gathered to date, the District took disciplinary action that excluded the Student from his educational program for at least 7 days, however it has not been established that the Student's BIP was followed prior to his removal from the School, or that the disciplinary action prompted the District to re-evaluate the BIP, even though the District had a reasonable basis to suspect that the Student's behaviors were related to disability. To complete the investigation, OCR would need to obtain further documentation and information regarding the District's disciplinary actions, the implementation of the Student's IEP and BIP, and the Student's attendance record. This would include (but is not limited to) conducting interviews with District staff and other witnesses. Accordingly, this matter remains unresolved.

Summary of Resolution and Conclusion

Prior to the conclusion of OCR's investigation, the District, without admitting to any violation of law, entered into the enclosed Agreement. The Agreement is aligned with the complaint allegations and the information obtained by OCR during its investigation, and it addresses the concerns identified by OCR during the investigation to date.

Under the Agreement, the District will conduct an IEP meeting and develop and Individualized Support Plan for the Student. The District will also provide written guidance and training to school site staff.

Based on the commitments made in the Agreement, OCR is closing the investigation of this complaint as of the date of this letter. When fully implemented, the Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of Agreement until the District is in compliance with Section 504 and Title II, and its respective implementing regulations, which were at issue in the case.

This concludes OCR's investigation of the 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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Abony Alexander, Civil Rights Attorney, at Abony.Alexander@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Enclosures

cc: Constance M. Taylor, Atkinson, Andelson, Loya, Ruud & Romo, Attorney for the District (by e-mail only)