



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

May 31, 2019

SENT VIA EMAIL

Donna Becnel
Superintendent
Konocti Unified School District
9430-B Lake Street
Lower Lake, CA 95457

(In reply, please refer to OCR case number 09-19-1133.)

Dear Superintendent Becnel:

This letter is to inform you that the U.S. Department of Education's Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against Konocti Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether the District denied the Student a free appropriate public education (FAPE) by failing to implement the Student's Section 504 plan, including by disciplining him for disability-related behavior.

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 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing 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. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, OCR concluded that the District violated Section 504. The legal standards, facts gathered, and the reasons for our determination are summarized below.

¹ OCR previously provided the District with the identity of the Complainant and the Student. We are withholding their names from this letter to protect their privacy.

Legal Standards

The Section 504 regulations, at 34 C.F.R. § 104.33, require public school districts to provide a 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 accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (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.

Section 104.35(a) of the 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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. Under § 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. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must 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. 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 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district 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.

The exclusion of a student with a disability from his or her program for more than ten consecutive days, or for a total of more than ten cumulative days in a school year 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.

Factual Findings

Background

The District is a public school district serving students in kindergarten through twelfth grade. According to the California Department of Education’s website, the District served 3,575 students in the 2018-19 school year.

The Complainant’s son (Student) was in XXXXX grade in the 2018-19 school year. The Complainant alleged that the District failed to implement the Student’s Section 504 plan at his elementary school (School). The Complainant further alleged that the District’s failure to implement the Student’s Section 504 plan caused him to be suspended multiple times due to disability-related behavior.

2017 Section 504 Plan

OCR’s investigation found that during the Student’s XXXXX grade year (2016-2017), the Complainant made a written request for the District to evaluate the Student for a disability, Attention Deficit Hyperactivity Disorder (ADHD), under IDEA and Section 504. In response, the School Psychologist observed the Student in the classroom on several days in March 2017. The School then developed a Behavioral Support Plan (BSP) dated April XX, 2017. The BSP included a list of 23 items described as “changes needed by staff to remove likelihood of [the Student’s problem] behavior occurring.” These items included providing positive reinforcement, providing clear and age-appropriate consequences and ensuring understanding, using break cards, employing de-escalation strategies including when reacting to problem behavior from the Student (e.g., giving time and space to the Student), daily check in/out with teachers, teaching replacement behaviors, and other behavior related strategies and interventions. The BSP was signed by the Complainant, School Psychologist, administrator, and one other attendee.

Approximately one month after the BSP was created, the School’s Assistant Principal created a Section 504 “Classroom Modification Plan,” dated May XX, 2017 (2017 504 Plan). The 2017 Section 504 Plan stated that the Student qualified for a Section 504 Plan, identified certain behavior challenges, and included a number of supports described as “modifications,” including: modification of instruction and specific strategies for completing in-class assignments, additional time on assignments, home-school communication such as teacher and parent signing homework nightly, modified test delivery by providing student a smaller and quieter place to test, use of behavior management techniques such as “toolbox tools,” alternative recess, check-in/check-out. The 2017 Section 504 Plan refers in two places to the BSP. The two goals identified included improving self-regulation and reducing defiant behavior. The 2017 Section 504 Plan was blank with respect to the “basis for decision” regarding the Student’s substantial limitation, did not include a list of participants, and was not signed by any District staff or by the Complainant.

The Assistant Principal who developed the 2017 Section 504 Plan left the District in June 2017. According to the District, the Assistant Principal did not follow District protocol to register the plan with the District Special Education Department, and the plan was misplaced in the Student’s cumulative file. The District told OCR that other District and School staff were therefore unaware of the existence of a Section 504 plan for the Student until OCR notified the District of this complaint in December 2018. The District indicated that it had no record of any Section 504

meetings being held for the Student and no record that the 2017 Section 504 Plan (including the BSP) had been implemented during the 2017-18 school year or the first half of the 2018-19 school year, although the District told OCR that the Student had received some “components” of the BSP during the 2018-19 school year with the School’s “check-in/check-out” program.

District records show the Student was referred for misbehavior five times during the 2017-18 school year, none of which resulted in a suspension. As of January XX, 2019, the Student had been suspended 11 days during the 2018-19 school year.

2019 Section 504 Plan

After being notified of this investigation, the District held a new Section 504 meeting for the Student and developed a new Section 504 plan dated January XX, 2019 (2019 Section 504 Plan). The notes for this Section 504 meeting indicate that the Student may have a second disability (sensory processing deficit) as reported by the Complainant. The District did not conduct any further psychoeducational, behavioral or other assessments of the Student prior to holding the 504 meeting or developing the 2019 Section 504 Plan.

Since January XX, 2019, the Student has been referred for behavior problems 13 additional times, resulting in five more days of out-of-school suspension. These incidents were similar to those that occurred prior to January XX, 2019, and included hitting other students, throwing food or other items, defiance/disruption, and profanity. In total, the Student has received 26 disciplinary referrals, 16 days of out-of-school suspensions and four days of in-school suspensions, during the 2018-19 school year.

Analysis

OCR found that the District failed to implement the 2017 Section 504 plan throughout the 2017-18 school year and until at least January XX, 2019 of the 2018-19 school year and that the District’s failure to implement the Section 504 plan resulted in a denial of FAPE for the Student. Pursuant to Section 106(a) of OCR’s Case Processing Manual, OCR found a continuing violation with respect to implementation of the Student’s Section 504 plan.²

Section 504 requires a school district to provide a FAPE to all students with disabilities in the district. Here, the District developed a Section 504 plan (including the BSP) in April-May 2017 that was meant to provide the Student with a FAPE. However, OCR found, by a preponderance of the evidence, that the District did not implement the 2017 Section 504 Plan during the 2017-18 school year or the first half of the 2018-19 school year. After several behavior referrals during the 2017-18 school year, the Student had significant and repeated behavioral problems during the 2018-19 school year, resulting in lost instruction, including 16 days of out-of-school suspension and four days of in-school suspensions – a significant change in placement. The District’s failure to implement the Student’s Section 504 plan therefore resulted in a denial of FAPE for the Student, in violation of Section 504 at 34 C.F.R. §§ 104.33. Implementation of the Student’s Section 504 plan, which included a BSP and focused almost entirely on behavior, including de-

² Section 106 of the CPM states that “[t]imely allegations may include . . . a continuing violation and/or a pattern or practice of discrimination.” The CPM can be found at www.ed.gov/ocr/docs/ocrcpm.pdf.

escalation techniques specific to the Student, may have mitigated or even prevented the Student's behavioral problems during the 2017-18 and 2018-19 school years.

The exclusion of a student with a disability from his or her program for more than ten consecutive days, or for a total of more than ten cumulative days in a school year under circumstances that show a pattern of exclusion, constitutes a significant change in placement. And, 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 (manifestation determination). 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. Here, as of the 2019 Section 504 meeting, the Student had been excluded for more than ten days for disciplinary reasons, yet the 2019 Section 504 meeting did not include a manifestation determination. Indeed, the District also has not conducted a manifestation determination since the January 2019 meeting, although the Student had received a total of 16 days of out-of-school suspensions and 4 days of in-school-suspensions as of April XX, 2019. OCR therefore found that the District failed to hold a manifestation determination meeting for the Student prior to a significant disciplinary change in placement, as required by 34 C.F.R. §§ 104.35-104.36.

In addition, Section 504 requires that school districts conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of a disability prior to any significant change in placement. Here, the District did not conduct a behavioral, psychoeducational, or other evaluation of the Student prior to the January 2019 Section 504 meeting although this meeting resulted in a new Section 504 plan for the Student, and significant changes to the Student's special education and related aids and services. In particular, the 2017 Section 504 Plan included a detailed BSP and two behavior-specific "Student Goals and Objectives", whereas the 2019 Section 504 Plan included a number of behavior related "accommodations," but did not include a BSP and also did not include any "goals and objectives" for the Student (behavior or otherwise). In addition, the 2019 Section 504 Plan did not include a provision for modifying test delivery, such as allowing the student to take tests in a "smaller, quiet place," which was part of the Student's 2017 Section 504 Plan. In addition, whereas the 2017 Section 504 Plan discusses behavior management techniques and identifies specific goals aligned with these techniques, the 2019 Section 504 Plan references only positive behavior interventions and supports as the behavior strategy to be used with the Student. And, while the 2019 Section 504 Plan includes some of the strategies and supports discussed in the 2017 Section 504 Plan, it lacks the level of detail included in the BSP.

Section 504 also states that 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. Further, placement decisions must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options, and placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. Although the 2019 Section 504 team developed a new placement for the Student, those placement decisions were not based on information from a variety of sources, as the only evaluative information the District identified for the meeting was the Student's discipline information and grades. Any other evaluative information that may have

been considered was not documented in the notes to the 2019 Section 504 Plan, or otherwise, as required by 34 C.F.R. § 104.35(c). Moreover, the 2019 Section 504 Plan was developed without full information about a critical component – the Student’s major life activity that is impacted by ADHD – as the plan says “not applicable” in response to this prompt. This information about the major life activity of the Student that is substantially impaired is information that should have been gathered through a complete evaluation, and is critical to determining (1) whether the Student is an individual with a disability under Section 504, and (2) what special education or related aids and services the Student needs to receive a FAPE.

While psychoeducational or other more formal testing may not be necessary for an adequate evaluation in every instance under Section 504, here, a preponderance of the evidence showed that further evaluation regarding the Student’s behavior and disability was needed to properly identify the Student’s major life activity that was impaired by his ADHD, and to provide the Student with a FAPE, after he had gone for approximately 1.5 school years without implementation of a Section 504 plan despite the existence of one, and after he repeatedly demonstrated problematic behavior that had resulted in, at the time of the 2019 Section 504 meeting, a significant change in placement as a result of discipline that included 13 behavior referrals, 4 days of in-school suspension, and 11 days out of-school suspension. In fact, absent further evaluation, the Student’s behavior challenges have persisted after the 2019 Section 504 meeting, resulting in 13 more behavior referrals and 5 more days of out-of-school suspension between January XX and April XX, 2019. OCR therefore found that the District failed to conduct an adequate evaluation of the Student, as required by 34 C.F.R. § 104.35.

The 2019 Section 504 meeting notes also indicate that the Student may have another disability – a processing deficit. Section 104.35(a) requires that a Student be evaluated with respect to any suspected disabilities, or if the District determines that evaluation is not appropriate, it may inform the parent/guardian of this decision and provide them with procedural safeguards pursuant to § 104.36. Here, the District may have had reason to suspect a secondary disability for the Student, as discussed in the Section 504 meeting notes and based on the Complainant’s statement that the Student had been diagnosed by a doctor for a processing deficit, yet there is no evidence that the District has evaluated the Student with respect to this possible disability, or in the alternative, that it has declined to evaluate the Student and provided the Complainant with procedural safeguards as required by 34 C.F.R. § 104.36. Section 504 also requires that placement decisions be made based on information from a variety of sources and be carefully considered and documented by the Section 504 team. Thus, to the extent that the Student’s January 2019 Section 504 team discussed the Student’s major life activity that is substantially impaired, or any possible secondary disabilities and made decisions with respect to these issues, but simply did not fully explain this information in the notes of the Section 504 meeting, then the District has not met its obligations to document this information pursuant to 34 C.F.R. § 104.35(c). The District also did not provide OCR with evidence that it provided procedural safeguards to the Complainant with respect to the 2019 Section 504 meeting decisions, as required by 34 C.F.R. § 104.36.

Conclusion

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the District and the

Complainant concurrently. When fully implemented, the resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

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.

If you have any questions regarding this letter, please contact Senior Attorney Brian Lambert at 415-486-XXXX or brian.lambert@ed.gov.

Sincerely,

/s/

Joseph Wheeler
Team Leader

enclosure