



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

January 10, 2020

Via Electronic Mail

Dr. Clark Burke
Superintendent
Manteca Unified School District
Manteca, California 95336
cburke@musd.net

(In reply, please refer to OCR Complaint No. 09-19-1206.)

Dear Superintendent Burke:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Manteca Unified School District (District). The Complainant alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether:

1. The District failed to provide the Student with a free, appropriate public education (FAPE) by (a) failing to implement the Student's Section 504 plan from the Student's prior District of attendance and (b) failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability; and
2. The District failed to provide the Student with a FAPE by failing to follow adequate evaluation and placement procedures before disciplining the Student.

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 an education system, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR reviewed documents and other information provided by the Complainant and the District. OCR found insufficient evidence to support a conclusion of noncompliance with respect to Issue 1(a). Prior to OCR completing its investigation and making a compliance determination with respect to Issues 1(b) and 2, the District expressed an interest in voluntarily resolving this matter pursuant to section 302 of OCR's Case Processing Manual

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

(CPM), and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Factual Findings to Date

During the 2017-2018 school year, the Student attended a school (School 2) within a different district (District 2) than the District at issue in this complaint. District 2 attempted to create at least two Section 504 plans for the Student during the 2017-2018 school year, but both plans were incomplete and unsigned.

According to the Complainant, on July XX, 2018, she informed Counselor 1 that the Student had previously been in a psychiatric hospital XXX XXXXXXXXXXXX.

On July XX, 2018, the Student transferred into the District from District 2. On August X, 2018, he was officially enrolled in a high school (School). And on August X, 2018, he began the 2018-2019 school year in the XXXX grade.

The Student saw Counselor 1 and two Community Counselors (Counselor 2 and Counselor 3) at School. According to the Complainant, the Student regularly met with a counselor from the end of August 2018 until approximately December XX, 2018.

On October X, 2018, the Student was involved in a physical altercation with another student (Student 1). On the same day, the School Resource Officer (SRO) and Vice Principal (VP) called the Complainant and her daughter about an unrelated matter. The Complainant informed OCR that during the conversation, her daughter explained to the SRO and VP that the Student suffers from severe depression. Later that day, the Student attempted to XXXXXXXXXXXX.

On October X, 2018, the Student informed the School that he had XXXXXXXXXXXX XX XXXXXXXXXXXX the night before. The School contacted the Complainant to notify her and asked her to pick the Student up from School. The Student was hospitalized until October XX, 2018. The School was on vacation the week of October XX-XX, 2018.

On October XX, 2018, the Student returned to School and the School issued a Report of Suspension finding the Student responsible for assault and theft on October X. The District informed OCR that the suspension was delayed from the date of the incident because of the Student's hospitalization and the School's vacation. OCR reviewed the District's Report of Suspension, which indicated that the Student would return to School on October XX, that the Student had violated an Ed Code, and that his presence on campus would cause a danger to others or threaten to disrupt the instructional process.

On October XX, 2018, the Student was placed on a Behavior Plan at the School administrators' request. The Plan indicated that the Student would be referred to the Disciplinary Review Board for an expulsion hearing if the Student violated the Plan. On October XX, 2018, the Student returned to School. The following day, the Student was involved in a verbal altercation with another student (Student 2). In response, the District suspended him for three days for violating the Behavior Plan.

On November X, 2018, the School requested the Student's discipline file from School 2, noting that the School had not yet received the Student's cumulative file.

On November X, 2018, the Student returned to School.

According to the District, on November XX, 2018, the School received a partial cumulative file for the Student from School 2, which included an incomplete form for a Section 504 plan for the Student. OCR reviewed this document, which indicated that the Student was eligible for Section 504 services based on his mental health, listed effective dates of May XX, 2017 to May XX, 2018, and identified persons responsible. However, the document was not signed by anyone and did not specify any accommodations, modifications or recommended services. The District informed OCR that it provided this incomplete Section 504 plan to Counselor 1 on November XX, 2018.

On December XX, 2018, Counselor 1 met with the Complainant. According to the District, the purpose of the meeting was to discuss the incomplete Section 504 plan. The Complainant informed OCR that the purpose of the meeting was to request that the Student be tested for special education services. According to the Complainant, during this meeting, she requested a Section 504 plan and a special education evaluation for the Student and Counselor 1 told her she needed to put her request in writing. According to Counselor 1, the Complainant requested that the Student be tested for special education services and did not request a Section 504 meeting. Counselor 1 informed OCR that she notified the Complainant that the School had received incomplete Section 504 documents from School 2 and suggested that the School convene a Section 504 meeting to discuss the Student's eligibility and assessment for special education services.

On December XX, 2018, the Student was involved in a physical altercation with another student (Student 3), which resulted in the Student's arrest for robbery. The District suspended the Student for five days, beginning December XX, 2018. OCR reviewed the District's suspension and expulsion documentation, which indicated that the Student had a Section 504 plan and stated that the Student was seeing an outside psychiatrist. The document recommended the Student for expulsion, indicated that the Student's presence caused a continuing danger to the physical safety of other students and that other means of correction had repeatedly failed.

On December XX, 2018, the Complainant emailed the District's Special Education Program Specialist a request for a Section 504 plan and an evaluation of the Student for special education services. On December XX, 2018, the Complainant emailed the Special Education Program Specialist requesting an update on her December XX request. On December XX, the Special Education Program Specialist responded to the Complainant that she had forwarded the request for special education testing to the School Program Specialist.

On December XX, 2018, the District mailed the Complainant a letter, informing her that an Assistant Principal from another high school (AP) met with the VP to discuss the Student's December XX suspension. The letter stated that although the Complainant was unable to attend the meeting, it was held in her absence. The letter further informed her that the AP determined the Student's presence at the School would cause a danger to persons or property and extended the Student's suspension until the scheduled January XX, 2019 expulsion hearing. The District told

OCR that the Complainant was unreachable to discuss expulsion proceedings and as a result, the Student's suspension was extended.

On December XX, 2018, the School received a letter from the Student's doctor which stated that the Student had been under his care since October XX, 2018. OCR reviewed the letter, which notified the District that the Student had been diagnosed with X--- content redacted---X.

According to the Complainant, on December XX, 2018, she and her daughter met with the VP and the SRO to discuss the expulsion hearing. The Complainant told OCR that when her daughter mentioned the Student's Section 504 plan, the VP and SRO said a Section 504 plan was not relevant to the expulsion hearing because it is for students who have disabilities. According to the Complainant, she informed them that School 2 had faxed the Student's cumulative file which included a Section 504 plan and that the District should have held a manifestation determination meeting and evaluated the Student prior to any disciplinary action.

The School was on winter break between December XX, 2018 – January X, 2019.

The District informed OCR that on January X, 2019, it sent the Complainant an assessment plan (Assessment Plan) for her review and consent. OCR reviewed the Assessment Plan which indicated that the Student was referred by the Complainant for a psycho-educational assessment in consideration of eligibility for special education due to concerns with his difficulties focusing on lessons and assignments. At the time of the assessment, the Student's suspected areas of disability included: Other Health Impairment (OHI), Specific Learning Disability (SLD) and Emotional Disturbance (SED).

On January X, 2019, the School received additional records from the Student's cumulative file from School 2, including the Student's discipline file and another incomplete and unsigned form for a Section 504 plan, with effective dates of December XX, 2017 through December XX, 2018. The cumulative file also included a log entry from October XX, 2017, which stated that School 2 left the Student's dad a message regarding a Section 504 meeting.

OCR reviewed this second incomplete Section 504 plan from School 2, which indicated that it was an annual review and listed the Student's disability as depression / anxiety. The five areas of concern were: struggle with focus in class; often becomes distracted in class; safety plan in place; due to his disability, struggles with submitting assignments timely; and struggles with self-advocacy. To accommodate the areas of concern, the plan provided that: the Student could request to work in an alternate room; when the Student becomes distracted, he could request a counselor, a quiet place to unwind or call a counselor; safety plan included breathing exercises and use of a stress ball; extended deadlines on assignments; and the Student would use his advisor to support his self-advocacy. The document listed all teachers and an advisor as the persons responsible, but it was not signed by anyone.

According to the District, on January XX, 2019, after review of additional information and the Student's Assessment Plan, the District decided not to proceed with the expulsion referral. The VP emailed the Complainant to inform her that the expulsion hearing was cancelled and to request

a Section 504 meeting. OCR reviewed the correspondence, in which the VP informed the Complainant that the expulsion hearing was cancelled.

The Student's December XX suspension was extended until January XX, 2019.

On January XX, 2019, the School convened a Section 504 meeting with the Complainant, the Principal, the VP, two teachers, and a counselor. The Section 504 team determined that the Student was eligible under Section 504 and developed a plan. The District informed OCR that during the Section 504 meeting, the Section 504 team agreed on an alternative school placement (School 3) for the Student and the Student was enrolled in School 3 the following day.

OCR reviewed the Student's Section 504 Plan documents dated January XX, 2019. The stated purpose of the Section 504 Plan was an annual review and described the Student's disability as depression / anxiety. The team reviewed the Student's academic records, behavior records, attendance records, recent medical history, teacher and parent input and a letter from behavioral health services which included the Student's diagnosis. The six areas of concern were: learning; struggles with focus; distractions; safety plan; self-advocacy; and learning. To accommodate these areas of concern, the Student: would receive redirection in a private setting; could request to work in an alternate room; could request a counselor, a quiet place to unwind or call a counselor when he feels anxious; use his advisor to support his self-advocacy and have extended deadlines on assignments, tests, and quizzes. In addition, the Student's emergency plan included breathing exercises, use of a stress ball, intense exercise or change of temperature. The persons responsible included all teachers. The Plan was signed and dated by the Principal, VP, two teachers, a counselor, and the Complainant.

On January XX, 2019, the Complainant signed the Assessment Plan and consented for the School Psychologist to evaluate the Student.

According to the District, School 3 started implementing the Section 504 Plan on January XX, 2019.

OCR reviewed the Student's attendance records at the School, which show he was suspended for five consecutive days from October XX through October XX, 2018. Records also show that the Student was suspended for three consecutive days from October XX through November X, 2018 and assigned Saturday school on December X. Records further show that the Student was suspended for six and a half consecutive days from December XX through December XX, 2018. Records also show that the Student was suspended for an additional ten consecutive days from January X through January XX, 2019.

OCR reviewed the Student's profile as of February X, 2019, which indicated a Section 504 Accommodation Plan with an entry date of August X, 2018.

OCR reviewed the Student's cumulative file which showed that the Student was out of school for a total of 24½ days between August 2018-January 2019.

The Complainant informed OCR that as a result of the District's failure to timely evaluate the Student, he has a judicial file from an arrest after the December incident. According to the Complainant, the Student began the 2019-2020 school year at School 4, which is also in the District, and he has a Section 504 Plan with necessary accommodations. The Complainant informed OCR that the Student is more stable and is managing his disability, through the Section 504 Plan accommodations and participation in sports.

Legal Standards

FAPE

The Section 504 regulations, at 34 C.F.R. § 104.33, require public school districts to provide a free appropriate public education (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 sections 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.

Evaluation and Placement

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.

In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

Discipline

The Section 504 regulations, at 34 C.F.R. § 104.3(j)(1)(i), and Title II at 28 C.F.R. § 35.104, define an individual with a disability as one who has a mental or physical impairment that substantially

limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.

The regulations implementing Section 504, 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. Subsection (c) requires that placement decisions 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. 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. Taken together, the regulations prohibit a district from taking disciplinary action that results in a significant change in the placement of a student has, or is believed to have, a disability without evaluating 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.

Analysis

Issue 1(a): Whether the District failed to provide the Student with a FAPE by failing to implement the Student's Section 504 plan from the Student's prior district of attendance.

Where a student with a disability transfers from one district to another district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving district who are knowledgeable about the meaning of the evaluation data and placement options determines that the Section 504 plan is appropriate, the receiving school district is required to implement the Section 504 plan. On the other hand, if the district determines that the plan is inappropriate, the district should evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student.

In this case, on November XX, 2018, the School received an incomplete Section 504 plan from School 2, which indicated that the Student was eligible for Section 504 services based on his mental health and listed effective dates of May XX, 2017 through May XX, 2018. However, this document did not list any accommodations, modifications or recommended services for the Student and was not signed by anyone at School 2 or District 2. OCR found that the District could not have implemented this plan because it was incomplete.

On January X, 2019, the School received a second incomplete Section 504 plan from School 2 which listed the Student's disability as depression and anxiety, listed five areas of concerns and identified corresponding accommodations. The document listed effective dates of December XX, 2017 through December XX, 2018, but it was not signed by anyone at School 2 or District 2. Although the District did not implement this second incomplete plan, the District promptly cancelled the expulsion hearing, convened a Section 504 meeting, and developed a new Section 504 plan within two weeks of receiving it.

For these reasons, OCR finds insufficient evidence that the District failed to provide the Student with a FAPE by failing to implement incomplete Section 504 plans from the Student's prior district of attendance.

Issue 1(b): Whether the District failed to provide the Student with a FAPE by failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability.

Section 104.35(a) of the regulations requires a school district to conduct a timely evaluation when it is aware of a student's disability or has reason to suspect a student has a disability. In this case, there were multiple incidents that could have led the District to suspect the Student had a disability in fall 2018.

According to the Complainant, on July XX, 2018, she informed Counselor 1 that the Student had previously been in a psychiatric hospital XXX XXXXXXXXXXXX, and the Student met with Counselor 1 and other counselors regularly from the end of August 2018 through December 2018. According to the District, the Student saw a Community Counselor once a week.

On October X, 2018, the Student informed School staff that he had XXXXXXXXXXXX XX XXXXX XXXXXXXX the previous night. The District was also aware that the Student was hospitalized from October XXXX, 2018.

The Student had two serious altercations with other students in October 2018 that resulted in the Student getting suspended for five days, placed on a Behavior Plan, and then suspended for another three days, which could have led the District to suspect that the Student had a disability.

On November XX, 2018, the School received an incomplete Section 504 plan from District 2, which indicated that the Student was eligible at School 2 for Section 504 services based on his mental health. Although this document was not signed by anyone and listed no accommodations, modifications or recommended services, receipt of this document could have given the District reason to suspect the Student had a disability.

On December XX, 2018, the Complainant met with Counselor 1 and requested that the Student be evaluated for special education services. During this meeting, the Complainant and Counselor 1 discussed convening a Section 504 meeting, however a Section 504 meeting was not scheduled until late January 2019.

The following day, the Student was arrested at the School for fighting, was suspended for five days and the District subsequently recommended the Student for expulsion. The relevant documentation recorded the Student as having a Section 504 plan; however, the evidence shows that the Student did not have a Section 504 plan in place at the School. The documentation also stated that the Student was seeing an outside psychiatrist. Although the Student did not have a Section 504 plan in place in December 2018, the School's indication that he did and the School's knowledge that the Student was seeing a psychiatrist could have given the District reason to suspect the Student had a disability.

Subsequently, the School received a letter from the Student's doctor on December XX, 2018, in which he specified several diagnoses that could have given the District additional reason to suspect the Student had a disability.

On January X, 2019, the School received a second incomplete Section 504 plan from School 2, which listed the Student's disability as depression and anxiety and included corresponding accommodations. Although this incomplete plan was not signed by anyone, receipt of this plan provided the District notice that School 2 had attempted to create a Section 504 plan for the Student with specific accommodations to address specific disabilities.

Because there were so many incidents that could have given the District reason to suspect the Student had a disability as early as July 2018, OCR is concerned that the District's failure to convene a Section 504 meeting until January XX, 2019 denied the Student a FAPE.

Prior to completing its investigation, the District informed OCR that it was interested in voluntarily resolving this matter.

Issue 2: Whether the District failed to provide the Student with a FAPE by failing to follow adequate evaluation and placement procedures before disciplining the Student.

The exclusion of a disabled student from his or her program for more than 10 consecutive days, or for a total of more than 10 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. As discussed in Issue 1(b) above, the District may have had reasons to believe that the Student was an individual with a disability or needed special education or related services months before the Section 504 team met on January XX, 2019. Although the District had notice about the Student's XXXXXXXXXX XXXXXXXX on October X, 2018, and that the Student was hospitalized between October X through XX, 2018, the District did not evaluate the Student for special education or related services prior to the five-day suspension on October XX or the three-day suspension on October XX. Despite receiving an incomplete Section 504 plan from District 2 on November XX and the Complainant's request that the Student be tested for special education services on December XX, the District also failed to evaluate the Student prior to his five-day suspension on December XX, his referral for expulsion on December XX, or the decision on December XX to extend his suspension by ten days. The District also did not evaluate the Student upon receiving a letter from the Student's doctor on December XX, 2018.

Despite the incidents described above that show the District could have had reason to suspect that the Student had a disability or needed special education services as early as October X, 2018, the District did not assess the Student for special education or related aids and services prior to suspending the Student for a total of 14½ days between October – December 2018. Further, OCR found that the Student was suspended for ten additional consecutive school days from January X through January XX, 2019 prior to the January XX Section 504 meeting. Thus, OCR is concerned that the District could have denied the Student a FAPE if the District had a reasonable basis to

suspect that the Student may have had a disability before the cumulative 24½ days of suspension between October 2018 and January 2019.

Prior to completing its investigation, the District informed OCR that it was interested in voluntarily resolving this matter.

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 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.

OCR's determination in this matter 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 may have the right to file a private suit in federal court whether or not OCR finds a violation.

The Complainant has a right to appeal OCR's determination with respect to Issue 1(a) 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 District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact OCR Attorney Nezhia Rae Burkes at (415) 486-XXXX or Nezhia.Burkes@ed.gov.

Sincerely,

/s/

Joseph Wheeler
Team Leader

cc: Suzan Turner, Director of Special Education (email only)