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OFFICE FOR CIVIL RIGHTS

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January 28, 2019

Mr. Rex M. Wertz
Superintendent
Polson School District No. 23
111 4th Avenue East
Polson, Montana 59860

Re: Polson School District No. 23
OCR Reference No. 10171201

Dear Superintendent Wertz:

This letter is to inform you of the disposition of the above-referenced discrimination complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR) against Polson School District No. 23 (district). The complaint contained allegations that the district discriminated against a student based on disability and retaliated against him. Specifically, the complainant alleged that the district:

1. discriminated against the student based on disability when the district failed to timely evaluate the student's disability-related needs despite the parent's repeated requests for an evaluation in February and March 2017;
2. subjected the student to disability harassment when staff members made disparaging remarks about the student to the student, to the student's parent, and to other parents during the 2016-2017 school year;
3. retaliated against the student when a district staff member contacted the student's juvenile detention officer on February 17, 2017, because the student's parent requested a copy of the district's complaint handbook on February 17, 2017; and
4. retaliated against the student by suspending the student on March 29, 2017, after the student's parent inquired about filing a complaint on March 29, 2017.

OCR investigated this case under OCR's authority to enforce Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). These laws prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance and by public entities, respectively. The implementing regulations for Section 504 also state that no recipient shall intimidate, threaten, coerce, or discriminate against any individual who has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under OCR's regulations, or for the purpose of interfering with any right or privilege

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secured by the laws enforced by OCR. The district receives federal financial assistance from the Department and is a public entity and is therefore subject to these laws.

As discussed below, regarding Allegation No. 1, prior to the completion of OCR's investigation, the district expressed an interest in voluntarily resolving this allegation and signed the enclosed Voluntary Resolution Agreement (agreement) to address Allegation No. 1. Regarding Allegation Nos. 2-4, through its investigation, OCR determined that the allegations should be dismissed because the district had already investigated the allegations through its internal grievance process and provided a comparable resolution process to OCR's pursuant to legal standards that are acceptable to OCR.

Allegation No. 1

The issue OCR investigated was whether the district failed to evaluate the student in a timely manner during the 2016-2017 school year in violation of Section 504 and Title II.

The regulation implementing Section 504 at 34 C.F.R. § 104.33 requires a public school district to provide a free appropriate public education (FAPE) to each qualified individual with a disability in the district's jurisdiction. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual educational needs of the individual with a disability as adequately as the needs of nondisabled persons are met. The regulation at 34 C.F.R. § 104.35 states that a recipient shall conduct an evaluation in accordance with the procedural requirements of Section 504 of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

The Title II regulation at 28 C.F.R. § 35.130 prohibits a public entity from excluding an individual from participating in or denying the benefits of the services, programs, or activities of the public entity.

OCR's investigation to date found that the district's investigator concluded that the school employees failed to timely identify and serve the student as a student with a disability. OCR also found that the district agreed to immediately evaluate the student based on the investigator's findings and, on June 5, 2017, found the student eligible for an individualized education program (IEP). The district, however, did not convene a team meeting to determine whether the student needed compensatory services to address the district's failure to timely evaluate his disability-related education needs. OCR has identified a concern that the student may have not received compensatory services, if needed.

In accordance with Section 302 of the OCR *Case Processing Manual* (CPM), a complaint may be resolved at any time when, before OCR issues a final determination, the recipient expresses an interest in resolving the complaint allegation and OCR determines that it is appropriate to resolve the issue under investigation with an agreement. In this case, the district requested to resolve Allegation No. 1 prior to the conclusion of OCR's investigation. In light of the district's willingness to address the concern identified by OCR comprehensively without further investigation, OCR determined that entering into a voluntary resolution agreement was appropriate. Subsequent discussions with the district resulted in the district signing the enclosed agreement.

Pursuant to the agreement, the district will convene a team of persons knowledgeable about the student to consider whether the district's alleged failure to timely evaluate the student during the 2016-2017 school year resulted in an adverse impact to the student's education and, if so, determine whether the student needs compensatory and/or remedial services as a result of any failure to timely evaluate the student. If the district determines that compensatory and/or remedial services are necessary, within one week of its determination, the team will develop a plan to timely provide compensatory and/or remedial services.

Allegation Nos. 2-4

Documents submitted to OCR indicated that the complainant filed the same complaint allegations against the district through the district's internal complaint process on April 4, 2017. The district's Director of Support Services, Human Resources and Information Technology (hereinafter the Director) investigated the allegations and interviewed the student and five staff members, but did not interview the student's parent because the parent informed him by e-mail that she did not have anything further to add to her complaint. On April 20, 2017, the Director issued his findings and conclusion. The Director concluded that, based on the information available to him, there was not sufficient evidence to support a claim of bullying or harassment by the assistant principal. With respect to the Section 504 and Individuals with Disabilities Education Act (IDEA) claim that the student was not timely evaluated and was therefore denied a FAPE, the Director referred the parent's concern to the Special Education Director who immediately agreed to evaluate the student.

On April 26, 2017, the parent filed a letter with the district's Board of Trustees appealing the Director's findings. The district retained an outside attorney to conduct an investigation of the parent's concerns related to the alleged harassment and retaliation by the assistant principal. On May 17, 2017, the attorney completed her investigation and provided the district with her findings and recommendations. The attorney found:

1. school employees failed to timely identify and serve the student as a student with a disability;
2. efforts to work with or discipline the student were ineffective and based on conduct that would "likely be a manifestation of the student's disability;"
3. the assistant principal did not intentionally interfere with the student's friend groups, though his responsive remark to a parent's question was admittedly ill-advised;
4. the assistant principal's conduct did not meet the definition of bullying or harassment, but the evidence supported a conclusion that he engaged in questionable disciplinary decisions based on knowledge of the student's disabilities;
5. the parent was not notified of disciplinary action or tardy status and the school's disciplinary log was not updated to include the student's suspension when he pulled a fire alarm; and

6. the timing of enforcement of the tardy rule supported the perception that the discipline was retaliatory, despite the absence of evidence supporting an intent to retaliate.

The findings of the investigation were conveyed to the parent and the district agreed to take certain corrective actions. Specifically, the district agreed to: evaluate the student and implement a plan pursuant to the requirements of IDEA and Section 504; hold accountable all middle school “staff who were determined to have culpability in this situation;” counsel and train district staff regarding the appropriate treatment of a student with a disability; remove the assistant principal from disciplinary determinations related to the student for the remainder of the 2016-2017 school year; and review and revise its Section 504 policies and forms prior to the start of the 2017-2018 school year.

The district informed OCR that it reviewed its Section 504 policies and made substantial revisions to those policies, and will implement the new policies district-wide. The district also stated that it provided training to all staff prior to the commencement of the 2017-2018 school year and will continue to provide training throughout the school year regarding the identification, evaluation and placement of students with disabilities under IDEA and Section 504.

Pursuant to OCR’s CPM, OCR will dismiss an allegation filed with OCR when the same or similar allegation, based on the same operative facts, has been resolved by another federal, state, or local civil rights enforcement agency or through a recipient’s internal grievance procedures, and all allegations were investigated and there was a comparable resolution process pursuant to legal standards that are acceptable to OCR.

OCR has reviewed the district’s internal investigation, and determined that the district investigated the same or similar allegations filed with OCR, based on the same operative facts, and that the district used a comparable resolution process to OCR’s and utilized legal standards that are acceptable to OCR. Accordingly, OCR is dismissing Allegation Nos. 2-4 and will not be taking further action with respect to these allegations.

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.

This concludes OCR’s investigation of the complaint. The complainant may have the right to file a private suit in federal court regardless of OCR’s determination. The complainant has a right to appeal OCR’s determination regarding Allegation Nos. 2-4 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete, inaccurate, 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 recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the district may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant 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.

OCR will monitor the implementation of the agreement and will close the complaint when OCR determines that the terms of the agreement have been satisfied. The first report under the agreement is due by February 22, 2019.

Thank you for the cooperation that you and your staff extended to OCR staff in resolving this complaint. If you have any questions about this letter, please contact Catherine Fawley, Attorney, by telephone at (206) 607-1609, or by e-mail at catherine.fawley@ed.gov.

Sincerely,

Sukien Luu
Supervisory Attorney