



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

December 19, 2019

Via Email Bobbie.Short@ashevillecityschools.net

Bobbie Short, Ed.D
Interim Superintendent
85 Mountain Street
Asheville, NC 28801

RE: OCR Complaint No. 11-19-1409
Resolution Letter

Dear Dr. Short:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on June 24, 2019 against Asheville City Schools (the District). The Complainant filed the complaint on behalf of an out-of-district student (the Student). The Complainant alleges that the District discriminated against the Student on the basis of disability when the District denied the Student enrollment XXXX through the District's discretionary admission of out-of-district students' program for the 2019-2020 school year.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During the investigation to date, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District staff. Before OCR completed its investigation, the District expressed a willingness to resolve the allegation pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination if the District expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District’s programs or activities on the basis of disability.

Facts

The Student lives outside the boundaries of the District, and the Complainant applied for the District’s discretionary out-of-district admissions. XXXX.¹ The District denied the Student’s discretionary out-of-district admissions for the 2019-2020 school year (when the Student would have been a XXXX grader) in XXXX 2019. According to correspondence and District documentation, the Complainant requested an evaluation for special education and related aids and/or services in XXXX 2019. Subsequently, the District developed a Section 504 Plan in XXXX 2019 and later developed an Individualized Education Program on XXXX, 2019.

OCR reviewed the District’s policies and procedures concerning the District’s discretionary out-of-district admissions. Policy 4130, Discretionary Admission of Out-of-District Students, states that “[a]dmission may be granted of up to one full school year” and that “future admission at the school of initial placement or at any other school within the” District is not guaranteed. Policy 4130(B)(2) indicates that an “out-of-district may be admitted, at the discretion of the Superintendent, if the following condition” is met: “[t]he Superintendent or designee has determined that space is available in the school district and in the particular school or program in which the student seeks to enroll.” Policy 4130(D), Renewal of Admission for Out-of-District Students, requires students to submit an “updated release as required by administration each subsequent school year in which admission is desired. To be considered for admission for subsequent years, the student must be in good standing in terms of academics, satisfactory attendance, timely arrival each day, behavior, and other standards of good standing and progress in” the District.

Policy 4130-P(A), Revocations of Admission for Out-of-District Students, explains that “admission may be revoked at any time during the school year if a student is not in good standing with” the District and it defines good standing. Students may not be determined to be in good standing if the student performs unsatisfactorily in any grading period, misses more than eighteen (18) days of school, is tardy more than eighteen (18) times at school, or exhibits behavior that warrants in-school or out-of-school suspension. Policy 4130-P(B), Renewal of Admission for Out-of-District Students, states that a student must be in good standing to be considered for continued enrollment and defines good standing the same as Policy 4130-P(A).

The District’s narrative response denied that the District discriminated against the Student and asserts that the District has a practice “to revoke the admission of students who do not reside within its boundaries” when “additional resources and/or personnel are required to serve the student.” The District acknowledged in its narrative response that the “initial letter stated that

¹ XXXX.

the reason for revocation was behavior, however, school official clarified [at a later date] for [the Complainant] that the additional resources required to serve [the Student] was the reason.” Specifically, the District’s narrative response noted that the Student required “additional staffing . . . to safely remain in the regular education setting as specified by his IEP.”

OCR reviewed correspondence and documentation related to the Student’s discretionary admission. The Complainant and District’s documentation states that the District denied the Student’s discretionary admission for the 2019-2020 school year, citing Policy 4130, XXXX. OCR notes that the Complainant provided OCR a letter she received from the District indicating that the basis for the revocation was due to the Student’s attendance and behavior; however, the District provided OCR a letter indicating that the only basis for the revocation was behavior. On XXXX, the Complainant appealed the District’s determination, by email, to revoke the Student’s admission arguing that the Student’s behavior and attendance are “directly correlated to [the Student’s] disabilities.” On XXXX, 2019, District administrators and School staff met with the Complainant to discuss the District’s determination to revoke the Student’s admission. After the meeting, on XXXX, 2019, the Complainant emailed the Assistant Superintendent of Administration (Assistant Superintendent) noting that her understanding from the meeting was that the attendance and behavior were no longer the reason for the revocation, but that the reason was “due to the accommodations of the safety plan and need of additional staff.” On XXXX, 2019, the District’s Superintendent upheld the determination to revoke the Student’s discretionary admission, citing Board Policy 4130. On XXXX, 2019, the Assistant Superintendent emailed the Executive Director of Curriculum and Student Resources (ED) asking him how he should respond to the Complainant’s XXXX, 2019 email requesting clarification regarding the reason for the revocation. The ED stated that the District’s “line needs to be this: Both the attendance and particularly the behavior are attributable to the Noonan’s Syndrome. We are not upholding the revocation based on those issues. The revocation is based on Policy 4130 Section B # 2 regarding space/resources being available to serve the student. It not being revoked for cause. It is being revoked based on resources available.” On XXXX, 2019, the Assistant Superintendent emailed the Complainant responding to her XXXX, 2019 email seeking clarification by repeating the District’s position that the ED stated.

OCR interviewed the School’s Principal, the District’s Exceptional Children Director, the Assistant Superintendent, and the ED and everyone confirmed that the primary reason for revoking the Student’s discretionary out-of-district admissions was the Student’s behavior. Administrators and staff explained that, based on the Student’s behavior history, the Student’s general education classroom teacher needed a full-time teacher’s assistant to support him and the other students but that the District did not have the resources to add the full-time teacher’s assistant to a second grade classroom.

OCR reviewed the District’s documentation concerning all students, including students with and without a disability, whose discretionary admission was accepted and denied. OCR notes that the documentation showed that the District accepted and denied students, regardless of disability status, for the 2019-2020 school year. The documentation indicates that many students, regardless of disability status, were denied admission because the school was not accepting any out of-district students due to space (with the exception of District staff and siblings). The documentation does not provide any information that how “space” was defined for each student.

Specifically, there is no information in the District’s documentation that indicates whether a student was denied admission because “space” was defined as physical space in the school or program or whether “space” was defined as insufficient staffing and or resources at the requested school. OCR further notes that the documentation identifies several students who were denied discretionary admissions but provides no specific reason for the District’s denial.

Analysis

The Complainant alleged to OCR that the District’s determination to revoke the Student’s discretionary out-of-district admission for the 2019-2020 school year was based on the Student’s disability. OCR’s review of documents and interviews indicate that District initially revoked the Student’s discretionary admission because of his behavior and attendance; however, after the Complainant explained to District administrators that the Student’s behavior and attendance were directly related to his disabilities, that the District changed its reason for revocation from behavior and attendance to resource availability.

Based on the above information, OCR has a concern that the District’s explanation for the revocation may constitute disability discrimination. Here, the District’s reason to revoke the Student’s admissions was based on the behaviors the Student exhibited during the school year, which were related to his disability. Administrators told OCR that they understood the Student’s behavior was related to his disability and that the Student’s behavior was the primary reason for the initial revocation and for upholding the revocation on appeal. OCR notes that Administrators explained to OCR that the reason the District upheld the revocation was not directly because of his behavior or his disability but it was because of the cost associated with the resources the School needed to address the Student’s behavior. OCR has a concern that the District’s reason for its determination was still, ultimately, based on the Student’s behavior. Before OCR could request additional documentation to clarify the identified concerns, the District requested to resolve the complaint voluntarily.

On December 19, 2019, the District signed the enclosed Resolution Agreement which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR’s investigation, and are consistent with applicable law and regulation. The Agreement requires the District to review and revise the District’s policies and procedures concerning the discretionary out-of-district admissions, train all staff responsible for recommending and reviewing applications for discretionary out-of-district admissions on the revised policies and procedures, and provide the Student an opportunity to reapply to the District’s discretionary out-of-district admissions for the 2020-2021 school year. Please review the enclosed Agreement for further details. OCR will monitor the District’s implementation of the Agreement until the District has fulfilled the terms of the Agreement.

This concludes OCR’s investigation of the complaint. This letter 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. 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. 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 District 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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact Zorayda Moreira-Smith, the OCR attorney assigned to this complaint, at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

Kristi R. Harris
Team Leader, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXX