



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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REGION XV
MICHIGAN
OHIO

June 6, 2014

Megan M. Savage, Esq.
Means, Bichimer, Burkholder & Baker Co., LPA
1650 Lake Shore Drive, Suite 285
Columbus, Ohio 43204

Re: OCR Docket #15-13-1395

Dear Ms. Savage:

This letter is to notify you of the disposition of the complaint filed August 30, 2013, with the U.S. Department of Education (Department), Office for Civil Rights (OCR) against Tuslaw Local School District (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleged that the District discriminated against the Student on the basis of disability when it refused to allow the Student to attend the District for the 2013-2014 school year through the District's open enrollment program because the Student has a disability and receives services pursuant to a Section 504 Plan.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* and its implementing regulation, 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 from the Department and as a public entity, the District is subject to these laws.

Based on the complaint allegation, OCR opened an investigation into the following legal issues:

- Whether the District treated a qualified student with a disability differently from students without disabilities, denied the student the opportunity to participate in or benefit from its aid, benefit, or service, or otherwise limited the student in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(i),(vii).
- Whether the District refused to make reasonable modifications in policies, practices, or procedures when the modifications were necessary to avoid discrimination on the basis of disability, in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(7).

OCR investigated the complaint by reviewing documentation submitted by the District, including the District’s open enrollment policies and student open enrollment data for the 2012-2013 and 2013-2014 school years. In addition, OCR interviewed the Complainant as well as the superintendent of the District and two building principals. Based on a careful analysis of this information, we have determined that the evidence is sufficient to support a finding that the District discriminated against the Student on the basis of disability, as alleged.

Summary of OCR’s Investigation

X---PARAGRAPH REDACTED---X

A. The Complainant’s Allegations

X---PARAGRAPH REDACTED---X

The District’s open enrollment application form does not indicate whether the Student has disabilities or is on a Section 504 plan, but the Complainant stated that during the application process she disclosed to the District that the Student, who would be enrolling in the xxxxxxxxxxxx was on a Section 504 plan. According to the Complainant, the superintendent told her that the District does not allow students with individualized education programs (IEPs) or Section 504 plans to enroll in the District through open enrollment because the District does not want to pay for it. The Complainant said that the District told her that xxx xxxxxxxx xxxxxxxx could enroll in the District because he had no documented disabilities, but that if they discovered later that xxx xxxxxxxx xxxxxxxx did need services, he, like the Student, would not be permitted to attend the District through open enrollment. In a letter dated xxx xxx xxxxxx the District informed the complainant that due to the large class size at the requested grade level, the District would not approve the Student’s open enrollment application, but would keep the request on file in case the enrollment figures changed. The Complainant told OCR staff that she had heard from two other parents that their children were also denied open enrollment because they had disabilities.

B. The District’s Enrollment Policies and Procedures

In response to the allegations, the District denied that it excludes students with IEPs or Section 504 plans from open enrollment and the superintendent denied telling the Complainant this. According to the superintendent, approximately 1,435 students are enrolled in the District's elementary school (kindergarten through grade four), middle school (grades five through eight), and high school (grades nine through twelve). The superintendent said that the District enrolls approximately 140-150 students in open enrollment each school year, including students on IEPs and Section 504 plans.

The superintendent said that he makes the open enrollment admission decisions on a "first-come, first-served" basis, provided there is available space in the appropriate classroom for the student, so the order in which the District receives the applications is relevant. The District begins accepting the applications for open enrollment on April 1 at 7:00 a.m. The superintendent said that open enrollment applications may be submitted to the superintendent's office or to the school building where the student would be enrolled. (However, the District's "Interdistrict Open Enrollment Guidelines (2013-2014)" (the Open Enrollment Guidelines) state that applications must be submitted to the superintendent's office.) The superintendent stated that the District keeps a log of the day and time the application is turned in to his office and the day and time the application is received. If the student turns the application in to a school, the school forwards it to the administration building. The application form does not indicate whether a student has a disability, is on an IEP, or has a Section 504 plan.

The superintendent said that he then gets the list of students who applied in the order of the time and date the district received their application, although he acknowledged that when applications come in all at once they are placed in a pile and the order in which they are recorded as being received depends, to some extent, on the luck of where the application landed on the pile. He then determines if there is space for the student.

According to the superintendent, there are no automatic disqualifiers for open enrollment. However, the District maintains enrollment limits (discussed below) and, in addition, the superintendent said, if a student has a disability, the type or the "degree" of the disability could have a bearing on a student's eligibility for open enrollment. The superintendent said that generally, the determinant factor of whether a student with a disability is admitted through open enrollment is the availability of space and whether the principal of the school says he or she can serve the student. According to the superintendent, cost is not a factor in this determination for students requiring special education services, because the funding from the state for these services follows the student. However, he said that whether cost may be a factor for students on Section 504 plans is a case-by-case determination.

The superintendent stated that during its decision making and acceptance process, the principals of the buildings where the applicants would attend if accepted obtain all the applicants' student records from their home districts, at which time they learn which students have IEPs or Section 504 plans. If a student is on an IEP or a Section 504 plan, the principal of the school where that student would attend then inquires with the home

district school as to what services are necessary to meet the student's needs. If the principal determines that the District can serve the student, and if there is room, the superintendent accepts the student. The elementary school principal said that in making this determination she considers whether the District will be able to "serve the students and serve them well." The middle school principal stated that they look at their numbers to see if they have room for a student on a Section 504 plan.

On May 30 or May 31 the District mails letters to all the applicants (except kindergarten applicants), informing them of their enrollment status. Students who are not accepted are placed on a waiting list.

With respect to the District's published policy, the Open Enrollment Guidelines (which are available on the District's website and have remained substantially unchanged for the 2014-2015 school year) state that students in special education classes will be accepted on a space-available basis and within Ohio Department of Education "Rules for the Education of Handicapped Students." They specifically provide that the enrollment of students who have learning disabilities or are "developmentally handicapped" are limited to 14 students in the kindergarten through eighth grade, and 22 students in the ninth through twelfth grade, and that the enrollment of students who have "severe behavioral handicaps" is limited to ten in the ninth through twelfth grade. The superintendent explained that the District does not have a program for severe behavioral handicaps for students in the kindergarten through eighth grade.

In the general education classrooms, the Open Enrollment Guidelines provide that no inter-district transfer will be permitted if the enrollment of the grade level being requested exceeds 22 for the kindergarten through third grade, 25 for grades four through six, and 25 for grades nine through twelve. The superintendent clarified that the District has approximately four classes per grade level (i.e., four first grade classes, four second grade classes, etc.), and that the slots per class per grade go to District students first and then to the open enrollment students until the cap is reached.

The Open Enrollment Guidelines provide the specific provision for special education students:

Special Education and Related Services:

- a. Direct billed
- b. District must be able to serve
- c. Contingent on unit numbers
- d. Applications should be sent to district special education supervisor

The superintendent clarified that “direct billed” refers to when another school district places a student with a disability in a District program because the sending district does not have the necessary program, in which case the District would bill the sending district for the services provided. The superintendent stated that this would not typically come up with open enrollment. He also explained that item b, “District must be able to serve,” means that if a student applies for open enrollment and has a disability requiring services the District does not offer, it will not accept that student. He cited occupational therapy, physical therapy, and possibly a one-on-one aide as examples of services that the District may not offer. The Open Enrollment Guidelines also state that “[d]istricts are not required to institute any special education programs to serve open enrollment transfer students.”

C. The District’s Open Enrollment for the 2013-2014 School Year

The District provided open enrollment records for the 2013-2014 school year in the form of an spreadsheet showing, among other information, the name of the student, student’s grade level, the date and time the District received the student’s application, whether the student was accepted through open enrollment, and whether the student had an IEP. This column had notations of “yes,” “no,” or it was left blank. The superintendent said that if that column was left blank, the District did not know the disability status of the student. Handwritten notations on the records also indicate in some instances whether the student had a Section 504 plan.

These records indicate that the District accepted 40 students under open enrollment, including three students on IEPs and eight students for whom that information was unavailable (the column was left blank). The District received 38 open enrollment applications from students in the kindergarten through grade five and accepted 11 of these students. The District’s records show, and the superintendent acknowledged, that the District did not admit any students with disabilities into the District’s elementary school through open enrollment in the 2013-2014 school year.

The District denied acceptance to two students on IEPs and both of these students submitted their applications on xxxxx xx xxxxx One of the two students on IEPs who was denied acceptance was going into xxxxx xxxxx The other of the two students on IEPs who was denied acceptance was going into xxxxx xxxxx and was the sixth applicant overall to submit his application. The District accepted five students into grade seven through open enrollment whose applications it received on or after April 1, including one that it received on May 3. These five students did not have IEPs and did not appear to have Section 504 plans. The middle school principal stated that they could not accept the student on the IEP because they had a large number of students in grades seven and eight and they would have had to hire additional staff if they accepted the student on the IEP.

With respect to the Student, the superintendent said that he was involved in the decision to deny her admission under open enrollment for the 2013-2014 school year. He explained that the District learned that the Student had a Section 504 Plan when the principal called the Student's home district. The superintendent did not know what was said between the principal and the home district, as he was not privy to that conversation, but the principal concluded that the Student needed more services than the District could provide and therefore she was not admitted. The superintendent told OCR staff that they have had many things going on at the elementary school in the 2013-2014 school year, and many students who needed services, and they therefore did not think they "could handle a student on a Section 504 plan." For example, he described a new program at the school for students with visual impairments. The superintendent did not know what services were called for in the Student's Section 504 Plan or what specific services the Student needed that the District could not accommodate. He also did not recall whether the services the Student needed were part of her participation in a general education classroom or a special education classroom. The principal at the elementary school had no recollection of the Student.

The superintendent acknowledged that the denial was unrelated to class size, and the District open enrollment records show that four students who were not on IEPs and who submitted applications for open enrollment after the Student were admitted into grade one. The data also shows that the only other students who were not admitted into grade one under open enrollment were two students whose IEP status is unclear.

Applicable Legal Standards

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a) and (b)(i) and (vii), requires that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Section 504 implementing regulation specifically provides that a recipient shall not afford a qualified student with a disability an opportunity to participate or benefit from an aid, benefit, or service that is not equal to that afforded others. 34 C.F.R. § 104.4(b)(1)(ii). The Title II implementing regulation contains a similar prohibition for public entities at 28 C.F.R. § 35.130(a).

In addition, under the Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(4)(i), a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability. See also 28 C.F.R. § 35.130(b)(3)(i).

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7).

A public entity also may not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Analysis and Summary

- **Individual Allegation**

In investigating an allegation of disability discrimination under a different treatment theory, OCR first will determine whether the recipient treated an individual with a disability differently from an individual without a disability in similar circumstances. If so, OCR will determine whether the recipient has articulated a legitimate, nondiscriminatory reason for the difference in treatment and then whether that reason was a pretext for unlawful discrimination. Generally, under Section 504, an elementary or secondary school student with a disability is a qualified individual with a disability if the student is of an appropriate age to participate based on state law or Federal disability laws.

In this instance, OCR finds that the evidence is sufficient to show that the District treated the Student differently and denied her participation in its open enrollment program on the basis of her disability and treated her differently than student applicants who did not have disabilities when it denied her admission under open enrollment.

Applying the above standards, OCR determined as a threshold matter that the Student has a disability and was qualified and applied for open enrollment. Her application was one of the first that the District received. The enrollment limits were admittedly not an impediment to the Student's acceptance; the District accepted students into grade XXX whose applications it received after the Student's, and the superintendent told OCR that the District had available space in the classroom for her.

However, the District imposed an additional requirement on the Student solely because of her disability that it did not impose on the applicants who did not have disabilities. When the District learned that the Student was on a Section 504 plan and therefore had a disability, the District required the principal of the elementary school to assess whether the District could provide the necessary services for the Student. The District acknowledged that it denied the Student admission because it felt it could not adequately serve her, given her disabilities. Thus, the District treated the Student differently in its open enrollment process than similarly-situated students who did not have disabilities.

Because the District treated the Student differently based on her disabilities, we next considered whether the District provided a legitimate, non-discriminatory reason for the different treatment that is not a pretext for discrimination. The District stated that it denied her enrollment because the Student needed more services than the District could provide, based on the principal's undocumented, and apparently discretionary, assessment of the Student's needs and the available resources at the elementary school. However, the District could not identify the aids and services the Student would need to receive a free and appropriate public education (FAPE), or how it made that determination, or why it could not provide them. The decision appeared to be related more to the fact that the Student's need for any disability-related services might place an additional stress on the elementary school staff resources at a time when it was already facing the stress of initiating a new program for students with visual impairments.

To the extent that the District could generalize as to why it would deny any student on a Section 504 plan open enrollment, it cited or alluded to such factors as whether the District already provided the particular services the student would need, the resources available at the school building where the student would attend if admitted, taking into account other disability programs at the school and the resources they would require, and possibly the cost of the services the District would have to provide.

Although Ohio law permits districts to deny open enrollment to a student on an IEP if they do not have the services described in that student's IEP, the District did not cite this as a basis for the denial of her admission.¹ The District stated that the Student needed *more* unspecified services than it could provide, and later noted that the elementary staff was overburdened. Moreover, regardless of Ohio law, in an open enrollment situation, a district may not deny nonresident students with disabilities admission to the district on the basis of their disability and a district receiving a transfer student assumes full responsibility for providing all special education and related services to that student.
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xxxxxxx xx xxxxx The District's stated and implied reasons for denying her admission were directly related to her disability and the resources the District would have to expend to accommodate it. Therefore, the District's bases for denying the Student open enrollment are not legitimate or non-discriminatory under Section 504 and Title II.

¹ Ohio law permits a school district to deny enrollment to a student receiving services under the Individuals with Disabilities Education Act (IDEA) if the services described in the student's IEP are not available in the district's schools. However, this law does not specifically address or reference services provided under Section 504. See ORC 3313.98(C)(2).

Accordingly, OCR finds that the evidence is sufficient to show that the District discriminated against the Student on the basis of her disability when it denied her admission to the District through open enrollment.

- Open Enrollment Guidelines

As stated above, a district may not deny nonresident students with disabilities admission to the district through open enrollment on the basis of their disability and a district receiving a transfer student assumes full responsibility for providing all special education and related services to that student.

With respect to the District's policies and practices regarding open enrollment in general, the District imposes eligibility criteria for open enrollment, both in writing and in practice, that screen out or tend to screen out individuals with disabilities and/or classes of individuals with disabilities.

The application process for open enrollment includes an additional hurdle for students with disabilities. For students who do not have disabilities enrollment decisions are based primarily on the order in which the application arrived at the District and the availability of spaces in the applicant's grade. For students who have disabilities, however, in addition to the above, if a student is on an IEP or has a Section 504 plan, the Open Enrollment Guidelines state that the District "must be able to serve" the student, without providing any limitations or defining criteria. In addition, the District states in its Open Enrollment Guidelines that it is not required to institute any special education programs for open enrollment transfer students, which the superintendent indicated could include physical therapy, occupational therapy, or hiring an aide. Finally, the enrollment limitations are lower for students with disabilities than they are for students who do not have disabilities.

In practice, the principal evaluates whether the District can serve the student, based on his or her own independent assessment of both the student's needs and the resources at the school. This assessment is undocumented and is discretionary; there are no guidelines, criteria, or limitations for establishing what the student's needs are or whether the District can meet those needs, leaving open the possibility that the District could use this provision as a pretext for excluding a student with a disability on nearly any grounds.

The enrollment data the District provided for the 2013-2014 school year suggests that in addition to the Student, two other students with disabilities were denied acceptance under open enrollment even though their applications were received prior to the applications of students who did not have disabilities and who were accepted. Although OCR does not have more information regarding these specific students, it supports the finding that students who have disabilities are treated differently in the open enrollment process and must meet additional criteria to be accepted to the District.

Thus, in both the District's written policies and its practices with respect to open enrollment, the District treats applicants with disabilities differently than it treats those applicants who do not have disabilities and denies them enrollment because of their disabilities.

The Open Enrollment Guidelines also include several confusing or misleading provisions that may dissuade students with disabilities from even applying for open enrollment. For example, under "Special Education and Related Services" it lists, as the first item, "Direct billed," which, as explained, is not related to open enrollment but could mislead people into believing that individuals or parents are directly billed for the special education services their children receive at the District through open enrollment.

In summary, the evidence supports a finding that the District denied the Student's enrollment because of her disability and treated the Student differently from students without disabilities in violation of the Section 504 and Title II implementing regulations, as alleged. In addition, the evidence supports that the District's open enrollment policies and procedures are misleading and discriminatory towards students with disabilities.

Conclusion

On May 29, 2014, the District signed the enclosed Resolution Agreement (the Agreement), which requires the District to notify the parent(s) or guardian(s) of all students with known disabilities who were denied open enrollment or placed on a waiting list for the 2013-2014 school year that it has changed its open enrollment policies and procedures and invite them to reapply for open enrollment for the 2014-2015 school year, granting them an extension of time to enroll.

In addition, the Agreement requires the District to revise its policies and procedures to ensure that when a student with a disability applies through the District's open enrollment program, the District will consider the individual needs of that student and whether it can meet those needs when determining whether the District is capable of providing the student a free appropriate public education (FAPE), without taking cost into account. The District will consider capability without taking cost into account, but the District is not required to create a new program to provide FAPE. However, the District will not use the lack of an existing program as a pretext for denying students with a disability open enrollment. The District's revised policies and procedures must also ensure that the District make a meaningful determination of the individual needs of each student for special education and related aids and services and consider all alternative services it does have available for that student before determining that it does not have the capability of providing the student a FAPE. The Agreement also includes a monitoring provision for OCR to review the District's implementation of its revised policies.

In light of the Agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR is informing the Complainant of this resolution by concurrent letter. OCR will monitor the District's full implementation of the commitments contained in the Agreement.

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.

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, 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.

The complainant may have the right to file a private suit in Federal court, whether or not OCR finds a violation.

OCR looks forward to receiving the District's first monitoring report by September 1, 2014. The report should be directed to xxx xxxxxxxx xxxxxxxx who can be reached at xxxxx xxxxxxxxxx. Monitoring reports submitted by e-mail should be submitted to OCRCleMonitoringReports@ed.gov.

If you have any questions about this letter or OCR's resolution of this case, please contact me at xxxxx xxxxxxxxxx

Sincerely,

/s/

Donald S. Yarab
Supervisory Attorney/Team Leader

Enclosure

cc: Richard W. Ross, Esq.