



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

Helen S. Carroll, Esq.
Roetzel & Andress
222 South Main Street
Akron, Ohio 44308

Re: OCR Docket #15-15-1250

Dear Ms. Carroll:

This letter is to inform you of the disposition of the above-referenced complaint, which was filed with the U.S. Department of Education’s Office for Civil Rights (OCR) on April 21, 2015, against Green Local School District (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability (XXX XXXXX XXXXXXXXXXXX XXXXX and XXXXXXXXXXX XXXXXXXX). Specifically, the complaint alleged that:

1. On XXXXXXXXXXX, the District failed to implement the Student’s behavior intervention plan (BIP) following an incident in which the teacher XXXXXXX XXXXX XXX XXXXXXXXXXX XXX XXX XXXX XXXXXXXXXXX XXXXXXXX XXX XXXXX XXXXX XXXXXXXXXXXX XX XXXXX XXXXX XXXXXXXXXXXXXXXXXXX XXXXX XX XXX XXXXXXXXXXX XXXXXXX.
2. From XXXXXXX, through the remainder of the school year, the District excluded the Student from attending school without conducting an evaluation to determine whether the Student’s placement was appropriate or providing a notice of procedural safeguards.
3. From XXXXXXX, through XXXXXXX, the District provided no educational services to the Student, and from XXXXX, through the remainder of the school year, the District provided the Student with assignments but no educational instruction.

4. From XXXXXXXXXXX, through the remainder of the school year, the District excluded the Student from nonacademic and extracurricular activities, including a XXXXXXXX XXXXXXXX XXX XX XXXXXX XXX XXXXXX XXX.
5. During the 2014-2015 school year, the District did not provide the Student with extended time for tests, which was required by his Section 504 plan.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 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. Therefore, OCR had jurisdiction to investigate this complaint.

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

- Whether the District failed to provide a qualified student with disability a free appropriate public education (FAPE) as required by Section 504's implementing regulation at 34 C.F.R. § 104.33.
- Whether the District failed to conduct an evaluation of a student with a disability before a significant change in the student's placement as required by Section 504's implementing regulation at 34 C.F.R. § 104.35(a).
- Whether the District failed to ensure that a qualified student with a disability was not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any of the District's programs, activities, aids, benefits, or services, in violation of 34 C.F.R. § 104.4 of the Section 504 implementing regulation and 28 C.F.R. § 35.130 of the Title II implementing regulation.

Summary of OCR's Investigation to Date

To date, OCR has investigated this complaint by interviewing the Student, his parent, and the principal for the school where the Student attended. OCR also reviewed documentation provided by the parent and the District. After a careful review of the information obtained during the investigation, OCR determined that the evidence is insufficient to conclude that the District failed to implement the Student's BIP during the behavioral incident at school on XXXXXXX, as set forth in allegation #1, or that the District failed to provide the Student with extended time on tests as required by his Section 504 plan, as stated in allegation #5. With respect to allegation #2, OCR determined that the evidence is sufficient to conclude that the District failed to conduct an evaluation before making a significant change in the Student's placement. With respect to the remaining allegations ##3 and 4, before OCR completed its investigation, the District asked to

voluntarily resolve any possible compliance concerns pursuant to Section 302 of OCR’s *Case Processing Manual* (CPM) and OCR determined that it is appropriate to resolve these allegations with an agreement. Accordingly, with respect to allegations ##3 and 4, OCR is not making a finding with regard to the District’s compliance with Section 504 or Title II in this letter. OCR explains the bases for its decisions below.

- **Background**

This complaint was filed by the Student, who is an adult. XX PARAGRAPH REDACTED XX.

The Student’s initial Section 504 plan was implemented in XXXXX. Following a number of behavior incidents XXXXX XXXXX XXXXX XXXX XXX XXXXX, the District conducted a functional behavior assessment of the Student and, as a result, his existing Section 504 plan and behavior intervention plan (BIP) were amended to include an additional provision XXX XXX XXXX XXXXX XXXX XXXX XXXX XXXXXXXX. These plans remained in effect through the end of the school year. XX REMAINDER OF PARAGRAPH REDACTED XX.

XX PARAGRAPH REDACTED

The Student’s parent stated that the District suspended the Student for multiple days with a recommendation for expulsion. The Student’s parents, through their attorney, requested to meet with the District prior to the Student’s expulsion hearing. During the meeting, which occurred on XXXXXXXX, the parents, the Student, the District, and attorneys for both parties agreed that the Student would not be expelled but would be permitted to finish the school year XXXXXX in order to graduate on time.

- **Allegation #1: Alleged Failure to Implement the Student’s BIP on XXXXXXXX**

The complaint alleged that during the disciplinary incident on XXXXXXXX, the teacher failed to follow the Student’s BIP by XXXXXXX XXXXX XXX XXXXXXXX XXX XXX XXXX XXXXXXXX XXXXXXXX XXX XXXXX XXXXX XXXXXXXXXXXX XX XXXXX XXXXX XXXXXXXXXXXXXXXXXXXX XXXXX XX XXX XXXXXXXXXXXX XXXXXXX.

OCR reviewed the Student’s BIP in effect during this incident. XX PARAGRAPH REDACTED XX

OCR reviewed the written statements of several school officials who witnessed parts of the incident. XX PARAGRAPH REDACTED XX

XX PARAGRAPH REDACTED XX

OCR also reviewed written statements provided by other witnesses. XX PARAGRAPH REDACTED XX

- **Allegation #2: Alleged Exclusion of the Student from School Without Conducting An Evaluation**

The complaint alleged that the District changed the Student's placement without conducting a manifestation determination review following the disciplinary incident on XXXXXXXX.

OCR reviewed documents provided by the District, including the Student's attendance record for the 2014-2015 school year, disciplinary documents related to the XXXXXXXX, incident and subsequent letters sent between the Student's attorney and the District's attorney. The attendance records show that the Student was marked absent XXX XXXX XXXXXXXX XXXXX XXXXXXXX XXXXXXXX XXXXXXXX.

XX PARAGRAPH REDACTED XX

XX PARAGRAPH REDACTED XX

The School's principal stated that the manifestation determination review scheduled for XXXXXXXX, was never held because the Student's parents requested that the suspension to be delayed and because the parties came to an agreement at the XXXXXXXX, meeting to provide the Student with XXXXXXXX instruction that would best serve the Student. The principal stated that the attendees determined the Student's intervention specialist would serve as the XXXXX instructor. The principal stated that the plan's overall goal was to have the Student graduate. The principal stated that the Student's attendance status was considered an excused absence from the period from XXXXXXXX XXXX XXX XXXX XXXX XXX XXXXXXXX XXXXX XX. The individuals who signed the Student's XXXXXXXX, Section 504 plan were the parent, the school psychologist, the guidance counselor, and a teacher. The persons from the Student's Section 504 team, other than the parent, were not present at the XXXX meeting.

- **Allegation 3: Alleged Failure to Provide the Student with Educational Services and Instruction**

The complaint alleged that from XXXXXXXX to XXXXXXXX, the District provided no educational services to the Student, and that from XXXX through the remainder of the school year, the District provided the Student with assignments but no educational instruction. The Student's parent stated the Student was supposed to get 1.5 hours per day of XXXXX instruction but the tutor merely served as a courier for homework assignments and provided no instruction. The Student's parent further stated that two of the Student's courses were online.

OCR reviewed a daily log provided by the Student's intervention specialist who provided the XXXXX instruction to the Student. The log demonstrated that XXXXX instruction was provided to the Student starting on XXXXXXXX, and ending XXXXXXXX, and that the Student was completing a program called XXXXXXXXXXXX XXXXXXXXXXXX. The log documented the times that the intervention specialist met with the Student, the assignments provided to the Student by his teachers, the status of completed or missing assignments, and the Student's progress toward meeting graduation requirements. The log also documented the three times when the intervention specialist did not meet with the Student and the reasons they did not meet on a particular day. XX REAMINDER OF PARAGRAPH REDACTED XX

services a team determined were necessary to provide the student with FAPE. OCR then determines whether the district provided the student the agreed-upon services and, if not, whether this resulted in a denial of FAPE.

The Section 504 regulation states, at 34 C.F.R. § 104.35(a), that a recipient school district shall conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any action regarding the person's initial placement or any subsequent significant change in placement. School districts must reevaluate a student with disabilities periodically and before any significant change in placement. The Section 504 regulation, at 34 C.F.R. § 104.35(c), further provides that in making placement decisions the recipient shall draw upon information from a variety of sources, including aptitude and achievement tests and teacher recommendations. Additionally, a recipient must ensure that placement decisions are made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

Under OCR policy, any suspension, exclusion, or expulsion that exceeds 10 days or any series of shorter suspensions or exclusions that in the aggregate totals more than 10 days and creates a pattern of exclusions constitutes a significant change of placement that would trigger the district's duty to reevaluate a student under 34 C.F.R. § 104.35(a). OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified person 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 a recipient's program or activity. Title II's implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). Prohibited discrimination by a recipient or public entity includes denying a qualified person with a disability the opportunity to participate in or benefit from the aids, benefits, or services offered by that recipient or public entity; affording a qualified person with a disability an opportunity to participate in or benefit from aids, benefits, or services that is not equal to that afforded others; providing a qualified person with a disability with aids, benefits, or services that are not as effective as those provided to others; providing different or separate aids, benefits, or services to a person with a disability than those provided to others, unless necessary to provide a qualified person with a disability with aid, benefits, or services that are as effective as those provided to others; or otherwise limiting a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. 34 C.F.R. § 104.4(b)(1)(i)-(iv) and (vii); 28 C.F.R. § 35.130(b)(1)(i)-(iv) and (vii).

In investigating an allegation of disability discrimination under a different treatment theory, OCR first will determine whether the recipient treated individuals with a disability differently from individuals without disabilities 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.

Analysis and Resolution

With respect to allegation #1, that on XX PARAGRAPH REDACTED XX

Therefore, with respect to this allegation, pursuant to Section 303(a) of OCR's Case Processing Manual, OCR has determined that the preponderance of the evidence does not support a conclusion that the District failed to implement the Student's BIP as written and that the evidence is insufficient to support a finding that the District violated the Section 504 regulation as alleged.

With respect to allegation #2 that the District changed the Student's placement without a manifestation determination, the evidence is sufficient to conclude that the District failed to conduct an evaluation before it made a significant change in the Student's placement. It is undisputed that the District was set to hold a manifestation determination hearing prior to his expulsion hearing but that it was never held because of a written request from the Student's parent and his attorney. Instead, in response to the parent's request, the District held a meeting with the Student's parent and other participants, who were not the Student's Section 504 team, and agreed that the Student would complete his graduation requirements XXXXXXXX XXXXX XXX XXXXX XXXXX. OCR concludes that the decision XX XXXXX XXXX XXX XXX XXXX XXXXX XXXXX was a significant change in placement. OCR further concludes that the District did this at the parent's request, but that it failed to reevaluate the Student before making this change in his placement and before determining whether or not the Student's behavior that had triggered the pending expulsion was a manifestation of the Student's disability.

As noted above, the evidence further shows that the attendees at the meeting at which the Student's change in placement was discussed did not include the members of the Student's Section 504 team. In attendance at the meeting were some individuals with knowledge of the Student and his disability (e.g., his parent and an assistant principal). However, none of the Student's teachers were present at the meeting nor was the school psychologist, the guidance counselor, or the Section 504 coordinator. Other than the Student and his parent, none of the individuals who had been involved in making the Student's previous placement decision were present at the XXXXXXXX, meeting. As a result, the evidence is sufficient to conclude that the placement change violated the requirements of 34 C.F.R. § 104.35(a) and (c).

With regard to allegation #5, that the District failed to provide the Student with extended time on tests during the 2014-2015 school year, the preponderance of the evidence does not support that extended time for testing was included in the Student's Section 504 plan or BIP. Therefore, pursuant to Section 303(a) of OCR's Case Processing Manual, OCR concludes that the District was under no obligation to provide this service to the Student and that the evidence is insufficient to support a finding that the District violated the Section 504 regulation.

As stated above, prior to the completion of OCR's investigation of allegations ##3 and 4, the District asked to resolve the complaint pursuant to Section 302 of OCR's CPM. The CPM, at Section 302, provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegation(s). Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces with respect to these allegations. The provisions of the resolution agreement are to be aligned with the complaint allegation(s) or the information obtained during the investigation and consistent with applicable regulations. OCR has determined that it is appropriate to resolve allegations ## 3 and 4 with an agreement.

On March 14, 2016, the District provided OCR with the enclosed signed Agreement, which, once implemented, will resolve allegations ## 2, 3 and 4. In summary, the Agreement requires the District to convene the Student's Section 504 team to determine whether the placement decision made on XXXXXXXX, was appropriate to provide the Student with FAPE and, if not, to determine what compensatory educational services or other remedial measures are appropriate. The agreement also requires the District to provide training to the District's Section 504 coordinator and all administrators at the School, including the principal and assistant principals.

Conclusion

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 harmed individual may file a complaint alleging such treatment.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

We look forward to receiving the District's first monitoring report by **June 15, 2016**. The District already submitted a copy of the meeting invitation it issued to the Student dated March 11, 2016. The monitoring report due June 15 should include additional documentation of the District's implementation of Action Step 1 of the Agreement. For questions about implementation of the Agreement, please contact Ms. Julianne Gran, who will be monitoring the District's implementation, by e-mail at Julianne.Gran@ed.gov or by telephone at (216) 522-2684.

Page 9 – Helen S. Carroll, Esq.

For questions about this letter, please contact me at (216) 522-7640.

Sincerely,

/s/

Sacara M. Martin
Supervisory Attorney/Team Leader

Enclosure