



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

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MICHIGAN
OHIO

May 17, 2016

Valerie Browning-Thompson, Ph.D.
Superintendent
Pickerington Local School District
90 North East Street
Pickerington, Ohio 43147

Re: OCR Docket #15-15-1434

Dear Superintendent Browning-Thompson:

This letter is to notify you of the disposition of the complaint filed against Pickerington Local School District (the District) with the U.S. Department of Education, Office for Civil Rights (OCR) on September 28, 2015. The complaint alleged discrimination on the basis of disability. Specifically, the complaint alleged that that the District discriminated against a student with disabilities (the Student), during the 2015-2016 school year, by denying the Student the ability to participate in the Kindergarten Literacy Intervention Program (KLIP) because he had an existing Individualized Education Program (IEP) with academic goals.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit 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 at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance and as a public entity, the District is subject to these laws.

Based on the complaint allegation, OCR investigated the following legal issue: whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied him the benefits of, or otherwise subjected him to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

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Summary of OCR’s Investigation

The Student’s parent (the parent) alleged that the District denied the Student the ability to participate in KLIP because he had “academic goals” in his IEP. She alleged that KLIP is a District program that provides 12.5 hours of additional reading instruction per week for kindergarten students who are selected for the program. The parent told OCR that, in order to be eligible for KLIP, a child must be evaluated and have test scores low enough to show they need intervention.

The parent said that when she asked the District to enroll the Student in KLIP, she was told by multiple administrators that he was not eligible, because he had an IEP with current academic goals. She added that one District administrator (Administrator A) told her that absent these academic goals in the Student’s IEP, he would have been eligible for KLIP based on his test scores and evaluation. The parent added that, during one of the discussions she had with District administrators regarding the Student’s participation in the program, another District administrator (Administrator B) advised her to seek a review of the Student’s IEP which would have resulted in pulling the Student out of class for supplemental instruction.

To investigate this complaint, OCR interviewed the Complainant, reviewed documentation submitted by the Complainant and the District, and interviewed District employees. Based upon a review of this information, OCR has determined that the District excluded the Student from KLIP in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130. The District submitted a resolution agreement to address the non-compliance finding. OCR’s findings and the resolution are explained below.

- **Kindergarten Literacy Intervention Program (KLIP)**

Based on the information provided to OCR by the District, the Student’s school (the School) currently has 75 kindergarten students who receive regular half-day kindergarten instruction. The half-day kindergarten program is divided into morning and afternoon sessions. KLIP is an afternoon supplemental program. The students who participate in KLIP attend school all day because those students receive regular kindergarten instruction during the morning and attend KLIP in the afternoon. A District administrator (Administrator C) advised OCR that kindergartners with IEPs receive services during their regular class time. Kindergartners with IEPs containing specific academic goals all attend the afternoon kindergarten class because that is when the special education teacher is available.

The District provided OCR with a document outlining KLIP (the KLIP policy), explaining that KLIP is a Response to Intervention (RTI) program for the District’s four Title I buildings, including the School. District staff advised OCR that, based on the success of KLIP, the District plans to expand KLIP to all seven of their elementary buildings for the 2016-2017 school year. District staff indicated that a decision to expand KLIP could be made later in the 2015-2016 school year.

The KLIP policy states that the program is designed for kindergartners “with significantly delayed academic skills, who have not already been identified as needing special programming” District personnel confirmed that KLIP is a year round intervention used by the District as a part of its RTI program to provide “at risk” students at the School supplemental small group instruction, and to help these students stay “on track” academically. District personnel said KLIP is specifically designed to provide support to kindergartners with literacy deficiencies, but also includes a minor math component.

As noted above, students in KLIP receive an additional half-day of instruction. Administrator B told OCR that the program of instruction for KLIP is completed on a school-by-school basis. She said KLIP is designed to increase exposure, and provides double the literacy education that a kindergarten student would typically receive. She said KLIP uses the same math program (“ST Math”) that is used for all kindergarten through eighth grade students as part of the regular curriculum. The District provided OCR with a handout summarizing the School’s KLIP (the handout). The handout states that the purpose of KLIP is to assist students with “Letter Identification,” “Letter Sounds,” “Rhyming,” “Reading,” “Phonological Awareness,” “Number Identification,” “Counting,” “Fine Motor Skills,” and “Gross Motor Skills.” The handout says the instruction includes “Daily Read Alouds,” “Literacy Centers,” “Hands-on Learning Experience,” and “Small group, large group, and one-on-one instruction.” The handout indicates that the School’s KLIP sets aside 30 minutes for math inventions and 1 hour and 55 minutes for literacy interventions.

Regarding the student selection criteria for KLIP, District staff advised OCR that “at risk” students are initially identified by reviewing students’ standardized test scores on the following assessments: Bracken School Readiness Assessment (Bracken), Kindergarten Readiness Assessment (KRA), and STAR Early Literacy (STAR EL) assessment. District staff added that kindergartners complete the Bracken assessment when they register for school, while the Star-EL and literacy portions of the KRA assessments are completed during the first few weeks of kindergarten. In addition to the assessments listed above, the School’s RTI team also looks at the Diagnostic Reading Assessment (DRA), which is a tool used by teachers to measure a student’s progress in class when determining who should participate in KLIP. Once all kindergarten students are assessed, the District reviews the assessment data to identify students who qualify for the program. Qualifying test scores/percentiles could change each school year. The KLIP policy shows that, for the 2015-2016 school year, District personnel could recommend a child for KLIP if the child scored 7 or below on the Bracken, 262 or below on the KRA, and below the 25th percentile on the STAR EL assessment. KLIP is only guaranteed for one semester, and at the end of the semester students are reassessed for continued participation.

District staff stated that the RTI team determines who is selected for KLIP after reviewing the list of eligible students, the students’ parents’ am/pm preferences and whether the student is an English learner (EL) or has an IEP. District staff stated RTI teams look at more than students’ test scores when deciding who should be in KLIP; decisions are based on the individual needs of the student.

Administrator A explained that RTI teams look to see if a student is receiving other interventions and/or ESL or EL services (i.e. they consider whether the assessment scores could be due a language barrier). She said, for students identified as having a disability, RTI teams consider the interventions that are already in place for the student. For example, an RTI team might take into consideration special education interventions a student is already receiving and would look to see if a student has goals/services as a part of their special education program that are already in place to address the identified deficit. Administrator B added that parental information is also important and plays a factor in who gets intervention services.

Each of the District administrators stated that students who have IEPs with academic goals, and who otherwise qualify for KLIP, are not considered for the program. The administrators did not provide consistent information regarding whether the District's definition of "academic goals" for KLIP participation purposes included only academic goals in reading, or whether it would extend to other academic areas, such as math. District staff said that parental consent is required for student participation in KLIP.

In its data response, the District provided OCR with a narrative explaining why students with academic goals and/or interventions in their IEPs are not eligible for KLIP. The District explained in the narrative that "Title I and general funds fund KLIP" and that "Title I funds cannot be used to supplant or take the place of services require for students with disabilities under the IDEA [Individuals with Disabilities Education Act]; Title I funds cannot supplant IDEA services." It states further that "Title I funds are used to provide supplemental services to students identified as having the greatest need and are most at-risk [sic] of failing to meet the State's academic achievement standards." The District added that "if KLIP interventions were provided to students with IEPs that already receive IEP services in areas similar to KLIP, there would be fewer slots available for educationally at-risk students"

District staff also stated that excluding students with IEPs including specialized academic instruction from KLIP was primarily due to Title I funding requirements and resource limitations, however, staff could not identify any reasons why Title I funding would prohibit these students from participating in KLIP.

Administrator B and Administrator C stated that students with special education services that include specialized instruction for reading already receive individual instruction greater than what is provided by KLIP. Administrator B said the District does not have the capacity or the tools to provide KLIP to students who already receive specialized instruction per their IEPs.

The District provided OCR with spreadsheets stating the names and test scores of all the students who participated in KLIP during the first semester of the 2015-2016 school year and confirmed that students with academic goals in their IEPs did not participate in KLIP. OCR noted and the District confirmed that KLIP is not listed as a placement in students' IEPs.

One District administrator told OCR that the Student was not eligible for KLIP because he had academic goals in his IEP and also confirmed that there were other kindergarteners who were excluded from KLIP for similar reasons.

- **The Student Found Not Eligible For KLIP**

The Student was enrolled in afternoon kindergarten at the School for the 2015-2016 school year. Records indicate that the Student has multiple disabilities and received services via an IEP for the 2015-2016 school year. These services included, in relevant part, XXXXXX XXXXXXXXXXXX XXXXXXXX XX X XXXXX XXXXX XXXXX X XXXXX-XXXXXXX XXXXXXXXXXX XXX 30 minutes once a week.

The District advised OCR that the School’s RTI team met on September 14, 2015, to determine who was eligible for KLIP. Administrator A said she was not sure if the Student met the requirements for KLIP in all three of the assessments used to determine KLIP eligibility. The District provided OCR with documentation regarding the Student’s assessments, which supported that he met the eligibility criteria for KLIP pursuant to those assessments. Regardless of the results of the Student’s assessments, the District explained to OCR and to the parent that it was the content of the Student’s IEP that disqualified him from KLIP.

XX PARAGRAPH REDACTED XX

Applicable Regulatory Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and the Title II implementing regulation at 28 C.F.R. § 35.130(a) prohibit recipient institutions and public entities, respectively, from excluding qualified students with disabilities from participation in, denying them the benefits of, or otherwise subjected them to discrimination under any of a school district’s programs, activities, aids, benefits, or services. Recipients are specifically prohibited from affording a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded to others, or from providing different aid, benefits, or services to persons with disabilities or to any class of persons with disabilities unless such action is necessary to provide qualified persons with disabilities with aid, benefits, or services that are as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(ii),(iv). Absent direct evidence of discriminatory motive, in determining whether a recipient subjected a student to different treatment on the basis of disability in violation of Section 504 and/or Title II, OCR looks to whether there were any apparent differences in the treatment of similarly-situated students on the basis of disability. If so, OCR assesses any recipient explanation for any differences in the treatment of similarly-situated students to determine whether the reasons articulated are legitimate or are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the students in a manner that is consistent with its established policies and procedures and whether there is any other evidence of discrimination based on disability.

Summary of OCR's Analysis and Conclusions

Based on the above information, OCR finds that it is undisputed that during the relevant time period it was the District's practice to exclude students with IEPs containing specialized academic services from participating in KLIP. OCR further finds that it is undisputed that the District did not allow the Student to participate in KLIP for this same reason. OCR further finds that the District's practice of eliminating eligible students with disabilities from the KLIP eligibility pool, for no reason other than the contents of their IEPs, resulted in different treatment of the Student, and of other students, on the basis of their disability. Although the weight of the evidence supports that the District does not exclude all students with disabilities from KLIP, it is undisputed that some students with certain types of disabilities are excluded from the eligibility pool because they receive academic services as a part of their free appropriate public education (FAPE). OCR further finds that KLIP is a supplemental program that students attend in addition to their regular education program. The KLIP program provides students with an additional half-day of instruction, five days a week, to students who participate. Although the District explained that Title I funds are used to provide supplemental services to students identified as most at risk of failing to meet the State's academic achievement standards, the District also stated that KLIP interventions were not provided to students with IEPs that already receive academic services in order to increase the slots available for other educationally at risk students. The District, therefore, was unable to identify a legitimate and non-discriminatory list of eligibility criteria for its KLIP program.

Therefore, OCR concludes that there is direct evidence that the District treated students with disabilities (including the Student) differently in its determination of students eligible for KLIP during the 2015-2016 school year and that the different treatment resulted in students who may have otherwise been eligible being excluded from this program offered by the District on the basis of their disabilities.

Based upon its investigation and documentation provided by the District, OCR finds that the District's practice of excluding students with IEPs containing specialized academic services from eligibility for KLIP violates Section 504 and Title II by excluding qualified students with disabilities from participation in a program, activity, aid, benefit, or service provided by the District.

Resolution and Conclusion

On May 2, 2016, the District signed the enclosed agreement to resolve OCR's noncompliance finding. OCR will monitor the implementation of the agreement. The District's first monitoring report is due by July 15, 2016. If the District does not fully implement the agreement, OCR will take appropriate action to ensure the District's compliance with Section 504 and Title II.

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

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 another complaint alleging such treatment.

OCR would like to thank you and the District for your cooperation in the investigation and resolution of this matter. The OCR contact person for the monitoring of the agreement is Michael Todd, who may be reached at (216) 522-7644 or at <mailto:Michael.Todd@ed.gov>.

If you have any questions about this letter, you may contact Ms. Sacara Martin, Supervisory Attorney/Team Leader, at (216) 522-7640.

Sincerely,

/s/

Emily Babb
Acting Director

Enclosure

cc: Ms. Kristina Hulse
Director of Special Education