



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

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

May 7, 2021

Via E-mail Only to: bborla@hcplaw.net

R. Brian Borla, Esq.
Hanna, Campbell & Powell, LLP
3737 Embassy Parkway, Ste. 100
Akron, Ohio 44333

Re: OCR Docket No. 15-20-1280

Dear Mr. Borla:

This letter is to notify you of the disposition of the above-referenced complaint filed on May 14, 2020, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Dalton Local School District (the District) alleging that the District discriminated against XXXXX XXXXX XXXXX the Students) on the basis of disability. Specifically, the complaint alleges that the District denied the Students open enrollment for the XXXX school year based on their disabilities.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 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. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 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 from the Department and as a public entity, the District is subject to these laws.

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

- whether the District, on the basis of disability, excluded a student from participation in, denied a student the benefits of, or otherwise subjected a student to discrimination in its programs and activities based on the student's disability in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.4, and the regulation implementing Title II at 28 C.F.R. § 35.130; and
- whether the District failed 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).

To conduct its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District administrators. After a careful review and analysis of the information obtained during its investigation, OCR has determined that the evidence is sufficient to support a finding that the District violated the regulations implementing Section 504 and Title II as alleged. The bases for OCR’s determination are explained below.

Summary of OCR’s Investigation

XXXXXXXXXX, non-resident students with disabilities, applied for open enrollment in the District for the XXXX school year. The Students XXXXX XXXXX XXXXXX; XXXXX XXXXX XXXXXX. The District provided OCR with XXXXX Individualized Education Program (IEP) and XXXXX Section 504 plan that it represented as those on file with the District on XXX, XXXX, which is, according to the District, the date it notified XXX that the Students would not be enrolled. XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXXX.

The District said the Students were denied open enrollment for the XXXX school year because the District did not have intervention specialist capacity at XXXXX XXXXX XXXXX (the School).

The District provided OCR with its policy entitled “Inter-District Open Enrollment,” which stated: “The Board of Education shall permit the enrollment of students from any Ohio district in a school or program of this District, provided each enrollment is in accordance with laws and regulations of the State concerning Inter-District Open Enrollment, the provisions of this policy, and the administrative guidelines established to implement this policy.” The administrative guideline entitled “ADMISSION OF STUDENTS PARTICIPATING UNDER INTER-DISTRICT OPEN-ENROLLMENT” (available on the District’s website as of December 22, 2020) stated:

Application for Admission

- A. The number of openings in a particular program for students from other Ohio districts will be determined by optimum size for a particular program, classroom/school building, or grade level which is the number of students that can be accommodated without increasing District expenditures for staff or equipment.
- B. Applications for admission from students from other Ohio districts may be submitted to the Superintendent in this District.
- C. Applications from students from other Ohio districts will not be considered until March 1st.
- D. Applications from tuition students and any adjacent district or other school district students previously enrolled under the provisions of this guideline or Board Policy 5113 shall be given priority over applications from new students from other Ohio districts.

- E. When a student from another Ohio district or his/her home-school requests an application, s/he is to be informed of the prerequisites for each program or course of study in which enrollment is sought. No student from another Ohio district will be enrolled in a program or course of study who has not met the prerequisites established for District students and tuition students.
- F. The final date for considering applications for students from other Ohio districts is May 15th. The applications of students from other Ohio districts shall be revoked in reverse order of acceptance (last in-first out) if enrollment, at any time prior to the start of the school year, of a new home-school student or an application from a tuition student brings the enrollment of District students to optimum size. However, students from other Ohio districts who have begun the program shall be allowed to complete the school year.
- G. Applications from students from other Ohio districts who have an I.E.P. shall not be considered if the District is not currently providing the services called for in the I.E.P.
- H. The parents of the student from another Ohio district will be notified, using Form 5113 F1, of their acceptance by June 30th.
- I. The District shall not discriminate against any disabled students (IDEA or 504). The District shall not be required to provide any services or adapt any facilities not already provided disabled, resident native students. If a student from another Ohio district becomes disabled under Section 504 or the staff finds out that a student from another Ohio district is in need of services in accordance with an I.E.P., it will provide appropriate services. The student, however, must agree to attend the District school at which the needed services are currently available. If any services must be obtained elsewhere, the Superintendent/designee shall notify the other Ohio district to determine if it wants to arrange for the services or have the District arrange for them at the other Ohio district's expense.
- J. Enrollment in a program or school shall be subject to an agreement that transportation of the student from another Ohio district to the school or to a scheduled in-District bus stop is provided for by the student, his/her parents, or the other Ohio district. Exceptions to this requirement may need to be made for disabled students.
- K. Applications from students from other Ohio districts may be rejected if the racial balance of the other Ohio district or this District's program, classroom, or school would be negatively impacted, as defined in Policy 5113.
- L. Applications from students from other Ohio districts may also be rejected if the student has been suspended or expelled for ten (10) consecutive days or more during the semester of application or the preceding semester.

The District said the application period for open enrollment for the XXXX school year was closed on XXX, XXXX. The Students' applications were properly and timely submitted to the District. The District provided OCR with copies of the Students' applications, which indicated a date of receipt of XXX, XXXX. The District said XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. However, the District said the ability to enroll any student depends upon whether the District has capacity, both in terms of facility space and instructor capacity, to accept a student. According to District witnesses, open enrollment applications are reviewed and discussed by a committee that includes the superintendent, each school's principal, and the special education coordinator. One witness said the committee looks at IEP numbers and Section 504 plan numbers to make sure the District is not exceeding the numbers for each intervention specialist's caseload.

OCR asked the District for information regarding its enrollment capacity for students in the XXX grades for the XXXX school year. In response, the District said it was not aware of any enrollment restrictions for non-disabled students and, accordingly, it does not have a maximum enrollment capacity for students in the XXX and XXX grades. It said it believed that 150 students would be the upper limit of enrollment for XXX and XXX grades based on the facility and resources. District witnesses confirmed this information in their interviews. The District said, because there is no maximum enrollment capacity for non-disabled students, the District does not hold open or reserve slots for students that might enroll during the year.

The District said all families with students with disabilities who applied for open enrollment in the School were not accepted. For the XXXX school year, that resulted in four students being denied open enrollment: XXXXX XXXXX XXXXX XXXXX XXXXX. The District said students with disabilities in XXX and XXX grades were granted open enrollment. The District provided OCR with a spreadsheet that it represented lists each student who applied for open enrollment in the District and whether their application was approved or denied, and another spreadsheet with the dates that open enrollment applications were received by the District for students entering XXX and XXX grades. The spreadsheets show that five XXX grade students whose applications were received after XXX application were admitted for open enrollment; none of those students were noted as students with disabilities. Four XXX grade students whose applications were received after XXX application were admitted for open enrollment; none of those students were noted as students with disabilities.

When asked to provide examples of reasons an open enrollment applicant, with or without a disability, might not be enrolled in the District, one witness said students have been denied enrollment based on the numbers in the grade level in the past. Another witness said they usually are looking at capacity numbers as the main reason they would not accept an open enrollment student. He said another reason may be because of severe discipline problems, but he had not experienced that situation in the District. When asked if open enrollment applications have been denied for students that might participate in a costly school program such as band, athletics, or a special honors program, for example, one witness said students have not been denied because of programs they were involved in and another witness said he did not know if open enrollment applications had been denied for such reasons.

District witnesses said the only reason the Students were not enrolled during the XXXX school year was because the intervention specialists for XXX and XXX grade students were at capacity with the District's resident students. On XXX, the superintendent sent the following message to the XXXXX XXXXXX:

I truly am sorry for how this has turned out for XXXXX XXXXX XXXXX XXXXXX. Please know we do not make any determinations until our Open Enrollment application process is complete, which is not until XXX. Then we gather all the applications, which I believe this year was around 122 students, and look at our numbers. Our issue this year is the number of students, which reside in the District, who receive Special Education Services has increased to the point where our Intervention Specialists have full caseloads. Maybe that is something we can be cognizant of in the future, but to be honest as we are in the midst of the school year I am not thinking about comparing our current enrollment numbers to what next year's open enrollment might be. I guess after the open enrollment process ends we consider all students (even open enrolled students) "ours", even though they technically are only ours for that school year. Open enrollment is a process which has to be renewed each year, thus the application because we do not know who will return and who will not return. In fact we do have current students, who are at the High School, who did not fill out the Open Enrollment application to return to XXXXX next year. We just do not know.

The District asserted as follows that provisions of the Ohio Administrative Code (the Code) limit the number of students an intervention specialist may serve:

OAC 3301-51-09 provides directives to [d]istricts on the manner in which a school district shall serve its children with disabilities, including the maximum number of students an intervention specialist may serve in total and the maximum number of students permitted in one instructional period. OAC 3301-51-09(I)(2)(a-g) provides the following restrictions related to the various categories of disabled students:

- Students with intellectual disabilities - An intervention specialist shall serve no more than 16 children in total, and no more than 12 shall be served in any one instructional period.
- Students with specific learning disabilities - An intervention specialist shall serve no more than 16 children in total, and no more than 12 shall be served in any one instructional period.
- Students with hearing, visual, orthopedic or other health impairments - An intervention specialist shall serve no more than 10 children in total, and no more than 8 shall be served in any one instructional period.
- Students with emotional disturbances - An intervention specialist shall serve no more than 12 children in total, and no more than 10 shall be served in any one instructional period.
- Students with multiple disabilities - An intervention specialist shall serve no more than 8 children in total, and no more than 8 shall be served in any one instructional period.

- Students with autism, deaf-blindness and/or traumatic brain injuries - An intervention specialist shall serve no more than 6 children in total, and there must be one full-time paraprofessional in each class for these children.

The Code permits an intervention specialist to serve multiple categories of children, and when that is the case, the ratio shall be determined by considering all areas of service provided to children with and without disabilities, the severity of each child's need, the level and frequency of services necessary to provide FAPE, the severity of each child's need and frequency of service and the time needed for teacher planning, BUT IN NO CASE can the intervention specialist serve more than 16 students in total or in one instructional period.

The District said, for the XXXX school year, the School had 41 students with disabilities enrolled that resided within the District, with one of those students served by a speech therapist only (no intervention specialist). The District said it has three licensed intervention specialists: specialist A, specialist B, and specialist C. The District provide OCR with a spreadsheet that listed the enrolled students with disabilities at the School, with assigned intervention specialist and disability category. The District stated in supplemental information that “[d]ue to lack of funding, the intervention specialists also have the responsibility for managing all of the Section 504 Plans and providing accommodation supports.”

Specialist A teaches in the resource room, which the District said is for students with more severe disabilities in grades XXXXX XXXXX XXXXX. The District said specialist A had nine students for the XXXX school year. The District said XXXXX was in specialist A's resource room in XXXX and would have been placed there in the XXXX school year. Per the Code language provided by the District, the capacity limit of eight is set for students with multiple disabilities.

Specialist B serves students in the XXXXX XXXXX XXXXX grades in an inclusion setting. The District said specialist B served 16 students for the XXXX school year.

Specialist C serves students in the XXXXX XXXXX XXXXX grades in an inclusion setting. The District said specialist C served 14 students for the XXXX school year, which was supported by the documentation of intervention specialist assignments provided by the District. The District said, under the Code, specialist C had 2 spaces available, but the District decided not to fill those spaces for two reasons: 1 – there was still one student that needed to be assigned an instructor who was a XXXXX grader in an inclusion setting; and 2 – last year (XXXX), the District had 18 students with disabilities move into the District just before the start of the school year, or during the school year. The District said it determined that some open capacity (although minimal) was needed in the event additional students with disabilities enroll in the District as a resident. The District said beginning in June and continuing through Friday, August 21, XXXX, new students with disabilities were moving or had moved into the District. One District witness said he did not know the exact numbers for specialist C and did not know why she was left with capacity for two more students before the start of the year. Another District witness said seats were not reserved for specialist C.

OCR asked the District for additional information regarding the unassigned resident student with a disability and other students with disabilities that the District identified as enrolling from June to August 21, XXXX. The District said the unassigned student was assigned to specialist C; one resident student with a disability enrolled in the District during that time period was assigned to specialist B. The District said specialist B then had 17 students in her caseload.

OCR asked witnesses whether the District considered hiring an additional intervention specialist or other staff member for the XXXX school year. One witness was sure they would have discussed it but could not remember the conversation; he said the law does not require them to hire staff to provide intervention specialists for open enrolled students. Another witness said hiring an additional intervention specialist or other staff member was not considered because of funding issues. When asked if the District explored other options for how it might serve open enrollment students with disabilities in the School considering the capacity issues, one witness said other options were considered (although he could not remember what options specifically), but they determined it was not possible because of how the District is set up with the XXXXX XXXXX XXXXX grade intervention specialist and XXXXX XXXXX XXXXX grade intervention specialist. When asked if the District considered using intervention specialists or other staff in different ways such as across wider age ranges or using specialists from another school in an itinerant manner, one witness said he did not recall such a discussion. Another witness said he was not sure what all the considerations were but, in the summer, they did move one resident student to the speech-language therapist to provide services to bring specialist B down to capacity and had a tutor provide intervention support to a student.

During OCR’s investigation, the District modified its open enrollment administrative guideline entitled “ADMISSION OF STUDENTS PARTICIPATING UNDER INTER-DISTRICT OPEN-ENROLLMENT,” and adopted the updated guideline on April 26, 2021. The guideline states at Paragraph G:

With respect to applications from students from other Ohio districts who have an I.E.P. or 504 Plan, the District shall consider the individual needs of the student and determine whether the District can meet those needs. If the services called for in the student’s I.E.P or 504 Plan are not available in the District schools, the District may refuse to admit the student. Before refusing to admit the student because the District does not have the capability to provide the student with a free appropriate public education (FAPE), the District shall 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 has available for the student.

The guideline also provides that staffing may not serve as a basis to deny open enrollment.

Applicable Regulatory Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides also 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). 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 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, if so, whether that reason was a pretext for unlawful discrimination.

Analysis and Conclusion

It is undisputed that the Students are a member of a protected class—they are both students with disabilities. 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.

The District acknowledged that the Students' applications for the XXXX school year were properly and timely submitted to the District. The District also confirmed that the Students had been XXXXX XXXXX XXXXX XXXX. Based on this information and a review of additional information provided by the District regarding the Students' educational needs, including XXXXX IEP and Section 504 plan and the District's identification of the intervention specialists that would have provided services to the Students if they had been enrolled, OCR determined the District has the services the Students needed.

Applying the above standards, OCR determined the Students are qualified individuals with disabilities.

In investigating an allegation of disability discrimination under a different treatment theory, OCR next determines whether the District treated an individual with a disability differently from an individual without a disability in similar circumstances.

Here, the Students (and other student applicants with disabilities) were subjected to an additional admission requirement solely because of their disabilities that did not apply to applicants without disabilities. The District said there was no set maximum enrollment capacity for non-disabled students at the XXXX school and the District does not hold open or reserve slots for resident students without disabilities that might enroll during the year. However, according to the District, it denied the Students admission because the XXXXX school intervention specialists were at their capacity limits set by Ohio law. For one of the intervention specialists, the District said it set aside two open slots for enrollment based on one resident student with a disability that had not been assigned an intervention specialist as of August XXXX and the potential for new resident students to enroll in the District for the XXXX school year. According to documentation provided by the District, except for one student, all other students without disabilities who applied for open enrollment (including multiple students that applied after the Students) were admitted to the District for the XXXX school year.

Thus, the District treated the Students differently in its open enrollment process than similarly situated students who did not have disabilities. The Students were not provided with an equal

opportunity to participate in the District's open enrollment program as students without disabilities.

Because the Students not provided with an equal opportunity to participate in the District's open enrollment program based on their disabilities, OCR 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 the Students, as well as all XXXXX school student applicants with disabilities, open enrollment because its intervention specialists did not have any capacity to serve additional students with a disability at the School based on the capacity limits set by Ohio law.

However, despite its assertion that Ohio law sets forth the maximum number of students an intervention specialist is permitted to serve and that the Students could not be enrolled because the intervention specialists were at that capacity (8 students for specialist A; 16 students for specialists B and C), the District also informed OCR that specialist A had 9 students in her caseload and, when a new resident student with a disability enrolled in the District in the summer, specialist B's caseload was at 17. One District witness stated that at some point during the summer a student was assigned to the speech language therapist for services to bring the specialist B's caseload down. The supporting information the District provided also demonstrated that, even under the intervention specialist capacity limits described by the District, specialist C still had at least one space open to serve a student with a disability as of August 24, XXXX, which was after the District denied enrollment to all students with disabilities that applied for open enrollment in the School. On the list of students denied open enrollment was a XXXXX grade student with an IEP; the specialist with at least one space open, based on District information, serves students in the XXXXX XXXXX XXXXX grades.

Moreover, the District asserted that its actions were permissible because Ohio law sets capacity limits for intervention specialists and does not require it to hire staff to provide intervention specialists for open enrolled services. While the law that the District cited states that individual intervention specialists shall serve no more than the number of students identified in the Code provision (based on disability type), it does not state that a district shall not need to hire additional staff or reassign current staff where appropriate to comply with other legal requirements, particularly under federal law.

In an open enrollment situation, a district may not deny nonresident students with disabilities admission to the district based on their disability. The District's reason for denying the Students admission was directly related to their disabilities and the resources the District would have to expend to accommodate them. Therefore, the District's bases for denying the Students open enrollment are not legitimate or non-discriminatory under Section 504 and Title II.

For these reasons, OCR finds that the preponderance of evidence shows that the District discriminated against the Students based on disability when it denied them admission to the District through open enrollment. OCR notes that, in April 2021, the District took steps to prevent further discrimination of students with disabilities by making changes to its open enrollment policy.

On April 29, 2021, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address the violations in accordance with Section 504 and Title II. OCR will monitor the implementation of the Resolution 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 individual 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, OCR 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 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 June 11, 2021. For questions about implementation of the Agreement, please contact XXXXXX. XXXXX will be overseeing the monitoring and can be reached by telephone at (XXX) XXX-XXXX or by e-mail at XXXXX. If you have questions about this letter, please contact me by telephone at (216) 522-7640, or by e-mail at Sacara.Miller@ed.gov.

Sincerely,

/s/

Sacara E. Miller
Supervisory Attorney/Team Leader

Enclosure