



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

32 OLD SLIP, 26th FLOOR
NEW YORK, NY 10005-2500

REGION II
NEW JERSEY
NEW YORK
PUERTO RICO
VIRGIN ISLANDS

November 14, 2014

Daniel E. Giordano
Superintendent
Lindenhurst Public Schools
Central Administration
McKenna Administration Building
350 Daniel Street
Lindenhurst, New York 11757

Re: Case No. 02-14-1358
Lindenhurst Union Free School District

Dear Superintendent Giordano:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the Lindenhurst Union Free School District (the District). The complainant alleged that the District discriminated against her daughter (the Student) on the basis of her disability, by: failing to provide the Student with counseling services during school year 2013-2014, as required by her Individualized Education Program (IEP) (Allegation 1); and, failing to provide her with notice and obtain her consent prior to conducting a psychological evaluation of the Student, in or around February 2014 (Allegation 2).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

In its investigation, OCR interviewed the complainant and District personnel. OCR also reviewed information and documentation that the complainant and the District submitted.

During school year 2013-2014, the Student was a XXXXX-grade student enrolled at the Lindenhurst Senior High School (the School). The District's Committee on Special Education (CSE) classified the Student as having an "XXXXXXXXXXXXXXXXXXXX" in the Student's IEPs for school year 2013-2014, dated May 16, 2013 and June 5, 2014.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student on the basis of her disability, by failing to provide her with counseling services during school year 2013-2014, as required by her IEPs. The complainant asserted that the Student informed her that she did not receive any counseling services during the school year.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a district shall provide a free appropriate public education (FAPE) to each qualified student with a disability, regardless of the nature or severity of the person's disability. The regulation, at 34 C.F.R. § 104.33(b)(1)(i) and 34 C.F.R. § 104.33(b)(2) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met; the implementation of an IEP is one means that a district may provide a FAPE to a student with a disability.

The Student's IEP, dated May 16, 2013, required the District to provide the Student with counseling services twice per month for 30 minutes, from September 23, 2013 through June 13, 2014. The School's XXXXX XXXXX (XXXXXX XXXXXX 1) was responsible for providing the required counseling services to the Student. XXXXX XXXXXX 1 explained that on a day prior to the Student's intended counseling session¹, she sent passes to the Student's homeroom teacher, and the teacher for the specific class period in which the Student was scheduled to receive counseling. The teachers were to distribute the counseling passes to the Student, and the Student would receive the counseling services in XXXXX XXXXXX 1's office. XXXXX XXXXXX 1 stated that she informed the Student at the beginning of the school year that it was her responsibility to attend counseling sessions. XXXXX XXXXXX 1 stated that the objective of school-based counseling is to provide support to a student in his/her academic environment, and that counseling services should not be "forced" on students; however, the Student's IEP did not state that the Student could attend counseling sessions at her election.

Based on documentation XXXXX XXXXXX 1 provided, OCR determined that of the 18 counseling sessions that XXXXX XXXXXX 1 was required to provide the Student from September 23, 2013 through June 5, 2014², she sent counseling passes for 12 sessions XXXXX XXXXXX 1 asserted that she did not send counseling passes for certain periods of time due to

¹ XXXXX XXXXXX 1 informed OCR that she did not regularly schedule counseling sessions on a specific day of the week or class period; rather, she maintained an irregular schedule to ensure that the Student did not miss instructional time in the same class for each counseling session.

² As discussed below, because the CSE placed the Student on home instruction on June 5, 2014, only a few days into the month of June, OCR excluded from its computation the two sessions that XXXXX XXXXXX 1 was required to provide the Student in June 2014.

the Student's inconsistent attendance, and general recalcitrance regarding counseling; she explained that a manifestation of the Student's disability was "school avoidance." XXXXXX XXXXXX 1 did not maintain any documentation of whether the Student actually attended the 12 sessions and received the required counseling services.

Pursuant to a subsequent IEP for the Student, dated June 5, 2014, the CSE changed the Student's placement to home instruction, and specified that the Student would receive individual counseling services one hour per day, from June 6, 2014 through June 16, 2014. The Student's counseling services were to be provided at the District's McKenna Administration Building (the Building) by the Student's previous XXXXXX XXXXXX from her XXXXXX school (XXXXXX XXXXXX 2).

On Friday, June 6, 2014, the first day of the Student's home instruction placement, the Student experienced extreme emotional difficulties and was unable to receive home instruction; however, the District provided documentation indicating that XXXXXX XXXXXX 2 provided the Student with the required one hour of counseling services for that day. On June 6, 2014, the complainant, the School Principal, the Assistant Superintendent, and other District personnel met to address the difficulty the Student experienced on the first day of her home instruction placement. The group agreed that the Student's placement should be modified, such that for the remainder of the school year, in lieu of attending an hour-long counseling session per day in addition to the two hours of home instruction, XXXXXX XXXXXX 2 would remain present with the Student while she received home instruction, in order to provide counseling and general support services. From Monday, June 9, 2014, through Monday, June 16, 2014, XXXXXX XXXXXX 2 provided the Student with counseling and general support services for two hours during each of the Student's six home instruction sessions, consistent with the placement determination made the group of knowledgeable persons on June 6, 2014.

Based on the foregoing, OCR determined that the District failed to provide the Student with counseling services from September 23, 2013 through June 5, 2014, as required by the Student's IEP, dated May 16, 2013. Although XXXXXX XXXXXX 1 provided OCR with documentation indicating that she sent counseling passes to the Student for 12 out of the 18 required counseling sessions, XXXXXX XXXXXX 1 failed to maintain any documentation to substantiate whether the Student attended the sessions to receive the required counseling services. Therefore, OCR determined that there was sufficient evidence to substantiate that the District discriminated against the Student on the basis of her disability, by failing to provide her with counseling services from September 23, 2013 through June 5, 2014, as required by her IEP, dated May 16, 2013.

The District agreed to implement the enclosed resolution agreement to resolve OCR's concerns with respect to Allegation 1. OCR will monitor the implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

Regarding Allegation 2, the complainant alleged that District discriminated against the Student on the basis of her disability, by failing to provide her with notice and obtain her consent prior to conducting a psychological evaluation of the Student, in or around February 2014.

On February 26, 2014, the District conducted a psychological evaluation of the Student. Prior to conducting the evaluation, in a letter dated November 6, 2013, the District sent the complainant a document entitled, “Prior Written Notice - Proposed Reevaluation and Request for Consent” (the Notice) that specified that the District would conduct a psychological evaluation of the Student; and included a Consent Form for the complainant’s signature.³

The District acknowledged to OCR that it failed to obtain the complainant’s consent prior to conducting the evaluation. The District’s Assistant Superintendent of Special Education and Pupil Personnel (the Assistant Superintendent) informed OCR that during a conversation with the complainant following the Student’s annual CSE meeting, convened on May 6, 2014⁴, and in an email, dated May 8, 2014, the complainant notified her that the District had failed to obtain her consent regarding the evaluation. The Assistant Superintendent informed OCR that she investigated the complainant’s concern and determined that due to administrative oversight, the District did not verify receipt of the complainant’s consent prior to evaluating the Student. The Assistant Superintendent informed OCR that the District has taken steps to ensure that signed consent and other required documents are on file prior to conducting evaluations, including revising the District’s evaluation/reevaluation procedures for school year 2014-2015, and providing training to District personnel with respect to such procedures.⁵ OCR reviewed copies of the revised forms the District is currently using to ensure that parental consent is obtained prior to conducting evaluations and reevaluations of students.

Based on the foregoing, the complainant did not provide and OCR did not find sufficient evidence to support that the District discriminated against the Student, on the basis of her disability, by failing to provide the complainant with notice regarding the evaluation. Rather, OCR determined that the District sent the notice to the complainant regarding the evaluation in a letter, dated November 6, 2013. To the extent that the District failed to obtain the complainant’s consent prior to conducting the evaluation of the Student, OCR determined that this portion of the complainant’s allegation is moot and no additional prospective individual relief is available to the Student. As discussed above, the District has revised its procedures and provided training to District personnel regarding obtaining parental consent prior to conducting evaluations and reevaluations of students. Therefore, OCR has determined that there is insufficient evidence to substantiate that the District discriminated against the Student on the basis of her disability, as the complainant alleged. Accordingly, OCR will take no further action regarding Allegation 2.

As stated above, the attached resolution agreement addresses Allegation 1. OCR will monitor the implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

³ The Notice also stated that the complainant previously had received a copy of the District’s Procedural Safeguards Notice, but that she could contact the District if she required an additional copy.

⁴ The Student’s IEP, dated May 6, 2014, applies to school year 2014-2015, not school year 2013-2014.

⁵ Specifically, the Assistant Superintendent stated that she implemented checklists and forms, and the oversight of such checklists and forms, which clearly indicate whether parental/guardian consent for an evaluation/reevaluation has been obtained; if parental/guardian consent has not been obtained, the Student’s CSE file is prevented from being forwarded to the evaluation/reevaluation stage. Further, the Assistant Superintendent stated that she designated a Special Education/CSE Coordinator to ensure consistency across grades 6-12.

This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District 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.

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, it 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.

If you have any questions regarding OCR's determination, please contact Letisha Morgan, Senior Compliance Team Investigator, at (646) 428-3827 or letisha.morgan@ed.gov; or, Félice A. Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXX X XXXXX, Esq.