

April 14, 2014

Dr. Kenneth Folks
Superintendent
East Allen County Schools
1240 State Road 930 East
New Haven, Indiana 46774

Re: OCR Docket #05-14-1004

Dear Dr. Folks:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against East Allen County Schools (the District) alleging discrimination on the basis of disability.

Specifically, the complaint alleges that:

1. in May 2013, the District subjected a high school student with X and XX (Student A) to discrimination based on disability when it did not allow Student A to join the XX;
2. in July 2013, the District subjected Student A to discrimination based on disability when it removed her from the XX; and
3. in summer 2013, the District subjected Student A's parent to discrimination based on Student A's disability when it failed to investigate a grievance the parent filed alleging disability discrimination.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

During OCR's investigation, OCR reviewed data provided by the District and Student A's parent, and interviewed District personnel and Student A's parent. Based on the investigation, OCR determined that the evidence was insufficient to establish a violation of the applicable regulations with regard to allegations #1 and #2, but established a violation with regard to allegation #3. The bases for these conclusions are set forth below.

Legal Standards

The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in this complaint do not provide greater protection than the applicable Section 504 regulations and has, therefore, applied the relevant Section 504 standards in its analysis of this complaint.

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 any program or activity which receives or benefits from Federal financial assistance from the Department. The regulations implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(ii) and (iv), provide, in relevant part, that a recipient shall not deny a qualified individual with a disability an aid, benefit or service, or provide such aid, benefit or service to an individual that is not equal to or is different from that provided to others because of the individual's disability.

In analyzing an allegation of different treatment of a student based on disability, OCR ascertains whether there were any apparent differences in the treatment of similarly situated students on the basis of disability. If this is found to be the case, then OCR assesses the recipient's explanation for any differences in the treatment to determine whether the reasons are legitimate, non-discriminatory reasons and whether they are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the student in a manner that was consistent with its established policies and procedures and whether there is any other evidence of discrimination on the basis of disability.

The Section 504 implementing regulation, at 34 C.F.R. §104.7(a), requires a recipient to designate at least one person to coordinate its efforts to comply with Section 504. The Section 504 implementing regulation, at 34 C.F.R. §104.7(b), requires a recipient to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504.

The Section 504 implementing regulation, at 34 C.F.R. § 104.37(a) and (c), states that a recipient that offers extracurricular athletics must do so in such a manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This requires making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the recipient can show that doing so would be a fundamental alteration to its program. However, this does not mean that a recipient must allow a student with a disability to participate in any selective or competitive program offered by a recipient; recipients may require a level of skill or ability of a student with a disability in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory. Finally, a recipient may not operate its

program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular.¹

District Policies and Procedures

The District provided OCR a copy of its non-discrimination statement, which says that “all educational services, student activities, programs, instruction, and facilities will not be denied” as a result of a student’s disability, among other factors. This statement provides the name of the individuals to contact with questions or concerns related to several different laws, but does not identify the individual to contact for inquiries regarding Section 504, and OCR did not find this contact information published in any other document provided by the District or on the District’s website.

The District also provided OCR a copy of its procedures for complaints of any type, including discrimination based on disability. The District did not provide documentation demonstrating that students or parents are notified that these complaint procedures are also to be used to file disability discrimination grievances, and no other information provided by the District demonstrated that students or parents are informed of the proper procedure for filing grievances of disability discrimination. Under this procedure, a parent may file a complaint by completing the “Parent/Staff/Patron Complaint & Request Form” and submitting it to the building principal. The principal is to meet with the complainant within five working days, then complete the applicable portions of the form to provide a response to the complainant, generally within five working days. There are four levels of appeals, through the General Counsel/Executive Director of Employee Relations, the Deputy Superintendent, the Superintendent, and the School Board, each with specific timeframes.

The District provided OCR a copy of its 2013-2014 handbook for the XX program at Leo High School (the School). The handbook describes XX as a “X section” of the XX “that provides additional visual aspects to the performance.” The Director of the XX (Director) told OCR that all aspects of the handbook pertain to the XXX and also apply to the XX. The handbook specifies that attendance at XX and all rehearsals is mandatory for XX members, but that absences may be excused due to illness, death in the family, or other family emergencies. The handbook includes a schedule, which indicated that X practice would occur five times for two and a half hours each in late May and early June 2013 and three times for three hours each during the week of July 22, that XX would occur from 8:00 to 4:00 Monday through Friday the weeks of July 29 and August 5, and that practices would typically occur three or four days per week beginning the week of August 12, the first week of school. The handbook includes a permission slip for students and parents to sign acknowledging several requirements, including that all students must attend the entire XX, with no exceptions.

¹ For additional information about a recipient’s obligations to ensure that students with disabilities have opportunities to participate in extracurricular activities, see OCR’s Dear Colleague Letter, issued January 25, 2013, and available on-line at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>

Facts

Student A is in X grade at the School in the 2013-2014 school year. According to Student A's parent, Student A has been diagnosed with X problems, as well as determined to be on the XX. Student A has an Individualized Education Program (IEP) in place due to an X disability.

On April 30, 2013, a meeting was held to develop Student A's IEP for the 2013-2014 school year. The IEP said that Student A would receive an opportunity to participate in all extracurricular activities that are made available to all nondisabled students, but did not mention XX or XX specifically. The documentation related to this meeting did not indicate that Student A's parent indicated that Student A was interested in joining the XX or XX.

According to the District, in April 2013, a meeting was held for any students interested in joining the School's XX or XX for the 2013-2014 school year. Student A did not attend this meeting. Student A's parent said that in May 2013, Student A told her that she wanted to participate in the XX in high school. She said that she and Student A told Student A's teacher of record (TOR) about Student A's interest, and that Student A went to talk to the Director, who told her that the XX would be "too stressful" for her and that she could not join. The TOR and Director denied that either Student A or her parent communicated Student A's desire to participate in the XX at any time during the spring 2013. No documentation provided to OCR indicated that Student A or her parent informed any District personnel in spring 2013 that Student A was interested in the XX. Student A did not attend tryouts for the X or XX in May 2013 or any practices held in late May or early June 2013.

The parent said that in July 2013, Student A learned from a friend that there were openings on the XX, so the parent contacted the XX coach (Coach) to ask if Student A could join. The parent said she informed the Coach of Student A's disabilities and also told her that the Director had denied Student A's request to join the XX because he thought it would be "too stressful" for her. Student A said the Coach told her that she had no problem allowing Student A participate on the XX. The Coach confirmed that Student A's parent notified her about Student A's XX, and that she was comfortable allowing Student A to join the XX if the parent believed that Student A would be able to catch up. The Coach said that Student A's parent assured her that Student A would be able to catch up and learn the material she had missed during early summer practices.

Student A's parent said the Coach initially said Student A would be a full member of the XX, but later said she had changed a routine and that Student A would become an alternate and would only fill in for members who were ill or left the X. The Coach told OCR that, at the time Student A joined the XX, she and the Director were in the process of modifying the routines and formations because one person had left the X and she hoped that Student A would be able to fill the open spot. She said that after she and the Director had observed Student A, and realized that she was not learning the required X as quickly as hoped, they completed the changes and informed Student A's parent that Student A would serve as an alternate. She stated that this may have occurred during XX.

According to the District, Student A attended the three practices the week of July 22, but did not attend the XX the week of July 29 due to a family vacation that had been scheduled before

Student A joined the XX. The District indicated that Student A attended the second week of XX practice sessions on August 5, 6, and 7, left practice early on August 8, and declined to participate in the practice on August 9; the District indicated that she did not attend any other practices after that.

Student A's parent said that during the practices Student A attended, Student A was not allowed on the field with the team, and had to practice on the sidelines by herself; the parent said that she visited one practice and observed that Student A did not have all of the required equipment, that no other students were required to practice on the sidelines, and that Student A was not included in the team huddles or conversations. The Coach told OCR that Student A often sat down during practice and sometimes walked away without informing the Coach where she was going. The Coach said that Student A seemed disinterested during practices, even after the Coach and a senior student worked with Student A one-on-one to assist her in learning the drills. The Coach told OCR that she and the senior student attempted to teach Student A the required drills in sections so that Student A would not be overwhelmed. She said that since Student A had not yet learned the drills used in the XX routines, she did not want to place Student A on the field and risk Student A becoming discouraged. The Director also stated that Student A would not have been permitted on the field until she had achieved the requisite skill level in order to ensure her safety and the safety of other students as they moved about the field.

The Director noted that another student, who did not have a disability, moved into the District late and joined the XX after summer practices had already begun. He said this student was also given a non-X position in the X also until he was able to learn the necessary drills. The Director said that creating alternate positions for students joining late is common and used as a way to keep the student involved in the XX program until a permanent spot is available or the student has achieved the skill level required.

On August 12, Student A's parent went to XX rehearsal to express concern to the Coach about Student A not being provided assistance in learning routines and not being permitted to practice on the field with the team. The parent told OCR that while talking with the Coach, the Director approached them and began talking to her in a very rude manner and stated that Student A was not on the field because she could not handle her X. Student A's parent told OCR that the Director also stated that he had thousands of dollars in the X and, therefore, Student A would not be placed on the field. The Director confirmed that he approached Student A's parent while she spoke with the Coach. He denied, however, that he was rude or that he raised his voice at the parent. The Director said that he told the parent that Student A would not be permitted on the field until she had demonstrated the minimum skill level, and that the parent was upset at the substance of his remarks. He said that he told the parent that she could contact the office to file a complaint.

On August 12, Student A's parent contacted the Assistant Principal via email and asserted that Student A had been subjected to discrimination based on her disability with regard to her treatment in the XX. In response to this email, the Assistant Principal informed the District's Human Resources Director (HR Director) of the complaint made by the parent, who in turn notified the District's Special Services Director (SSD) and suggested that they process the investigation jointly because it was not clear whether the parent was alleging discrimination

under Title IX of the Education Amendments of 1972 (Title IX)², or alleging a violation of special education rules. The parent notified the HR Director by e-mail dated August 14 that she did not believe her concerns related to Title IX, as she was alleging discrimination based on disability, not sex; the HR Director responded by e-mail dated August 14 that she was working with the Assistant Principal on all aspects of the investigation, “not as it relates to Title IX,” and that the Assistant Principal was handling the fact-gathering regarding her complaint. On the same date, the Assistant Principal reiterated, via email to the HR Director, SSD, Principal, and Manager of Special Services, that the parent believed Student A had been subjected to discrimination based on disability, and that he was still in the fact-finding stage of the process.

The investigation involved interviews with the Coach, Director, and Student A. On September 14, the HR Director notified the parent that the investigation had been completed and that she had concluded that the Title IX regulation was not violated. The HR Director told OCR that she conducted an investigation pursuant to Title IX because it was not immediately apparent on what basis Student A’s parent had filed her grievance, despite emails from Student A’s parent on August 12 and 14 specifically referencing disability discrimination. She said that she believed that because she started the investigation as a Title IX investigation, she had to complete a Title IX investigation. She said that upon learning that the parent’s complaint involved a claim of discrimination based on disability, she contacted the SSD and asked that she be involved in the investigation. The HR Director stated that she is not responsible for investigating complaints of disability discrimination, but that the SSD is responsible for such complaints; therefore, she said she believed that the SSD was handling any necessary review or response to the parent’s grievance related to disability discrimination. The SSD told OCR that the HR Director is responsible for investigating all complaints of discrimination filed with the District, including those of disability discrimination, so she did not conduct an investigation of the disability discrimination allegations.

In her September 14 correspondence to the parent, the HR Director wrote that the Director and Coach had made a professional determination regarding Student A’s performance in specific routines and that this determination was consistent with their practices in all cases. The parent responded the same day questioning the relevance of Title IX and wrote, “[Y]ou are right that there is no [T]itle IX violation as that is not our complaint.”

The SSD told OCR that because the parent was still dissatisfied, she convened a case conference meeting on September 17 to discuss Student A’s interest in any extracurricular activity, including XX, and to determine appropriate modifications. The SSD said that, although the District personnel did not believe they had done anything wrong, because they had not been informed of Student A’s interest in the XX during the April case conference meeting, she wanted to do whatever possible to assist Student A. She said that, therefore, the District offered to pay for a private instructor to assist Student A in learning XX routines so that she could reach full participation. The parent declined and said Student A did not want to be in XX as long as the Director oversaw the X program.

² Title IX prohibits discrimination based on sex in programs and activities that receive Federal financial assistance from the U.S. Department of Education.

On September 23, Student A's parent sent another e-mail to the HR Director and the SSD and indicated that she believed Student A had been subjected to discrimination based on disability and that her allegation had not been investigated. The District re-interviewed the Director on October 1, and then the SSD sent Student A's parent a letter indicating that the District had found that the Director did not discriminate against Student A in violation of Title IX and offering mediation conducted by the Indiana Department of Education pursuant to its special education rules if there was a dispute about Student A's educational program. The parent sent a response on October 17 reiterating that her complaint was not of a Title IX violation but a Section 504 violation and that the District did not address her concerns. The parent said she would consider the offer for mediation but said that she believed it would be best for an impartial agency to investigate her concerns.

The District provided a list of participants in the XX and XX in the 2013-2014 school year, which indicated that three students with IEPs played X in the XX and one student identified as disabled under Section 504 participated in the XX. The Director and Coach told OCR that these students were full participants in the program.

Analysis and Conclusions

Allegation #1

The complaint alleged that in May 2013, the District subjected Student A to discrimination based on disability when it did not allow Student A to join the XX.

The evidence established that Student A's parent did not indicate at an IEP meeting in spring 2013 that Student A wished to join the XX and that Student A did not attend tryouts for the XX in spring 2013. While the parent asserted that Student A spoke to two staff members about her interest in XX in May 2013, both denied this, and there was no independent documentation to support that Student A expressed interest at the time in the XX. Therefore, OCR determined that there was insufficient evidence to establish that the District subjected Student A to discrimination based on disability by not allowing her to join the XX in May 2013.

Allegation #2

The complaint alleged that in summer 2013, the District subjected Student A to discrimination based on disability when it removed her from the XX.

The evidence established that the District, contrary to its written policies, permitted Student A to join the XX in summer 2013 even though she did not attend the required XX in its entirety. The evidence also established that Student A was not removed from the XX by District personnel, but stopped attending the XX practices after a few weeks because her parent was displeased with the level of participation Student A had been permitted. The evidence further established that Student A was in fact treated differently than other students in the XX, in that her participation in practices was limited and she was designated an alternate rather than a full member of the XX; however, the Coach and Director explained to OCR that this was due to the fact that Student A had not yet learned the necessary routines. The treatment of Student A was consistent with the

treatment of a student without a disability who joined the XX late and was also limited in his participation until he learned the routines. OCR found no evidence that the reasons for the treatment of Student A were a pretext for unlawful discrimination and did not find other evidence of discrimination on the basis of disability. Therefore, OCR determined that there was insufficient evidence to establish that the District subjected Student A to discrimination based on disability by removing her from the XX in summer 2013.

Allegation #3

The complaint alleged that in summer 2013, the District failed to investigate a grievance Student A's parent filed alleging disability discrimination.

The evidence established that the District has published a non-discrimination statement based on disability, but has not provided notice of the individual parents or students should contact for inquiries regarding Section 504 grievances. The evidence indicated that the District has in place procedures for complaints of discrimination based on disability; while Student A's parent did not use the forms referenced in these procedures, she communicated to the District on multiple occasions in August 2013 that she believed Student A had been subjected to discrimination based on disability. The testimony of District administrators conflicted as to who was responsible for investigating the parent's disability discrimination complaint, and ultimately the District processed the complaint under Title IX but made no determination of whether disability discrimination had occurred. OCR determined, therefore, that the District failed to comply with the Section 504 implementing regulation, at 34 C.F.R. §104.7(b), in that it did not provide the parent a grievance procedure that incorporated appropriate due process standards and provided for the prompt and equitable resolution of her complaint.

The District has provided the enclosed agreement to OCR, which, when fully implemented, will correct the compliance problems found in allegation #3. OCR will monitor the agreement to ensure compliance.

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 file a private suit in Federal court, whether or not OCR finds a violation.

We appreciate the cooperation you and your staff extended to OCR during the course of the processing of this complaint. We particularly appreciate the cooperation of the District's counsel, Ms. Elizabeth Barnes. If you have any questions, please contact TiShaunda McPherson, Civil Rights Attorney, at 312-730-1633 or by email at TiShaunda.McPherson@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Ms. Elizabeth Barnes