

November 10, 2014

Richard E. Kroopnick, Esq.  
Lusk & Albertson PLC  
40950 Woodward Avenue, Suite 350  
Bloomfield Hills, Michigan 48304-5129

Re: OCR Docket #15-14-1154

Dear Mr. Kroopnick:

This is to notify you of the disposition of the above-referenced complaint that was filed on March 24, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR), against the Walled Lake Consolidated Schools (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of her disability by failing to properly and timely evaluate the Student to determine whether she is a student with a disability.

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 allegation, OCR investigated whether the District failed to properly and timely identify a student with a disability and provide the student with appropriate disability-related services in violation of the regulation implementing Section 504 at 34 C.F.R. §§ 104.33 and 104.35.

During its investigation, OCR interviewed the Student's parent, a District representative, and reviewed documentation submitted by the Student's parent and the District. OCR also reviewed the District's Section 504 policies. OCR determined that the District had failed to timely evaluate the Student, as alleged, and that the District's Section 504 policies required revision to comply with the requirements of Section 504 and its implementing regulation. The District submitted the enclosed resolution agreement, described below, to resolve these issues. The bases for the foregoing determinations, and the resolution agreement, are discussed below.

## **Applicable Legal and Policy Standards**

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), states 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. In addition, the Section 504 implementing regulation, at 34 C.F.R. § 104.35(b), requires recipient school districts to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. The regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and placement options; and (4) ensure that the placement decision is made in conformance with the educational setting requirements at 34 C.F.R. § 104.34.

Although the Section 504 regulation does not set forth specific timeframes by which recipients must complete evaluations of students, OCR will consider, as guidance, state-required timeframes for evaluations as well as a recipient's internal guidelines to determine whether the evaluation has been completed within a reasonable time.

Under the regulation implementing Section 504, at 34 C.F.R. § 104.33, school districts are required to provide a free, appropriate public education (FAPE) to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

In addition, the Section 504 implementing regulation, at 34 C.F.R. § 104.36, provides that recipient school districts shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

School districts may use regular education intervention strategies to assist students with difficulties in school. However, Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services. Interventions should not delay referral for evaluation where such a delay would be inconsistent with meeting the school district's obligations under Section 504.

Finally, the Section 504 regulation, at 34 C.F.R. § 104.7(b), states, in part, that a recipient shall 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. When evaluating whether a recipient's grievance procedures meet the prompt and equitable standard, OCR considers a number of factors, including whether the procedures provide for:

- (1) notice of the procedures, including where complaints may be filed;
- (2) application of the procedure to complaints alleging discrimination carried out by employees, other students, or third parties;
- (3) adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- (4) designated and reasonably prompt timeframes for the major stages of the complaint process;
- (5) notice to the parties of the outcome of the complaint; and
- (6) an assurance that the school will take steps to prevent recurrence of any discrimination and to correct discriminatory effects on the complainant and others, if appropriate.

A grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. The school must make sure that all designated employees have adequate training as to what conduct constitutes disability discrimination and are able to explain how the grievance procedure operates.

Grievance procedures may include informal mechanisms for resolving disability discrimination complaints to be used if the parties agree to do so. In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, mediation will not be appropriate even on a voluntary basis.

Although not required under Section 504, many institutions provide an opportunity to appeal the findings or remedies in a grievance. In such cases, OCR evaluates the grievance process, inclusive of the appeal level, to determine whether, as a whole, the process is both prompt and equitable. Finally, OCR recommends, and many institutions include, a provision advising that retaliation against any individual who files a complaint or participates in the grievance process is prohibited.

### **Summary of OCR's Investigation**

The Student's parent told OCR that during the 2012-2013 school year the Student had been evaluated by the elementary school staff for an Individualized Education Program (IEP). While the Student was found ineligible for an IEP during a xxx xxxx xxxxx team meeting, the team generated x xxxx xxxx xxxx xxx xxxxxxx xxxxxxxxxxx xxxxxxxxxxxxxxx xxxxxxxx. Because the Student was moving to a District middle school from a District elementary school

for xxxxxxxx school year, the elementary principal strongly recommended that the Student's parent set up a meeting with the middle school principal as soon as possible to further discuss the Student's needs.

X---PARAGRAPH REDACTED---X

X---PARAGRAPH REDACTED---X

After the initiation of OCR's investigation, you advised OCR that the District would evaluate the Student pursuant to Section 504. The Student's parent confirmed to OCR that, xx xxxx xx xxxxx the Student's Section 504 team convened and determined that the Student was eligible for services as a student with a disability under Section 504 and developed a Section 504 plan for the Student.

Based on the foregoing, OCR finds that the District did not evaluate the Student until xxxx xxxxx approximately one year after initial discussions between the District and parent regarding the need for a Section 504 evaluation of the Student. Accordingly, OCR has determined that the District failed to timely evaluate the Student for a disability, as alleged, in violation of Section 504 and Title II.

OCR's also reviewed the District's Section 504 policies and procedures and found that they did not fully comply with the requirements of Section 504 and its implementing regulation. For example, the District's non-discrimination policy refers to "equal opportunity for educational development" when the standard is equal opportunity to participate in the District's program; the District's grievance procedures do not provide an alternative contact if the designated contact is the party alleged to have engaged in discrimination; the grievance procedures do not ensure that the District's compliance officer interview anyone reasonably likely to have information regarding a complaint, and review any relevant documents related to a complaint, not just the persons or documents identified by the complainant; the policies inaccurately suggest that individuals cannot file a complaint with OCR prior to filing a grievance; and the policies contain an inaccurate address for OCR.

OCR also found Section 504 compliance concerns regarding the District's Procedures for Providing Educational Services to Students Under Section 504 of the Rehabilitation Act of 1973. For instance, OCR found that these procedures need to be modified: to ensure that the District's list of major life activities are consistent with the list of activities articulated by the ADA Amendments Act; to clarify who is responsible for initiating referrals of students for suspected disabilities as an "other certified school employee;" to ensure that parents/guardians have a meaningful opportunity to provide input; to ensure that re-evaluations occur periodically; to ensure that services or modifications may be made to a student's regular or special education program; and to ensure that impartial hearing officers are not employees of the District.

### **Resolution Agreement**

On October 31, 2014, the District signed an agreement stating that it will reconvene the Student's Section 504 team to determine if the Student requires compensatory education or other

remedial services for the time period the Student was not identified as a student with a disability pursuant to Section 504. If the team determines that compensatory education or other remedial services are required, the team will develop a written plan for providing the Student with the compensatory education or other remedial services deemed necessary, which plan will identify the nature and amount of the services to be provided at no cost to the Student's parents, by whom, and when, and will become part of the Student's Section 504 plan.

In addition, the agreement requires the District to draft and submit to OCR for review and approval Section 504 policies and procedures that address the identification, evaluation, and placement of students who the District knows or has reason to suspect have a mental or physical impairment that substantially limits a major life activity. The agreement also requires the District to draft and submit to OCR for review and approval a Section 504 grievance procedure that incorporates appropriate due process standards and provides for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The agreement states that, after approval by OCR, the District will adopt the policies and procedures, publish them, and provide notice of its newly-adopted Section 504 policies and procedures and where they are located to students, parents, guardians, and staff. The agreement also requires the District to provide Section 504 training to all of its administrators and other District staff who have responsibilities for implementing portions of students' Section 504 plans or a role in the identification, evaluation, and placement of students that have or are suspected of having a disability under Section 504. The training will focus on the District's responsibilities regarding identification, evaluation, reevaluation, and placement procedures required by Section 504, the District's obligation to provide qualified students with disabilities a FAPE, and the District's new Section 504 policies and procedures.

### **Conclusion**

In light of the District's submission of the signed agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the agreement. Should the District fail to fully implement the agreement, OCR will reopen the complaint and take further appropriate action.

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 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 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.

OCR appreciates the cooperation of the District during the investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, you may contact xxx xxxxxxxx xxxxxx xx xxxxxx xxxxxxxx xx xx xxxxxxxxxxxxxxxxxxxxxxxxxxxx The OCR contact person for the monitoring of the agreement is xxx xxxxxxxx xxxxxx who can be reached at xxxxx xxxxxxxx or at xxxxxxxxxxxxxxxxxxxxxxxxxxxx

OCR looks forward to receiving the District's first monitoring report by November 29, 2014. The report can be submitted to OCR via the U.S. Postal Service or via e-mail to the following address: [OCRCleMonitoringReports@ed.gov](mailto:OCRCleMonitoringReports@ed.gov).

Sincerely,

/s/

Donald S. Yarab  
Supervising Attorney/Team Leader

Enclosure