



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

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

June 30, 2015

Jennifer K. Johnston, Esq.
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, Michigan 48826

Re: OCR Docket #15-14-1191

Dear Ms. Johnston:

This is to notify you of the disposition of the above-referenced complaint filed on April 23, 2014, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Whiteford Agricultural Schools (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability by suspending the Student from school on XXXXX XX, 2014, and prohibiting him from returning until he was not considered a threat to either himself or others. The complaint also alleged that the District failed to evaluate the Student although he was suspected of having a disability.

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 prohibits discrimination on the basis of disability by public entities. As a recipient of such financial assistance and as a public entity, the District is subject to these laws; accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following issues:

- whether the District excluded a qualified student with a disability from participation in, denied him the benefits of, or otherwise subjected him to discrimination in the District's programs or activities 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 conduct an evaluation of a student who, because of disability, needed or was believed to need special education or related services, in violation of Section 504’s implementing regulation at 34 C.F.R. § 104.35(a).

During the course of OCR’s investigation, OCR staff interviewed the Student’s parents and District staff. OCR also reviewed documentation provided by the parties. After a careful review of the relevant information, OCR determined that the District violated Section 504 and Title II when it removed the Student from school, denying him the ability to participate in the District’s program. Further, OCR determined that the District violated Section 504 and Title II by not initiating an evaluation or offering to evaluate the Student for a disability at the time of the removal. Additionally, separately from the issues raised by the allegations, during the investigation OCR identified sections of a District Section 504 policy document that do not comply with the requirements of the Section 504 regulation, including an incorrect definition of disability and application of an incorrect standard for eligibility for regular or special education and related aids and services. The District has signed a Resolution Agreement, a copy of which is enclosed, that, once implemented, will address the compliance issues OCR identified. OCR discusses the bases for its determinations below.

Background

“XXX-paragraph redacted-XXX”

Summary of OCR’s Investigation

- **Alleged Exclusion**

“XXX-17 paragraphs redacted-“

- **Alleged Failure to Evaluate**

“XXX-3 paragraphs redacted-XXX”

- **The District’s Section 504 Policies**

In response to OCR’s request for documents, the District submitted Section 2260.01 of its Bylaws & Policies, which is entitled, “Section 504/ADA PROHIBITION AGAINST DISCRIMINATION BASED ON DISABILITY.” Under the portion entitled “Education,” the bylaws and policies state the following:

If a student has a physical or mental impairment that significantly limits his/her learning, but does not require specially designed instruction to benefit educationally, the student will be eligible for reasonable, but more than standard, accommodations and/or modifications of the regular classroom or curriculum in order to have the same access to an education as students without disabilities. Such

accommodations and/or modifications will be provided pursuant to a Section 504 Accommodation Plan (Form 2260.01A F13).

Parents/guardians/custodians ("parents") are invited and encouraged to participate fully in the evaluation process and development of a Section 504 Plan.

If a student has a physical or mental impairment, but it does not significantly limit his/her learning, the student will not be entitled to a Section 504 Accommodation Plan, but s/he may still be eligible for a "Classroom Accommodation/Checklist" (Form 2260.01A F14).

Applicable Regulatory Requirements

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j)(1), defines an individual with a disability as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. The Section 504 regulation, at 34 C.F.R. § 104.3(j)(2)(iv), further provides that a person is regarded as having an impairment when the person: has a physical or mental impairment that does not substantially limit major life activities but who is treated by a recipient as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined by the regulation, but is treated by a recipient as having such an impairment. As of January 1, 2009, the date the Americans with Disabilities Amendments Act of 2008 took effect, a person is regarded as having a disability if he or she has been subjected to an action prohibited under Section 504 because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. See the Title II implementing regulation at 28 C.F.R. § 35.104. Accordingly, OCR's analysis focuses on whether a recipient of Federal financial assistance perceives that an individual has a physical or a mental impairment, without considering whether the recipient perceives that individual to be limited in a major life activity.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), also provides that no qualified person with a disability shall, on the basis of a disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any recipient's program or activity. With regard to public preschool, elementary, secondary, or adult educational services, a person with a disability is a qualified person with a disability if of an age during which persons without disabilities are provided such services, of any age during which it is mandatory under state law to provide such services to persons with disabilities, or a person to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). See 34 C.F.R. § 104.3(l)(2).

The Title II regulation, at 28 C.F.R. § 35.130(a), similarly states that an entity may not, based on disability, exclude a qualified individual from participation in, deny him the benefits of, or otherwise subject him to discrimination in the District's programs or activities. The Title II regulation, at 28 C.F.R. § 35.139, further states:

Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety **of others**. [emphasis added]

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

The regulation implementing Section 504, at 34 C.F.R. § 104.33, provides that a recipient that operates a public elementary or secondary education program or activity must provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction. An appropriate education is defined 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 nondisabled students are met and that are based upon adherence to procedures that satisfy the educational setting, evaluation and placement, and procedural safeguards requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

To be eligible for a FAPE, a student must be determined to have a physical or mental impairment that substantially limits one or more major life activities. This determination must be made on the basis of an individual inquiry. Major life activities to be considered are not limited to learning and also include, but are not limited to, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Major life activities also include the operation of a major bodily function, such as immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 34 C.F.R. § 104.3(j)(1)(i), as amended by the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), requires school districts to evaluate any child who, because of disability, needs or is believed to need special education or related aids and services. The regulation at 34 C.F.R. § 104.35(b)

requires recipients 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 for students with disabilities, 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. If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. § 104.35(a) and (b), the district must ensure that the child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, these methods may be used in lieu of a medical assessment.

The Section 504 regulation, at 34 C.F.R. § 104.36, requires a recipient that operates a public elementary or secondary education program or activity to 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. Compliance with the procedural safeguards of IDEA is one means of meeting this requirement.

Analysis

- **Exclusion from Educational Program**

The evidence shows that the District excluded the Student from its educational program from XXXXX XX through XXXX XX, 2014, after the XXXXXXXXX completed a Risk Assessment Document, on which she determined that the Student posed a “Strong Concern,” which the Risk Assessment Document defines as a student who poses a “direct, specific, and highly plausible threat” or who “poses clear and immediate danger to the safety of others.” The form documents that the XXXXXXXXX arrived at this risk determination on the basis that the Student was disengaged with school staff, socially isolated from peers, had declining grades, and staff had expressed general concerns regarding his emotional state. The evidence further shows that the XXXXXXXXX, based upon this conclusion, met with the Student’s parent and advised him that the Student could not return to school until he was evaluated, at the family’s expense, by a doctor who determined that the Student did not pose a threat to himself or others.

OCR finds that the XXXXXXXXXX's conclusion that that the Student posed a "Strong Concern" was unsupported by the information available to her because none of the available, objective evidence indicated that the Student had said or done anything to indicate that he posed a probable threat to others at any time during the 2013-2014 school year or that there was any probability that any potential injury to any other person would actually occur. The District's reliance on the Student's statement to the XXXXXXX XXXXXXX that "no one can help" to justify the exclusion of the Student was misplaced given the context of the statement and the absence of any statements or actions supporting its interpretation of the statement. Thus, the District's removal of the Student as a potential threat to others was not permitted under the Title II regulation at 28 C.F.R. § 35.139.

OCR further finds that the XXXXXXXXXX viewed the Student as having a mental impairment due to his emotional state and that the XXXXXXXXXX excluded him from the District's educational program based on unfounded fears, prejudices, and stereotypes associated with her perception of his perceived mental impairment. Accordingly, OCR finds that the District excluded the Student from its program, based on disability, in violation of the Section 504 regulation at 34 C.F.R. § 104.4(a), and the Title II regulation at 28 C.F.R. § 35.130(a).

- **Failure to Evaluate for Suspected Disability**

The evidence shows that, by XXXXX XX, 2014, District staff had obtained sufficient information to believe that the Student was, or might be, a student with a disability under Section 504. Specifically, District staff had reported to the XXXXXXXXXX that the Student's grades were falling, that he seemed very depressed, that he had become isolated from peers, that he was disengaged from staff, that he lacked energy, that he was inattentive in class, and that his study habits were deteriorating. Staff also expressed concern about the Student's emotional state to the XXXXXXXXXX. Additionally, the evidence shows that the XXXXXXXXXX, on XXXXX XX, 2014, determined that the Student required a mental health evaluation by a doctor due to his emotional issues and advised the Student's parent of such. The District advised the parents to obtain a medical evaluation of the Student at their expense, which the parents did. Finally, the evidence shows that the District did not self-initiate an evaluation of the Student to determine whether he had a disability, and would not, according to the XXXXXXXXXX (who was also the school's Section 504 coordinator), have self-initiated such an evaluation. The District evaluated the Student only because the Student's parents requested such evaluation. Based on the foregoing, OCR finds that the District failed to initiate an evaluation of a Student it suspected, or should have suspected, of having a disability, in violation of the Section 504 regulation at 34 C.F.R. § 104.35(a).

- **The District's Section 504 Policies**

Though not raised as an issue by the allegations, during the investigation OCR identified deficiencies in a District Section 504 policy document. The evidence shows that the District's Bylaws and Policies, at Section 2260.01 (SECTION 504/ADA PROHIBITION

AGAINST DISCRIMINATION BASED ON DISABILITY) are inconsistent with the requirements of Section 504 and Title II. For instance, the District policy uses the word “significantly” rather than “substantially” in determining whether a physical or mental impairment constitutes a disability; it limits placement and services options to a scope more narrow than the FAPE standard required by the Section 504 regulation; and it limits eligibility to students who have physical or mental impairments impacting learning. Accordingly, the District’s policy conflicts with the requirements of the Section 504 regulation.

Resolution

To resolve the above-described compliance findings, the District submitted the enclosed Resolution Agreement (the Agreement) to OCR on June 29, 2015. Under the terms of the Agreement, the District will:

- revise its Risk Assessment policy to ensure that it makes clear the District’s ongoing obligations to comply with Section 504 and Title II, revise District policy 2260.01 to comply with Section 504, adopt and publish the revised policies, and provide training on its revised policies and procedures to relevant District staff; and
- provide the Student with counseling, reimbursement for the private evaluation the District required and related expenses, and compensation for the state-level band competition he was precluded from attending while inappropriately removed from school through provision of drum lessons or participation in a music-related activity at District expense.

Conclusion

Based on the foregoing, OCR is closing its 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 take appropriate action to ensure the District’s full 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 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. If this happens, the harmed individual may file a complaint alleging such treatment.

We look forward to receiving the District's first monitoring report by July 15, 2015. For questions about implementation of the Agreement, please contact Ms. Sarah Poppleton, who will be monitoring the District's implementation, by e-mail at Sarah.Poppleton@ed.gov or by telephone at (216) 522-2674. For questions about this letter, please contact Supervisory Attorney/Team Leader Donald S. Yarab at (216) 522-7634.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure