



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

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

Melissa Martinez Bondy, Esq.
Bricker and Eckler, LLP
100 South Third Street
Columbus, Ohio 43215

Re: OCR Docket #15-14-1318

Dear Ms. Bondy:

This letter is to notify you of the disposition of the above-referenced complaint that was filed on September 15, 2014, against the Buckeye Valley Local School District (the District), with the U.S. Department of Education (the Department), Office for Civil Rights (OCR). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleged that:

1. In the xxxxx xxx xxxx xx xxxxx the District failed to appropriately evaluate the Student for a Section 504 plan.
2. In the xxxx xx xxxxx the xxxxxxxxxx at the Student's school unilaterally changed the Student's Section 504 plan without convening the Section 504 team to make an appropriate placement determination.
3. In the xxxx xx xxxxx the District failed to appropriately respond to the internal grievances the xxxxxxxxxx xxxxxx filed with the District in which the parent alleged that the principal improperly changed the Student's Section 504 plan.

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). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR also is 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). 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 complaint allegations, OCR initiated an investigation into the following legal issues:

- Whether the District failed to provide a free appropriate public education (FAPE) to a qualified student with a disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.33.
- Whether the District failed to properly and timely identify, evaluate, and place a student as an individual with a disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35.
- Whether the District adopted grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by the Section 504 and Title II regulations, as required by the Section 504 implementing regulation at 34 C.F.R. § 104.7(b) and the Title II implementing regulation at 28 C.F.R. § 35.107(b), and whether those procedures were properly used in this case.

Background

At the time the complaint was filed, the xxxxxxxxx xxxxxx told OCR that xxx had filed two internal grievances with the District raising the same allegation (allegation #2, above) that was included in the instant OCR complaint. OCR's *Case Processing Manual (the Manual)* provides that generally, OCR does not conduct its own investigation of allegations that have already been filed by a Student's parent through a recipient's internal grievance procedures. Instead, OCR reviews the results of the recipient's action and determines whether the recipient's resolution of the complaint meets OCR's regulatory standards; i.e., all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR's standards.

After reviewing the xxxxxxxxx xxxxxxxxx internal complaints, OCR determined that it would conduct a review of the District's decision regarding the xxxxxxxxx xxxxxxxxx allegation that the District discriminated against the Student based on disability (allegation #2, above), to determine whether the District provided the xxxxxxxxx xxxxxx with a resolution process comparable to OCR's resolution process. If OCR determined that the District did not provide a comparable resolution process to OCR's, OCR would then conduct a *de novo* investigation of the allegations included in the internal grievances. OCR also initiated an investigation of the allegation that the District failed to properly evaluate the Student for a Section 504 plan (allegation #1) and whether the District failed to appropriately respond to the internal grievances the xxxxxxxxx xxxxxx filed with the District in which it was alleged that the xxxxxxxxx improperly changed the Student's Section 504 plan.

Prior to the completion of OCR's investigation, the District expressed an interest in voluntarily resolving the complaint allegations. However, based on the information obtained to date, OCR determined that the District did not have Section 504 grievance procedures that provided for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 or

Title II, in violation of Section 504 and Title II, and therefore could not provide a comparable resolution process for OCR to review. To date, OCR has not completed its investigation of the complaint allegations.

On April 6, 2015, the District signed the enclosed agreement that, once implemented, will fully address the compliance violations, as well as the allegations that have not been fully investigated, in accordance with Section 504 and Title II. A summary of the applicable legal standards, OCR's investigation, the bases for OCR's determinations, and the terms of the agreement are presented below.

Applicable Regulatory Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts to provide a FAPE to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education for purposes of FAPE 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 developed in accordance with procedural requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards).

The Section 504 regulation states, at 34 C.F.R. § 104.35(a), 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.

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. Major life activities include things such as walking, bending, breathing and normal cell growth or other major bodily functions.

The Section 504 regulation at 34 C.F.R. § 104.35(c) provides that in making placement decisions, the recipient shall draw upon information from a variety of sources, including aptitude and achievement tests and teacher recommendations. Additionally, a recipient must ensure that placement decisions are made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

The Section 504 implementing regulation at 34 C.F.R. § 104.7(b) states that a recipient that employs fifteen or more persons 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. The Title II regulation at 28 C.F.R. § 35.107(b) provides that a public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II.

When evaluating a recipient's grievance procedures under Section 504 and Title II, OCR considers a number of factors to determine if the grievance procedures meet regulatory requirements, 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.
6. An assurance that the school will take steps to prevent recurrence of any harassment and to correct discriminatory effects on the complainant and others, if appropriate.

Summary of OCR's Investigation and Analysis To Date

For the xxxxxxxx school year, the Student is enrolled in the xxxxxxx xxxxx at the District's middle school. According to the xxxxxxxx xxxxxxx the Student's xxxxxxxx xxxxxxxxxxxx are xxxxxxxxxxx xxx xxxxxxx. The Student did not have a Section 504 plan for these physical impairments until the xxxx xx xxxxx. The xxxxxxxxxxx xxxxxxx said that prior to xxxxxxx in the summer of xxxxx the Student had to xxxx x xxxx xxxxx xxx xx xx xxxxx x xxx and was suffering from severe pain due to the xxxxxxxxxxx. The xxxxxxxxxxx xxxxxxx said that xxxxx xxxxx xxxxxxx in the Student's xxxxxxx xxxxx led to the pain and also impacted xxx ability to xxxxxxx xx xxxxxxx xxxxxxx xxx xxxxxxx. In xxxx xxxxx the Student underwent a xxxxxxxxxxx xxxxxxxxxxx called a xxxxxxxxxxx xxxxxxx xxxxxxx. The xxxxxxxxxxx xxxxxxx said that on xxxxxx xx xxxxx she met with the District's Section 504 Coordinator and the Student's building xxxxxxxxxxx xxxxx xxxxxxxxxxx regarding the xxxxxxxxxxx xxxxxxxxxxx put into place by the Student's xxxxxxx. At this meeting, the District developed a Section 504 plan for the Student. The xxxxxxxxxxx xxxxxxx said that she requested that the Student's teachers be present at the xxxxxx xxxxx meeting, but that no teachers attended the meeting. The xxxxxxxxxxx xxxxxxx said one of the provisions in the Student's Section 504 plan was that xxx was to be xxxxxxxxxxx xx xxxxx xxxxx xxxxx xxxxxxx xxxxx so that xxx could get to xxx next class xxxxxxx xxxxx xxxxx by other students in the hallway.

The xxxxxxxxxxx xxxxxxx stated that beginning on xxxxxxxxxxx xx xxxxx the building principal began xxx efforts to unilaterally change the Student's Section 504 plan by xxxxxxx the Student that xxx could no longer have the xxxx xxxxxxx xx xxxxxxxxxxx xxxxxxx xxxxxxx by xxxxxxx the Student's xxxxxxxxxxx xxxxxxx xx xxxxxxxxxxx xxxxx xx xxxxx xxxxxxxxxxx and by telling the Student's teachers to xxx xxxxx xxx xx xxxxx xxxxx xxxxxxx xxxxx xxx xxxxx xxxxxxxxxxx

XXXXXXXXXX XXXXXX to the superintendent on the morning of XXXXXXXXXXXX XXX XXXXXX the Student's XXXXXX XXXXXXXX did not allow XXX to leave XXXX XXXXXXXX XXXXXXXX. By noon of the same day, the XXXXXXXXXXXX disseminated an e-mail stating that the teachers should allow the Student, at XXX discretion, to XXXXX XXX XXXXXXXXXXXX XX XX XXXX XXXXXXXX XXXXXXXX XXX XXXXX.

On XXXXXXXXXXXX XXX XXXXXX the XXXXXXXXXXXX XXXXXXXX filed two internal grievances on Section 504 Compliance Grievance Forms provided by the District alleging that the XXXXXXXXXXXX unilaterally changed the Student's Section 504 plan and violated the Student's privacy by contacting the Student's XXXXXXXXXXXX. Also on that day, the XXXXXXXXXXXX XXXXXXXX filed a complaint with the Ohio Department of Education (ODE) alleging similar issues. The District claimed to OCR that the ODE complaint was dismissed but did not provide any documentation to support this assertion.

On XXXXXXXX XXX XXXXXX the District notified the XXXXXXXXXXXX XXXXXXXX by letter of the outcome of the internal grievances XXX filed and summarized its investigation. According to the letter, the superintendent conducted the investigation by reviewing the e-mails sent by the XXXXXXXXXXXX XXXXXXXXXXXX spoke with the XXXXXXXXXXXX XXXXXXXXXXXX who took the phone call from the XXXXXXXXXXXX met with the XXXXXXXXXXXX on two occasions, and had an informal conversation with the XXXXXXXXXXXX XXXXXXXX at a school football game. The letter stated that the District had determined the Student was not denied a FAPE and was not discriminated against on the basis of XXX disability. The letter also listed several corrective measures it put in place to ensure that the Student continued to receive a FAPE.

X---PARAGRAPH REDACTED---X

On XXXXXXXXXXXX XXX XXXXXX the Student's XXXXXXXX XXX XXX XXXXXXXX filed a civil complaint in the County Court of Common Pleas alleging that this chain of events gave rise to causes of action under other laws not enforced by OCR.

During the course of OCR's investigation, OCR confirmed that the District did not have a formally adopted set of grievance procedures to address complaints filed under Section 504 or Title II; rather, the District provided OCR with a copy of a draft Section 504 grievance procedure. According to the information provided, the grievance procedure is available for any disagreement with respect to actions regarding the identification, evaluation, educational services or educational program of students who, because of disability, need or are believed to need Section 504 Plans. The grievance procedure further states that it does not apply to students who are eligible for services under the Individuals with Disability in Education Act (IDEA) and does not apply to cases of disciplinary actions where the provisions of the Student Code of Conduct apply. Further, the grievance procedure states that it applies only to disagreements about the identification, evaluation, educational services or educational program for students, which does not cover all complaints of discrimination under Section 504. The grievance procedure does not include a provision to address complaints alleging discrimination carried out by employees, other students or third parties.

The first step in the grievance procedure is that complainants are required to file a request for a "conference" with the building principal or the building 504 officer in order to discuss the complaint and seek a resolution. This step is a prerequisite to step two, and, while it is not referred to as an informal process, it does not provide for a formal investigation. The principal is required to hold the conference within five days of the request and to issue his decision in writing within five days of the conference. If the complainant is not satisfied with the outcome

of the conference, the complainant has five days to appeal the principal's decision in writing with the District's Section 504 Compliance Officer. This appeal to the District's Section 504 Compliance Officer is step two of the grievance procedure. Step two of the grievance procedure does not require that the District conduct an impartial investigation and does not state that parties have an opportunity to present witnesses and other evidence. Rather, it states that the Compliance Officer will review the case and may conduct an informal hearing. The Compliance Officer must issue his or her decision, in writing, within 10 days of receiving the appeal. In summary, the grievance procedure states that complainants are required to file a request for a "conference" and then file an appeal for a hearing on the matter. It does not provide a process for an adequate, reliable, and impartial investigation of complaints, including the opportunity for parties to present witnesses and other evidence.

Step three of the grievance procedure states that the complainant may appeal for an independent due process hearing or may take the matter "directly to the U.S. Department of Education's Office for Civil Rights." The grievance procedure does not provide an assurance that the school will take steps to prevent recurrence of any harassment and to correct discriminatory effects on the student, and others, if appropriate.

As noted above, prior to OCR's completion of its investigation of the allegations, the District requested to resolve the complaint allegations. However, based on the information obtained and summarized above, OCR finds that the District has failed to adopt Section 504 grievance procedures that provide for the prompt and equitable resolution of complaints alleging disability discrimination, in violation of Section 504 or Title II.

Resolution and Conclusion

On April 6, 2015, the District provided OCR with the enclosed resolution agreement, which, once implemented, will resolve any compliance concerns raised by the allegations and the information obtained by OCR to date. In summary, the resolution agreement requires: 1) the District to develop and adopt grievance procedures that comply with Section 504 and to train relevant staff on the newly adopted procedures; 2) the District to conduct a review of its investigation of the xxxxxxxxx xxxxxxxxx internal complaints to ensure that it complied with the minimum requirements of Section 504, and, to the extent the investigation was deficient, will conduct a new investigation to remedy any deficiencies; 3) the District to re-convene the Student's Section 504 team, which will include at least some of xxx teachers, to determine whether a suitable placement decision was made by a group of persons knowledgeable about the Student during the xxxxxxxxx and xxxxxxxxx school years, and if not, whether it resulted in a denial of FAPE to the Student, and if so, will develop a plan to provide any necessary remedial education or services; and 4) the District to provide Section 504 training to District administrators, including but not limited to the Student's principal, who are responsible for the identification, evaluation and placement of students with disabilities.

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 harmed individual may file another complaint alleging such treatment.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

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 OCR contact person for the monitoring of the agreement is Mr. xxxxx xxxxxxxx-xxxx, who may be reached at (216) 522-xxxx or by e-mail at xxxxxxxxxxxxxxxxxxxx@ed.gov. We look forward to receiving the District's first monitoring report, which should be directed to Mr. xxxxxxxx-xxxx. Should you wish to submit the report electronically, you may do so at OCRCleMonitoringReports@ed.gov. If you have questions regarding this letter, please contact me at (216) 522-xxxx.

Sincerely,

/s/

Lisa M. Lane
Supervisory Attorney/Team Leader

Enclosure