



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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BOSTON, MA 02109-3921

REGION I

CONNECTICUT  
MAINE  
MASSACHUSETTS  
NEW HAMPSHIRE  
RHODE ISLAND  
VERMONT

May 12, 2023

Superintendent John Tague  
By email: [jtague@fwsu.org](mailto:jtague@fwsu.org)

Re: Complaint No. 01-23-1070  
Franklin West Supervisory Union

Dear Superintendent Tague:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education, Office for Civil Rights (OCR) received against Franklin West Supervisory Union (District). The Complainants allege that during the XXXXXXXXXX school year, the District discriminated against their son (Student) on the basis of disability and retaliated against him.

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance from the U.S. Department of Education. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance from the U.S. Department of Education. The laws enforced by OCR also prohibit retaliation against any individual who asserts rights or privileges under these laws or their implementing regulations, or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the District receives federal financial assistance from the U.S. Department of Education and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

OCR opened the following issues for investigation:

1. Whether the District denied the Student a free appropriate public education (FAPE) by failing to timely evaluate his eligibility for special education and/or related aids and services, in violation of 34 C.F.R. § 104.35(a) and (b), and 28 C.F.R. § 35.130;
2. Whether the District failed to provide the Complainants with notice of procedural safeguards, in violation of 34 C.F.R. § 104.36, and 28 C.F.R. §35.130; and
3. Whether the District retaliated against the Student on or about XXXXXXXXXX, by investigating him for bullying, because the Complainants engaged in disability-related advocacy on his behalf, in violation of 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.7(e) by reference) and 28 C.F.R. § 35.134.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

During the investigation, OCR reviewed documents provided by the Complainants and the District and interviewed the Complainants and District staff. Before OCR completed its investigation, the District expressed a willingness to resolve Allegation 1. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Allegations 2 and 3. OCR’s findings and conclusions are further discussed below.

## **Legal Standards**

### **Evaluation**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to each qualified student with a disability in its jurisdiction. An appropriate education is 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 students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student’s possible eligibility is recognized and the district conducts the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Vermont state regulations, like the federal IDEA regulation, require that school districts conduct initial evaluations within 60 days of receiving parental consent, although certain exceptions may apply. Vt. Code Rule § 2362.2.1.

Under the Americans with Disabilities Act Amendments Act, school districts may not consider the ameliorative effects of most mitigating measures when making a disability determination. A school district must conduct an evaluation of any individual who because of a disability “needs or is believed to need” special education or related services. Once a school district determines

that a student has a disability, however, that student’s use of mitigating measures may still be relevant in determining their need for special education or related services.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

#### Section 504/Title II Coordinator

The Section 504 regulation, at 34 C.F.R. § 104.7(a), requires each school district that employs 15 or more persons to designate at least one person to coordinate its efforts to comply with Section 504. The Title II regulation, at 28 C.F.R. § 35.107(a), contains a similar requirement in the instance of a public entity that employs 50 or more persons and requires the public entity to make available the name, office address, and telephone number of the designated employee or employees.

#### Procedural Safeguards

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents’ right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

#### Retaliation

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In analyzing an individual’s claim of retaliation against a school district, OCR analyzes whether: (1) the individual engaged in a protected activity;<sup>1</sup> (2) the individual experienced an adverse action caused by the school district;<sup>2</sup> and (3) there is some evidence of a causal connection

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<sup>1</sup> A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws.

<sup>2</sup> An “adverse action” is something that could deter a reasonable person from engaging in further protected activity.





On XXXXXX, Student 1 reported, in writing, that during recess, the Student said XXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. The School separated the two students  
for the day and the Behavioral Specialist filled out a Student Conduct Form. According to the  
District, the XXXXXXXXXX and Principal reviewed the Student’s disciplinary referrals,  
consulted, and the School Principal determined that the School needed to initiate a bullying  
investigation. That afternoon, the Principal emailed the Complainants to notify them of the  
incident and that “[a]s part of [their] bullying policy protocol,” they were opening an  
investigation and would be conducting interviews the next day. The Principal explained in the  
email that the School would notify the Complainants of their findings within five school days  
and that there would be a safety plan in place for the remainder of the school year. XXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

The District provided OCR with the School’s Policy and Procedures on the Prevention of  
Harassment, Hazing, and Bullying of Students (HHB Policy). The HHB Policy, which mirrors  
the State model policy,<sup>3</sup> defines bullying as “any overt act or combination of acts ... directed  
against a student by another student ... and which: (a) Is repeated over time; (b) Is intended to  
ridicule, humiliate, or intimidate the student; and (c)(i) occurs during the school day on school  
property....” Once the School has notice of potential bullying conduct, the information must be  
reported to the school administrator, and the school administrator is required to promptly initiate  
an investigation of any allegations “which the school administrator reasonably believes may  
constitute...bullying.”

The District asserted that the Student’s disciplinary referral forms report acts against Student 1  
which were repeated over time and occurred during the school day and on school property, and  
that the alleged incidents, particularly in light of the ongoing discussions with the Student about  
his behavior, necessitated an investigation to determine whether the acts were intended to  
ridicule, humiliate, or intimidate Student 1. The XXXXXXXXXX told OCR that the reports  
raised concerns because they were of repetitive incidents in a matter of days and it appeared that  
the Student was targeting Student 1. The Principal told OCR that staff were on notice of  
repeated incidents directed towards Student 1 in a short period of time and had information that  
Student 1 was being intimidated. The Principal explained that there was a question of the  
Student’s intent and that they opened the investigation to get more information about the  
incidents, so they could make a safe decision for Student 1.

On XXXXXX, the Complainants accompanied the Student to the School’s interview of him.  
After the interview, the Complainants sent an email to the School reporting that the Student  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX by XXXXXXXX classmates XXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. The District reported to OCR  
that in response to the email, the School reviewed student disciplinary referrals and found that  
aside from the referral in which the Student XXXXXXXXXX

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<sup>3</sup><https://education.vermont.gov/documents/healthy-safe-schools-hhb-model-policy>. Vermont schools must adopt  
HHB policies that are at least as stringent as model policies developed by the Vermont Agency of Education. See 16  
V.S.A. § 570(b).



The District provided OCR with copies of documents titled “What is ‘Section 504?’” and “Summary of Parent/Student Rights under Section 504,” and reported that these documents are provided to parents at Section 504 meetings and were provided to the Complainants on XXXXXX. The documents include information for parents on their right to receive notice with respect to the identification, evaluation, or placement of their child, to examine their child’s education records, and to request an impartial hearing—with opportunity to participate and be represented by counsel—in the event that they disagree with an action regarding the identification, evaluation, or placement of their child, and their right to a review of such decision. The documents also identify the School Counselor as the school-based Section 504 Coordinator. The Complainants confirmed to OCR that they were provided copies of these documents during the meeting.

The XXXXXXXXXXXX described for OCR the School’s Section 504 referral process. The XXXXXXXXXXXX explained that when a social-emotional or academic concern is raised by a teacher or parent, the protocol is for the student to first be referred to the EST, which will convene and develop a plan for the Student. The XXXXXXXXXXXX stated that the EST members will reconvene after about four-to-eight weeks to review the student’s progress under the plan. He explained that if the plan is not working, the EST could then initiate testing and evaluation under Section 504. The XXXXXXXXXXXX stated that there may be circumstances (e.g., parent insists on a Section 504 meeting) where the School would convene a Section 504 eligibility meeting without first attempting EST, but that the School tries to be proactive and start with EST. The XXXXXXXXXXXX noted that the School wants to first try a referral to the EST because the School has many universal supports available.

OCR reviewed the School’s policies and procedures on the identification, evaluation, and placement of students with disabilities under Section 504 and Title II, which are included in the School’s handbook and the “What is ‘Section 504?’” notice.<sup>4</sup> These policies describe protections for students under Section 504 and provide information on, among other things, referrals, evaluation, and placement. The School’s handbook notes regarding eligibility: “Students that need support and accommodations that are more intensive than an EST plan, but not intensive enough to meet all of the special education requirements, may meet requirements for a section 504 plan. There needs to be a significant effect on school performance.”

## Analysis

### Allegation 1

Based on OCR’s preliminary investigation, OCR is concerned that the District may have failed to conduct a timely evaluation for the Student. OCR found that the District promptly held a team meeting in response to the Complainants’ XXXXXX request that the Student be evaluated for a Section 504 plan; however, information provided by the parties indicates that the School may have been on notice earlier in the school year that the Student needed special education or related aids and services because of a disability. Specifically, evidence shows that the District was first

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<sup>4</sup> XXX  
XX. The District reported to OCR that it also relies on the Section 504 Manual created by the Vermont Agency of Education. See <https://education.vermont.gov/sites/aoe/files/documents/edu-special-education-504-guide.pdf>.



on notice of the Student's XXXXXX diagnosis during the XXXXXXXX school year and that starting in the XXXXXXXXXXXX, the Student was being referred out of the classroom with some frequency for XXXXXXXXXXXXXXXXXXXXXXXX. In addition, while OCR has not reached a finding as to whether the Complainants explicitly requested that the School evaluate the Student in XXXXXXXX, such an express request is not required by Section 504, and the record suggests that the District may have had sufficient information to trigger its referral and evaluation obligations. For example, correspondence shows that they communicated with School staff regarding the Student's diagnosis and the XXXXXXXX challenges he was having in the classroom, as well as with a District administrator regarding their desire XXXXXXXXXXXX XXXXXXXX the Student.

The evidence OCR has reviewed to date also raises concerns about the School's referral and evaluation process under Section 504. While not referenced in the District's Section 504 procedures, information provided by School staff indicates that when a student is experiencing challenges (i.e., academic or social-emotional) at school, the School's general practice is, as a first response, to attempt supportive measures through its EST process, regardless of whether the student is suspected of having a disability.

School districts may implement intervention strategies and provide supportive measures; however, those supports must not deny or delay an evaluation of a student who is suspected to need special education or related services because of a disability. In addition, a student's performance with the use of mitigating measures (other than the ameliorative effects of ordinary eyeglasses or contact lenses) cannot be considered when making a disability determination, that is, the fact that a student may perform better with the use of supportive measures is irrelevant to the determination of whether the student has an impairment that substantially limits a major life activity. Once a student has been identified as having a disability, the school must then determine what, if any, regular or special education and related aids and services the student needs because of the disability. If the Section 504 team believes an intervention strategy would be effective in addressing the student's needs, then the team could consider including those interventions as part of the student's Section 504 Plan.

Information provided by School staff also suggests that the School has a requirement that parents/guardians must provide documentation of a formal diagnosis to initiate the Section 504 process. OCR notes that this requirement is not referenced in the District's Section 504 procedures. Section 504 does not require a medical assessment as a precondition to a school district's determination that the student has a disability and requires special education or related aids and services due to their disability. However, if a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation, the school district must ensure that the student receives this assessment at no cost to the student's parents/guardians.

OCR also has concerns with the description of Section 504 eligibility in the School's handbook; specifically, that "Students that need support and accommodations that are more intensive than an EST plan, but not intensive enough to meet all of the special education requirements, may meet requirements for a section 504 plan. There needs to be a significant effect on school performance." A school district must evaluate a student if it believes the student has a disability



opportunity to examine their child’s educational records, an impartial hearing with an opportunity to participate and be represented by counsel, and a review procedure. Accordingly, OCR found insufficient evidence to substantiate Allegation 2 and will take no further action on it.

Allegation 3

OCR also determined that there was insufficient evidence that the District retaliated against the Student by investigating him for bullying because the Complainants engaged in disability-related advocacy on his behalf.

As an initial matter, OCR found evidence that the Complainants engaged in protected activity during the XXXXXXXX school year by advocating for the Student’s rights under Section 504 and Title II. These protected activities include: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXX; discussing the Student’s diagnosis and XXXXXXXX with District staff in the context of the Student’s challenges in the classroom; and communicating with a District administrator regarding their desire “to get a 504 plan in place for” the Student. OCR also found that the District took an adverse action against the Student on XXXXXXXX when the Principal opened a bullying investigation against him.

Assuming without deciding that OCR can infer a causal connection between the Complainants’ protected activity and the adverse action, OCR found that the District identified a legitimate, non-retaliatory reason for investigating the Student for bullying. Specifically, District witnesses told OCR that they opened a bullying investigation against the Student per the HHB Policy because they were on notice of repeated incidents over the course of a few days in which the Student targeted Student 1 during the school day.

In evaluating whether these reasons were pretext for unlawful retaliation, OCR considered evidence gathered during the investigation, including, but not limited to, information provided by the Complainants. Based on a preponderance of the evidence, OCR found insufficient evidence that the District’s explanation was pretextual.

According to the HHB Policy, the Principal is required to promptly initiate an investigation of any allegations which the Principal reasonably believes may constitute bullying. OCR determined that the decision to open the bullying investigation was consistent with the School’s policy, and that the documentation of the incidents and the District’s investigation supports the Principal’s and XXXXXXXXXXXX explanation that they believed the reported incidents could constitute bullying and that they were therefore obligated by the School’s policy and state law to open an investigation. OCR did not identify any direct evidence of retaliation or any other evidence tending to disprove the District’s non-retaliatory explanation.

The Complainants raised as evidence of retaliation that the School did not open a bullying investigation in response to their XXXXXXXX email XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. However, OCR’s investigation supports the Principal’s and XXXXXXXXXXXX explanation that the School did not open a separate

investigation because they did not have specifics from the Student or other corroborating evidence XXXXXXXXXXXXXXXXXXXX.

Based on the foregoing, OCR found insufficient evidence to substantiate Allegation 3 and will take no further action on it.

**Conclusion**

This concludes OCR’s investigation of the complaint. 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 complainants may have a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Sincerely,

/s/ Michelle Kalka

Michelle Kalka  
Compliance Team Leader

Enclosure

cc: Adrienne Shea, Esq. (by email: ashea@lynnlawvt.com)