

Jeffrey J. Butler, Esq.
LaPointe & Butler, P.C.
2143 Commons Parkway
Okemos, Michigan 48864-3987

Re: OCR Docket # 15-13-1257

Dear Mr. Butler:

This is to notify you of the disposition of the above-referenced complaint that was filed on April 29, 2013, with the U.S. Department of Education, Office for Civil Rights (OCR), against the Berkley School District (the District). The complaint alleged that the District discriminated against a student (the Student) based on disability, by failing to timely and appropriately evaluate the Student to determine if xxxxx is a student with a disability. The complaint also alleged that the failure to evaluate the Student xxxxx Student receiving several suspensions for behaviors related to her disability during the 2012-2013 school year.

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; thus, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation into the legal issue of whether the District failed to timely evaluate a student who needs or is believed to need special education or related services, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35.

OCR interviewed the Student's parent, the District's Director of Special Education, and reviewed documentation submitted by the Complainant. Prior to the completion of OCR's investigation, the District expressed an interest in resolving this complaint pursuant to Section 302 of OCR's Case Processing Manual (Manual). The District submitted the enclosed resolution agreement, described below, to resolve the complaint.

Applicable Legal and Policy Standards

The regulation implementing Section 504 states, at 34 C.F.R. § 104.33, that 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.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires recipients, like the District, to evaluate any child who, because of disability, needs or is believed to need special education or related services. Teachers, counselors, and other school staff should be aware of the District's responsibility to, at the District's expense, evaluate students who may need special education or related services and, thus, should refer for evaluation students they suspect might have a disability. One of the definitions of disability under Section 504 is any physical or mental impairment that substantially limits one or more major life activities.

Furthermore, the Section 504 regulation states, at 34 C.F.R. § 104.36, that a recipient school district shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a 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 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.

Summary of OCR's Investigation to Date

The Student was enrolled in the xxxxx school year. Documents reviewed by OCR indicate that the Student was xxxxx during the school year for xxxxx that the parent asserts were symptoms related to xxxxx, although xxxxx; in one instance, the Student was xxxxx. The Student's parent asserted that she made numerous attempts to get help from school staff and administrators to address the Student's situation and to keep the Student xxxxx. During a conversation with the xxxxx about xxxxx. The xxxxx suggested that the Student xxxxx. OCR's review of a xxxxx, from the District to the parent indicates that the xxxxx by the Student's parent and xxxxx indicated that the Student was xxxxx. The District's xxxxx further indicated that the District was xxxxx. The parent obtained xxxxx.

Documents reviewed by OCR indicated that after the Student was xxxxx and diagnosed as having xxxxx, the District continued to xxxxx, including xxxxx against xxxxx. The

Student's parent told OCR, that it was not until xxxxx that she learned that she could request an Individual Education Plan (IEP) for the Student, which she did in xxxxx. She stated that after she requested an IEP, the District then evaluated the Student. The District's xxxxx informed OCR that the Student was evaluated and identified as a student with a disability in xxxxx. After OCR explained the specific issues raised in the complaint that were of potential concern for OCR, the District indicated that it would like to resolve the complaint.

Voluntary Resolution Prior to Conclusion of Investigation

As noted above, before OCR completed its investigation, the District expressed interest in resolving the complaint pursuant to Section 302 of the *Manual*. The *Manual* provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient expresses an interest in resolving the complaint. This does not constitute an admission of liability on the part of a recipient such as the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and are to be consistent with applicable regulations.

The District has signed the enclosed resolution agreement, which, once implemented, will fully address the information obtained during the investigation in accordance with Section 504 and Title II. The agreement requires the District to: issue a written reminder to all staff and administrators responsible for identification, evaluation, and placement of students who have a disability or are suspected of having a disability that, if the District determines, based on the facts and circumstances of the individual case, xxxxx is necessary to complete an appropriate evaluation consistent with 34 C.F.R. § 104.35(a) and (b), the District must ensure that the student receives this xxxxx at no cost to the parents/guardians; and, to remind staff and administrators that if the District does not believe the student has a disability and refuses to evaluate the Student, the District must inform the parents/guardian of their procedural safeguards under 34 C.F.R. § 104.36, including their right to challenge the District's determination that the student does not have a disability requiring an evaluation through requesting an impartial due process hearing, rather than require them to obtain and/or pay for the medical assessment in order for the evaluation process to proceed.

With respect to the Student at issue, the Agreement requires the District to: conduct a meeting with the appropriate staff and invite the parent(s) to attend and or participate, or otherwise provide the parent(s) the opportunity to provide meaningful input in that meeting, to determine whether compensatory education services are appropriate for the time period between xxxxx and xxxxx, when the District did not identify xxxxx as a student with a disability, and the time period between xxxxx and xxxxx, in which any xxxxx issued may have been a manifestation of her disability; notify the Student's parent, in writing, of the determinations made at the meeting(s), including, if applicable, the type and amount of compensatory services that will be provided at the District's expense, and

that the Student's xxxxx; and, notify the Student's parent in writing of Section 504's procedural safeguards.

In light of this agreement, OCR considers the allegations in the complaint to be 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 case and take appropriate action to ensure the District's full compliance with Section 504 and Title II.

Conclusion

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. A complainant may have the right to file a private suit in Federal court, whether or not OCR finds a violation.

We appreciate the cooperation of District staff and legal counsel during the resolution of this complaint. We look forward to receiving the District's first monitoring report, which is due by xxxxx. Please send any electronic monitoring correspondence to OCRCleMonitoringReports@ed.gov. Any monitoring reports submitted by regular mail may be addressed to Denise C. Vaughn, who will be monitoring the District's implementation of this agreement. Ms. Vaughn may be reached at (216) 522-xxxx. If you have any questions about this letter, you may contact me at (216) 522-xxxx.

Sincerely,

/s/

Kelly M. Johnson
Supervisory Attorney/Team Leader

Enclosure