

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

Re: OCR Docket #15-13-1290

Dear Ms. Johnston:

This is to inform you of the disposition of the above-referenced complaint, which was filed with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Lakeview Public Schools (the District) on May 28, 2013. The complaint alleged that the District discriminated against a student (the Student) based on his disabilities by xxxxxxxx xxx from xxx Individualized Education Program (IEP) on xxxxxxxx xxx xxxxx and by xxxxxxxx xx xxxxxxxx xxx for an IEP or a Section 504 plan during the remainder of the xxxxxxxxxx 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, and 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. Section 504 and Title II prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department and by public entities, respectively. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to Section 504 and Title II. Because the Title II regulation provides no greater protection than the Section 504 regulation with respect to your allegations of disability discrimination, we applied Section 504 standards in analyzing your complaint.

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

1. whether the District failed to appropriately evaluate a student prior to a significant change in the student's placement in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.35; and
2. whether the District failed to provide a free appropriate public education to a qualified student with a disability in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.33.

During its investigation, OCR interviewed the Student's parent and relevant District witnesses and reviewed documentation provided by the Student's parent and the District. After reviewing all of the information provided, OCR finds that there is sufficient information to support that the District failed to appropriately evaluate a student prior to a significant change in the student's placement and failed to provide a free and appropriate public education (FAPE) to a qualified student with a disability in violation of Section 504. We set forth below the bases for OCR's determination.

Summary of OCR's Investigation

- Background

During the xxxxxxxx school year, the period relevant to the complaint allegations, the Student was xxxxxx xxxxx xxx and in the xxxxx grade at the District's middle school. The Student's parent told OCR that the Student has xxxxxxxxx xxxxxxxxxxxxxxxx xxxxxxxx xxxxxx including xxxxxxxxx xxxxxxxx xxxxxxxx xxxxxxx xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx xxxxxxxxx xxx xxxxxxx xxxxxxxxxxxx xxxxxxxxxxx xxxxx xxxxxxxxxxx xxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxx xxxxxxx xxxxxxx xxx xxxxx xxxxxxxx xxxxx xx xxx xxxxxxxx

Prior to the xxxxxxxxx school year, the Student was identified by the District as having a disability under the Individuals with Disabilities Education Act (IDEA) and was receiving services, aids, and supports that were set forth in an IEP that had been developed when he was at the District's elementary school. The IEP, which was still in effect as of the beginning of the xxxxxxxxx school year, stated that his disability category was xxxxxx xxx xxxxxxxxx however, the IEP noted that the Student had also been diagnosed with xxxxxx xxxxxxxx xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxx xxxxx The Student's parent stated that the IEP contained provisions related to his other impairments and did not solely address xxxxxxxx OCR's review of a copy of the Student's IEP confirmed that, in addition to xxxxxxx xxxxxxxxx the IEP included provisions such as xxxxxxxx xxxxx xx xxxxxxxxxxxxxxx xxxxxxx xx xx xxxxxxxx xxxxxxxx xxxxxxxx and xxxxxxxxx xxxxxx xxx xxxxxxxxx

- Reevaluation and Termination of IEP

The District had scheduled the Student for a reevaluation in xxxxxx xxxxx but the reevaluation was not completed until the end of xxxxxxxx xxxxx The District continued to implement the Student's IEP at the beginning of the xxxxxxxxx school year while it

reevaluated him. District witnesses stated that the reevaluation included a xxxxxx xx xxx
xxxxxxxxxx xxxxxxxx xxxxxxxx xxx xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx x xxxxxxx xx
xxxxxxxxxxxxxxxx xxx xxx xxxxxxxxxxx xxxxxxxx xxx xxxxxxxxxxx xx x xxxxxxx xx
xxxxxxxxxxxxxxxx xxxxxxxxxxx xxx xxxxxxx xxxxxxxxxxxxxx xxxxxxx xxxxxx xxxxxx xxx xxx
xxxxxxxx xxxxxxxxxxxxxxxxxxx xxxxxxxxxxx xxxxxxx xxxxxxx

X---Paragraph Redacted---X

X---Paragraph Redacted---X

On xxxxxxx xxx xxxxx the Student's IEP team met following the completion of the reevaluation and determined that the Student no longer qualified as a student with a disability under IDEA and was therefore no longer eligible for special education. In attendance at that meeting were the special education director, the multi-factored evaluation (MET) team, the Student's mathematics teacher, the assistant principal of the school, the Student's parent, and a community mental health services representative who accompanied the Student's parent.

There is no dispute that the team only made its xxxxxxx xxx xxxxx determination using IDEA eligibility standards and did not consider or discuss whether the Student would be eligible for services as a student with a disability under Section 504. For instance, with respect to several assessments that showed concerns in the areas of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx the IEP determination report stated:

X---Paragraph Redacted---X

The District employees who participated in the xxxxxxx xxx xxx meeting asserted that they did not raise the possibility of evaluating the Student for Section 504 eligibility because they believed that the Student's parent had no interest in Section 504 and was upset that the Student was found ineligible to receive services under IDEA.

- The Remainder of the xxxxxxx School Year

The Student's parent acknowledged that the District gave her information about procedural safeguards under IDEA when the District decided to remove the Student from his IEP. Rather than pursue due process, she asked the District to conduct an independent educational evaluation (IEE) under IDEA.

In the interim, in response to the parent's request that the District put the Student back on an IEP, the District convened a meeting on xxx xxx xxxxx The school's Section 504 coordinator was invited to the meeting because the IEP team thought the Student might qualify for services under Section 504. The Section 504 coordinator told OCR that no one talked to her about the Student until the xxx xxx meeting. The Section 504 coordinator said she attended the meeting, but they never had an opportunity to discuss

evaluating the Student for Section 504 eligibility because the Student's parent ended the meeting abruptly.

The Student's parent said that the Student had been doing well in school prior to the termination of the IEP in xxxxxxx xxxxx. Although he did not receive actual letter grades until the xxxxx grade, his academic progress reports while he received services through an IEP had largely been positive. According to the Student's parent, after the Student was exited from his IEP, he became overwhelmed by the workload at school and began xxxxxxx his courses. She noted that the Student had to attend xxxxxxx xxxxxxx at the end of the xxxxxxxxxx school year, which he had never had to do before, and for which she had to pay. During the course of OCR's investigation, the District provided OCR with a copy of a xxxxxxxxxx xxxxx showing that it ultimately reimbursed the Student's parent for the cost of the xxxxxxx xxxxxxx xxxxxxx course. According to the Student's parent, as a result of the Student's xxxxx xxxxxxxxxx performance, the District also required the Student to attend xxxxxxxxxx xxx xxxxx xxxxx xx xxxxxxx Monday through Thursday).

The documents OCR obtained during the investigation showed that, as of the xxxxxxx xxxxx IEP meeting, when the Student was still on an IEP and receiving services, he had xx in math and language arts and xx in social studies and science. The IEP meeting report stated that his xxxxxxx were negatively impacted by xxxxxxx xxxxxxxxxxxxxxx and his xxxxx and xxxxx grades ranged from xx xx xxx. The IEP meeting report included teachers' reports that the Student was xxxxxxxxxxx xxxxxxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxx xxxxxxx xxxxxxxxxxx xxxxxxxxxxx xx xxxxx x xxxxx xxx xxxxxxx xx xxxxxxxxxxx xxxxxxx xx xxxxx xx xxxxxxx xxxxxxxxxxxxxxx. The Student's final grades for the 2012-2013 school year were Ds in all of his academic courses except science, for which he received an F.

All of the Student's academic teachers from the xxxxxxxxxx school year stated that the Student was xxxxx xx xxxxxxx information. The xxxxxxx teacher said he needed a lot of xxxxx xxxxx to get work done, and that, although he could discuss the materials they covered in class and seemed to understand the concepts, his xxxxx scores were not always indicative of that.

According to both the District and the Student's parent, the Student's general education academic teachers continued to informally provide the Student with accommodations in their classrooms throughout the xxxxxxxxxx school year, even after he was taken off the IEP. The Student's teachers said they did not meet and discuss the Student as a group or with other District staff members. None of the teachers suggested that the Student be evaluated to determine his eligibility under Section 504.

The xxxxxxx teacher stated that the Student probably failed his xxxxxxx class for a combination of reasons, including that he did not always do xxx xxxxxxxxxx although he received xxxxx xxxxx to complete the work. He also struggled with xxxxxxx but his xxxxx were modified and he had the option of taking them in the xxxxxxxxxx xxxxx (which he did not always do). The xxxxxxx teacher stated that most of the students who took xxxxxxxxxx xxxxx or took xxxxx in the xxxxxxxxxx xxxxx were on IEPs or Section 504 plans, but she

also provided these xxxxxxxxxxxxxxxx for several students who were not identified as having disabilities. She explained that a xxxxxxxx xxxx might have the same number of questions but xxxxx multiple choice options for each question. She also xxxxxxxxxxx the Student's assignments, gave him xxxxx xxxx to complete his xxxxxxxxxxx and xxxxxxxx xxxxxxxxxxx his xxxxx so that he did not have to do as much xxxxxxxx

The xxxxxxxxxxx teacher said he also provided the Student with xxxxxxxxxxxxxxx many of which he said he makes available to any student who needs them, not all of whom are on IEPs or Section 504 plans. In addition to xxxxx xxxx on assignments, he said that he required the Student to xxxxxxxx xxxx xxx xxxxxxxxxxx in the assignments because the Student had difficulty xxxxxxxxxxx xxx xxxxxxxxxxx on time, allowed the Student to use a xxxxxxxx xxxxxxxxxxx (and provided extensive training on how to use it), offered xxxxx help for the Student xxxxxx xxx xxxxx school, and gave the Student the option of taking his xxxxx in the xxxxxxxxxxx xxxxx He said he based the xxxxxxxxxxxxxxx on the Student's needs, and, specifically, the Student's difficulty xxxxxxxxxxx xxxxxxxxxxx xxx xxxxxxxxxxx xxxxxxxx

The xxxxxxxx xxxx teacher stated that she allowed the Student xxxxx xxxx on tests, quizzes, and homework, and the option to take tests and quizzes in the xxxxxxxx xxxxx She also xxxxxxxx his tests and quizzes to xxxxxx xxx xxxxx The xxxxxxx xxxxxxx teacher could not specifically recall whether she gave the Student xxxxx xxxx on tests, but said that she did allow some of her students that xxxxxxxxxxxxxxxx She stated that she also permitted him to turn homework in xxxxx xxx xxxxxxxxxxx xxxxxxx xx xx xxx xxx This was a class policy and applied to all of her students.

- The Student's Current Section 504 Plan

Following the completion of the IEE referenced above, the District, on xxxxxxxxxxx xxx placed the Student on a Section 504 plan at the conclusion of a Section 504 meeting held on the same date. The Section 504 plan identifies the Student as having xxxxxxx xxxxx xxx xxx that substantially his limit major life activities because of xxxxxxxxxxx xxxxxxxxxxx xx xxxxxxx xxxxxxxxxxxxxx xxx xxxxxxxxxxxxxxxxxxx The plan provides that the Student is to receive xxxxxxxx xxxx xx xxxxxxx xxxxxxxxxxx xxx xxxxxxxxxxxxxx xx xxxxxxx xxxxx xxx xxxxxxxxxxxxxx xxxxxxx xxx xxxxx xxxxxxxxxxx xxx xx xxxxxx xx xxx xx xxxxxx xxx xx xxxxxx xxx xxxxxx xxxxxxxxxxx xxxxxxxxxxx xxx xxx xxxxxxx xxxxxxxxxxx xxxxxxx xxxxxxx xxxxxx xxx xxxxxxx xxxxxxxxxxx xxx xx xx xxxxxxxxxxx xx xxxxxxxxxxx xxx xxxxxxx xxxxxxx On xxxxxxx xxx xxxxx the team amended the Student's Section 504 plan to add a provision requiring xxxxxxxxxxx xxxxxxxxxxx as necessary.

As of late xxxxxxx xxxxx the Student was receiving a xxxxxxx grade in his math class and had a x in language arts, even though he scored above the District average in both of these subject areas on the state proficiency assessment.

- The District's Section 504 Policies and Procedures

OCR's review of the District's written policies and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services under Section 504 showed that they meet the standards set forth in the Section 504 statute and implementing regulations. In addition, the District has specifically attached to, and adopted as part of its administrative guidelines, the Section 504 regulation provisions set forth at 34 C.F.R. §§ 104.31-104.39.

The Section 504 coordinator at the school said that, in practice, Section 504 evaluations are usually triggered by a noticeable change or problem with a student, such as if a parent were to notify her that a child was recently diagnosed with ADHD, or if teachers raise a concern that a student is struggling academically, struggling with homework at home, or showing behavior issues in class.

The information obtained by OCR, however, showed that District staff did not implement the District's written policies or procedures or stated practice under Section 504 with regard to the Student during the xxxxxxxx school year.

Applicable Regulatory Requirements

Section 504 requires that school districts provide a free appropriate public education (FAPE) to qualified students with disabilities in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities. 34 C.F.R. §§ 104.3(j)(1), 104.33. 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 students without disabilities are met and that are developed in accordance with the procedural requirements of the Section 504 implementing regulation at 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards. Implementation of an IEP developed in accordance with IDEA is one means of meeting these requirements.

Major life activities, as defined in the Section 504 regulation at 34 C.F.R. 104.3(j)(2)(ii), as amended by the Americans with Disabilities Amendments Act of 2008, include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, and working. Major life activities also include the operation of major bodily functions, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. These lists are not exhaustive. The determination of whether a student has a disability under Section 504 should not be limited by a school district to consideration of an impairment's effect on the student's learning.

In determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, a school district must not consider the ameliorating effects of any mitigating measures that student is using. Mitigating

measures that may not be considered include: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

School districts may always 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.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires recipient school districts to conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35(b) of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Subsection (b) requires a recipient school district 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 Section 504 regulation at subsection (b) also requires a recipient school district 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.

Analysis and Conclusion

The evidence shows that prior to the beginning of the xxxxxxxx school year the District was aware that the Student might have impairments that substantially limited one or more major life activities. The District was aware and did not dispute, for example, that the Student had been diagnosed with a number of impairments, and that some of the symptoms of those impairments, for example xxxxx had been observed by District staff in the school environment. His teachers reported that he was frequently xxxxxxxxxxxx required xxxxxxxxxxx xxxxxxxxxxx and xxxxxxxxxxx xxxxxxxxxxx xx xxxxx x xxxxx xxx xxx xxx xxx xx xxxxxxx xxxxxx xx xxx xx xxxxxx xxxxxxxxxxx All of the Student's teachers noted that he xxxxxxxx information very slowly, which also was noted by the speech pathologist. The Student's grades at the end of the xxxxxxxx school year indicate that the Student had struggled academically, receiving xx and one x as final grades.

Based on the foregoing information, which was known to the District, the District should have recognized its obligation to evaluate the Student in accordance with the requirements of 34 C.F.R. § 104.35(b) to determine his appropriate placement and/or related services under Section 504, regardless of his need for special education services. However, instead, the District only considered IDEA eligibility in its reevaluation process and decision to terminate the Student's IEP in xxxxxxx xxxxx The District

acknowledged that it did not consider whether the Student would be eligible for placement and services under Section 504 and did not evaluate him again at any point during the xxxxxxxx school year for Section 504 eligibility. The District's failure to appropriately evaluate the Student under Section 504 resulted in a denial of FAPE to the Student from the date of the termination of his IEP on xxxxxxxx xxx xxxxx through xxxxxxxx xxx xxxxx when the District placed the Student on a Section 504 plan.

Based on the foregoing, OCR finds that the evidence is sufficient to conclude that the District failed to appropriately evaluate a student prior to a significant change in the student's placement and therefore failed to provide a FAPE to a qualified student with a disability in violation of Section 504.

To resolve this violation, however, the District voluntarily submitted the enclosed agreement on December 5, 2013. The agreement requires the District to reconvene the Student's Section 504 team to determine the compensatory education services necessary to address the District's failure to provide the Student with a FAPE for the period of time from xxxxxxxx xx xxxxx through xxxxxxxx xxx xxxxx. Additionally, the agreement requires the District to provide training to the middle school staff on the general requirements of Section 504 and Title II concerning the identification, evaluation, and placement of students with disabilities, including the definition of disability under Section 504.

OCR will monitor the implementation of the agreement. If the District does not fully implement the agreement, OCR will reopen the investigation and take 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 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 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.

We look forward to receiving the District's first monitoring report by January 6, 2014. The report should be directed to Mr. xxxxxx xxxxxxxx who will be monitoring the District's implementation of the agreement. Mr. xxxxxx may be reached at xxxxxxxxxxxxxx@ed.gov or at (216) 522-xxxxx Thank you for the cooperation of District staff during OCR's investigation and resolution of this complaint. If you have questions about this letter, you may contact Brenda Redmond, the acting team leader, at (216) 522-xxxxx

Sincerely,

/s/

Catherine D. Criswell
Director

Enclosure