

September 12, 2014

Julia Bauer, Esq.
Scott, Scriven & Wahoff LLP
250 East Broad Street
Suite 900
Columbus, Ohio 43215

OCR Docket: #15-14-1143

Dear Ms. Bauer:

This letter is to notify you of the disposition of the complaint filed on March 17, 2014, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Elida Local School District (the District), alleging that the District discriminated against a student (the Student) on the basis of his disability. Specifically, the complaint alleges that from xxxxxx xxxx through xxxxx xx xxxxx the District failed to properly and timely evaluate the Student to determine whether he is a student with a disability xxxxxxxx xxxxxxxxxxxxxx and failed to provide the Student's parents with notice of their procedural rights and safeguards.

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 Academy is subject to these laws. OCR therefore had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following 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 evaluate 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 has failed to 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 in violation of Section 504’s implementing regulation at 34 C.F.R. § 104.36; and
- whether the District has failed to take appropriate steps to ensure that communications with a student with a disability are as effective as communications with others in violation of Title II’s implementing regulation at 28 C.F.R. § 35.160(a).

OCR investigated the complaint by reviewing documentation submitted by the Complainant and the District. In addition, OCR interviewed the Student’s parent as well as District administrators and staff. Based on a careful analysis of the information, OCR has determined that the evidence is sufficient to support a finding that the District discriminated against the Student, as alleged, for the reasons set forth below.

Summary of OCR’s Investigation

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A. Evaluation, Placement, and Denial of FAPE

The Section 504 implementing regulation, at 34 C.F.R. § 104.33(a), requires recipient school districts to provide a free appropriate public education (FAPE) to each qualified student with a disability in the recipient's jurisdiction, regardless of the nature or severity of the disability. An appropriate education is defined, at 34 C.F.R. § 104.33(b)(1), as the provision of special or regular education and related aids and services that are designed to meet the individual educational needs of the student with disabilities as adequately as the needs of students without disabilities are met and that are based on adherence to procedures that satisfy the educational setting, evaluation, placement, and procedural safeguards requirements set forth in the Section 504 implementing regulation at 34 C.F.R. §§ 104.34-104.36. For example, placement decisions are to be made based on evaluation data by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

34 C.F.R. § 104.35(c)(3). The Section 504 implementing regulation also states that implementation of an IEP developed in accordance with IDEA is one means of meeting this standard. 34 C.F.R. § 104.33 (b)(2).

OCR does not, except in extraordinary circumstances, review the results of individual placement and other educational decisions, so long as the school district complies with the procedural requirements of the Section 504 regulation.

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. See, e.g., *Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities* (OCR 3/17/11).

- **Analysis and Conclusion**

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Based on the foregoing, OCR finds that there is sufficient evidence to support that the District failed to identify and evaluate the Student to determine his eligibility for services under Section 504 and otherwise failed to follow the procedural requirements of 34 C.F.R. §104.35 pertaining to educational setting, evaluation and placement. In addition the evidence is sufficient to establish that, because of these failures, the District failed to provide the Student with a FAPE in violation of 34 C.F.R. §104.33.

B. Procedural Safeguards

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.

- **Analysis and Conclusion**

The Complainant first provided the District with notice of the Student's suspected disability in xxxx xxxxx and thereafter raised the issue on numerous occasions throughout the school year while also requesting an IEP for the Student. At no time between xxxx xxxx xxx xxxxx xxxx did the District notify the Complainant of whether it had decided to evaluate the Student for eligibility under Section 504 or IDEA, or whether it had determined that the Student was not eligible to receive services under Section 504 or IDEA. Moreover, the District did not include the Student's parents in any meetings at which it decided xx xxxx xxx xxxxxxxx xxx xxx xx xxx xx xxxxxxxx xxx x xxxxx xxxxxxxx

The District apparently made an internal decision that the Student was not eligible for services under IDEA sometime in xxxxxxxxxx xxxxxxx xxxxxx xx xxxxx xxxxxxxxxxxxxxxxxxx xxxxxxxx xxx xxxxxxxxxx xxxxxxxxxxxxxxxxxxx xxx xxx xxxxxxxxxx xxxxxxxxxxx xxxxxxxxxx but never explicitly communicated that decision to the Complainant until xxxxxxxxxx xxxxxx Nor did it inform her of her right to challenge the decision until xxx xxxxxx xx xxxxxx Section 504 meeting. Therefore, the Complainant was given neither a decision to challenge, nor the information she needed to challenge it until the school year was almost completed.

Based on the foregoing, OCR finds that there is sufficient evidence to support that the District failed to provide the Complainant with information regarding procedural safeguards in a timely fashion, in violation of the Section 504 regulation at 34 C.F.R. § 104.36.

C. Effective Communication

Title II requires, at 28 C.F.R. § 35.160(a), that public entities take appropriate steps to ensure that communications with persons with disabilities are as effective as communications with others. The Title II regulation, at 28 C.F.R. § 35.160(b), requires that a public entity furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. The Title II regulation states that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.

In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

When interpreting what constitutes “primary consideration,” guidance provided by the Department of Justice in Appendix A to the regulation states:

As noted in the preamble to the 1991 Title II regulation, and reaffirmed here: ‘The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the

request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.’

28 C.F.R. Part 35, App. A (2010).

- **Analysis and Conclusion**

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The District did not take appropriate steps to ensure classroom communication with the Student were as effective as classroom communication with other students without disabilities. Likewise, the District failed to give primary consideration to the parent’s and the Student’s request for xx xx xxxxxx when determining whether or what type of auxiliary aid the Student should receive. Based on the foregoing, OCR finds that there is sufficient evidence to support that the District failed to ensure that its communications with the Student were effective, and denied him an equal opportunity to participate in, and enjoy the benefits of, its program, in violation of the Title II regulation at 28 C.F.R. § 35.160.

Resolution

To resolve the above compliance findings, the District submitted the enclosed resolution agreement (the Agreement) on September 12, 2014. Under the terms of the Agreement, the District will determine what compensatory education or other remedial services the Student requires for xxxxxxxxx school year, during which period the District failed to conduct a timely and proper evaluation of the Student under Section 504 plan. The Agreement also requires the District to provide the Student with xx xx xxxxxx to ensure his communications in the classroom are as effective as those for students without disabilities, and requires the district to notify and train administrators and staff on their obligations under Section 504, including on their responsibilities related to the identification, evaluation and placement of students with disabilities and guidelines for the required provision of notice to parents of their procedural rights and safeguards.

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. 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.

OCR appreciates your cooperation and that of the District during the investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, please contact me at xxxxx xxxxxxxxxx For questions about execution of the Agreement, please contact xxx xxxxxxxx xxxxxxx xxxxxxxxxx who will be monitoring the District's implementation, by e-mail at xxxxxxxxxxxxxxxxxxxxxxxx xx xx xxxxxxxxxx xx xxxxx xxxxxxxxxx We look forward to receiving the District's first monitoring report by September 30, 2014. Should you choose to submit your monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov .

Sincerely,

/s/

Donald S. Yarab
Supervisory Attorney/Team Leader

Enclosure