



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

November 7, 2014

Kathryn I. Perrico, Esq.
Britton Smith Peters & Kalail Co. L.P.A.
3 Summit Park Drive, Suite 400
Cleveland, Ohio 44131

Re: OCR Docket #15-14-1156

Dear Ms. Perrico:

This is to notify you of the disposition of the above-referenced complaint against Benton Carroll Salem Local School District (the District), which was filed on March 24, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR). The complaint alleged that the District discriminated against two students (the Students) on the basis of disability xxxxxxxxxxx xxxxx xxx xxxxxxxx xxxxxxxxxxxx. Specifically, the complaint alleged that the Students were excluded from the general education setting including, but not limited to, middle school choir concerts, fundraising activities, and home economics class. The complaint also alleged that the District did not have an evacuation plan for the Students in the case of an emergency.

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 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 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.

Because the regulation implementing Title II provides no greater protection than the Section 504 implementing regulation with respect to this case, OCR applied Section 504 standards. Based on the complaint allegations, OCR investigated the following legal issues:

- whether the District afforded qualified persons with disabilities an opportunity to participate in and benefit from the District's emergency-related services that is not

equal to or as effective as that afforded others, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4(b); and

- whether the District failed to educate disabled students with non-disabled students to the maximum extent appropriate in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.34(a) and (b).

During its investigation to date, OCR interviewed the Students' parent and reviewed documents and information provided by the District. Prior to the completion of OCR's investigation, the District developed and implemented an emergency evacuation plan for the Students. Accordingly, OCR has determined that allegation has been resolved by actions taken by the District. With regard to the remaining allegation, the District conceded that the Complainant's factual assertion that the Students were not receiving information regarding extracurricular and after-school activities, such as the choir concert and fundraising events, was accurate, therefore, OCR finds that the District's actions did not comport with the requirements of Section 504. We set forth below the basis for OCR's determination.

Applicable Legal and Policy Standards

The regulation at 34 C.F.R. § 104.34(a) requires that a recipient school district educate, or provide for the education of, each qualified student with a disability in its jurisdiction with persons without disabilities to the maximum extent appropriate to the needs of the person with a disability. A recipient is required to place a student with a disability in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.

Also, the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(iii), requires a recipient to provide students with disabilities with aids, benefits and services that are as effective as those provided to students without disabilities. The Section 504 implementing regulation at 34 C.F.R. § 104.4(b)(1)(iv) provides that recipients may not on the basis of disability provide different aids, benefits or services to students with disabilities except when necessary to provide such students with aids, benefits or services that are as effective as those provided to others.

Under Section 504 and Title II, a school district must ensure that students with disabilities have an equal opportunity to benefit from services provided to others, such as emergency evacuation procedures, and cannot provide different services unless necessary to provide students with disabilities with services that are as effective as those provided to others. Public school districts must also make reasonable modifications in policies, practices or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless they can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). OCR has held that an emergency evacuation is an aid, benefit, or service provided by a recipient, and, as such, pursuant to Section 504, students with disabilities

must be provided with an evacuation plan that is as effective as the plan provided to students without disabilities.

Summary of OCR's Investigation to Date

During the xxxxxxxx school year, the Students were in the xxxxxxx xxxxx at Oak Harbor Middle School (the School). During the xxxxxxx school year, the Students' parent requested that the Students remain in the xxxxxxx xxxxx for an additional year so they could stay in the same classroom with the same teacher. The District agreed.

X---PARAGRAPH REDACTED---X

- **Evacuation Plan**

The Students' parent indicated that prior to the 2014-2015, the District did not have an evacuation plan for the Students. During the course of our investigation, the District acknowledged that it had no evacuation plan in place for the Students. After the complaint was filed, the District informed OCR that it had developed an evacuation plan in collaboration with the local fire department, the ESC, the Students' parent and School staff. The District submitted to OCR copies of emails between the Students' teacher, District staff, ESC staff and the Students' parent discussing the development of an evacuation plan for the Students. The District also submitted to OCR a copy of the finalized evacuation plan. OCR reviewed the plan and found it to reasonable and appropriate.

OCR confirmed with the Students' parent that the Students' evacuation plan had been finalized and that the District had conducted a practice drill with the Students. The practice drill included the Fire Department, the principal, the Students' physical therapist and occupational therapist, and their teachers. The Students' parent stated that she was satisfied with the plan and the practice drill.

Accordingly, the evidence shows that the District, in consultation with the Students' parent, the Students' teacher, and the ESC, created an evacuation plan, and this allegation is resolved.

- **Exclusion from Certain Classes, School Events, and Activities**

The Students' parent stated that during the xxxxxxxx school year, the Students were excluded from home economics, art, health and music classes. She said that during the first semester of the xxxxxxxx school year, the Students were not in home economics because xxx xxxxxxx xxx xxxxxxx xxx xxx xxxxxxx xxxxxxx xx xxxxx xx xxx xxxxx xxx xxx xxxxxxx. The Students' parent added that during the second semester, one of the Students was enrolled in home economics but the other Student was not because of X xxxxxxx xxxxxxxxxxx xxx xxxxxxx xxx xx xx xxx xxxxxxx xxxxxxx xxx xxxxxxx xxxxxxx.

The Students' parent also said that during the xxxxxxxx school year, the Students

attended choir class the entire school year. However, the Students' parent was not given adequate notice regarding choir concerts, making it difficult for the Students to participate. The Students' parent recalled that she received a note on a Friday afternoon regarding an upcoming choir concert. The note asked if she wanted the Students to participate in the concert, which was scheduled for Monday evening. The Students' parent wanted the Students to participate, but when they arrived at the concert on Monday, the Students did not have a choir vests like the other students and the Students had to sit a part from the rest of the choir on the stage.

The Students' parent also explained that the Students were not included in any of the District's after school or extracurricular activities. As examples, the Students' parent recounted that the District's sponsors a "twirl clinic" open to any child in grades 3-8, which students would attend on a Friday afternoon and then be part of the football game that night. The Students' parent said she learned about the clinic through a Facebook post by the instructor, but did not receive any notification from the School about the event. She also mentioned a "Make-A-Wish" fundraising event that was held at the middle school. The Complainant did not get information about event and would have attended if she had been aware.

The Students' parent explained that School students are typically informed about extracurricular, after-school activities and upcoming events, such as the choir concert, during morning announcements and, if they are interested in the activity, they can get more information from the School's office. This system does not work for the Students and the Students' parent was never informed about any of the District's extracurricular, after-school activities or upcoming events.

The District confirmed that xxxxxxxx xxxxxxxx at the School take one year (two semesters) of choir as their music instruction, one semester of home economics, and one semester of health. XXXXXXXX grade students do not take art class or physical education and no music class, other than choir, is offered. The District acknowledged that the Students did not take home economics the first semester of the xxxxxxxxxxxx. The District felt that since the regular teacher was xxx xx xxxxxxxxxxxx xxxxxxxx there would be different substitute teachers in the class through the first semester and this might be difficult for the Students and the substitute teachers. The District stated that the Students are currently in home economics this semester and will take health class next semester with their general education peers. The Students' parent confirmed that this was accurate and the Students were enrolled in all elective classes that the general education students take throughout the school year.

Regarding informing the Students' parent about extracurricular, after-school activities, and upcoming events, the District acknowledged that this did not occur and the Students were being excluded from these activities as a result. The District indicated that it would correct this problem.

Conclusion

Based on the above, OCR finds that the Students were not receiving information regarding extracurricular, after-school activities and upcoming events, such as choir concerts and fundraising events, therefore, OCR finds that the District's actions did not comport with the Section 504 regulation at 34 C.F.R. § 104.34(a). To resolve these compliance concerns, the District submitted the enclosed agreement on November 7, 2014.

Under terms of the Agreement, the District will develop a procedure by which a printed copy of the morning announcements, along with any flyers, applications, or other documents pertaining to extracurricular, after-school activities and upcoming events, are provided to the families of each student in the xxxxxxxxxxxxxxxxxxx xxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxx at Oak Harbor. The Oak Harbor Middle School principal will issue a written directive to all middle school staff explaining the procedure outlined to ensure these students receive this information. Further, the District will issue a written directive to all middle school and high school administrators and special education staff that the Students cannot be excluded from any elective or "special" classes, including, but not limited to, art, music, home economics, health and physical education, unless such an exclusion is decided by the Students' IEP teams and reflected in the Students' IEPs.

In light of the signed Agreement, OCR finds that this complaint is resolved, and OCR is closing its 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 complaint and resume its investigation of the complaint allegation.

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 individual may file another complaint alleging such treatment.

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.

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

We appreciate the cooperation 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, you may contact xxxxxxxx xxxxxxxx xx xxxxx xxxxxxxxx xx xx
xxxxxxxxxxxxxxxxxxxxxxxxxxxx

We look forward to receiving the District's monitoring report by December 15, 2014. The report should be directed to xxxxxxxx xxxxxxxxx attention.

Sincerely,

/s/

Donald S. Yarab
Supervising Attorney/Team Leader

Enclosure