



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

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REGION XV
MICHIGAN
OHIO

July 8, 2015

Roy H. Henley, Esq.
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, Michigan 48826

Re: OCR Docket #15-15-1094

Dear Mr. Henley:

This letter is to notify you of the disposition of the complaint filed on December 22, 2014, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Howell Public Schools (District), alleging discrimination against a student (Student) on the basis of disability. Specifically, the complaint alleged that the District discriminated against the Student in the fall of 2014, by refusing to evaluate xxx for areas of suspected disability because xxx was xx x xxxxxxxxxxxx xxxxxxxxxxx xxxxxxxx xxxxxxxx the District.

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 U.S. Department of Education (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. Therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the legal issue of whether the District failed to conduct an evaluation of a student who, because of disability, needs or is believed to need special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35.

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I. Summary of OCR's Investigation

During the course of its investigation, OCR interviewed the Complainant, the principal of Howell High School and Freshman Campus (the School), the District's special education director, and a District social worker. It also reviewed documentation submitted by the District.

[x--- paragraph redacted---x]

In the summer of 2014, as the Student's parent considered various placements for the xxxxxxxx xxx xxxx xxxxx, she requested a meeting with the District to learn about the program at Howell High School, and what services could be provided to the Student. The meeting occurred on xxxx xx xxxx, and included the Student's parent, the high school principal and the District's special education director.

The Student's parent and District staff provided slightly different accounts of the discussion that occurred at the xxxx xx meeting.

[x--- paragraph redacted---]

Both the principal and the special education director recalled that the parent told them she was seeking an Individualized Education Program (IEP), special education, and an emotional impairment placement for the Student. The principal said the parent did not provide information about any specific diagnosis, but did mention that the Student frequently xxxx. Likewise, the special education director did not recall discussion of diagnoses, but did recall the parent mentioning a prior xxxxxxxxxxxxxxxxxxxx and xxxxxxxxxxx xxxxxxxxxxx. He said they asked if the Student had a current IEP, and that the parent confirmed that she did not. Both the principal and special education director said they discussed with the parent the possibility of an evaluation commencing upon enrollment, but that the first step would be determining the Student's schedule and obtaining teacher observations of the Student in the general curriculum. They said that because some of the general education classes were co-taught with special education teachers, it was possible that the Student would not need further evaluation. The principal and special education director said they asked the parent to provide any information related the Student's disability needs upon enrollment.

Staff said they did not provide procedural safeguards at this time because the parent was still "shopping" for educational programs and uncommitted to the District by the end of the meeting. They did not recall specifically reviewing the steps of the evaluation process with her or explaining how a subsequent request for evaluation could be made. It is undisputed that the parent left the xxxx xx meeting without making a decision as to whether to enroll the Student.

The parent enrolled the Student on xxxxxx xx xxxx. Her first day of school was xxxxxxxxxxx x xxxx. The parties agree that the Student's family did not provide further information regarding xxx needs upon enrollment, nor did xxx contact anyone further regarding an evaluation at that time. The Student did not have any behavioral issues in the first few weeks of school and did well academically. No evaluation of the Student was conducted, and no other

supports were provided, aside from one teacher suggesting in late September that the Student participate in a leadership class at the school to support students with low self-esteem issues.

On xxxxxxx x xxxx, the Student reported an xxxxx issue to the District, which staff immediately reported to xxxxx xxxxxxxxxxx xxxxxxxx as well as the Student's parents. In response, the Student's family reminded the District of the Student's xxxxx xxxxxxx xxxxxxx and history of making xxxxxxxxxxx xxxxxxxxxxx. Around this time, the Student began speaking with a social worker at the school about various issues including bullying by peers, difficulty making friends, and coping skills for dealing with anger.

[x--- paragraph redacted---x]

Over the next several weeks, District staff stayed in frequent contact with the Student's family to determine when xxx would return. The date changed several times. During the Student's xxxxxxxxxxxxxxxxxxx, the District provided homework through xxxxxxxx xx, at which point the family requested that it no longer be sent.

[x--- paragraph redacted---x]

The District responded by letter to the family dated xxxxxxxx x xxxx, expressing a willingness to "hear about [the family's] concerns" and "discuss moving forward with an evaluation," but stressed that the actual evaluation could not begin until the Student xxxxxxxx xx xxxxx. The letter enclosed procedural safeguards.

On xxxxxxxx x xxxx, upon receipt of a records request from the Student's xxxxxxxx xxxxxxxxxxx placement at xxxxxxxx xxxxxxx in xxxxxxxx, xxxxxxxx, the District dis-enrolled the Student. Staff told OCR this is the typical procedure upon receiving such a request from another school. On xxxxxxxx x xxxx, the Student's parent and the special education director spoke via telephone. According to the special education director's notes documenting this conversation, he encouraged the parent to contact him the week prior to the Student's xxxxxxxx so the evaluation process could begin promptly upon xxx return to the District.

The parent filed xxx OCR complaint on xxxxxxxx xx xxxx. The Student was released from xxxxxxxxxxx xxxxxxxxxxx in mid-xxxx xxxx, and re-enrolled in the District. The District obtained consent to evaluate on xxxxx xx xxxx, and commenced an evaluation in the areas of academics, behavior, social/emotional functioning, and occupational therapy. The District adopted an IEP for the Student on xxxxx xx xxxx. The parent said xxx gave substantial input into the IEP and that xxx was satisfied with the outcome of the evaluation process. However, xxx said the process did not include any discussion of xxxxxxxxxxx xxxxxxxx for the Student.

As part of its investigation, OCR asked the District to explain the process it uses to evaluate students who are new to the District for areas of suspected disability. Staff explained that if a student enrolls in the District without an IEP, and there is no specific request by the parent for evaluation, the District uses its general "child find" process to observe the student and determine whether he/she may need additional supports. A team of staff will observe the student in the general curriculum and try to understand how the student is functioning. If the team determines

that an evaluation is indicated under Section 504 or IDEA, they will then seek consent and begin the process of collecting additional data and determining placement. The special education director does not become involved unless the evaluation occurs under IDEA; otherwise, the principal and assistant principal oversee the process. If the referral is for a special education evaluation, a teacher consultant assigned to the student will oversee the process. Additionally, at any point following enrollment, the parent may also request evaluation under Section 504 or IDEA, provide consent, and begin the evaluation process described above.

Although the principal and special education director both said they were knowledgeable about both Section 504 and IDEA, the social worker said she was unaware of the District's policies pertaining to disability evaluation, and did not feel it was her role to make referrals under Section 504. She said she had convened "staffing" meetings regarding students who needed additional support, but that these had never led to Section 504 evaluations. She said she believed Section 504 plans were only for students with medical issues.

OCR reviewed the District's Section 504 policies and procedures regarding the identification, evaluation, and placement of students with disabilities, which are available on the District's web site. Specifically, OCR reviewed its Administrative Guidelines 2260.01A – Section 504/ADA Prohibition Against Discrimination Based on Disability and 2260.01B – SECTION 504/ADA – Complaint and Due Process Procedures. The policy section related to identification, evaluation, and placement of students with disabilities comported with Section 504 requirements.

II. Relevant Law and Policy

Section 504 and the ADA define disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such impairment; or (3) being regarded as having such an impairment. The definition of disability is construed broadly and the determination of whether an individual has a disability should not demand extensive analysis.

The ADA also provides a non-exhaustive list of major life activities, which include, but are not limited to: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. A student will be deemed to have a disability under Section 504 and to be entitled to a free and appropriate public education (FAPE) if the student has a mental or physical impairment that substantially limits one or more major life activities.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a recipient school district to evaluate any student who, because of disability, needs or is believed to need special education or related services. The Section 504 regulation does not set out specific circumstances that trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances in each case.

Recipient school districts must establish standards and procedures for initial evaluations and

periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

Finally, the Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b) provides that recipients must provide a FAPE to each qualified student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the disability. For purposes of FAPE, the provision of an appropriate education is 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 based upon adherence to procedures that satisfy the specific procedural requirements set forth in the Section 504 regulation at 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards.

III. Analysis and Conclusion

The evidence obtained above demonstrates that at a meeting with District staff on xxxx xx xxxx, the Student's parent inquired about services for the Student, and provided information to District staff regarding the Student's disabilities. Present at the meeting were the Student's parent, the high school principal and the District's special education director. Although there is some dispute regarding the specific information provided, the principal and special education director recalled receiving information regarding the Student's prior xxxxxxxxxxxxxxxx, and xxx issues with xxxxx and xxxxxxxxxxx xxxxxxxxxxx.

The evidence demonstrates that the District took no steps to begin an evaluation process based on the information it received during the xxxx xx meeting, nor did it provide the Student's parent with any procedural safeguards. Additionally, the District made no attempt to obtain consent to initiate an evaluation of the Student once xxx began attending the high school in the District on xxxxxxxxxxx x xxxx. It is undisputed by the parties that by xxxxxxxx x xxxx, the Student's parent provided the District with specific information regarding the Student's xxxxx xxxxxxx xxxxxxxx and issues with making xxxxx xxxxxxx. The following week, the District learned of the Student's xxxxxxxxxxx xxxxxxxxxxxxxxxx, and received further information from the parent about the Student's xxxxxxxx xxxxx xxxxxxxxxxx xx xxxxx, including a xxxxxxxxxxxxxxxx evaluation. The District failed to initiate an evaluation of the Student until she returned to school after her xxxxxxxxxxxxxxxx in xxxxx xxxx.

OCR finds that the evidence is sufficient to determine that the District failed to timely evaluate the Student in violation of 34 C.F.R. § 104.35, during the period xxx was enrolled in the District

from xxxxxxxxxxx x xxx xx xxxxxxxxxxx x xxxx, and that no assessment was done to determine the need for compensatory education services for the Student for that period of time. OCR also finds that no such assessment has been done, nor compensatory education services provided since the Student re-enrolled in the District on or about xxxxx xx xxxx.

On July 7, 2015, the District submitted the enclosed signed Agreement to OCR, which, once fully implemented, will resolve the complaint violations regarding the deficiencies in its 504 policies and procedures and the failure to evaluate the Student fully and appropriately, and will ensure the District's compliance with Section 504 and Title II.

IV. Conclusion

Based on the information above, OCR is closing this complaint effective the date of this letter. 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, coerced, 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.

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 have the right to file a private suit in federal court, whether or not OCR finds a violation.

OCR appreciates the District's cooperation during the investigation of this complaint. If you have any questions, please contact me at (xxx) xxx-xxxx, or xxxxx.x.xxxxxxx@ed.gov. For questions about implementation of the Agreement, please contact xxxxxx xxxxxxxx at (xxx) xxx-xxxx, or by email at xxxxx.xxxxxxx@ed.gov, who will be monitoring the District's implementation of the Agreement. We look forward to receiving the District's first monitoring report by October 15, 2015.

Sincerely,

/s/

Kelly M. Johnson
Supervisory Attorney/Team Leader