



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

1350 EUCLID AVENUE, SUITE 325  
CLEVELAND, OH 44115

REGION XV  
MICHIGAN  
OHIO

November 16, 2018

Rhonda Porter, Esq.  
General Counsel  
Akron Public Schools  
70 N. Broadway  
Akron, Ohio 44308-1911

Re: OCR Docket No. 15-15-1305

Dear Ms. Porter:

This letter is to notify you of the disposition of the above-referenced complaint filed on June 1, 2015, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Akron Public Schools (the District) alleging that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleged that the District discriminated against the Student when:

1. From January through March 2015, the District did not allow the Student to XXXXXX XXXX XXXX the previous grading period that she XXX XXXXXX XXX XX XXXXXX related to her disability.
2. From January 2015 through the end of the school year the District created a hostile environment for the Student based on disability because XXX XX XXX XXXX XXXXX XXXXXX XXX XXXXXX XXX XXXX XXXX XXXXXX XXXXXX XXXXX XXXX XX XXXXXXXXXXXXXXXXXXXXXXX.
3. During the fourth grading period of the 2014-2015 school year the District failed to implement the Student's Section 504 plan when a teacher refused to allow the Student to XXX X XXXXXX XXXXXXXXXXXX.
4. During the fourth grading period of the 2014-2015 school year, the District's actions resulted in the Student's parent XXXXXX X XXXX XXXX XX XXXX XXX XXXXXX XXXXXXXXXXXXXXX.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit 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 opened an investigation of the following legal issues:

- whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied her the benefits of, or otherwise subjected her to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
- whether the District failed to provide a qualified student with a disability with a free appropriate public education (FAPE), in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33; and
- whether the District subjected a student to disability-based harassment that was sufficiently severe, persistent, or pervasive to interfere with the student’s ability to participate in or benefit from the District’s educational program, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

Under Section 302 of OCR’s *Case Processing Manual* (CPM), allegations under investigation may be resolved at any time when, prior to the issuance of a final investigative determination, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them with an agreement. In this case, the District expressed an interest in resolving the allegations prior to OCR making a final investigative determination. On November 1, 2018, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address all of the allegations in the complaint. OCR will monitor the implementation of the Resolution Agreement. The basis for the Agreement is explained below.

### **Background and Summary of Investigation to Date**

During its investigation to date, OCR reviewed documents provided by the District and interviewed the Complainant and District staff.

X---two paragraphs redacted---X

### **Allegation #1 – XXXX-XX XXXX**

X---twelve paragraphs redacted---X

Section 504’s implementing regulation, at 34 C.F.R. § 104.4, provides that no qualified person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination by a recipient of federal financial assistance.

The regulation further provides, at 34 C.F.R. § 104.33, that public school districts are required to provide a free appropriate public education (FAPE) to each qualified student with a disability within the district’s jurisdiction, regardless of the nature or severity of the disability. An appropriate education is defined as the provision of regular or special education and related aids

and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities. The Section 504 regulation also states, at 34 C.F.R. § 104.35(a), that a recipient school district shall conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any action regarding the person's initial placement or any subsequent significant change in placement. Pursuant to the Section 504 regulation, if a district has reason to suspect that the services provided in a student's Section 504 plan or IEP are no longer sufficient to provide the student with FAPE, it must timely reconvene the student's Section 504 or IEP team and reevaluate the student as necessary to determine whether a change in placement or services are necessary to provide FAPE.

X---one paragraph redacted---X

While the information above raised compliance concerns pursuant to Section 504, before OCR could complete its investigation with respect to this allegation, the District sought to voluntarily resolve the complaint, including this allegation, pursuant to Section 302 of the CPM.

### **Allegation #2 – Disability Harassment**

X---six paragraphs redacted---X

The implementing regulation for Section 504 at 34 C.F.R. § 104.4(a) provides that qualified students with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a recipient's programs or activities. Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II. Disability harassment is intimidation or abusive behavior toward a student based on disability that is sufficiently severe, persistent, or pervasive that it creates a hostile environment that interferes with or denies the student's ability to participate in or receive the benefits of the school's programs and activities.

OCR enforces the requirements of the laws it enforces consistent with the requirements of the First Amendment of the U.S. Constitution. The laws that OCR enforces protect students from discrimination, but are not intended to restrict the exercise of protected speech in violation of the First Amendment. Thus, for example, in addressing harassment allegations, OCR has recognized that the fact that a particular expression is offensive, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.

When a school knows or should know of harassing conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If a school's investigation reveals that harassment based on disability created a hostile environment, i.e., it was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by the school, the school must take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects.

When a school employee acting within the scope of his or her duties over students harasses based on disability a student and the harassment interferes with or denies the student’s ability to participate in or receive the benefits of the school’s programs and activities, the school district is responsible for the harassment regardless of whether it has “notice.”

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the Section 504 regulation at 34 C.F.R. § 104.33.

The information OCR has gathered to date raises concerns that the Student may have been subjected to harassment XX XXXXX XXX XXXXXXXXXX based on her disability, and that School personnel may have had notice of the harassment but did not respond. However, prior to OCR’s completion of its investigation into this allegation, the District asked to voluntarily resolve this allegation pursuant to Section 302 of the CPM.

**Allegation #3 – Student’s Use XX XXX XXXXXXX XXXXXXXXXX**

X---four paragraphs redacted---X

As noted above, pursuant to the Section 504 regulation at 34 C.F.R. § 104.33, public school districts are required to provide a FAPE to each qualified student with a disability within the district’s jurisdiction, regardless of the nature or severity of the disability. An appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities.

X---one paragraph redacted---X

**Allegation #4 – XXXXXXXXXX XX XXXXXX XXXX**

X---eight paragraphs redacted---X

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) prohibits recipient institutions from excluding qualified students with disabilities from participation in, denying them the benefits of, or otherwise subjecting them to discrimination under any of the recipient’s programs or activities. Title II contains a similar provision relating to public entities at 28 C.F.R. § 35.130(a). The Section 504 implementing regulation, at 34 C.F.R. §104.4(b)(1)(ii), and the Title II implementing regulation, at 28 C.F.R. § 35.130(b)(1)(ii), prohibit recipient institutions and public entities, respectively, from affording a qualified person with a disability an opportunity to participate in or benefit from the entity’s aids, benefits, or services that is not equal to that afforded to others.

The Section 504 implementing regulation, at 34 C.F.R. § 104.37(a), also requires recipient institutions to provide nonacademic and extracurricular services and activities in such a manner that students with disabilities are provided an equal opportunity to participate.

X---one paragraph redacted---X

### **Voluntary Resolution and Conclusion**

On November 1, 2018, the District signed the enclosed resolution agreement. The agreement, when fully implemented, will address all of the allegations in the complaint. OCR will monitor the implementation of the resolution agreement.

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 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, OCR 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.

OCR received the District's first monitoring report on November 5, 2018, and will review the report and address it under separate cover. If you have questions about OCR's resolution of this complaint, please contact me by telephone at (216) 522-2667 or by e-mail at [Brenda.Redmond@ed.gov](mailto:Brenda.Redmond@ed.gov). If you have questions about OCR's monitoring of the District's implementation of the resolution agreement, please contact Mr. Daniel Scharf. He will be overseeing the monitoring and can be reached by telephone at (216) 522-7627 or by e-mail at [Daniel.Scharf@ed.gov](mailto:Daniel.Scharf@ed.gov).

Sincerely,

/s/

Brenda Redmond  
Supervisory Attorney/Team Leader

Enclosure