



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

December 23, 2016

Jordan M. Bullinger, Esq.
LaPointe & Butler, P.C.
6639 Centurion Driver, Suite #140
Lansing, Michigan 48917

Re: OCR Docket # 15-16-1478

Dear Mr. Bullinger:

This letter is to notify you of the disposition of a complaint filed on July 11, 2016, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Benton Harbor Area Schools (the District), alleging that the District discriminated against a student on the basis of disability (the Student). Specifically, the complaint alleged that the District failed to evaluate the Student under Section 504, despite repeated requests; and failed to provide the Student's parents with notice of Section 504 procedural safeguards, during the 2015-2016 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 (Section 504). 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). 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. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegation, OCR began investigating the following issues:

1. whether the District failed to appropriately identify and evaluate a student with a disability as required by Section 504 implementing regulation at 34 C.F.R. § 104.35; and
2. whether the District failed to establish and implement, with respect to actions regarding the educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, as required by the Section 504 implementing regulation at 34 C.F.R. § 104.36.

In its investigation of this complaint to date, OCR reviewed documentation provided by the District and the Complainant. Prior to the completion of OCR's investigation, the District asked to voluntarily resolve this complaint pursuant to Section 302 of OCR's *Case Processing Manual* (CPM) and signed the enclosed resolution agreement (the Agreement), which, once implemented, will fully address the complaint allegations. We set forth below a summary of OCR's investigation to date.

OCR's Investigation to Date

During the 2015-2016 school year, the Student was in the XXXXX grade at the District. As noted above, the complaint alleged that the District failed to evaluate the Student under Section 504, despite repeated requests; and failed to provide the Student's parents with notice of Section 504 procedural safeguards, during the 2015-2016 school year.

OCR's review of documentation revealed that on XXXXXXXXXXXX the Student's parent (the Parent) submitted a written request to the District to evaluate the Student for special education or Section 504 services. On XXXXXXXXXXXX the District conducted a Review of Existing Evaluation Data, and on XXXXXXXXXXXX the District determined that the Student was ineligible for an Individualized Education Program (IEP). On XXXXXXXXXXXX, the Parent submitted a written request to the District, for a Section 504 evaluation. The complaint alleged that the District did not respond to said request. In response to a complaint decision and plan for corrective action issued by the Michigan Department of Education, the District developed an IEP for the Student on XXXXXXXXXXXX.

Although the results of OCR's review described above do not, without more, provide sufficient evidence for OCR to determine a violation of Section 504 or Title II, they raise potential compliance concerns regarding the District's delayed response to the Parent's request for an evaluation for special education, the District's failure to respond to the Parent's requests for a Section 504 evaluation, and the District's failure to provide the Student's parents with notice of Section 504 procedural safeguards.

Applicable Legal Standards and OCR Policy

The regulation implementing Section 504, at 34 C.F.R. § 104.35, requires recipients to conduct an evaluation of any student 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 student in regular or special education.

Further, the regulation implementing Section 504, at 34 C.F.R. § 104.36, requires recipients to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons with disabilities, a system of procedural safeguards, including notice of these decisions to the parent or guardian, an opportunity for the parent or guardian to review relevant records, and an opportunity for the parent or guardian to challenge decisions regarding identification, evaluation and placement through an impartial hearing. The regulations also indicate that compliance with IDEA is one means of meeting the requirements of Section 504. If parents request a disability evaluation the recipient may: (1) evaluate the student within a reasonable period of time; or (2) decline to evaluate the student because the recipient does not believe that the student has a disability. If the recipient refuses to evaluate, it must explain to the parents the reason, and inform them that they have the right to challenge the refusal to evaluate the student by requesting an impartial hearing by a person knowledgeable about the requirements of Section 504.

Resolution

As noted above, prior to the completion of OCR's investigation, the District expressed interest in resolving the complaint allegations pursuant to Section 302 of OCR's CPM, which provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegation(s). Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegation(s) or the information obtained during the investigation and consistent with applicable regulations.

On December 19, 2016, the District signed the enclosed Agreement, which, once implemented, will fully address the complaint allegations in accordance with Section 504 and Title II. The terms of the Agreement require the following:

- The District will convene a Section 504 team (the Team) by January 16, 2017, consisting of persons knowledgeable about the Student, including the parent(s), and complete its evaluation of the Student to determine whether the Student is eligible for a Section 504 plan to ensure that the Student receives a free appropriate public education (FAPE) under Section 504. If the Student is found to have a disability under Section 504, the Team will determine whether the Student needs regular or special education to be provided under a Section 504 plan, related aids and services, or supplementary aids and services because of the disability, and in what setting the Student should receive them.

- The Team will also determine, by January 16, 2017, whether the Student requires compensatory education and/or remedial services, from XXXXX to present, when the complaint states that the District failed to appropriately identify and evaluate the Student under Section 504. The Team will develop a written plan for providing the Student with compensatory education and/or remedial services, if deemed necessary. Any such plan will identify the nature and amount of the services to be provided at no cost to the Student's parent(s), by whom, and when.
- The District will provide the Student's parent(s) with written notification of the Team's decisions regarding a Section 504 plan for the Student and compensatory education and/or remedial services, by January 30, 2017. The District will also notify the Student's parent(s) in writing of her procedural safeguards, including the right to challenge any decisions regarding the evaluation, placement, and compensatory education and/or remedial services through requesting an impartial due process hearing.
- The District will provide training to its administrators, staff person(s) responsible for the District's compliance with Section 504 and Title II, and staff person(s) responsible for responding to requests for Section 504 evaluations, by February 28, 2017, regarding the District's policies and procedures, in accordance with Section 504, pertaining to procedural safeguards and the District's obligations upon receiving a request for a Section 504 evaluation by a parent, guardian, teacher, other certified school employee, the student if 18 years of age or older, or other individual.

The District will provide documentation to OCR to demonstrate its implementation of the Agreement, as outlined in the Agreement.

Conclusion

In light of the signed Agreement, OCR finds that the complaint is resolved. 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. A complainant may 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 a complaint alleging such treatment.

If you have any questions about this letter or the resolution of the complaint, you may contact me by telephone at (216) 522-7634. For questions about implementation of the Agreement, please contact Ms. Timsi Pathak, who will be monitoring the District's implementation. Ms. Pathak can be reached by e-mail at Timsi.Pathak@ed.gov or by telephone at (216) 522-7642. We look forward to receiving the District's first monitoring report by January 30, 2017.

Sincerely,

/s/

Donald S. Yarab
Supervisory Attorney/Team Leader

Enclosure