



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

September 2, 2022

Via e-mail only to: [redacted]

Melissa Martinez Bondy, Esq.
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291

Re: OCR Docket No. 15-22-1020

Dear Ms. Bondy:

This letter is to notify you of the disposition of the above-referenced complaint filed on October 15, 2021, with the U.S. Department of Education, Office for Civil Rights (OCR), against Fairless Local Schools (the District) alleging that the District discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged that:

1. since [redacted] the District had refused to consider whether the Student required any reasonable modifications to ensure he had an equal opportunity to participate in [redacted] activities at the District (redacted); and
2. on [redacted], the District dismissed the Student from its [redacted] after disciplining him for disability-related behaviors.

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 student from participation in, denied a student the benefits of, or otherwise subjected a student to discrimination in its programs and activities based on the student's disability in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.4, and the regulation implementing Title II at 28 C.F.R. § 35.130;

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

www.ed.gov

- whether the District failed to ensure that a qualified student with a disability was afforded with nonacademic and extracurricular services and activities in such manner as was necessary to afford the student with an equal opportunity to participate in such services and activities, in violation of the Section 504 implementation regulation at 34 C.F.R. § 104.37; and
- whether the District has made reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, as required by the Title II implementing regulation at 28 C.F.R. § 35.130(b)(7)(i).

To conduct its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District witnesses. After a careful review and analysis of the information obtained during its investigation, OCR has determined that the evidence is insufficient to support a finding that the District violated the regulations implementing Section 504 or Title II regarding allegation #2. However, regarding allegation #1, OCR found several compliance concerns from the information obtained during its investigation. On August 8, 2022, the District requested to voluntarily resolve the complaint under Section 302 of the OCR's *Case Processing Manual* and OCR found that it is appropriate to resolve compliance concerns regarding allegation #1 under Section 302. The bases for OCR's determination are explained below.

Summary of OCR's Investigation

The Student attended the District's [redacted] as a [redacted] for the 2021-2022 school year. According to the Complainant, the Student has [redacted] and had been on a Section 504 plan at the District since [redacted] grade. The Student participated in the District's [redacted].

The Complainant told OCR that in [redacted] she requested a meeting with the Student's Section 504 team when the Student began to struggle with [redacted] issues while participating in [redacted]. At that meeting, the team discussed additional accommodations to help the Student, but the Complainant stated that she did not specifically ask about accommodations for [redacted] because she did not realize that the District was not implementing the Section 504 plan for [redacted]. The Complainant stated that the Student then began to have issues during his participation on the school's [redacted]. The Complainant stated that she requested that the accommodations listed in the Student's Section 504 plan be implemented in [redacted] by sharing a copy of his Section 504 plan with [redacted] staff in [redacted]. The Complainant stated that one of the accommodations that the Student might need was to [redacted]. The Complainant also stated that the Student required [redacted] because of his disabilities, as described in his Section 504 plan. The Complainant stated that, when she requested that District staff implement the Student's Section 504 plan in [redacted] activities, District staff told her that the Student's Section 504 plan never goes outside the classroom. The Complainant later told OCR that she did not realize until talking to the [redacted] that the Section 504 plan was not being used in [redacted]. [sentence redacted]

The Complainant stated that the Student's [redacted] picked on him because he did not get [redacted]. The Complainant stated that, as a result, the Student [redacted], and was suspended

for [redacted]; the District reported that this occurred on [redacted]. [sentence redacted] The Complainant said that when [redacted] reached out to her on [redacted], about the Student's behavior she told him that the Student required additional communication for reinforcement at [redacted] because of his disabilities and that they needed to implement the Student's Section 504 plan at [redacted]. The last incident occurred on [redacted], when, according to the Complainant, the Student was [redacted] and [redacted] came over and told him to [redacted]. The Complainant stated that the Student was dismissed from [redacted]. The Complainant also stated that the Student was disciplined based on the [redacted] discretion, not based on any written rule.

The Complainant told OCR that the Student has limitations related to [redacted] as noted in his Section 504 plan. [sentence redacted] The Complainant also stated that, due to additional difficulties the prior school year regarding the Student's behavior, the Section 504 team made additions in his plan in [redacted], such as [redacted]. [sentence redacted]

OCR's review of the Student's Section 504 plan, revised [redacted], confirms the inclusion of the [redacted]. Although the Complainant stated that the Section 504 plan allowed the Student to [redacted], the Student's Section 504 plan did not mention [redacted] as an approved accommodation. Furthermore, all approved accommodations in the Section 504 plan were listed as being for the "General Education Classroom" and for the "Intervention Classroom."

The District denied the complaint allegations and asserted that the Student was afforded equal opportunity to participate in [redacted]. The District confirmed that the Student participated in the District's [redacted]. The District asserted that neither the Student nor the Complainant ever requested that the Student be permitted to [redacted] as a reasonable accommodation and asserted that the Complainant did not raise the issue when his Section 504 plan was modified in [redacted]. The District noted that the Student's Section 504 plan did not identify [redacted] as an accommodation. The District also asserted that the Student was disciplined during the [redacted] because of violations of written team rules unrelated to his status as a student with a disability, and denied that the Student was dismissed from the [redacted], asserting that it was the Student who elected not to participate as of the [redacted].

[paragraphs redacted]

Both the [redacted] and [redacted] told OCR that the Student was involved in several behavior incidents while participating in the [redacted]. [sentence redacted] According to the [redacted], he learned about the incident during a [redacted]. As a result, he and [redacted] interviewed the team and found that [redacted]. [sentence redacted] The [redacted] suspended the Student for the [redacted]; the specific circumstances surrounding this incident and the actions taken by the District with respect to other student will not be described in detail here, as they are protected from disclosure under the Family Educational Rights and Privacy Act (FERPA). [sentenced redacted]

The [redacted] explained that subsequently, on [redacted], [redacted]. The [redacted] stated that he spoke to individual students involved and learned that [redacted]. [sentence redacted] The [redacted] stated that the Student was not individually reprimanded for this action but, rather, the entire team was talked to and made to do [redacted] as a consequence. The [redacted] notified

the Complainant of the incident and said that the Complainant later e-mailed him, sharing her concerns about these incidents and alleging that the Student was [redacted]. The [redacted] told OCR that he responded to the Complainant stating that he took the matter seriously and investigated it with the [redacted] by speaking with all team members, including the Student. [sentences redacted]

OCR reviewed e-mail records provided by the District and the Complainant regarding these incidents. [sentences redacted]

OCR spoke with the [redacted], who confirmed that the Student's Section 504 plan at that time did not include any accommodation related to the [redacted]. He also stated that he could not recall any prior discussion, such as at the Student's most recent Section 504 team meeting in [redacted], about the Student needing disability-related accommodations to participate in [redacted] activities. [sentences redacted]

The [redacted] recalled a telephone call with the Complainant on [redacted], and that the Complainant conveyed that the Student was struggling with other teammates [redacted] and referenced a [redacted]. As a result, the [redacted] spoke with the [redacted]. During these conversations, they reviewed the Student's Section 504 plan and discussed some strategies that could be beneficial for the [redacted] to know so that they could brainstorm how they could work together to help the Student be successful (e.g., redacted). OCR's review of the records obtained during the investigation showed that the [redacted] subsequently spoke with the [redacted] on [redacted], and the [redacted] on [redacted], as described below.

[redacted], the Complainant e-mailed the [redacted]. In this e-mail she stated that since her original e-mail (which appears to be the [redacted] e-mail described above) the Complainant had spoken with the [redacted]. Also, the Complainant noted that during their call the [redacted] suggested that they look at the Student's Section 504 plan, consider "how the Student interacts and his other development may be interfering on the [redacted]," and "work on ways to integrate this with extra[]curricular activities." The Complainant attached a copy of the Student's Section 504 plan to the e-mail.

OCR reviewed another [redacted], e-mail, submitted by both the Complainant and District, in which the [redacted] e-mailed the Complainant to confirm in writing details of a telephone call on [redacted]. [sentences redacted]

Both the District and the Complainant provided records confirming that a meeting was held later on [redacted], attended by [redacted], the Complainant, and, for part of the meeting, the Student, to ensure the Student understood that he was at risk of being dismissed. [sentences redacted]

[paragraph redacted]

In another e-mail dated [redacted], the Complainant wrote to the [redacted], copying the [redacted], and stated that she had met with the [redacted] earlier in the day and learned from him that staff had been discussing the Student and that "despite all the redirects" he was at his final warning in terms of being able to remain on [redacted]. In this e-mail, the Complainant expressed concern that she was told by the [redacted] that the Student's "Section 504 does not go

into effect on the [redacted]” and asserted that no one on the [redacted] team or in the [redacted] department was aware of the Student’s Section 504 plan prior to her e-mailing it to staff that morning, implying that they were not implementing it. [sentence redacted]

The District acknowledged in its position statement to OCR in response to this complaint that it did not take specific steps at the beginning of the [redacted] to ensure that the [redacted] were familiar with the Student’s Section 504 plan, accommodations, and strategies for handling the Student’s behavior issues. The District also stated that the [redacted] intended to initiate conversations with [redacted], should the Student elect to go out for [redacted] for the coming year. The [redacted] also explained to OCR that prior to spring 2022 [redacted] would have had to independently research to access student special education plans, meaning [redacted] who also had teaching appointments could review their rosters and look students up in the District’s system. As of spring 2022, the District has implemented a new process where a digital copy of the individualized education program (IEP) or Section 504 plan for a student with a disability is sent to the [redacted] staff based on students on the roster, and the [redacted] checks in with the [redacted] as roster changes happen. The [redacted] explained that if [redacted] received a plan with classroom-only interventions he would have expected them to discern which they could adapt to [redacted]. The [redacted] clarified that some accommodations are not clearly applicable for [redacted] while some could be helpful, but they do not specifically write about what would be helpful in [redacted] in the plan because it depends on the nature of the [redacted] activity.

[paragraphs redacted]

The [redacted] said the Student was not disciplined for his [redacted] and was just told to put [redacted] away, but the Student did not follow his instructions. The [redacted] said he had never seen the Student try to [redacted] before, and that neither the Student nor the Complainant had ever brought up the Student’s need to [redacted] because of his disability. The [redacted] further stated that, regardless of disability, all students could [redacted] before or after the [redacted]. However, during [redacted], no [redacted] were allowed. [sentences redacted]

The [redacted] told OCR that, after speaking with the [redacted], he spoke with the Student the next day to get his account of the events. The [redacted] said that the Student told him that he did not want to play and did not want to [redacted], so he left. The Student stated that he understood that he was not on the team anymore and stated that he did not want to [redacted]. After this conversation, the [redacted] notified the Complainant. The [redacted] said that there is no documentation or official notice indicating that the Student was removed from the team and that he told the Complainant that the Student is welcome to participate in any [redacted], including [redacted], and that the Student is in no way prohibited from joining these teams in the future.

[redacted], the Complainant sent an e-mail to the [redacted] in which she questioned [redacted] and asserted that, according to the Student’s version of events, the [redacted] disciplined him for the [redacted], then told him he was off the team and to [redacted]. The Complainant stated that the Student [redacted] and no one said anything, and that the Student had done so to [redacted]. [sentence redacted]

After reviewing the District’s documentation, and speaking to District witnesses, OCR asked the Complainant when and to whom she requested [redacted] during [redacted] as a reasonable accommodation. In response, the Complainant reiterated to OCR her position that this accommodation was written into the Student’s Section 504 plan and stated he had been using this accommodation as a tool in all areas of the school. The Complainant described making the request during the [redacted], meeting described above with the [redacted]. When asked who told her that the Student’s [redacted] was not allowed, the Complainant reiterated that that the [redacted] told her that no accommodations would be allowed outside the classroom.

When provided an opportunity to respond to the District’s information regarding the alleged discipline and removal from the team, the Complainant’s attorney provided a written response indicating the information had come from the Student, [redacted]. [sentences redacted]

[paragraph redacted]

Applicable Regulatory Standards

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall, 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 program or activity. Title II’s implementing regulation contains a similar provision for public entities at 28 C.F.R. § 35.130(a). The Section 504 implementing regulation, at 34 C.F.R. § 104.37(a)(1), provides that a recipient public school district shall provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford a qualified student with a disability an equal opportunity for participation in such services and activities.

The Title II regulation, at 28 C.F.R. § 35.130(b)(7)(i), requires a public entity to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to the extracurricular activity. In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the school district must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student’s participation.

The Section 504 regulation also requires a school district to provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the school district’s jurisdiction, regardless of the nature or severity of the person’s disability. 34 C.F.R. § 104.33(a). FAPE may include services a student requires in order to ensure that he or she has an equal

opportunity to participate in extracurricular and other nonacademic activities. One way to meet the Section 504 FAPE obligation is to implement an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. § 104.33(b)(2).¹ In general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation.²

Analysis and Conclusion

Regarding allegation #1, the Complainant alleged that since [redacted] the District had refused to consider whether the Student required any reasonable modifications to ensure he has an equal opportunity to participate in [redacted] activities at the District (*i.e.*, [redacted]). The Complainant asserted that the Student's Section 504 plan included his [redacted] and the District failed to allow the Student to [redacted] although she had specifically requested the District implement his Section 504 plan in [redacted]. The evidence obtained during the investigation, however, does not support that [redacted] was provided for in the Student's Section 504 plan as asserted during the relevant time period; it also does not support that a clear disability-related request to allow the Student to [redacted] during [redacted] was made to the District while the Student was on the [redacted] other than a brief comment the Complainant made during the [redacted], meeting suggesting the Student could maybe [redacted]. The evidence also suggests that there were no policies prohibiting such a [redacted]; rather, the handbook prohibited the [redacted] during practice. The [redacted] told OCR that all students were allowed to [redacted] before and after games, just not during active practice and games, and that the Student was never disciplined for his [redacted].

However, the evidence obtained during the investigation raises compliance concerns with regard to District practices around disability-related accommodations for extracurricular activities, and in particular [redacted]. For example, the District did not initiate any formal Section 504 process to appropriately explore the Student's individualized need for accommodations to participate in [redacted] as concerns arose in [redacted], despite the Complainant raising a concern to multiple District staff that the Student's disability-related issues with [redacted] were impacting his ability to participate on the [redacted], and [redacted]. The evidence shows that in multiple e-mails the Complainant asked or attempted to ask District staff to provide the Student with support for issues related to his disabilities in the [redacted] context by providing a copy of his Section 504 plan to staff and explaining his disability-related challenges and needs. Additionally, the evidence shows that the Complainant was told by District staff multiple times that the Student's Section 504 plan, as written, did not go outside the classroom. While District staff, including [redacted], discussed ways to employ the techniques described in the Student's Section 504 plan into the [redacted] context, the District did not reconvene the Student's Section 504 team to

¹ Although OCR does not enforce IDEA, OCR notes that the regulations implementing IDEA include the requirement that a student's IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities. 34 C.F.R. § 300.320(a)(4)(ii).

² For more information, please see Guidance on Schools' Obligation to Provide Equal Opportunity to Students with Disabilities to Participate in Extracurricular Athletics, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>

appropriately address his individualized needs to participate in [redacted]. Additionally, although the District appears to have implemented a practice to do so from spring 2022 forward, the District acknowledged to OCR that it did not take specific steps at the beginning of the 2021-2022 [redacted] to ensure that the [redacted] were familiar with the Student's Section 504 plan, accommodations, and strategies for handling the Student's [redacted] issues. During the pendency of the investigation, the Student was [redacted], but the records provided by the District do not support that the Student's [redacted] team considered accommodations that would apply to [redacted] or extracurriculars.

Under Section 302 of OCR's *Case Processing Manual*, allegations under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. In this case, the District expressed an interest in resolving the complaint prior to the conclusion of OCR's investigation and OCR determined it was appropriate to resolve allegation #1 under Section 302. On August 31, 2022, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address OCR's compliance concerns. OCR will monitor the implementation of the Resolution Agreement.

Regarding allegation #2, the Complainant alleged that on [redacted], the District dismissed the Student from its [redacted] after disciplining him for disability-related behaviors. OCR finds that the evidence is insufficient to support that the District improperly disciplined the Student for behavior relating to his disability. The evidence is also insufficient to support that it was the District who excluded the Student from participating in its [redacted] activity because of his disability. The evidence shows that the Student repeatedly engaged in behaviors that violated the District's [redacted]. [sentences redacted] Although OCR was unable to interview the Student, the Student's attorney stated to OCR that the [redacted] told the Student that he was no longer part of the team. The weight of the evidence, however, is insufficient to allow OCR to conclude that the Student was dismissed from the team as the evidence obtained by OCR supports that the [redacted] told the Student to return his [redacted] and the Student told the [redacted] "That's fine," and when the [redacted] spoke to the Student the next day and the Student told him that he did not want to [redacted] anymore.

For these reasons, OCR finds the evidence is insufficient to support that the District violated Section 504 or Title II as alleged in allegation #2.

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. Individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The Complainant has a right to appeal OCR's determination of allegation #2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information in this letter was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

OCR looks forward to receiving the District's first monitoring report by October 31, 2022. For questions about implementation of the Agreement, please contact Sarah Poppleton, who will oversee the monitoring and can be reached by telephone at (216) 522-2674 or by e-mail at Sarah.Poppleton@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-4709 or by e-mail at John.Cohen@ed.gov.

Sincerely,

/s/

for John Cohen
Supervisory Attorney/Team Leader

Enclosure