



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION XV
MICHIGAN
OHIO

November 9, 2022

Via e-mail only to XXXXX

Janet K. Cooper
Of Counsel
Bricker & Eckler L.L.P.
312 N. Patterson Blvd., Suite 200
Dayton, Ohio 45402

Re: OCR Docket No. 15-22-1052

Dear Attorney Cooper:

This letter is to notify you of the disposition of the above-referenced complaint filed on XXXXX XXXXX, XXXXX, with the U.S. Department of Education, Office for Civil Rights (OCR), against the Fremont City School District (the District) alleging that the District discriminated against two children (Student 1 and Student 2) on the basis of disability. Specifically, the Complainant alleged that:

1. From the beginning of the XXXXX school year until XXXXX XXXXX, the District did not implement Student 1's Section 504 plan with respect to XXXXX XXXXX XXXXX.
2. In XXXXX XXXXX, the District delayed evaluating Student 1 for XXXXX and then refused to conduct an evaluation XXXXX XXXXX XXXXX.
3. From XXXXX XXXXX until XXXXX XXXXX, the District did not implement Student 2's Section 504 plan with respect to XXXXX XXXXX XXXXX.

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.

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

Based on the complaint allegations, OCR opened an investigation of the following legal issues:

- 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.
- Whether the District failed to take appropriate steps to ensure that communications with a participant with a disability are as effective as communications with others, in violation of the Title II implementing regulation at 28 C.F.R. § 35.160.
- Whether the District failed to conduct an evaluation of a student who, because of disability, needed or was believed to have needed special education or related services, in violation of Section 504’s implementing regulation at 34 C.F.R. § 104.35(a).

To conduct its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District staff. After a careful review and analysis of the information obtained during its investigation, OCR determined that it is appropriate to resolve Allegation ##1 and 3 under CPM Section 302 because OCR’s investigation identified issues that can be addressed through a resolution agreement, and the District expressed an interest in resolving the allegations prior to the conclusion of OCR’s investigation. Specifically, OCR’s investigation identified issues with respect to the District’s provision of effective communication under Title II. With respect to Allegation #2, OCR found that the preponderance of the evidence does not support a conclusion that the District violated Section 504 as alleged. The bases for OCR’s determination are explained below.

Summary of OCR’s Investigation—Allegations ##1 and 3 (Failure to Implement)

Summary of Facts—Student 1

The Complainant alleged that the District did not implement Student 1’s Section 504 plan with respect to XXXXX XXXXX XXXXX. Specifically, XXXXX asserted that regular staff were not able to troubleshoot issues XXXXX XXXXX XXXXX, substitute staff were not trained XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX, XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX, and XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

During the XXXXX school year, Student 1 was XXXXX XXXXX XXXXX XXXXX student who attended XXXXX XXXXX XXXXX. Student 1 began receiving services pursuant to a 504 plan in XXXXX due to XXXXX XXXXX XXXXX. Student 1’s 504 plan for the relevant period of time—i.e., the from the beginning of the XXXXX school year—provides the following accommodation with respect to Student 1’s XXXXX: “XXXXX XXXXX XXXXX XXXXX.”

Student 1’s general education teacher (the general education teacher) stated that the XXXXX XXXXX, shared information on how to XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX along with training on how to XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX along with a packet and a video. The general education teacher felt that the training XXXXX

XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX was adequate. The general education teacher asserted that XXXXX performs a XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX at least XXXXX XXXXX XXXXX XXXXX — XXXXX XXXXX XXXXX XXXXX XXXXX — XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

The general education teacher stated that XXXXX used the classroom XXXXX XXXXX until Student 1's XXXXX XXXXX arrived on XXXXX XXXXX, XXXXX. After the XXXXX XXXXX arrived, the general education teacher used XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

On XXXXX XXXXX, XXXXX, the Complainant sent the District an email asserting that Student 1 “is reporting that XXXXX XXXXX has not XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The general education teacher acknowledged that XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX, XXXXX, because of XXXXX XXXXX XXXXX but stated that XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX so Student 1 did not miss any instructional time.

On XXXXX XXXXX, XXXXX, the educational team, including the Complainant, met to, among other things, XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX conducted of Student 1 on XXXXX XXXXX, XXXXX. During the meeting, XXXXX shared its observation that Student 1 “XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.”

XXXXX - SENTENCE REMOVED – XXXXX.

On XXXXX XXXXX, XXXXX, the general education teacher sent an email to the XXXXX XXXXX because XXXXX XXXXX XXXXX “XXXXX XXXXX” even after XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. Teacher 1 specified that XXXXX was “XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX” and that XXXXX had “XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.” The general education teacher confirmed that, around this time, the XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. According to the general education teacher, there was no gap in instructional time.

From XXXXX XXXXX, XXXXX, to XXXXX XXXXX, XXXXX, Student 1 brought XXXXX XXXXX XXXXX XXXXX to class. On XXXXX XXXXX, XXXXX, new XXXXX XXXXX arrived for Students 1 and 2 and the XXXXX XXXXX XXXXX XXXXX XXXXX. OCR did not receive any information regarding issues with the XXXXX XXXXX XXXXX and the Complainant confirmed that these XXXXX seemed to be doing well.

The special education director (the director) informed OCR that XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX assigned to XXXXX XXXXX XXXXX will go to Student 1 and 2's classrooms and XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The director was not aware of any issue involving XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

The ELA, math, and science teachers stated that the only issue Student 2 has XXXXX XXXXX XXXXX XXXXX is when XXXXX XXXXX XXXXX XXXXX. All the teachers stated that, when this occurs, Student 2 XXXXX XXXXX XXXXX XXXXX and that this happens, at most, XXXXX XXXXX XXXXX XXXXX. XXXXX - SENTENCE REMOVED - XXXXX.

None of Student 2's teachers were aware of any issues with XXXXX XXXXX XXXXX during absences when XXXXX XXXXX were used. As stated above, the XXXXX reported that XXXXX performs the XXXXX XXXXX and ensures XXXXX XXXXX XXXXX XXXXX XXXXX when XXXXX XXXXX XXXXX XXXXX XXXXX. The XXXXX was not aware of any instance in which XXXXX was not informed there would be a XXXXX XXXXX or XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

None of Student 2's teachers were aware of XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX as Student 2 XXXXX XXXXX XXXXX XXXXX XXXXX.

Student 2 also attended the XXXXX XXXXX event in which XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX for approximately XXXXX XXXXX.

Applicable Regulatory Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipients to provide a FAPE to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education for purposes of FAPE is defined as the provision of regular or special education and related aids and service that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met, and that are developed in accordance with procedural requirements set forth in 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards, including notice.

In addition, the Title II regulation, at 28 C.F.R. § 35.160(a), requires that public entities take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others. The Title II regulation, at 28 C.F.R. § 35.160(b), requires that a public entity furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. The Title II regulation states that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.

In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective,

auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

When interpreting what constitutes “primary consideration,” guidance provided by the Department of Justice in Appendix A to the regulation states:

As noted in the preamble to the 1991 Title II regulation and reaffirmed here:

The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.

28 C.F.R. Part 35, App. A (2010).

Analysis and Conclusion

FAPE Analysis

There is insufficient evidence for OCR to conclude that the District did not provide Students 1 and 2 with FAPE as it relates to XXXXX XXXXX XXXXX.

In analyzing an alleged denial of a FAPE, OCR first considers what regular or special education and related XXXXX and XXXXX a team determined were necessary to provide the student a FAPE. Here, the respective educational teams for Students 1 and 2 determined that the XXXXX XXXXX and XXXXX of either XXXXX XXXXX XXXXX XXXXX or XXXXX XXXXX XXXXX were necessary.

OCR next determines whether the recipient provided the students the required XXXXX and XXXXX. While the evidence shows that the District provided the students with the effective use of the XXXXX XXXXX or XXXXX XXXXX XXXXX on XXXXX XXXXX XXXXX in their classes, there is sufficient evidence for OCR to conclude that the District did not provide the XXXXX XXXXX and XXXXX for XXXXX XXXXX during a XXXXX XXXXX event on XXXXX XXXXX, XXXXX.

When OCR determines that a district did not provide the required XXXXX XXXXX XXXXX, it must consider whether this resulted in a denial of FAPE—i.e., had an educational impact on the student. While the evidence demonstrates the District did not provide Students 1 and 2 with the XXXXX XXXXX and XXXXX on XXXXX XXXXX, XXXXX, this is insufficient for OCR to conclude that Students 1 and 2 were denied FAPE as a result.

Here, the evidence shows that the denial of XXXXX and XXXXX impacted a minimal number of instructional minutes during the XXXXX XXXXX semester— XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. Moreover, the denial occurred during a XXXXX XXXXX event rather than XXXXX XXXXX XXXXX. Finally, there is insufficient evidence for OCR to conclude that the denial impacted the educational progress of either student. As a result, the

evidence is insufficient to find that the failure to XXXXX XXXXX XXXXX and XXXXX for XXXXX XXXXX during XXXXX XXXXX XXXXX XXXXX XXXXX school year resulted in a denial of FAPE for Students 1 and 2.

Accordingly, with respect to FAPE, the evidence is insufficient for OCR to conclude that the District violated Section 504 and Title II, as alleged, with regard to Allegations ##1 and 3.

Effective Communications Analysis

With respect to effective communication under Title II, the evidence indicates that, XXXXX XXXXX XXXXX XXXXX, the District took appropriate steps to provide and maintain XXXXX XXXXX XXXXX to ensure that XXXXX with the Student were as effective as XXXXX with others.

However, the evidence regarding the XXXXX event raises a concern that XXXXX with attendees to school events are as effective as XXXXX with individuals without disabilities. Based on the foregoing, OCR finds cause for concern that the District's XXXXX at this event were effective in violation of the Title II regulation at 28 C.F.R. § 35.160.

Accordingly, OCR has determined that it is appropriate to resolve Allegations ## 1 and 3 under CPM Section 302 because OCR's investigation to date has identified issues that can be addressed through a resolution agreement. On November 8, 2022, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address the cause for concern in accordance with Title II. OCR will monitor the implementation of the Resolution Agreement.

Summary of OCR's Investigation—Allegation #2 (Evaluation)

Summary of Facts

In XXXXX XXXXX, the Complainant requested that the District XXXXX XXXXX XXXXX XXXXX, XXXXX XXXXX XXXXX XXXXX, to determine if Student 1 qualified for XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The evaluation tested Student 1 in the XXXXX XXXXX XXXXX, XXXXX, XXXXX XXXXX. According to the director, the evaluation instruments do not specifically test for XXXXX but that an academic evaluation for XXXXX, which was part of the evaluation, would cover a XXXXX diagnosis. The evaluation was completed in XXXXX XXXXX.

The evaluation team report (ETR) for the XXXXX XXXXX evaluation includes a summary prepared by XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX, XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. XXXXX - SENTENCE REMOVED - XXXXX

The eligibility section of the ETR provides that the team determined Student 1 XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. XXXXX - SENTENCE REMOVED - XXXXX. XXXXX - SENTENCE REMOVED - XXXXX.

when they: 1) rigidly insist on first implementing interventions before conducting an evaluation, or that each tier of a multi-tiered model of intervention must be implemented first, regardless of whether or not a disability is suspected and there are needs based on the disability; or 2) categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.

A medical diagnosis alone does not necessarily trigger a school district’s obligation to conduct an evaluation to determine the need for special education or related services or the proper educational placement of a student who does have such need. If a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child has a disability under Section 504 and needs special education or related services because of a disability, the school district must ensure that the student receives this assessment at no cost to the student’s parents.

The Section 504 regulation, at 34 C.F.R. § 104.35(c), provides that in interpreting evaluation data and in making placement decisions, the recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with the educational setting requirements of 34 C.F.R. § 104.34.

The Section 504 regulation at 34 C.F.R. § 104.36 also requires a recipient school district to establish and implement, with respect to actions regarding the identification, evaluation, or 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, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.

Finally, the Section 504 regulation at 34 C.F.R. § 104.35(d) requires a recipient school district to establish procedures for the periodic reevaluation of students who have been provided special education and related services.

Analysis and Conclusion

There is insufficient evidence for OCR to conclude that the District delayed evaluating Student 1 for XXXXX in XXXXX XXXXX and then refused to conduct an evaluation in XXXXX XXXXX.

In analyzing an allegation that a District delayed or denied an evaluation, OCR first considers whether the District had reason to suspect that a student has a disability and that, because of the disability, needs special education or related aids and services. Here, there is insufficient evidence for OCR to conclude that the District suspected Student 1 had a disability— XXXXX

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 with respect to Allegation #2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information 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 District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

If you have questions about this letter, please contact me by telephone at XXXXX, or by e-mail at XXXXX.

Sincerely,

Nathaniel J. McDonald
Supervisory Attorney/Team Leader