



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XV
MICHIGAN
OHIO

September 20, 2022

Via e-mail only to: [redacted]

Travis Comstock, Esq.
Giarmarco, Mullins & Horton, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280

Re: OCR Docket No. 15-22-1275

Dear Mr. Comstock:

This letter is to notify you of the disposition of the above-referenced complaint filed on March 9, 2022, with the U.S. Department of Education, Office for Civil Rights (OCR), against Walled Lake Consolidated Schools (the District) alleging that the District discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged that the District:

1. placed a [redacted] in the Student's [redacted] school around [redacted], despite his documented [redacted], resulting in the Student missing multiple days of school and being excluded from the District's educational programs; and
2. failed to timely evaluate the Student to determine if he was a qualified student with a disability.

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 of Education 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 student with a disability from participation in, denied the student the benefits of, or otherwise subjected the student to discrimination in its programs and activities, in violation of the regulation

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implementing Section 504 at 34 C.F.R. § 104.4, and the regulation implementing Title II at 28 C.F.R. § 35.130;

- 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);
- 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 failed to make reasonable modifications in policies, practices, or procedures when the modifications were necessary to avoid discrimination on the basis of disability, in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(7).

During its investigation to date, OCR reviewed information and documentation provided by the Complainant and the District and interviewed the Complainant and District witnesses. 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 allegations prior to the conclusion of OCR's investigation and OCR determined resolution was appropriate. The bases for OCR's determination and the resolution are explained below.

Summary of Investigation to Date

During the [redacted] school year, the Student attended the District's [redacted] (the school) as a [redacted]. According to the Complainant, the Student was diagnosed with [redacted]. The Complainant stated that the Student's diagnoses were documented and that medication for his [redacted] were kept at the school office. The Complainant stated that the Student used his [redacted] throughout the school year and his usage was logged at the school office. The Complainant said that although the school knew about the Student's [redacted] no one approached her about a Section 504 process until she requested a Section 504 meeting in [redacted].

During the [redacted], the District placed a [redacted] in the school. [sentences redacted.]

Prior to the [redacted] school year, the Student had periodically used his [redacted], as needed, during the school day. The Complainant stated that the Student used his [redacted] times from [redacted] to [redacted] and [redacted] time from [redacted] to [redacted]. However, beginning in [redacted] through [redacted], she said, the Student used his [redacted] approximately [redacted] times at school. The Complainant said that even when he did not use his [redacted] at school, he routinely needed his [redacted] as soon as he got into the car when she picked him up after school.

The Complainant said that in [redacted] she met with the school's [redacted]. During the meeting, the Complainant shared that the Student was having a hard time [redacted] and that the Student's [redacted] said that it was because of his exposure to the [redacted]. The Complainant said that the [redacted] told her that he would tell the [redacted] not to [redacted] and that the Student could [redacted] since that was where the [redacted] was kept. The Complainant also provided OCR with a copy of the e-mails between her and the [redacted] dated [redacted]. The e-mails show that the Complainant reported to the [redacted] that in the prior three weeks the Student had been struggling to [redacted] when she picked him up so that she had to give him his [redacted] as soon as he got in the car; the Complainant said that, as his [redacted] was getting worse, she suspected he might be exposed to [redacted] at school.

The Complainant stated that after she spoke with the [redacted] she was contacted by the District's [redacted] who asked the Complainant to provide documentation from the Student's doctor regarding the Student's [redacted] and medical conditions. The Complainant told the [redacted] that she would get her the documentation. The Complainant said that, when she asked the [redacted] what the school would do for the Student in the meantime, the [redacted] responded that nothing would be done until the [redacted] received the medical documentation.

The Complainant provided the school's [redacted] with [redacted] letters, both dated [redacted]. [sentence redacted]. The [redacted]'s letter explained that exposure to the [redacted] was exacerbating his [redacted], requiring the Student to use his [redacted] more often, and that continued [redacted] exposure would further exacerbate the Student's [redacted]. [sentence redacted]. The Student's family physician recommended that [redacted].

The Complainant told OCR that after she provided these two letters from her doctors the [redacted] contacted her and said that the school had no problem [redacted]. The Complainant stated that the school [redacted] for [redacted] weeks, but the Student was still getting sick in school, so she decided to speak with the [redacted].

Before she met with the [redacted], the Complainant said she spoke with the Student's [redacted] and explained the Student was still getting sick. The Complainant requested that the [redacted] prepare an updated letter. The [redacted] provided a letter dated [redacted], which stated the Student's increased use of his [redacted] at school was due to the [redacted]. The letter stated that, while the [redacted] had previously recommended [redacted], that trial was "a failure" because the Student continued to have an increased need for his [redacted] at school. [sentence redacted] Therefore, the [redacted] concluded that the Student needed [redacted]. The [redacted] warned that, unless there were mitigation measures taken to eliminate the Student's exposure to the [redacted], the Student would continue to have ongoing inflammation in [redacted] leading to worsening of his [redacted].

The Complainant told OCR that she met with the [redacted] on [redacted], and provided him with the [redacted]'s second letter. According to the Complainant, the [redacted] asked to speak with the Student's [redacted], which she agreed to, and stated that he would get back with her during the [redacted], assuring her that the District would address the situation.

The Complainant recounted that from [redacted], the Student's symptoms were so bad that [redacted] to limit his exposure. The Complainant said that no one from the District contacted

her to discuss his numerous absences. The Complainant stated that over the [redacted] the Student's [redacted] improved since he was at home. The Complainant stated that the Student wanted to return to school because he missed his teacher and friends. Once break ended in [redacted], she sent the Student to school every day for the first week. However, the Student's [redacted] immediately got worse due to his exposure to the [redacted]. During the second week, the Complainant received a call from the [redacted] stating that he spoke with the Student's [redacted] and that the [redacted] had recommended a trial using [redacted] while still having the [redacted]. This contradicted what the [redacted] said in his [redacted] letter.

The Complainant said that on [redacted], the Student had [redacted], and his [redacted] did not help. The Complainant took the Student to the emergency room. The Complainant said the Student was [redacted] and was hospitalized for [redacted] days, [redacted]. [sentence redacted] The [redacted] wrote a new letter to the school, dated [redacted], documenting this hospital visit and treatment. The [redacted] went on to say that the significant worsening of his [redacted] was directly linked to his [redacted] exposure and that the Student was not tolerating being in the same building with [redacted]. The [redacted] concluded that for the Student's health and safety [redacted].

The Complainant said that around [redacted], she spoke to the District and was informed that the [redacted] wanted to speak with the Student's [redacted] again, and that the school would contact her about the future plan for the Student and [redacted]. [sentences redacted] The Complainant said the [redacted] told her that forcing the Student to attend school in a building with [redacted] would worsen his symptoms and [redacted].

The Complainant said that in [redacted] she contacted the District's Section 504 coordinator and requested a Section 504 evaluation of the Student. At the time of her request, the Complainant provided supporting medical documentation regarding the Student, including the [redacted] letters from the [redacted]. The Complainant said that the Student's Section 504 meeting was held on [redacted].

The Complainant stated that during the [redacted] meeting the team discussed the Student's [redacted], and the Complainant provided the letters from the Student's [redacted]. The Complainant said that the team determined that the Student was a student with a disability and eligible for services under Section 504. The Complainant said that she expressed her concern regarding the Student's [redacted] exacerbating his [redacted] and asked [redacted]. The Complainant said the team was only comfortable [redacted]. [sentence redacted] The Complainant said that District staff, including [redacted], said they would talk with the administration about her concern. The Complainant stated that on [redacted], the District's [redacted] contacted the Complainant by e-mail and wrote that the District's [redacted] had determined that a second opinion from an [redacted] was needed before the Student's Section 504 team could finalize the Student's Section 504 plan.

The Complainant stated that, after he was hospitalized on [redacted], the Student did not return to in-person school for [redacted]. The Complainant said that the District only provided the Student with [redacted] hours of [redacted] instruction per week. As the Complainant did not believe this was sufficient, she asked the District to provide more hours of instruction, but was

told that the District could not afford to pay overtime to his teacher for additional [redacted] sessions.

During the investigation, OCR interviewed District staff. [sentences redacted] The [redacted] stated that there are no written policies or procedures regarding the District's [redacted] program. [sentences redacted]

The [redacted] told OCR that [redacted] was not sure about the date when [redacted] first became aware of the Student's [redacted]. [sentences redacted] According to the [redacted], the Complainant and the Student's doctors wanted [redacted] on a temporary basis. [sentence redacted]

[paragraphs redacted]

[redacted] told OCR that [redacted] was aware of the Student's [redacted] at the [redacted] school year, but [redacted] was not initially aware of his [redacted]. The [redacted] stated that when the Student was having a difficult time [redacted] he usually requested to use his [redacted]. [sentences redacted]

The [redacted] told OCR that [redacted] learned about the Student's [redacted] in [redacted] when the [redacted] reached out to [redacted] and asked for [redacted] help. The [redacted] said that [redacted] asked for medical documentation confirming the Student's [redacted] and its severity. The [redacted] said that the Complainant provided the [redacted]'s letter indicating that [redacted] needed to be separated from the Student. [sentences redacted] The [redacted] stated that [redacted] never referred the Student for a Section 504 evaluation to determine if he was a student with a disability.

The [redacted] said that the Complainant told [redacted] that the Student was hospitalized for his [redacted] in [redacted] due to his exposure to [redacted], but the Complainant did not provide him with any medical records. Because of this, the [redacted] questioned if the information provided by the Complainant was accurate. The [redacted] said [redacted] never referred the Student for a Section 504 evaluation to determine if he was a student with a disability because the Section 504 process was not in [redacted] purview. The District confirmed that on [redacted], the Complainant requested a Section 504 evaluation of the Student. The [redacted] stated that, once the Complainant made this request, [redacted] stepped out of the process because [redacted] is not involved in Section 504 evaluations.

The District confirmed that the Complainant stopped sending the Student to school for in-person instruction on [redacted] and requested [redacted]. [sentences redacted]

[redacted] informed OCR that after receiving the request for a Section 504 evaluation the team scheduled a meeting for [redacted]. After reviewing the documentation provided by the Complainant, the team found the Student was a student with a disability and eligible for a Section 504 plan. [sentence redacted] The [redacted] stated that the team developed a Section 504 plan for the Student during the [redacted], meeting but that the plan was never finalized at the meeting because [redacted].

The [redacted] said that there was some discussion about [redacted] at the [redacted] meeting, but the team felt that the District should try other measures first, such as [redacted]. [redacted] The [redacted] informed OCR that the District had a signed consent/release form from the Complainant to obtain the Student's medical records but never requested the hospital records. Instead, the District expected the Complainant to obtain the medical records for the Section 504 team. [sentences redacted]

When asked how the team determined to include an accommodation for [redacted], the [redacted] said the [redacted] recommended this accommodation based on [redacted] discussion with the [redacted], even though the [redacted] was not a member of the Student's Section 504 team. [sentence redacted]

The [redacted] said that, when the Complainant did not provide medical records related to the Student's [redacted], the team requested an [redacted] of the Student regarding his [redacted]. When asked why the team wanted an [redacted], the [redacted] said the team did not have a complete picture of the Student's disability and what accommodations he needed. When asked why the team felt it did not have a complete picture, the [redacted] said that they wanted an "independent" evaluation of the Student because of the [redacted], and the belief that the [redacted] had not provided consistent information regarding [redacted]. [sentences redacted]

Applicable Legal Standards

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), provides also 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). Among other things, the Department's Section 504 regulations prohibit school districts from: denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service; affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs; providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Section 504's implementing regulation, at 34 C.F.R. § 104.33(a), requires that a recipient that operates a public elementary or secondary education program or activity provide a FAPE to each qualified student with a disability in its jurisdiction. Under Section 504, 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 a disability as adequately as the needs of students without a disability are met and that are developed in accordance with the procedural requirements of the Section 504's implementing regulation at 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and

procedural safeguards. Section 504's implementing regulation, at 34 C.F.R. § 104.35, requires a recipient that operates a public elementary or secondary education program or activity to conduct an evaluation of students who, because of disability, need or are believed to need, special education or related services.

Section 504 defines a person with a disability as one who (i) has a mental or physical impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. Pursuant to Section 504 and Title II, as amended by the ADA Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and 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, circulator, endocrine, and reproductive functions.

Under Section 504, school districts must conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability. When a school is aware of a student's disability or has reason to suspect a student has a disability, and the student needs or is believed to need special education or related services, it would be a violation of Section 504 if the school delays or denies the evaluation.

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.

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.

Analysis and Resolution

The evidence shows that multiple District staff were aware of the Student's [redacted] in [redacted]. The evidence shows that as a result of the [redacted], the Student developed difficulty [redacted], and eventually became seriously ill and was hospitalized in [redacted]. The evidence also shows that the Complainant and the District attempted to remediate the Student's [redacted], mainly by [redacted], but this was unsuccessful as the Student was hospitalized. As a result, the Complainant repeatedly requested that the District [redacted], and provided the District with letters from doctors supporting her request. The evidence shows that the District did not [redacted] and did not convene a Section 504 team until the Complainant formally requested a meeting in [redacted]. The Section 504 team ultimately requested a second opinion from another [redacted] because the [redacted]—who was not part of the group of knowledgeable persons comprising the Student's Section 504 team—wanted one. Despite having a signed medical release from the Complainant, the District never requested medical records from the Student's [redacted], or hospital. The Section 504 team did not reconvene and timely complete its evaluation or make individualized determinations based on the Student's needs to provide him a FAPE.

The evidence shows that the Student ultimately received [redacted] instruction from the District, which only included [redacted] hours of direct instruction per week. Prior to the [redacted], he had been able to attend school in person full-time with his peers with the periodic use of an [redacted]. He ended up missing most of his [redacted]-grade year of school.

The evidence above raises several compliance concerns for OCR. First, OCR is concerned that the District's refusal to [redacted] or to consider the Complainant's request for a reasonable modification from the [redacted] program (e.g., [redacted]), despite knowing of his [redacted], his increased use of his [redacted], his increased absences, and letters from his medical providers recommending [redacted], caused the Student to be excluded from participating in in-person learning.

Second, the information suggests that despite several staff having notice of the Student's [redacted], the District did not timely evaluate the Student under Section 504 until the Complainant made a specific request for a Section 504 evaluation in [redacted]. Furthermore, interviews with District staff members suggest that they do not have a clear understanding regarding the District's obligation to timely evaluate a student under Section 504 when information suggests that the student may have a disability. Additionally, the determination to [redacted] and to request a second opinion from an [redacted] was made by the [redacted], not by the Student's Section 504 team.

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 allegations prior to the conclusion of OCR's investigation and OCR determined resolution was appropriate. On September 15, 2022, 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.

OCR also reminds the District of its continuing obligation to comply with the requirements of Section 504 and Title II, as outlined above, for the Student as he moves to [redacted] school and for other students with disabilities who may be affected by its [redacted] in other buildings.

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.

OCR looks forward to receiving the District's first monitoring report by October 17, 2022. For questions about implementation of the Agreement, please contact Chandra Baldwin, who will oversee the monitoring and can be reached by telephone at (216) 522-2669 or by e-mail at Chandra.Baldwin@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/

John Cohen
Supervisory Attorney/Team Leader

Enclosure