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

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REGION XV
MICHIGAN
OHIO

Robert G. Huber, Esq.
Thrun Law Firm, P.C.
P.O. Box 2575
East Lansing, Michigan 48826

Re: OCR Docket #15-14-1109

Dear Mr. Huber:

This letter is to notify you of the disposition of the above-referenced complaint that was filed on February 18, 2014, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Olivet Community Schools (the District), alleging that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleged that during the 2013-2014 school year:

1. The District failed to timely evaluate the Student to determine whether he is a student with a disability.

2. The District unilaterally included requirements in the Student's Individualized Education Program (IEP) that were not agreed to by the full IEP team.

3. The Student's XXXX teacher subjected him to verbal harassment on the basis of his disability by making a disparaging comment to the Student on April 3, 2014, in front of other students, that the Student understood to mean he was "stupid."

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104 (Section 504), which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance and as a public entity, the District is subject to Section 504 and Title II. Therefore, OCR had jurisdiction to investigate this complaint.

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Based on the complaint allegations, OCR investigated the following legal issues:

- Whether the District failed to provide a free appropriate public education (FAPE) to a qualified student with a disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.33.

- Whether the District failed to timely conduct an evaluation in accordance with the procedures set forth at 34 C.F.R. § 104.35 of a student who, because of disability, needed or was believed to need special education or related services.

- Whether the District failed to ensure that its placement decision for a student with a disability was made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options, in violation of 34 C.F.R. § 104.35(c).

- Whether a student was subjected to harassing conduct by District staff on the basis of his disability that was sufficiently severe, persistent, or pervasive to interfere with his ability to participate in or benefit from the District's educational program, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.4.

Background

The Student has been enrolled at the District since XXXX. Throughout that time, the Student demonstrated behavior problems and an inability to complete assignments. While attending XXXX at the District, the Student began working with a paraprofessional and received tutoring. Also during that time, he began receiving special education services such as modifications to assignments and placement in the special education classroom without having been formally evaluated or determined eligible for special education services. The Student transitioned to the District's high school for the XXXX school year, and at the high school was not provided the special education services he had received at the middle school. During the 2013-2014 school year, the timeframe at issue in this complaint, the Student was in the XXXX grade at the high school.

During the course of its investigation, OCR interviewed the Complainant and reviewed documentation and information submitted by the Complainant and the District. OCR also interviewed the following District witnesses: the principal at the Student's high school (the high school principal); a high school special education teacher (the special education teacher); and the Student's XXXX teacher (the XXXX teacher). Finally, OCR provided the Complainant an opportunity to respond to information submitted by the District and interviewed the Student.

After a careful review of the information obtained during the investigation, OCR has determined that there is insufficient evidence to support a finding that the District discriminated against the Student on the basis of disability with regard to allegation #3.

However, there is enough evidence to support a finding that the District discriminated against the Student on the basis of disability with regard to allegations ##1 and 2, in violation of Section 504, as alleged. Additionally, during the course of OCR's investigation, OCR identified systemic compliance concerns that contributed to the District's violations of Section 504. The bases for these determinations are discussed below.

Summary of OCR's Investigation

- **Alleged Failure to Timely Evaluate the Student**

The Complainant said that the Student's academic performance and demeanor improved while he was receiving modifications and other special education services at the District's middle school. The Complainant stated that when the Student moved to the District's high school and stopped receiving those services his grades and self-esteem plummeted. According to the Complainant, during the Student's XXXX-grade year, after she made many months of requests, the District agreed to evaluate the Student for disability under Section 504 and later under the Individuals with Disabilities Education Act (IDEA), and he was determined ineligible for services. The Complainant provided documentation to OCR demonstrating that a Section 504 team meeting was held on XXXX, 2012, and the high school principal decided to evaluate the Student, which evaluation consisted of the principal's solicitation of feedback from the Student's teachers. The Complainant also indicated that the Student was evaluated by a school psychologist in the XXXX of 2013, and the District concluded that the Student was ineligible for special education services. The Complainant explained that eventually the District agreed to put the Student on a Section 504 plan, although she stated his teachers did not implement that plan. The Complainant provided OCR a copy of that plan, which was dated XXXX, 2013.

The Complainant also told OCR that, because she disagreed with the results of the school psychologist's XXXX 2013 evaluation, she requested an independent educational evaluation of the Student. The independent educational evaluation was conducted during the XXXX of 2013, and the evaluator determined that the Student was eligible for special education services. The Complainant said this evaluation data was sent to the District sometime in the XXXX. The Complainant stated that she was told by the District that they never received the evaluation report. In the early XXXX of 2013, the evaluator conducted an updated evaluation because the information contained in the original report was outdated, and sent the results of that evaluation to the District. The Complainant said that at that time she hand-delivered a copy of the evaluation report so that the District could not claim to never have received the information. The Complainant said that once the District received the evaluation report, which indicated that the Student was eligible for special education services, the District decided to reevaluate the Student.

The Student was again tested in XXXX 2013 by a school psychologist for the District. The Complainant said she met in XXXX 2013 with the school psychologist and an employee of the Calhoun Intermediate School District who serves as the special education supervisor for three districts, including the District (the ISD special education supervisor), to discuss the results of the evaluation. The District determined that the Student was ineligible for special education services. The District did not provide a copy of this evaluation report to OCR with its data response, and the Complainant said she never received a copy of the evaluation report, despite months of requests. The Complainant stated that during the XXXX 2013 meeting the school psychologist summarized his findings that the Student had no disability.

The Complainant stated that another evaluation was completed by the District in XXXX 2014 and then considered at an IEP team meeting on XXXX, 2014. During that meeting, the Student was determined eligible for an IEP, although, the Complainant said, no agreement was reached at that meeting as to the final language for the IEP.

OCR reviewed documentation provided by the District showing that the Student was determined eligible for a Section 504 plan in 2013 despite a conclusion that the Student did not have a mental or physical impairment that substantially limited a major life activity. Copies of the Student's Section 504 plans dated XXXX, 2013, XXXX, 2013, and XXXX, 2014, which were provided by both the Complainant and the District, state as follows: "[The Student] does not have a disability that substantially limits a major life activity. He is being deemed eligible based on him being regarded as a student that does have a mental impairment which substantially limits a major life activity . . . ."

The District also submitted to OCR information regarding the evaluations of the Student conducted from 2013 through 2014. According to the documents provided by the District, the Student was first evaluated by the District for special education eligibility on XXXX, 2013. A District school psychologist conducted two tests and considered the test results, observations during the testing, teacher input, parent input, and file review in recommending that the Student did not qualify for special education services for a cognitive impairment or a learning impairment. The District provided a copy of a Multidisciplinary Evaluation Team (MET) Eligibility Report Summary indicating that the MET found the Student ineligible based on the school psychologist's report.

Additionally, the District provided an e-mail dated XXXX, 2013, to OCR that stated that an outside evaluation report for the Student had been dropped off at the middle school by the Complainant. The documentation provided by the District does not include any indication that the MET was reconvened to review this outside evaluation report. Instead, the documents show that the Complainant signed a Review of Existing Evaluation Data (REED) form on XXXX, 2013, consenting to the District conducting another evaluation of the Student. According to the documents, the Student was next evaluated by the District in XXXX 2013, including assessment by a second school psychologist. Other than an e-mail invitation sent by the ISD special education supervisor to the high school principal and the school psychologist, titled "IEP [the Student] @ XXXX, 2013 XXXX," which was not addressed to the Complainant, the

documents provided by the Complainant and the District do not include any evidence that an IEP team meeting was held at any time from XXXX 2013 through XXXX 2014 to consider the District evaluation conducted in XXXX 2013 or the outside evaluation conducted XXXX of 2013.

The documents provided by the District also demonstrate that on XXXX, 2014, the Complainant dropped off another copy of the outside evaluation report, dated XXXX, 2013, to the high school principal, and again asserted that the Student qualified for special education services. The District then conducted another evaluation on XXXX, 2014, and convened an IEP team meeting on XXXX, 2014. During this meeting, the team determined that the Student was eligible for special education services under the IDEA category "Other Health Impairment," based on a diagnosis of Attention Deficit Disorder and the assessment conducted by the third school psychologist. The District provided an IEP Team Report dated XXXX, 2014, which shows the topics considered by the team and the types of accommodations and supports that would be provided to the Student. According to this document, the team considered credit recovery for the Student, and concluded that "XXXX."

The high school principal, who was the high school's Section 504 coordinator, confirmed that the Student had received a number of supports at the District's middle school without actually being found to be a student with a disability. He stated that the Student initially did not receive supports at the high school, and the Complainant contacted the school regarding the Student's performance. According to the high school principal, the Complainant expressed a desire to have the Student receive supports without being tested for special education eligibility. The high school principal conducted an "evaluation" of the Student, which evaluation consisted of sending an e-mail on XXXX, 2012, to the Student's teachers, who were to report back on the Student's performance in their classes. At this time, he explained, the Complainant did not want the Student evaluated for an IEP. Copies of e-mail correspondence submitted to OCR by the District confirmed that the Complainant stated in XXXX 2012 that she and the Student did not want the Student evaluated for special education and that the Complainant had asked the District not to bring up the topic of an evaluation with them again. But later e-mail correspondence submitted to OCR by the Complainant confirms that the Student and the Complainant changed their position sometime in late XXXX 2012 or early XXXX 2012 and consented to having the Student evaluated for special education eligibility.

The high school principal stated that, based on the information he obtained from the Student's teachers and because the Complainant did not present a diagnosis of disability from a medical professional, it was determined that the Student did not have a disability, but he made the decision to provide the Student with a Section 504 plan based on the Student having been regarded as a student with a disability while in middle school. The high school principal explained that the Student received a Section 504 plan only because he had received services at the District's middle school.[1] The high school principal developed the Student's Section 504 plan with one of the Student's teachers, the Complainant, a special education teacher from the District's middle school, and XXXX.

[1]XXXX.

Eventually, the high school principal stated, he told the Complainant that the amount of services she was requesting was more than what a Section 504 plan could provide, which led to the Complainant agreeing to have the Student tested for eligibility under IDEA.

The high school principal's recollection of the evaluations conducted of the Student was largely consistent with the District's documentation, described above. However, the principal recalled an IEP meeting taking place on XXXX, 2013, regarding the evaluation that the District conducted of the Student in XXXX 2013, although the District could not produce documentation confirming this. He explained that, because this was an IEP team meeting and not a Section 504 team meeting, he was less involved and could not recall all of what transpired during the meeting.

The high school principal explained that throughout the time the Student was being evaluated and the IEP was being developed the Section 504 plan remained in place until it was superseded by the finalized, published IEP.

OCR also interviewed the special education teacher, who confirmed that the Student was originally given a Section 504 plan at the high school because he was "regarded as" a student with a mental impairment that substantially limits a major life activity, falling into this category because he received services similar to those provided to students with diagnosed disabilities while he attended the District's middle school.

The special education teacher stated that the Student's first evaluation for IEP eligibility in XXXX 2013 was limited to determining whether the Student had a learning disability or cognitive impairment because the Complainant requested limited evaluation and refused an adaptive behavioral assessment. She explained that an outside evaluation was conducted in 2013, but she denied having received the evaluation report before XXXX 2014. The special education teacher acknowledged, however, that the evaluation report was dated sometime in XXXX 2013. The special education teacher also described the second evaluation for IEP eligibility that was initiated by the District in the fall of 2013 and the third District evaluation for IEP eligibility that was conducted in XXXX 2014. The special education teacher could not recall whether an IEP team meeting was held at the end of 2013 to consider the second evaluation report, and she could not provide any documentation demonstrating that such a meeting occurred.

The special education teacher stated that the IEP team met on XXXX, 2014, to consider the totality of the information obtained up to that point, including the District's third evaluation report. According to the special education teacher, the data in the District's third evaluation report was clearer than the information provided in prior reports. Combined with the independent evaluator's report, that led the team to determine that the Student was eligible for special education services. With respect to the issue of credit recovery addressed during the XXXX 2014 IEP team meeting, the special education teacher stated that she was unable to include summer classes in the Student's IEP because summer classes are not provided by the District's special education department. Instead, she explained that the District's primary concern with respect to students with disabilities is limited to the scope of the regular school day.

OCR provided the Complainant and the Student with an opportunity to respond to the information provided by the District. The Complainant confirmed that, although she met with the psychologist who conducted the second evaluation on behalf of the District and the ISD special education supervisor in XXXX 2013, the District never convened an IEP team meeting to review the results of that second evaluation.

In contrast to the special education teacher's statement that the Complainant refused an adaptive behavioral assessment in XXXX 2013, the Complainant denied that she refused any portion of a full IEP evaluation. The Complainant emphasized that she wanted the Student to be evaluated once he was in high school.

- **Alleged Inclusion in IEP of Requirements Not Agreed to by Team**

According to the Complainant, at the XXXX, 2014, IEP team meeting, the high school principal insisted that the IEP include a requirement that the Student request his own accommodations. She said that other members of the team, including the school psychologist who had conducted the evaluation and a special education teacher, said that the Student did not have the ability to make these requests on his own and therefore argued against inclusion of such a requirement in the Student's IEP. The Complainant said that the rest of the IEP team agreed that the Student should not have to request his accommodations. Nevertheless, the Complainant stated, at the high school principal's insistence, the IEP ultimately was drafted to include that requirement. The Complainant explained that she advocated for removing this requirement and that it was subsequently removed through an IEP amendment that was put in place on XXXX, 2014.

OCR noted that many of the accommodations set forth in the Student's Section 504 plan that was in place prior to the Student being found eligible for an IEP, including provision of unit study guides and a reader for tests, had been written to require the Student to formally request access to the accommodations. As explained by the high school principal, this was a typical provision in IEPs as well at the high school, because the special education teachers believed this requirement helps students develop personal responsibility by advocating for themselves. This requirement was objected to by the Complainant in a number of e-mails provided to OCR by the District.

According to the documents provided by the District, a draft IEP was created for the Student during the XXXX, 2014, IEP team meeting. The documents provided by the Complainant and the District do not include any contemporaneous notes from the XXXX, 2014, team meeting or corresponding meeting minutes. Like the Section 504 plan that was in place at this time, this IEP draft required the Student to ask for access to accommodations like a study guide at the beginning of each unit and a test reader.

The District also provided a copy of the IEP dated XXXX, 2014, two weeks after the XXXX IEP team meeting. OCR noted that this version of the document included an "Other Considerations" section, which stated as follows:

> According to [the Complainant], [the Student] works better when he has use of XXXX when he is reading or writing papers. **This is not a standard accommodation available to students that is listed on the IEP accommodations checklist.** When [the Student] wants to use XXXX to aid his ability to concentrate, he will need to get permission from his teachers and demonstrate that he is using his time well while using XXXX. The equipment is owned by [the Student] and the school district is not providing XXXX for him.

(Emphasis added).

The District provided documentation showing that the Student's IEP was amended on XXXX, 2014, with the removal of language requiring the Student to ask for his own accommodations. Specifically, the IEP amendment clarified that the supports of "Read test to student," "Provide copy of board work/overheads," and "Provide study guides . . . in advance of test/quizzes" would be provided even if the Student was unable to request the accommodation on his own. The document stated that the IEP was amended based on the Complainant's request and belief that the Student would not be able to request his own accommodations.

The high school principal stated that at the Student's XXXX, 2014, IEP meeting team members did not give input about which accommodations were appropriate for the Student's plan and, instead, the IEP was developed by the special education teacher. The high school principal could not recall any objections during the team meeting to language in the IEP requiring the Student to advocate for himself and request his own accommodations, and was only aware of the Complainant later expressing concern about that language. Based on his recommendation and the ISD special education supervisor's recommendation, the special education teacher then amended the IEP to remove language requiring that the Student request his own accommodations.

The high school principal also stated that, without further consulting the IEP team, the special education teacher added language to the IEP draft allowing the Student to use XXXX during class.

The special education teacher told OCR that, prior to the XXXX, 2014, meeting, she developed a draft IEP based on the evaluations of the Student, the Student's strengths and weaknesses as reported by the Student's teachers, and the accommodations that were recommended by the psychologists who conducted the evaluations. She explained that, as one of the high school's two special education teachers, she is responsible for implementing the IEP process, and one of her tasks is to draft an IEP for the team to consider. On XXXX, 2014, the IEP team reviewed the draft IEP, and the special education teacher could not recall anyone overriding the team's determinations during

that meeting. She did confirm, however, that she had included the requirement that the Student request his own accommodations despite the Complainant's objections.

The special education teacher confirmed that she later drafted an IEP amendment without reconvening the IEP team based on the Complainant's disagreement with language requiring the Student to request his own accommodations. The special education teacher also drafted additional language for the IEP that would allow the Student to use XXXX in class. She explained that use of XXXX was raised during the XXXX meeting and was discussed by the IEP team at that time. Following the IEP team meeting, she consulted with the ISD special education supervisor and then drafted language allowing the Student to use XXXX during class. This language was then reviewed and agreed to by the Complainant. The special education teacher told OCR that she was unable to incorporate XXXX use as an accommodation in that designated section in the IEP. She explained that the computer program used by the District to develop IEPs provides a dropdown menu of accommodations, and anything not included in that dropdown menu must be incorporated into a separate section of the IEP called "Other Considerations." That is where she placed the language concerning XXXX use.

When provided the opportunity to respond to the information provided by the District, the Complainant disagreed with the high school principal's characterization and instead asserted that the high school principal was pushing for inclusion of the requirement for the Student to request his accommodations, even though others at the team meeting, including a counselor/psychiatrist (whose name the Complainant could not recall) told the high school principal that it was unrealistic to expect the Student to be able to advocate for himself in this way. The Complainant said that this counselor/psychiatrist "argued" with the high school principal on this point during that meeting.

- **The District's General Section 504 Procedures for Identifying, Evaluating, and Placing Students with Disabilities**

At the time of the above-described incidents, the District did not have any formal Section 504 policies or procedures in place. The high school principal, who as noted above was the high school building Section 504 coordinator, told OCR that the District was working on policies that will govern the District's compliance with Section 504. The District's documentation submitted to OCR did not contain policies and procedures currently in effect that address the identification, evaluation, and placement of students with disabilities; or a notice identifying the employee designated to coordinate the District's efforts to comply with Section 504. Although there was some mention of a District coordinator on the District's website, the various postings conflicted as to which employee is assigned to that role with respect to Section 504, and, as explained below, none of the published materials stated the correct, current District or building Section 504 coordinators.

With respect to the District's Section 504 process in general, the high school principal told OCR that at any given time a student might be evaluated for a Section 504 plan or an IEP—never both at the same time. According to the high school principal, Section 504

plans and IEPs are distinguishable because a Section 504 plan is given to a student who has a "physical disability that impacts daily life," while an IEP is given to a student who has a disability "of an academic nature." He stated that a major life activity for purposes of Section 504 is physical rather than "on the mental side." He provided diabetes and anxiety disorder as examples of physical impairments that are addressed by a Section 504 plan. The high school principal further explained his belief that a Section 504 plan provides accommodations to meet students' physical demands, such as giving a student with a disability an opportunity go for a walk or have a quiet place to retreat during class.

The high school principal also stated that the District did not have a mandatory policy requiring teachers to refer students for evaluation who they suspect have a disability. He explained that some teachers initiate the referral process on their own by contacting parents regarding their suspicions, but further clarified that there was no policy in place requiring a referral. The high school principal also told OCR that he attended a professional development training in January 2015 and said he learned that anyone who requests a Section 504 plan will receive one. He explained that, because the definition of disability contained in Section 504 is so broad and because there is a fuller evaluation process required under IDEA, students are far more likely to get a Section 504 plan. Additionally, the high school principal stated his belief that students who are on medications or have a diagnosed disability will qualify for a Section 504 plan.

The high school principal also stated that the school wants students to avail themselves of supports that are already available (such as afterschool tutoring that teachers generally make available to any student) before providing extra supports through a Section 504 plan.

The high school principal explained that the Section 504 evaluation process involves a team considering parent and teacher input. He stated that no other evaluation activities are necessary under Section 504. The special education teacher also confirmed that students are never formally evaluated for Section 504 eligibility, but, she stated, the Section 504 team will consider documentation of a medical diagnosis provided by a student or the student's parent.

According to the high school principal, parents typically request 15-20 accommodations and the team then narrows the request down to a smaller number of accommodations that will end up in the final Section 504 plan.

In August 2015, the District informed OCR that it had hired a new high school principal who will also be the new high school Section 504 coordinator. The District also indicated it had a District Section 504 coordinator, who is the District's director of instruction. This information did not appear to be posted on the District's website, on

which, as of September 23, 2015, the previous high school principal is still listed as the Section 504 coordinator and, in some documents, an unnamed "District Title Coordinator" is listed as responsible for disability matters.

- **Alleged Disability-based Harassment**

The Complainant also alleged that the Student was harassed by his XXXX teacher on XXXX, 2014, because of his disability. She stated that, when the Student was unable to answer a question during class on that day, the Student's teacher called him something meaning "stupid" in front of the entire class. The Complainant stated that the Student could not remember the word, but recalled it was a "big word" that meant he was stupid. The Complainant also alleged that following that incident the Student's classmates approached him after class to express their anger about what had occurred. The Complainant e-mailed the high school principal about the incident, and the high school principal responded that he spoke with the teacher, who denied calling the Student a name. The Complainant did not believe the principal had spoken with any other witnesses, including students.

OCR reviewed documentation provided by the District, which included an e-mail dated XXXX, 2014, sent by the high school principal to the Complainant. In that e-mail, the high school principal told the Complainant that he had spoken with the XXXX teacher, who said that he told the Student he was "disappointed in him" after he was unable to answer a question. The e-mail explained that the XXXX teacher did not call the Student a name, but also acknowledged that the XXXX teacher's conduct "may not have been the best choice of words or action."

OCR interviewed the high school principal and the XXXX teacher regarding this incident. Both the high school principal and the XXXX teacher stated that the Student was not called a name during the XXXX class; rather, the XXXX teacher voiced his disappointment with the Student.

The high school principal stated that he spoke with the XXXX teacher after he was contacted by the Complainant, and the teacher described the incident. On the day in question, the XXXX teacher was following the high school's "Teach Like a Champion" initiative, which aims to teach staff strategies and techniques for improving instruction. One of the techniques involved responding to students who do not know the answer to a question. Pursuant to this technique, the teacher moves on to another student, who provides the answer, and then circles back to the original student to repeat that answer. On that day, the Student had notes with the answer in front of him, yet he was still unable to provide the answer. The XXXX teacher went on to another student, got the correct answer, and circled back to the Student, who could not restate the same answer. After this happened a second time, the XXXX teacher stated that he was disappointed in the Student because he was not listening. After learning that story from the XXXX teacher, the high school principal concluded that he did not need to speak with any of the witnesses suggested by the Complainant, especially because he believed that one of the students she had named was not a reputable source, that student having recently lied

about breaking a piece of technology in another classroom. According to the high school principal, there have been no complaints of name-calling by a teacher against the Student since this incident.

The XXXX teacher's description of the incident and the events that followed was consistent with the principal's. The teacher also stated that he was not aware of any negative reaction from the other students in the class or from the Student following the alleged incident.

OCR provided the Complainant and the Student with an opportunity to respond to the information provided by the District. The Student asserted that the XXXX teacher called him "stupid" using precisely that word. The Student denied that he or any of his classmates reacted visibly to the XXXX teacher's comment, but he reported that a classmate did report the incident to the high school principal. OCR then spoke with the Complainant, who maintained that the Student had not initially told her that the XXXX teacher used the word "stupid." Instead, she attributed the Student's conflicting statements to the Student's memory problems. The Complainant and the Student confirmed that there have been no problems with name-calling by the XXXX teacher or any other teacher since the XXXX, 2014, incident.

Applicable Legal Standards

- **Evaluation and Placement of Students with Disabilities**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts 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 services that are designed to meet the individual educational needs of a student with a disability as adequately as the needs of nondisabled students are met, and that are developed in accordance with procedural requirements of 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards).

The Section 504 regulation 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.

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j)(1), defines an individual with a disability, for purposes of eligibility for FAPE, as any person who has a physical or mental impairment that substantially limits one or more major life activities. Major life activities include things such as walking, bending, breathing, and normal cell growth or other major bodily functions. In public elementary and secondary schools, unless a

student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" being disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a FAPE.

The Section 504 regulation does not set out specific circumstances that trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances in each case. School districts should not assume that a student's academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. Grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. A student may have a disability even if his or her impairment does not substantially limit learning, as long as the impairment substantially limits another major life activity (such as focus or attention, among many others).

Section 504 mandates that recipients afford children with disabilities meaningful access to an education. A violation of 34 C.F.R. §§ 104.33 and 104.35 can be found where a recipient has failed to ensure that qualified persons with disabilities are evaluated and provided access to meaningful educational services without unreasonable delay. Although the Section 504 regulation does not set forth specific timeframes by which districts must complete evaluations of students, OCR considers state-required timeframes for evaluations as well as districts' own internal guidelines to determine whether the evaluation has been completed within a reasonable time. The Michigan Administrative Rules for Special Education (MARSE), at R 340.1721b, require that, within 10 school days of receipt of a written request for any evaluation, a district must provide the parent with written notice and request written parental consent to evaluate. This section further requires that the time from receipt of parental consent for an evaluation to a notice of an offer of a FAPE or a determination of ineligibility be no more than 30 school days, unless an extension is agreed to by the parent and the district in writing.

The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. A medical diagnosis cannot suffice as an evaluation for the purpose of providing FAPE. The results of an outside independent evaluation may be one of many sources to consider. The weight of the information is determined by the committee given the student's individual circumstances.

Once a student is identified as being eligible for regular or special education and related aids or services, a decision must be made regarding the type of services the student needs. For a placement to be appropriate, the education services for students with disabilities must accommodate the unique needs of students with disabilities. Additionally, as

required by 34 C.F.R. § 104.35(c)(3), a recipient must ensure that placement decisions are made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. This requirement of a team process applies in addition to a recipient's obligations under IDEA. Unlike some other sections of the regulation implementing Section 504 (for example, 34 C.F.R. § 104.35(d)), the section governing placement procedures in § 104.35(c) does not expressly state that compliance with IDEA is one means of meeting that provision's requirements. Additionally, the structure of the regulation defining an appropriate education for FAPE purposes reflects that a recipient's compliance with IDEA does not exhaust its Section 504 obligations. That regulation is comprised of two prongs. Although implementation of an IEP developed in accordance with IDEA is expressly one means of satisfying the first prong alone, the other prong at 34 C.F.R. § 104.33(b)(ii) requires additional compliance with 34 C.F.R. § 104.35, among others. Accordingly, although a placement decision made without convening the full IEP team could comply with the IDEA regulation pursuant to 34 C.F.R. § 300.324(a)(4), (6)[2], the Section 504 regulation on its face nevertheless superimposes the requirement that placement decisions be made by a group of persons as described above. In general, IDEA cannot be construed in a way that limits the rights of students with disabilities under Section 504. 20 U.S.C. § 1415(*l*).

- **Disability Harassment**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) states 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 any program or activity which receives Federal financial assistance. The Title II implementing regulation contains a similar prohibition at 28 C.F.R. § 35.130(a).

Disability harassment is a form of discrimination prohibited by Section 504 and Title II. Disability harassment under Section 504 or Title II is intimidation or abusive behavior toward a student because of disability that is so severe, pervasive, and/or persistent as to create a hostile environment that interferes with or denies the student's participation in a district's education program or activities. When disability harassment limits or denies a student's ability to participate in or benefit from a recipient's programs, the recipient must respond by promptly investigating the incident and responding appropriately. Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE a school district is required to provide to a qualified student with a disability under Section 504.

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[2] The IDEA regulation, at 34 C.F.R. § 300.324(a)(6), states that changes to a student's IEP may be made either by the entire IEP team at an IEP team meeting, or as provided in paragraph (a)(4) of the same section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. Paragraph (a)(4) of the section states that, in making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. The paragraph further states that, if changes are made to the child's IEP in this manner, the public agency must ensure that the child's IEP team is informed of those changes.

Analysis

- **Alleged Failure to Timely Evaluate the Student**

The evidence is sufficient for OCR to conclude that the District failed to timely evaluate the Student and make a decision regarding the Student's eligibility for special education services during the 2013-2014 school year, in violation of 34 C.F.R. § 104.35.

Although the Complainant asserted that she first submitted a copy of a report from an independent educational evaluation of the Student to the District in the XXXX of 2013, prior to the beginning of the 2013-2014 school year, the District does not have record of that. The District's documents do confirm, however, that the Complainant provided a copy of an outside evaluation report to the District on XXXX, 2013. There seems to be no dispute between the parties that the District agreed that an evaluation of the Student was appropriate at that time. The Complainant signed a REED form on XXXX, 2013, indicating that she consented to additional evaluation of the Student, and the high school principal signed the form on that same date. The documentation provided by the District demonstrates that a second District assessment was then conducted by a school psychologist in XXXX 2013. However, although there was vague recollection among witnesses of a meeting being held at the end of 2013, the District could not provide evidence that a group of persons knowledgeable about the Student, the evaluation data, and the placement options was convened to consider this information and the information submitted by the Complainant and to make a determination about the Student's eligibility for special education services. After the Complainant delivered to the District another copy of the outside evaluation report on XXXX, 2014, and again asserted that the Student qualified for special education services, the District conducted another evaluation on XXXX, 2014. Only then did the District convene an IEP team meeting on XXXX, 2014, to actually make eligibility and placement determinations.

As explained above, although the Section 504 regulation does not set forth specific timeframes by which districts must complete evaluations of students, OCR considers state-required timeframes for evaluations as well as districts' own internal guidelines to determine whether the evaluation was completed within a reasonable time. Michigan regulations require that the time from receipt of parental consent for an evaluation to a notice of an offer of a FAPE or a determination of ineligibility must be no more than 30 school days, unless an extension is agreed to by the parent and the district in writing. In this case, the District received the Complainant's consent for evaluation on XXXX, 2013. Thirty school days from XXXX, 2013, would have been XXXX, 2013. Although the District conducted an evaluation in XXXX 2013, the evidence does not support that the District concluded the evaluation or considered its results until XXXX, 2014, after the Complainant had again approached the District and the District had conducted another evaluation of the Student. In addition, the District did not provide any

reason for the delay during OCR's investigation. Therefore, the District failed to make a reasonably timely eligibility determination from approximately XXXX, 2013, through XXXX, 2014, in violation of the Section 504 regulation.[3]

- **Alleged Inclusion in IEP of Requirements Not Agreed to by Team**

The evidence is sufficient to conclude that District staff unilaterally determined the content of the Student's IEP without an appropriate team process, thus violating the Section 504 regulation at 34 C.F.R. § 104.35(c). However, the violation does not stem from conduct as originally alleged by the Complainant. The Complainant had asserted that the high school principal unilaterally overrode the IEP team's decision by requiring that the IEP require the Student to request his accommodations. District staff denied that the team as a whole originally determined that the Student was unable to request his accommodations and that the high school principal overrode that determination. Rather, the evidence shows that provisions requiring students to request their accommodations were typically applied for all Section 504 plans and IEPs at the high school. The high school principal explained this was the practice for IEPs in general, and the Student's own Section 504 plans prior to the development of the IEP also included this requirement.

However, this one-size-fits-all approach, even if apparently endorsed by the preponderance of an IEP team, does not comply with Section 504's requirement that a student's placement and services be tailored to meet the student's individual needs.

Additionally, OCR notes that the special education teacher confirmed that without re-convening the IEP team, in an April 28, 2014, amendment, she removed the requirement that the Student request his accommodations and included language allowing the Student to use XXXX during class. This failed to meet the District's obligation at 34 C.F.R. § 104.35(c) to ensure that placement decisions are made by a group of knowledgeable persons.

- **Systemic Issues at the District Contributing to the District's Failure to Appropriately Evaluate and Develop an IEP for the Student**

OCR's investigation revealed several other compliance concerns and other systemic issues that contributed to the District's violations of the Section 504 regulation with respect to the evaluation and placement of the Student. The District did not have formal Section 504 policies, including policies for the identification, evaluation, and placement of students with disabilities. The District also did not have a clear or consistent notice identifying the employee designated to coordinate the District's efforts to comply with Section 504.

[3] Although OCR obtained some evidence indicating the District may have also failed to timely evaluate and make a determination concerning the Student's eligibility under Section 504 and IDEA during the earlier part of the 2012-2013 school year, this evidence was only obtained as background to the allegation at issue and OCR did not consider whether that delay constituted a violation of Section 504 because the scope of OCR's investigation of this allegation was limited to the 2013-2014 school year.

Furthermore, interviews with District staff reflected misunderstandings of the scope and application of Section 504's protections for students with disabilities. The confusion stretched back to the Student's experience in middle school: although never formally identified as a student with a disability during that time, the District nevertheless provided him special education services. This misunderstanding persisted when the Student reached high school, where the District provided him services pursuant to a Section 504 plan, even though the team did not believe or have evaluation data to show that he actually had a disability. The high school team placed him on a Section 504 plan solely because the middle school had treated him like a student with a disability. District staff did insist that the Student's situation as a student placed on a Section 504 plan for being "regarded as" a student with a disability was XXXX and not common practice in the District. Nevertheless, the principal, who was the high school Section 504 coordinator, stated a belief during this investigation that anyone who requests a Section 504 plan will receive one.

District staff also misunderstood the District's affirmative obligation to locate students with disabilities. They appeared to believe that it was the obligation of parents to present a medical diagnosis before the District could consider whether a student had a disability.

District staff also did not understand what an evaluation under Section 504 should entail and the scope of the information the District should draw upon. The evidence indicated that the high school's common practice for conducting Section 504 evaluations was limited to soliciting recommendations and feedback from a student's teachers.

District staff also misunderstood the relationship between Section 504 and IDEA. For example, the high school Section 504 coordinator believed that Section 504 encompassed only physical disabilities.

Another area of concern dealt with the scope of services that are required under Section 504. The principal's statements to OCR suggested that he believed that only a certain number of accommodations were possible within a Section 504 plan and that a parent's proposed list of 15-20 accommodations would always need to be culled to a smaller list, as opposed to the team developing the student's placement and services based on what would be required for FAPE.

Furthermore, District staff responsible for drafting IEPs had the incorrect impression that they were not permitted to include a support or service that a student requires for FAPE in an IEP if it is novel, atypical, or, in the case of the XXXX requested by the Complainant, not found within the pre-populated accommodations existing in the District's software package used to publish IEPs.

Finally, information provided by District staff suggested that the District was unwilling to provide summer school or other instruction outside of the school day to the Student regardless of whether he needed it for FAPE because he was on an IEP and because such supplemental instruction is not generally provided by the District's special education department.

- **Alleged Disability-based Harassment**

OCR finds that the evidence is insufficient to conclude that the XXXX teacher subjected the Student to verbal harassment based on disability in violation of Section 504 or Title II, as alleged, and is therefore closing this allegation effective the date of this letter. OCR did not obtain sufficient information during its investigation to corroborate that the alleged discriminatory statements (to the effect that the Student was "stupid") were made to the Student. OCR is therefore unable to conclude that the XXXX teacher made a disparaging comment suggesting that the Student was stupid.

Considering the XXXX teacher's credible statement that what he told the Student was that he was disappointed because the Student could not provide a response to a question in class that was available in his notes and had just been stated by another student, the evidence is insufficient to conclude that this one-time comment amounted to intimidation or abusive behavior based on disability that was so severe, pervasive, and/or persistent as to create a hostile environment that interfered with or denied the Student's participation in the District's education program or activities. Nor does the evidence support the conclusion that the XXXX teacher's one-time comment constituted a denial of FAPE.

OCR notes that that District did promptly respond to the Complainant's report of a potential harassment incident, and both the Complainant and District witnesses denied that there have been any incidents involving alleged name-calling against the Student by a teacher since the Complainant's report.

Resolution and Conclusion

On October 12, 2015, the District signed the enclosed resolution agreement, which, once implemented, will fully address OCR's findings in accordance with Section 504 and Title II. In summary, the resolution agreement requires the District to: (1) convene the Student's IEP team to determine whether he had a disability between XXXX, 2013, and XXXX, 2014, and if so, consider the supports the Student already received during that time period in order to determine whether compensatory education is needed to ensure he received a FAPE during that time; (2) designate a District-wide Section 504 coordinator and disseminate the coordinator's contact information; (3) submit for OCR's review and approval policies and procedures to implement the District's obligations under Section 504; (4) disseminate those approved policies and procedures; (5) submit for OCR's review and approval a training on Section 504 and the OCR-approved policies and procedures; (6) execute the approved training across the District; and (7) implement a system to ensure that students' Section 504 plans or IEPs do not limit to a finite set of pre-populated items the accommodations, supports, or services that are publishable in the section of a student's IEP or Section 504 plan listing a student's accommodations. OCR will monitor the implementation of the agreement. If the District does not fully implement the agreement, OCR will reopen the investigation and take appropriate action.

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 alleging such treatment. If this happens, the Complainant 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, we 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 appreciates your cooperation and that of the District during the investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, please contact Traci L. Ext, Chief Attorney, at (216) 522-2671 or by e-mail at Traci.Ext@ed.gov.

For questions about implementation of the Agreement, please contact Michael Todd, who will be monitoring the District's implementation, by telephone at (216) 522-7644 or by e-mail at Michael.Todd@ed.gov. We look forward to receiving the District's first monitoring report by November 30, 2015. Should you choose to submit your monitoring reports electronically, please send them to Mr. Todd's e-mail address above.

Sincerely,

Meena Morey Chandra
Director

Enclosure