

Ms. Brenda L. Tenniswood
Assistant Superintendent for Instruction
East China School District
1585 Meisner Road
East China, Michigan 48054

Re: OCR Docket #15-14-1193

Dear Ms. Tenniswood:

This letter is to notify you of the disposition of the complaint filed on xxxxx, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the East China School District (District), alleging discrimination against a student (Student) on the basis of disability. Specifically, the complaint alleged that the District discriminated against the Student during the 2013-2014 school year by:

1. failing to xxxxx; and
2. failing to respond appropriately to complaints that xxxxx, based on disability.

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 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public institution, the District is subject to these laws. Therefore, OCR had jurisdiction to investigate this complaint.

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

- whether the District failed to evaluate a student who, because of disability, needs or was believed to need special education or related services, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35;

- whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied him the benefits of, or otherwise subjected him to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
- whether the District failed to provide a qualified student with a disability with a free appropriate public education (FAPE) as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33;
- whether a student was xxxxx, in violation of 34 C.F.R. § 104.4; and
- whether the District failed to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by the Section 504 or Title II regulations, as required by the Section 504 and Title II regulations at 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b).

To conduct its investigation, OCR interviewed xxxxx, as well as relevant current and former District staff. OCR also reviewed documents from the District and the parent related to the complaint allegations. After a careful review of the evidence obtained, OCR has determined that the evidence is sufficient to support a finding that the District failed to evaluate the Student when it had reason to believe that the student required related aids and services xxxxx, in violation of Section 504. However, OCR found insufficient evidence of a violation on all remaining allegations.

Background

During the xxxxx school year, the Student was enrolled in the xxxxx at the District's xxxxx (School). The District xxxxx identified the Student as a student with a disability, with a classification of xxxxx, and provided xxxxx services pursuant to an Individualized Education Program (IEP). The Student's parent xxxxx.

The complaint alleged that during this period the Student had an xxxxx, and that the Student's parent had informed the District of this diagnosis xxxxx. The Student's parent said the District was also aware that the Student xxxxx at school. The Student's parent said the Student received xxxxx. Despite these factors, however, the District xxxxx to determine whether he needed special education or related services in the area of behavior or attention under Section 504.

Relatedly, the complaint also alleged that because of xxxxx, the Student was xxxxx. The Student's parent said that in the xxxxx, she told the xxxxx.

Finally, the complaint alleged that xxxxx. She said that she xxxxx.

Applicable Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b) provides that recipients must provide a free appropriate public education (FAPE) to each qualified student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the disability. For purposes of FAPE, 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 disabilities as adequately as the needs of students without disabilities are met and that are based upon adherence to procedures that satisfy the specific procedural requirements set forth in the Section 504 regulation at 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a recipient school district to evaluate any student who, because of disability, needs or is believed to need special education or related services. 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. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades. 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 and the ADA define disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment. The definition of disability is construed broadly and the determination of whether an individual has a disability should not demand extensive analysis. An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting. Additionally, mitigating measures – such as medications – used to eliminate or reduce the effects of an impairment cannot be considered when determining whether a person has a substantially limiting impairment.

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), prohibits recipient school districts from, on the basis of disability, excluding a qualified person with a disability from participation in, denying the person the benefits of, or otherwise subjecting the person to discrimination under any program or activity. The Title II implementing regulation contains a similar provision at 28 C.F.R. § 35.130(a).

Disability-based harassment under Section 504 or Title II is intimidating 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 a 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. Where the recipient learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

While disability harassment must involve the bullying or harassing of a student "on the basis of disability," any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE that must be remedied, regardless of the nature of the bullying or harassment. Section 504 imposes on a recipient an ongoing obligation to provide FAPE to students with disabilities, and that obligation exists whether or not school officials know or reasonably know about harassment or bullying of a student with a disability that may be causing a denial of FAPE.

Summary of OCR's Investigation and Analysis

o Relevant District Policies

OCR's review of various District policies and procedures xxxxx indicated that the policies are publicly available on the District's web site as of fall 2014; however, the guidelines require a password to access. According to the District, copies of all relevant policies or guidelines may be obtained through the District, upon request. Additionally, prior to the start of the 2013-2014 school year, the District sent a newsletter to all families informing them of the District's policy against discrimination on the basis of various protected bases, including disability, and provided two contact individuals at the District from whom families could seek additional information.

With respect to disability-based harassment, the District maintains three pertinent policies: (1) Board Policy 5517: Anti-harassment (Harassment Policy); (2) Administrative Guideline for Policy 5517: Anti-Harassment (Harassment Guideline); and (3) Board Policy 5517.01 Bullying and Other Aggressive Behavior Toward Students (Bullying Policy).

The Harassment Policy specifically prohibits harassment on the basis of disability in school programs on or off campus, and provides examples of prohibited conduct. The Harassment Policy provides for correct and adequate notice to individuals about prohibited discrimination/harassment, procedures for filing complaints, including an informal and formal complaint procedure and the identity of relevant contact person(s), procedures for investigation and resolution of complaints, and requires written notification of the District's decision within prompt and reasonable time frames.

The Harassment Guideline overlaps with the Harassment Policy and provides similar information, but identifies the compliance officers as "Assistant Superintendent #1 – Personnel Office" and "Assistant Superintendent #2 – Curriculum Office" with no names. OCR determined that it is unclear to whom these references refer or if they overlap with the Harassment Policy.

The Bullying Policy also overlaps with both the Harassment Policy and Harassment Guideline, in that students are directed to report incidents of "bullying, hazing, or other aggressive

behavior” to the principal or assistant principal (or teacher or counselor, who forward the complaint to the relevant administrator). If the principal believes that the reported misconduct may have created a hostile learning environment and may have constituted unlawful discrimination on a protected basis, the principal should report it to the compliance officer for investigation in accordance with the Harassment Policy.

With respect to identification, evaluation and placement of students with disabilities under Section 504, the District maintains a manual entitled “Section 504 Manual for Identifying and Serving Eligible Students” (Manual). The Manual includes: accurate definitions of disability under Section 504; a clear description of the Section 504 referral, evaluation, and placement process; and, an explanation of when and how a parent can challenge the District’s decisions through an Impartial Due Process hearing. The Manual also includes a grievance procedure for complaints of disability-related discrimination and provides complete contact information for the District’s Section 504 coordinator.

OCR notes that although the Manual correctly notes that complaints may also be filed with OCR at any time, it contains outdated information regarding OCR’s address, and should be revised to reflect OCR’s current address.¹

The District told OCR that the Manual is given to parents during an initial request for evaluation under Section 504 as well as the annual review and three year re-evaluation, and that it is also available upon request from the building principal, teachers and counselors.

The District also maintains a number of separate Section 504-related policies and procedures on its web site. Specifically, with respect to identification, evaluation and placement, it maintains: (1) Policy 2260: Access to Equal Educational Opportunity; and (2) Administrative Guideline 2260.01A – Section 504/ADA Prohibition Against Discrimination Based on Disability. OCR notes that the policy and guideline differ in several respects from the Manual. For example, the guideline includes both due process grievance procedures and general disability-related grievance procedures. The general grievance procedure in the guideline has fewer steps than the one in the Manual; the Manual’s process offers an extra step of appeal to the superintendent and makes clear that parties need not file internally before filing with OCR. Likewise, the guideline sets forth a different process for referral, cites to different forms, and uses different standards from those set forth in the Manual. For example, the guideline repeatedly uses the terms “accommodations” and “reasonable accommodations” in discussing the standard for providing education for students with disabilities, which is contrary to Section 504. It further states that:

Qualified students with disabilities will be afforded reasonable accommodations and/or modifications to the District's programs and activities, unless such accommodations/modifications would impose an undue burden on the operation of the particular program/activity, or would alter the fundamental nature or purpose of the program/activity.

The above standard is contrary to the Manual and Section 504, which requires that the District

¹ The current contact information is U.S. Department of Education, Office for Civil Rights, 1350 Euclid Avenue, Suite 325, Cleveland, Ohio 44115; (216) 522-4970 (phone); (216)522-2573 (fax); e-mail: OCR.Cleveland@ed.gov.

provide students with disabilities a FAPE.

OCR finds that although the Manual complies with Section 504, the District's other policies and procedures overlap and are inconsistent with each other in some areas, and in some cases do not state correct legal standards regarding the provision of special education and related services under Section 504. The internal inconsistencies and incorrect information found in the other policies, procedures and guidelines may cause confusion for staff, parents, and students seeking to understand the District's process.

Accordingly, OCR finds sufficient evidence that the District's policies and procedures – to the extent that they conflict with the Manual and contain incorrect legal standards – violate Section 504.

- **Alleged xxxxx**

Documentation from the District and interviews with relevant xxxxx District staff in this matter show that the Student xxxxx received services under an IEP dated xxxxx, which identified him as xxxxx. The District does not dispute that the parent informed the student's xxxxx of the Student's diagnosis of xxxxx² and that xxxxx. The IEP notes that xxxxx were xxxxx, but provides no further detail as to the discussion regarding these matters.

In the first few weeks of the xxxxx school year, the Student's xxxxx noted that the Student xxxxx. The District responded to these concerns by xxxxx. The xxxxx occurred on xxxxx, and led to xxxxx. The xxxxx IEP also notes that xxxxx but provides no further detail as to the discussion regarding these matters.

- **xxxxxx**

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

² District documentation refers to the diagnosis as xxxxx.

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

OCR asked staff what discussion of behavioral issues occurred at the IEP team meetings. One staff member interviewed attended the xxxxx meeting, xxxxx. Another staff member who attended said xxxxx. Other reasons expressed to OCR by staff during interviews for xxxxx.

OCR notes that at least xxxxx interviewed stated that xxxxx.

Documentation from the District reflects that the parent xxxxx. The documentation further reflects that the parent spoke with xxxxx. She told xxxxx.

As noted above, Section 504 requires school districts to conduct an evaluation, in accordance with its procedural requirements, of any student who needs or is believed to need special education or related aids or services because of a disability. Section 504 does not require districts to evaluate all students with academic underperformance or diagnosed medical conditions. Rather, in determining whether a district has an obligation to evaluate a student, OCR considers the indicia of disability available to the district that might reasonably lead district personnel to suspect that the student needed special education or related aids and services due to a disability.

Here, the evidence shows that the District was aware that: xxxxx

OCR notes that several of the reasons advanced by staff for xxxxx are inconsistent with Section 504 as it relates to xxxxx. For example, the xxxxx.

OCR acknowledges the efforts of the District in this matter to try to address the Student's needs xxxxx. However, because these efforts took place entirely outside of the procedural requirements of Section 504 – which would have ensured, among other things, the legal right of the parent to challenge the District's evaluation and placement decisions – they failed to comply with Section 504.

Based on the above, OCR finds that the weight of the evidence supports that there is sufficient evidence to conclude that the District failed to provide the Student a FAPE when it failed to evaluate the Student for a xxxxx, as alleged.

The District has submitted the enclosed signed Agreement to OCR, which, once fully implemented, will resolve the complaint violations regarding the deficiencies in its 504 policies and procedures and the failure to xxxxx, and will ensure the District's compliance with Section 504 and Title II.

- **xxxxx**

X—paragraph deleted—X.

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

X—paragraph deleted—X

As noted above, in determining whether a district has an obligation to evaluate a student, OCR considers the indicia of disability available to the district that might reasonably lead district personnel to suspect that the student needed special education or related aids and services due to a disability. As noted, the fact that a student is academically proficient in certain areas does not prohibit consideration of disability. However, in this instance, OCR did not find any other evidence, and the parent provided no additional information, which suggested or, otherwise supported, the contention that the Student xxxxx. The above information and evidence did not support that the District had reason to suspect the Student may have a disability related to xxxxx that warranted a referral for an evaluation in this area. Accordingly, the evidence is insufficient to show that the District denied the Student a FAPE by failing to evaluate the Student, in violation of Section 504, as alleged.

- **Alleged Failure to xxxxx**

X—paragraph deleted—X

District staff denied having any knowledge of xxxxx, as described by the parent. They also denied that the parent, the Student, or anyone else xxxxx.

X—paragraph deleted—X

X—paragraph deleted—X

The Student's parent told OCR that she made xxxxx complaints as stated above, but xxxxx to any District staff or administrators. When asked whether she ever xxxxx, the parent stated that she xxxxx. When asked whether she had asked the Student xxxxx, she said that xxxxx. Despite having several weeks to provide the information, the parent never contacted OCR with any additional information.

OCR was unable to corroborate the parent's assertion that xxxxx.

Based on the above, OCR determined that although the Student's parent maintains that she xxxxx, OCR could only confirm that she told one staff member that xxxxx without providing any additional details. The parent confirmed that she xxxxx; likewise she never provided OCR xxxxx to enable OCR to investigate further. OCR found no evidence to substantiate that the parent xxxxx. Therefore, OCR determined that there was insufficient evidence to substantiate the complaint allegation that the District xxxxx on the basis of xxxxx disability. Accordingly, OCR finds that the evidence is insufficient to support a violation of Section 504, as alleged.

Conclusion

Based on the information above, OCR is closing this complaint effective the date of this letter. 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, coerced, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the 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 have the right to file a private suit in federal court, whether or not OCR finds a violation.

OCR appreciates the District's cooperation during the investigation of this complaint. If you have any questions, please contact me at (216) 522-xxxx, or Kelly.M.Johnson@ed.gov. For questions about implementation of the Agreement, please contact Ms. Aubrie Wancata at (216) 522-xxxx or Aubrie.wancata@ed.gov, who will be monitoring the District's implementation of the Agreement. We look forward to receiving the District's first monitoring report by xxxx. Should you choose to submit your monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

/s/

Kelly M. Johnson
Supervisory Attorney/Team Leader