



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

Dr. Ryle Kiser
Superintendent
Grass Lake Community Schools
899 S. Union Street
Grass Lake, Michigan 49240

Re: OCR Docket #15-15-1019

Dear Dr. Kiser:

This letter is to notify you of the disposition of the above-referenced complaint, filed with the U.S. Department of Education's Office for Civil Rights (OCR) against the Grass Lake Community Schools (the District), alleging discrimination on the basis of disability. Specifically, the complaint alleged that the District exited a student with a disability (the Student) from an Individualized Education Program (IEP) in xxx xxxx without considering the adverse impact of his xxxxxxxx xxxxx xxxxxxxxxxxxxxxx xxxxxxxx or any area of eligibility other than xxxxxx/xxxxxxx, despite the Student's having a xxxxxxxx xxxxxxxxxxxx xxxxxxxx and xxxxxxxx xxxxxxxx xxxxxxxx xxxx in place to address this; that the District xxxx the Student xxxx and xxxxxxxxxxxx him multiple times during the xxxx-xxxx and xxxx-xxxx school years due to xxxxxxxx related to his disability; and that the District failed to xxxxxx xxxxxxxx the Student for eligibility as a student with a disability from xxxxxxxx on despite a parental request for such an evaluation and a teacher's expressed concerns about his xxxxxxxx.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education (Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35 (Title II). 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 school district, the District is subject to these laws; thus, OCR had jurisdiction to investigate this complaint.

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Based on the complaint allegations, OCR opened an investigation to examine:

- whether a school district failed to appropriately re-evaluate a student with a disability prior to a significant change in placement in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35(d);
- whether a school district inappropriately excluded a student with a disability from participation in district services, programs, and activities due to behaviors related to disability 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(a); and
- whether a school district failed to timely evaluate a student who, because of disability, might need special education or related aids and services in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35(a).

Applicable Legal and Policy Standards

Under Section 504 and Title II, a school district may not, on the basis of disability, exclude a qualified student with a disability from participation in, deny the student the benefits of, or otherwise subject the student to discrimination under any of its programs or activities. 34 C.F.R. § 104.04(a); 28 C.F.R. § 35.130(a).

The regulation implementing Section 504 includes specific protections and requirements for school districts as regards students with disabilities. The regulation, at 34 C.F.R. § 104.33, provides that a recipient that operates a public elementary or secondary education program or activity must provide a free appropriate public education (FAPE) to each qualified individual with a disability within its jurisdiction. An appropriate education 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 students with disabilities as adequately as the needs of students without disabilities are met and that are based on adherence to procedures that satisfy the educational setting, evaluation and placement, and procedural safeguards requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), also requires school districts to evaluate any child who, because of disability, needs or is believed to need special education or related aids and services. In addition, that regulation, at 34 C.F.R. § 104.35(b), requires recipients to establish standards and procedures for the evaluation and placement of such persons. The regulation at 34 C.F.R. § 104.35(c) further requires that, in interpreting evaluation data and making placement decisions for students with disabilities, a 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 placement options; and (4) ensure that placement decisions are made in conformance with the educational setting requirements at 34 C.F.R. § 104.34.

A school district must not consider the ameliorating effects of any mitigating measures that student is using when determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity. Mitigating measures that may not be considered include, but are not limited to: medication; medical supplies, equipment, or appliances; low-vision devices (not including ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

If a school district determines, based on the facts and circumstances of an individual case, that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. §§ 104.35(a) and (b), the district must ensure that a child receives this assessment at no cost to the parents. If alternative assessment methods meet the evaluation criteria, these methods may be used in lieu of a medical assessment.

Although the Section 504 regulation does not set forth specific timeframes by which recipient school districts must complete evaluations of students, a recipient school district must ensure that qualified students with disabilities are evaluated and provided access to meaningful educational services without unreasonable delay. OCR will consider, as guidance, state-required timeframes for evaluations, as well as a school district's internal guidelines, to determine whether the evaluation has been completed within a reasonable time. Under Michigan's Administrative Rules for Special Education at R 340.1721b, initial evaluations must be completed within 30 days of receiving parental consent for an evaluation, although the timeline can be extended if agreed to in writing by mutual, written agreement of the parent and the public agency.

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts may always use regular education intervention strategies to assist students with difficulties in school. However, Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if a student, because of disability, needs or is believed to need such services. Interventions should not delay referral for evaluation where such a delay would be inconsistent with meeting the district's obligations under Section 504.

Under Section 504, if a parent requests an evaluation, the district may evaluate the student within a reasonable amount of time or may decline to evaluate the student because the district does not believe that the student has a disability within the meaning of Section 504. In the latter case, the procedural safeguards requirement of 34 C.F.R.

§ 104.36 requires the district to provide notice to the parent of its determination and resulting refusal to evaluate, as well as the parent’s right to challenge the district’s decision by requesting an impartial hearing by a person knowledgeable about Section 504.

Finally, a school district must re-evaluate a student with a disability before any significant change in placement. 34 C.F.R. § 104.35(a). OCR considers transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement. Under OCR policy, any suspension, exclusion (including in-school removal or suspension that removes a student from his/her program), or expulsion in a disciplinary context that exceeds ten days or any series of shorter suspensions or exclusions that in the aggregate totals more than ten days and creates a pattern of exclusion constitutes a significant change of placement that would trigger a district’s duty to re-evaluate a student under Section 504.

If a significant change in placement occurs in a disciplinary context, the first step of the re-evaluation process under Section 504 is for a school district to determine, using appropriate evaluation procedures that conform to the requirements of the Section 504 regulation, whether the conduct giving rise to the disciplinary removal was a manifestation of the student's disability. This determination is to be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. If the group determines that the conduct was a manifestation of the student's disability, the student may not be removed for a period which would constitute a significant change in placement, and the evaluation team should continue the evaluation to determine whether the current program is appropriate to meet the student's needs. If the group determines that the conduct was not a manifestation of the student’s disability, the school district may discipline the student as it would a student without a disability in similar circumstances.

Alleged Disability Discrimination

- **Summary of OCR’s Investigation to Date**

To date, OCR has interviewed the Student’s parent (Parent) and reviewed documentation submitted by the Parent and by the District. Prior to the completion of OCR’s investigation, the District asked to resolve this complaint under Section 302 of OCR’s Case Processing Manual (the Manual).

[XXX--- Paragraph Redacted---XXX]

[XXX---Paragraph Redacted---XXX]

[XXX---Paragraph Redacted---]

The Parent informed OCR that she was given the opportunity to provide input into the decision to de-certify the Student but that she was not familiar with her rights at that time

and did not know she could disagree, ask for an evaluation, or have the District look at his behavior. She stated that she was not well informed.

[XXX---Paragraph Redacted---XXX]

[XXX---Paragraph Redacted---XXX]

- **Voluntary Resolution of Individual Allegations**

As stated above, prior to the completion of this complaint investigation, the District asked to resolve the complaint under Section 302 of Manual by signing a voluntary resolution agreement (Agreement). The Manual provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegation(s). Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegation(s) or the information obtained during the investigation and consistent with applicable regulations.

To resolve the individual allegations of this complaint, under terms of the Agreement, the District will reconvene the Student’s Section 504/IEP team to determine whether he needs compensatory and/or remedial services as a result of the District’s exiting the Student from his xxx in xxxx xxxx and any consideration of mitigating measures in determining whether the Student qualified for services as a student with a disability from xxxx xx xxxxx until he was again placed on an xxx xx xxxxxxxxxxx xxxx. Should the District determine such services are necessary, the District will then provide the services and document their provision for OCR. The District will inform the Student’s parent(s) of the procedural safeguards afforded under Section 504, including their right to challenge determinations as to the Student’s placement/services. The District will then provide the services, with the consent of the Parent, and document their provision for OCR or will document for OCR the Parent’s lack of consent or failure to make the Student available for receipt of services.

The District’s Section 504 Policies and Procedures

- **Summary of OCR’s Investigation**

In response to an OCR data request for policies regarding identification, evaluation, and placement of students suspected of having disabilities, the District provided OCR with policies labelled, at the bottom of various pages, “NEOLA 2008,” “NEOLA 2011,” or “<http://neola.com/grasslake-mi/> that.” The policies thus appear to be, at least in part, either adopted from or copies of various commercially procured policies.

While one place in the policy identifies major life activities as specified in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122

Stat. 3553 (2008), the policy’s general page about Section 504/ADA “Prohibition against Discrimination based on Disability” includes only the major life activities listed in Section 504 and Title II prior to the ADAAA. The policy further states that students with a physical or mental impairment that significantly limits *learning* [emphasis added] but does not require specially designed instruction will be eligible for reasonable accommodations and/or modifications in the regular classroom or curriculum pursuant to a Section 504 Accommodation Plan (it does indicate elsewhere that other settings may be appropriate). The policy also states that, if a student’s impairment does not significantly limit learning, the student will not be eligible for a Section 504 Accommodation Plan but rather may be eligible for a “Classroom Accommodation/Checklist.”

The policy does not set out the standard for mitigating measures under the ADAAA and thus does not clarify that school districts may not consider the effects of mitigating measures when determining whether a student has a disability under Section 504/Title II.

The District’s policy on facilities access states the overall standard as articulated in 34 C.F.R. § 104.21 but then states:

The District is committed to operating its programs and activities so that they are readily accessible to persons with disabilities. This includes, but is not limited to, providing accommodations to parents with disabilities who desire access to their child’s educational program or meetings pertinent thereto. Programs and activities will be designed and scheduled so that the location and nature of the facility or area will not deny a student with a disability the opportunity to participate on the same basis as students without disabilities. The District will meet its obligation through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, alteration of existing facilities and/or construction of new facilities, or any other method that results in making its programs and activities accessible to persons with disabilities.

The policy states that parents have the right to request mediation or an impartial due process hearing and includes a line about where hearing requests should be made, but the line includes a blank space where it should indicate that information. Similarly, the policy states that the District’s Board of Education has designated “_____” as the District’s Section 504/ADA Compliance Officer(s), with no person or title filled in. The policy similar includes blank lines where the contact information for that person should appear. Other portions of the policy identify the Superintendent and provide a written address (and, in one location, an e-mail address and telephone number) for contacting him/her with inquiries about District non-discrimination policies or to address any complaint of discrimination.

The policy also states:

The Board will adopt a system of procedural safeguards that will provide for the prompt and equitable resolution of complaints alleging violations of Section 504/ADA. Due process rights of students with disabilities and their parents under Section 504 will be enforced.

The policy does not set out rules related to disciplining students with disabilities. The policy also provides readers with an incorrect address for OCR (OCR Cleveland's prior office address).

- **Applicable Legal Standards**

In addition to the requirement, described above, that a school district evaluate any individual within its jurisdiction who might need special education and/or related aids and services because of disability and, if the person does have a disability, to determine what placement, if any, would provide the student with a free appropriate public education, Section 504 also requires school district establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. 34 C.F.R. § 104.35(b).

Section 504 defines disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such impairment; or (3) being regarded as having such an impairment. 34 C.F.R. § 104.3(j); 28 C.F.R. § 35.104. To be eligible for protection as a student with a disability under prong one of that definition, a student must have a physical or mental impairment that substantially limits one or more major life activities. This determination must be made on the basis of an individual inquiry. Prior to the passage of the Americans with Disabilities Amendments Act (ADAAA), Section 504 and Title II defined major life activities (that would be considered in an evaluation) to include, but not to be limited to, functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and working. After passage of the ADAAA, the definition of major life activities for both laws was expanded to include eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating, as well as the operation of a major bodily function, such as immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. These lists are not exhaustive. Thus, under Section 504, a student may qualify as having a disability even if his impairment does not substantially limit learning. 34 C.F.R. § 104.3(j)(2).

Under the ADAAA, 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. As stated above, when determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, a school district must also not consider the ameliorating effects of any mitigating measures that student is using.

The Section 504 implementing regulation at 35 C.F.R. § 104.7(b) states that a recipient that employs fifteen or more persons shall 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 Section 504. Title II contains a similar provision at 28 C.F.R. § 35.107(b). However, the Section 504 regulation at 34 C.F.R. § 104.36 requires recipient school districts to establish and implement as well, with respect to actions regarding the identification, evaluation, or educational placement of such persons, a system of procedural safeguards that includes, in relevant part, notice and an impartial hearing.

The Section 504 and Title II implementing regulations both provide that institutions subject to these laws should designate at least one employee to coordinate its efforts to comply with those laws, including investigating complaints alleging non-compliance. In addition, institutions must publish make available the name or title, office address, telephone number, and e-mail address of the employee. 35 C.F.R. § 104.7(a); 28 C.F.R. § 35.107(a).

The Section 504 implementing regulation states that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 applies. 34 C.F.R. § 104.21. The Title II regulation contains a similar provision for public entities at 28 C.F.R. § 35.149.

The Section 504 and Title II regulations contain standards for determining whether a school's programs, activities, and services are readily accessible to and usable by individuals with disabilities, depending on whether the facilities are determined to be existing construction, new construction, or altered construction. The applicable standard depends on the date of construction or alteration of the facility and the nature of any alternation.

For existing facilities--those for which construction began (ground was broken) before June 3, 1977 under the Section 504 regulation and January 26, 1992 under the Title II implementing regulation--the regulations require an educational institution to operate each service, program, or activity so that, when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. This compliance standard is referred to as "program access." This standard does not require that an institution make each of its existing facilities or every part of a facility accessible if alternative methods are effective in providing overall access to the service, program, or activity. A recipient may comply with this standard through physical alteration of existing facilities, but a recipient is not required to make structural changes to the facility itself when other methods are effective in achieving compliance. 34 C.F.R. §104.22(a); 28 C.F.R. § 35.150(a). In choosing among available methods for meeting the program access requirement for existing facilities, an institution is required to give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate. 34 C.F.R. § 104.22(b); 28 C.F.R.

§ 35.150(b).

For new construction--facilities where construction began (ground was broken) on or after June 3, 1977 under Section 504 and on or after January 26, 1992 under Title II--the facility or newly constructed part of the facility must itself be readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(a); 28 C.F.R. § 35.151(a).

With regard to alterations, each facility or part of a facility that is altered by, on behalf of, or for the use of an institution, in a manner that affects or could affect the usability of the facility or part of the facility, after the effective dates of the Section 504 and/or Title II regulation must, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by persons with disabilities. 34 C.F.R. § 104.23(b); 28 C.F.R. § 35.151(b).

- **Analysis and Conclusion**

OCR identified a number of compliance concerns with regard to the District's policy. Section 504 requires school districts to establish standards and procedures for evaluation and placement. The District has a relevant policy. The policy does not consistently define disability as to major life activities and does not specify that mitigating measures cannot be used when determining whether a person is an individual with a disability; a correct, complete definition of disability and correct treatment of mitigating measures would have to be utilized as part of an effective, compliant evaluation. Thus, the policy does not comport with the requirements of Section 504 in these regards.

In addition, the regulation requires school districts to evaluate a student in accordance with the requirements of the Section 504 regulation if they suspect the student may have a disability and need related services and, if they determine that the student has a disability under Section 504, to determine a placement to meet the student's individual needs. The District's policy specifies, instead, that a student cannot have a Section 504 plan unless an impairment substantially limits learning, whereas Section 504 and Title II define disability as a substantial limitation to a major life activity and enumerate a number of other major life activities that could result in a student being eligible for protection and services under Section 504. This aspect of the policy does not therefore comport with the requirements of Section 504.

Further, while the District's policy correctly states its overall obligation for facility access, the policy also states that issues relating to facilities access can be resolved by means such as reassignment to an accessible location, assignment of aides, alterations, etc. While the policy acknowledges that new construction may be a method employed to provide access, it does not make clear that newly constructed facilities must themselves be accessible to persons with disabilities when constructed and that access is not simply an accommodation granted later upon request; rather, the policy indicates that the District can meet its responsibilities through actions such as reassignment of the location for an activity (without distinguishing new and existing facilities in this regard).

The District's policy appears to conflate grievance policies and due process rights. It uses language associated with required grievance procedures (e.g., "prompt and equitable resolution of complaints alleging violations of Section 504" and "due process"), but it uses the language after stating the Board will establish a system of procedural safeguards. Section 504 requires the District to have both a grievance procedure to resolve overall 504 complaints *and* a system of procedural safeguards that provide for a hearing before an impartial hearing officer knowledgeable about the requirements of Section 504 to hear those disputes specifically dealing with identification, evaluation, and placement determinations. In addition, the policy includes a blank line when describing whom to contact about what appears to be a due process procedure.

While one or more places in the policy correctly identify the District's Section 504 Coordinator and provide contact information, that information is lacking in another part of the policy, where a blank line appears. The District's required notification of its 504 Coordinator is therefore a compliance concern.

Based on the foregoing, OCR finds that the District's Section 504 policy and procedures fail to comply with requirements of the Section 504 implementing regulation. Under the Agreement, the District will revise its Section 504 policy to comport with the requirements of Section 504, notify beneficiaries of the revisions, post the revised policy on its website and include the policy in its handbooks, and train relevant staff on the revised policy and on Section 504's/Title II's requirements regarding the identification, evaluation, re-evaluation, and placement of students with disabilities and Section 504's requirements regarding discipline of students with disabilities

Conclusion

In light of the signed Agreement, OCR finds that this complaint is resolved and is closing this investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will reopen the complaint and resume its investigation of the complaint allegations.

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 or participated in the complaint resolution process. If this happens, the harmed individual may file a complaint alleging such treatment. The complainant may file a private suit in federal court whether or not OCR finds a violation.

We appreciate the District's cooperation during the resolution of this complaint. We look forward to receiving the District's first monitoring report, which is due by February 29, 2016. You may send the report to Ms. xxxxx xxxxxx, who will be monitoring the District's implementation of this agreement. Ms. xxxxxx may be reached at (216) xxx-xxxx or at xxxxx.xxxxxx@ed.gov. In addition, if you have any questions about this letter, you may contact Ms. xxxxx xxxxxx.

Sincerely,

Xxxx x xxxx
Supervisory Attorney/Team Leader

Enclosure