

May 26, 2015

Dr. Michael L. Thurmond  
Superintendent  
DeKalb County Schools  
1701 Mountain Industrial Boulevard  
Stone Mountain, Georgia 30083

**Re: OCR Docket # 04-15-1019**

Dear Dr. Thurmond:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint filed against DeKalb County Schools (District) on October 16, 2014, alleging discrimination on the basis of disability. The Complainant, who represented the Student (and the Student's Parent), alleged:

1. Different treatment of the Student and other students with disabilities in the Community Based Vocational Training (CBVT) program in the District by requiring their parents to sign a legal release in order for students to participate in community jobs as part of the CBVT program, while not requiring such a release from parents of students without disabilities who participate in other off-campus activities, such as band, field trips, etc.; and
2. Denial of a free appropriate public education (FAPE) for the Student, by not providing the community jobs part of the CBVT program, which is listed on the Student's Individualized Education Program (IEP).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance (FFA) 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 FFA from the Department and as a public entity, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

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

- Issue 1: Whether the District is treating the Student and other students with disabilities in the CBVT program, differently based on their disability, by requiring that their parents sign a legal release in order to participate in the community jobs part of the CBVT program, while not requiring such a release from parents of students

without disabilities who participate in other off-campus activities, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4 (a) and (b)(1)(i)-(iv) and (vii), and the Title II implementing regulation at 28 C.F.R. § 35.130 (a) and (b)(1)(i)-(iv) and (vii).

Issue 2: Whether the District denied the Student a FAPE by failing to provide the community jobs part of the CBVT program which is listed in her IEP, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.33 and the Title II implementing regulation at 28 C.F.R. § 35.130.

OCR reviewed information provided by the Complainant and the District, and interviewed the Complainant and several District officials. OCR attempted to schedule an interview with the Parent and Student, who are represented by the Complainant, but the Complainant did not respond to OCR's request to schedule an interview. The Student has since aged out of the District's program in xxxxx 2015, when she turned 22 years of age.

OCR reviewed the evidence under a preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates the evidence obtained during an investigation to determine whether the greater weight of the evidence was sufficient to support a conclusion that the recipient failed to comply with a law or regulation enforced by OCR, or whether the evidence was insufficient to support such a conclusion.

After a thorough review of all of the available evidence, OCR has determined, based upon the preponderance of the evidence, that there is sufficient evidence to support a finding that the District treats CBVT program participants differently than students without disabilities who participate in off-campus activities, as alleged. However, OCR is unable to determine whether the Student was denied a FAPE, since OCR could not obtain, despite repeated attempts, additional information from the Parent and Student. The factual and legal bases of OCR's determination are set forth below.

## **Regulatory Standards**

### Issue 1: Different treatment

The Section 504 regulation at 34 C.F.R. § 104.4(a) provides 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 or benefits from Federal financial assistance. The Section 504 regulation at 34 C.F.R. § 104.4(b)(1)(ii) requires that a qualified person with a disability be afforded an opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded to others. The Title II regulation at 28 C.F.R. § 35.130(a) and (b)(1)(ii) similarly prohibits discrimination.

In considering allegations that a recipient has discriminated on the basis of disability, OCR looks for evidence of discriminatory intent. Discriminatory intent can be established either through direct evidence (i.e., statements, documents, or actions that clearly evidence a discriminatory

intent), or through indirect (also known as circumstantial) evidence (i.e., a set of facts from which one may infer a discriminatory intent). Absent direct evidence that a recipient discriminated on the basis of disability, OCR applies a disparate treatment analysis under which OCR must determine whether the facts support a *prima facie* case of discrimination. A *prima facie* case exists if a preponderance of the evidence indicates that a recipient treated a person with a disability differently than one or more similarly situated nondisabled persons. If a *prima facie* case of different treatment is established, OCR must then determine whether the recipient had a legitimate, non-discriminatory reason for its action(s) that would rebut the *prima facie* case against it. If one or more legitimate, non-discriminatory reasons for the different treatment are identified, OCR must then determine whether the recipient's asserted reasons for its actions are a pretext for discrimination. Ultimately, however, the weight of the evidence must support a finding that actual discrimination occurred.

## Issue 2: Free Appropriate Public Education

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b)(1) and (2) requires a recipient to provide each qualified person with a disability in its jurisdiction a FAPE, regardless of the nature or severity of the person's disability. A FAPE is defined in the regulation as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of other persons are met. The provision of a FAPE must also be based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this standard.

As set forth in Appendix A, Subpart D of the Section 504 regulation, it is not the intent of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the process requirements of Section 504. The appropriate forum for raising these concerns is through the impartial due process hearing procedures in the District.

Title II offers no greater protection than Section 504 with respect to the complaint allegations; therefore, OCR investigated this complaint applying the Section 504 regulations.

## **Facts and Analysis**

### Issue 1: Different Treatment

The Complainant alleges that the District required the Student, xxxxxxxxxxxxxxxx (School), and other students with disabilities in the CBVT program, to submit a signed legal release form (Legal Release) in order to participate in community jobs off campus, yet students without disabilities go on field trips or participate in band/athletics and other off-campus activities without being required to submit a Legal Release. The Complainant provided OCR with a copy of the Legal Release that was sent home by the District's Transition Liaison for participation in the CBVT program. The cover letter states, "Beginning this school year, students participating

in the Community-Based Vocational Training (CBVT) program will need to complete the attached Student Release form prior to beginning job training.” The Legal Release states that the student agrees not to assert against the District a claim based on any injuries sustained by the student while participating in the District’s Vocational Training Program, and has blank spaces for both the student and parent to sign and date their signatures.

According to records obtained from the District and OCR interviews of District officials, the CBVT program is designed to provide on-the-job training for people with intellectual disabilities between the ages of 17-21 years of age in order for them to obtain the skills necessary for competitive or supported employment upon graduation. The CBVT program is considered a job-sampling program and therefore students are given the opportunity to experience job training in the community in at least four of eight clusters which include: 1) food service, 2) commercial cleaning, 3) retail, 4) building maintenance, 5) grounds maintenance, 6) office/clerical, 7) child care, and 8) packaging. Job tasks are assigned based on ability and the students are supervised by a classroom teacher or paraprofessional (Job Coach) that remains at the job site during the vocational training. Work performance information is collected on each student trainee at each community job site once per week and a progress report is written once per semester.

The District stated in its response to OCR that its legal counsel advised them to request the waiver in order to absolve the District of liability if a student is hurt or injured while participating in an off-campus activity with third party individuals, who are not District employees. Further, the District provided OCR with examples of two types of forms used throughout the District that include similar legal release language as the form sent home with CBVT students:

- College Tour Field Trip permission slip with medical release for all students, which states that the parent absolves and releases the school officials from any claims for personal injuries sustained while in route to and from, and during the field trip event; and
- Consent Form for Athletic Participation for all students, which states that the parent releases and waives any claim from any losses, damages or injuries arising during the activity or any trip associated with the activity.

OCR obtained a sampling from the District of the signed College Tour Field Trip permission slips/medical forms submitted by students at another District xxxx School (School 2) during the 2014-2015 school year. A total of 41 students at School 2 turned in the college tour forms, which asked for parental consent for the trip, any known allergies, needed medications, any special medical history, and physical restrictions. The forms reflect that of those 41 students, who attended the College Tour Field Trip, 29 students did not have a disability and 12 students had a disability, and all were required to submit the permission slip/medical forms which contained language similar to that in the Legal Release.

While a review of the College Tour forms revealed similarity of treatment of students with and without disabilities with respect to those tours, OCR notes that the CBVT program is not similar

to the College Tour. The CBVT program is an on-the-job training program for students with intellectual disabilities and the College Tour is an optional field trip activity for students considering college. Thus, OCR examined whether waivers or releases are required for other District programs more comparable to the CBVT program.

OCR reviewed information on the District's website regarding "Work Based Learning," an education program which is similar to the CBVT program. Through the Work Based Learning program District students work off campus to obtain job training and credits; however, the District confirmed that it does not require a Legal Release for students participating in this program.

The evidence shows that the Student's Parent refused to sign the Legal Release; thus, the Student did not participate in the off campus CBVT program, but at the request of the Parent participated in an in-school vocational program.

### Analysis and Conclusion

OCR used a different treatment analysis to determine whether the District discriminated against the Student on the basis of disability with respect to requiring the signed Legal Release for participation in the CBVT program. To establish a *prima facie* case of different treatment, OCR determined whether the District treated the Student differently than similarly-situated students without disabilities.

OCR's investigation established that District students, regardless of disability status, are required to submit waivers to participate in field trips, such as the College Field Trip Tour, and athletic participation. However, the evidence shows that the District requires the Legal Release for students participating in the CBVT program, but does not require such waivers for students participating in the Work Based Learning program. Accordingly, OCR finds that the District treated the Student and other similarly situated students participating in the CBVT program differently than their peers without disabilities.

OCR next analyzed the District's reason for requiring the waiver. The District's proffered reason for requiring the Legal Release is, based upon advice of its legal counsel, to absolve the District of liabilities if a student is hurt or injured while participating in the named off campus activity. Accordingly, OCR finds that the District has proffered a legitimate nondiscriminatory reason for its waiver requirement.

OCR next analyzed whether the District's proffered reason is a pretext for discrimination. When assessing the reasons provided by the District, OCR considers whether there is evidence showing that the reasons provided by the District were not believable, similarly situated individuals without disabilities were treated differently, or the District deviated from the established procedures or guidelines related to the proffered reason.

In analyzing the District's proffered reason, OCR noted that the District did not have any written policies or procedures that articulated its liability rationale and did not have a generally

applicable written waiver requirement for all students. Therefore, OCR examined the District's consistency in its practice of requiring liability waivers for off campus educational programs or activities. As noted above, although the District required waivers for certain voluntary off campus events, it does not require the release for all off campus activities and in particular, does not require it for a program that is similar to the CBVT program. As does the CBVT program, the Work Based Learning program allows students to work off campus. Despite the similarity of the programs and the off-site location for job placements under both programs, the regular education program does not require a liability waiver for participation. OCR, therefore, concludes that the District's "liability" reason for requiring waivers for the CBVT program is a pretext for discrimination on the basis of disability.

Based on the preponderance of the evidence, OCR finds sufficient evidence that the Student and other students with disabilities in the CBVT program are being treated differently on the basis of disability by being required to sign a Legal Release form, while students without disabilities are not required to sign such forms to participate in a similar off-campus work-based educational program in noncompliance with Section 504 and Title II, as alleged. The District has voluntarily agreed to take actions in accordance with the enclosed Resolution Agreement (Agreement) to resolve the noncompliance.

#### Issue 2: Free Appropriate Public Education

During the clarification call with the Complainant on November 10, 2014, she asserted that as of that time, the Student had not been provided any vocational work even though the Student had been told she would be able to perform her vocational work at the School. OCR reviewed information in the Student's past IEP regarding the vocational services that the Student was to receive as a component of FAPE.

The Student's IEP was amended on October 16, 2014 to reflect in-School Vocational Training and Culinary Arts as a part of the Student's vocational training. The IEP does not include any detail regarding the amended program. OCR provided the Complainant several opportunities (March 12, April 2, and April 3, 2015) to provide additional evidence related to this allegation, but she has not provided any additional information. On April 2, 2015, OCR contacted the Complainant requesting to speak with the Parent/Student to obtain more information regarding this allegation, and the Complainant responded by asking for proposed times from OCR on another date. OCR responded that same day with proposed times but the Complainant did not respond. On April 3, 2015, OCR again reached out to the Complainant, but the Complainant did not respond. Therefore, to date, OCR has been unable to speak with the Parent/Student to obtain more information concerning this allegation, including information about the specific services they contend the District failed to provide. OCR has since learned that the Student turned 22 years of age on xxxxxxxx, 2015 and has aged out of the District's program.

According to OCR's Case Processing Manual at § 110(g), when OCR determines that its ability to complete the investigation is substantially impaired by its inability to contact the aggrieved party in order to obtain information that is necessary for investigation of the complaint and to make a finding, OCR will close the complaint, as long as there is no evidence of any systemic

issue warranting further investigation. Therefore, OCR is closing this aspect of the Complaint pursuant to CPM § 110(g). However, OCR will provide the District technical assistance concerning its obligation to provide FAPE to students with disabilities and its obligation to ensure that it does not condition the provision of FAPE for any student with a disability upon a release of any legal claims.<sup>1</sup>

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OCR will closely monitor the District's implementation of the Agreement resolving Issue 1 to ensure that the commitments made are implemented timely and effectively and the District is in compliance with the relevant statute and regulations.

This concludes OCR's investigation of the complaint, which we are closing effective the date of 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

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<sup>1</sup> OCR did not gather evidence concerning whether the District's waiver requirement constituted conditioning an offer of FAPE services upon a release of liability. Instead, this matter will be addressed through technical assistance, rather than as an investigative finding. However, the Agreement will include training on the obligation to provide FAPE without conditioning an offer of FAPE upon a release of legal claims.

Complaint #04-15-1019

May 27, 2015

Page 8 of 8

If you have any questions regarding this complaint, please contact Angela Collins, Senior Attorney, at (404) 974-9346 or Wendy Gatlin, Compliance Team Leader, at (404) 974-9356.

Sincerely,

/S/

Melanie Velez  
Regional Director

Enclosure

cc: xxxxxxxx, Esquire (Counsel for the District)