



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

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REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

August 17, 2016

X
Superintendent
Clayton County School District
1058 Fifth Avenue
Jonesboro, Georgia 30236

Re: Complaint #04-15-1282

Dear Superintendent X:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed with the office on March 30, 2015, against the Clayton County School District (District), alleging discrimination on the basis of disability. The Complainant alleged that, on [X – DATE REDACTED], a teacher at X (School) told the Complainant’s daughter (Student), “If you got something to say, say it in my f*****g face. Go and hang yourself. Kill yourself [X – REMAINDER OF SENTENCE REDACTED]. Just die.” The Complainant also stated that [X – REMAINDER OF SENTENCE REDACTED].

OCR investigated this complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. Section 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 from the Department, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Sections 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public educational institutions. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

During the course of this investigation, OCR reviewed and analyzed documents submitted by the Complainant and the District, including a video of the [X – DATE REDACTED] incident submitted by the District and an audio recording of the Student’s [X – DATE REDACTED] tribunal hearing submitted by the Complainant. OCR also reviewed the District’s Section 504 Policies and Procedures Manual, the District’s “Complaints and Grievances” procedures for filing complaints of disability discrimination, the Student’s permanent file (including tribunal hearing documentation), the Student’s disability file, and information regarding the District’s investigation of the teacher’s interaction with the Student on [X – DATE REDACTED].

OCR evaluates evidence under a preponderance of the evidence standard. In order to establish a violation, the evidence must be sufficient to prove that it is more likely than not that a violation

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occurred. Based on its investigation, OCR has determined that the Student was subjected to harassment that created a hostile environment based on her disability and that the District failed to respond appropriately to the harassment in violation of Section 504 and Title II. In addition, OCR has determined that the District's Section 504 grievance procedures must be revised to comply with Section 504.

Legal Standards

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. Pursuant to 34 C.F.R. § 104.4(b)(1)(i), (ii), and (vii), a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i), (ii), and (vii) provide similar protections to a qualified person with a disability.

Both statutes define a "person with a disability" as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 34 C.F.R. § 104.3(j); 28 C.F.R. § 35.104. With respect to the first prong of the definition of "person with a disability," the statutes define a "physical or mental impairment" as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Both statutes define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The Americans with Disabilities Act (ADA) Amendments Act of 2008 (Amendments Act) added additional examples of "major life activities," such as eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.

For the "regarded as" prong of the disability definition, if an individual can establish that he or she has been subjected to an act prohibited by Section 504 or Title II (*e.g.*, denied equal access to educational programs) because of an actual or perceived physical or mental impairment, then he or she is entitled to protection under these laws. The Amendments Act clarified that the statutory protections apply whether or not the individual actually has the impairment, and also whether or not the impairment is perceived to be a substantial limitation on a major life activity.

Section 504 and Title II prohibit disability-based harassment that creates a hostile environment, and the existence of such an environment also constitutes different treatment on the basis of disability. Harassing conduct based on disability creates a hostile environment when the conduct is sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. If a school district knows or should have known about the harassment, it has an obligation to take prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects on the victim. A school district is responsible for disability harassment, regardless of whether it knew or should have known of the conduct, if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students, interfere with or limit a student's ability to participate in or benefit from the school's program on the basis of disability.

The Section 504 implementing regulation at 34 C.F.R. § 104.8(a) states that a recipient that employs 15 or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees that it does not discriminate on the basis of disability in violation of Section 504. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 34 C.F.R. § 104.7(a). The Title II implementing regulation has a similar notice requirement at 28 C.F.R. § 35.106.

The Section 504 implementing regulation at 34 C.F.R. § 104.7(a) states that a recipient that employs 15 or more persons shall designate at least one person to coordinate its efforts to comply with Section 504. In addition, the Section 504 implementing regulation at 34 C.F.R. § 104.7(b) states that a recipient that employs 15 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. In evaluating whether a recipient's grievance procedures satisfy this requirement, OCR reviews the following elements:

1. Notice to students, parents, and employees of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints alleging disability discrimination, including harassment, carried out by employees, other students, or third parties;
3. Provision for adequate, reliable, and impartial investigation of complaints, including an opportunity for the parties to present witnesses and supporting evidence;
4. Designated and reasonably prompt timeframes for the major stages of the grievance process;
5. Written notice to the parties of the outcome of the complaint and any appeal; and
6. Assurance that the institution will take appropriate steps to prevent the recurrence of any discrimination or harassment found to have occurred and remedy the discriminatory effects on the complainant and others, if appropriate.

Background

During the X school year, the Student was X years old and attended X grade at the School, which serves [X - REDACTED] grade students. During the X school year, the Student was promoted to X grade at X School, which is also located in the District.

Summary of Allegations

The Complainant stated that the Student has been diagnosed with [X – REMAINDER OF SENTENCE REDACTED]. The Complainant also identified X as a possible disability. The Complainant reported that the Student is [X – REMAINDER OF SENTENCE REDACTED]. The Complainant advised OCR that the Student [X – REMAINDER OF PARAGRAPH REDACTED].

The Complainant informed OCR that, on [X – DATE REDACTED], two fights occurred at the School. The students who were watching the fights dispersed. A teacher (Teacher) instructed the Student to return to class. The Student, who was not involved in the fights, allegedly told the Teacher to “shut up.” The Teacher then allegedly said to the Student, “If you got something to say, say it in my f-----g face. Go and hang yourself. Kill yourself [X – REMAINDER OF SENTENCE REDACTED]. Just die.” The Student then allegedly asked the Teacher, [X – REMAINDER OF SENTENCE REDACTED]?” According to the Complainant, the Teacher repeated her statements. When the Teacher turned her back, the Student charged after her, hitting her in the back several times and on the head. The Complainant advised OCR that the incident was recorded on the School’s video camera. [X - SENTENCE REDACTED.]

In addition, the Complainant alleged that other staff members at the School made negative comments to the Student.¹ She believes that the Student was targeted because [X – REMAINDER OF SENTENCE REDACTED]. She gave examples that occurred on [X – DATE REDACTED] and [X – DATE REDACTED]. Specifically, the Complainant alleged that on [X – DATE REDACTED], a teacher approached the Student in the library, put her hand in the Student’s face, and stated, “Nobody is talking to you.” The Complainant also alleged that, after the dismissal of school on [X – DATE REDACTED], a coach commented to the Student at the front entrance of the School, “That’s why [X – REMAINDER OF SENTENCE REDACTED]. X people like you make me talk like this.” Based upon information obtained during the investigation, OCR included these two previously-dismissed allegations within the scope of the investigation.

¹ OCR dismissed these allegations during the evaluation of this complaint because, on initial review, they appeared to be unrelated to disability. However, evidence obtained during the investigation reflects that the incidents may have been based on the disability-related behaviors of the Student.

Findings of Fact and Analysis

District's Notice(s) of Nondiscrimination

The District has included notices of nondiscrimination on the basis of disability as well as other protected bases in the Human Resources section of its website and in the Equal Educational Opportunities Section of its Board Policy. In addition, the District provided OCR with a copy of the 2015-2016 Student Handbook, which contained an annual notice of nondiscrimination. The notice set forth in the Human Resources section of the website does not identify a Section 504 Coordinator. The notice included in the Board policy identifies the Coordinator by title and includes a street address for the Coordinator. The notice in the 2015-2016 Student Handbook referred individuals with questions, complaints, or requests for additional information to the coordinators at a specified address. The current Handbook, which was updated as of August 2016, includes the name and additional contact information for the Coordinator.² In light of the failure to identify the Section 504 Coordinator in the notice on the Human Resources website, the District is in violation of Section 504.

District's Section 504 Grievance Procedures

The District's Section 504 grievance procedures encourage, but do not require, grievants to have a "pre-filing" discussion with the appropriate Section 504 Coordinator/Compliance Officer. The procedures provide that the principal or other designee is to issue a written decision to the parties within 10 days of the hearing and, if not satisfied with that decision, the grievant or respondent can request a hearing with the Superintendent. Grievants are required to file a written complaint within 30 days of the alleged violation. There is no notice of the resources available to grievants who, because of a disability, language barrier, or other difficulty, may require assistance to put their complaints in writing; nor is there a reference to the District's obligation to address harassment of which it has notice even if it does not receive a written complaint within 30 days of the incident. The last page of the procedures identifies a Coordinator for "Disabled Employees/Americans with Disabilities, Section 504" and a separate designee for "Disabled Students – Section 504" but does not identify an individual who is responsible for coordinating compliance with respect to the Section 504 concerns of individuals who are neither students nor employees. OCR also determined that while the procedures provide for a "hearing" with the grievant, respondent, principal or other designee, and Coordinator/Compliance Officer, there is no requirement of an investigation and no reference to opportunities to present witnesses.

² <http://www.clayton.k12.ga.us/cms/one.aspx?portalId=54515&pageId=91059> (last accessed August 16, 2016).

The District's Section 504 grievance procedures fail to provide for a prompt and equitable resolution process that incorporates due process principles in light of the following: (i) the absence of a provision for adequate, reliable, and impartial investigation of complaints; (ii) the absence of an assurance that the District will take appropriate steps to prevent the recurrence of any disability discrimination, including disability harassment, and to correct the discriminatory effects on the complainant and others, if appropriate; (iii) a requirement of a written complaint within 30 days of an incident with no reference to available assistance for filing written complaints or the District's obligation to address disability harassment of which it has knowledge or reasonably should have knowledge even if it does not receive a written complaint within 30 days; and (iv) the failure to identify a coordinator for disability-related matters that do not involve students or employees (*i.e.*, third party complaints).

Harassment Based on Disability and District's Response

The evidence submitted by both the District and the Complainant corroborate that during an interaction with the Student on [X – DATE REDACTED], the Teacher made inappropriate remarks to the Student. During this incident, the Teacher referred to the Student's [X – REMAINDER OF SENTENCE REDACTED]. These remarks were made in the presence of other staff and students. OCR reviewed three witness statements submitted by the District from the [X – DATE REDACTED] incident, which were from the Student, the Teacher, and an independent witness. The independent witness' statement corroborated that the Teacher made inappropriate comments as alleged.

In the audio recording of the Student's [X – DATE REDACTED] disciplinary tribunal hearing for violating Code of Conduct Item 17f, "PHYSICAL OFFENSES - Intentional physical contact of School Personnel (insulting or provoking in nature)," which was submitted by the Complainant to OCR, the Teacher did not deny making the above alleged statements, although she stated that she did not recall making them. OCR also reviewed a video recording of the incident submitted by the District. In the video, the Teacher can be heard making the following statements to the Student, "Go to class. Go to class. Ain't nobody talking to you. [X – REDACTED]. Yeah, I said it. You're going to tell me to 'shut the f--- up'? Yeah, I said it." The Student can be heard responding angrily [X – REDACTED], before striking the Teacher.

[X - PARAGRAPH REDACTED]

The Student initially received [X – REDACTED] for the charged offense. In addition, the tribunal hearing panel found the Student guilty of violating Code of Conduct Item 17f and [X – REMAINDER OF SENTENCE REDACTED]. The Student served this discipline.

The District had notice of the incident involving the Teacher. Documents provided by the District show that the District conducted an investigation into the Teacher's actions. However, the District's investigation focused solely on whether the Teacher violated the District's code of ethics and the Georgia Professional Standards Commission's Code of Ethics for Educators; the District's investigation did not focus on whether the conduct constituted disability-based harassment or created a hostile environment for the Student.

As summarized above, in addition to the [X – DATE REDACTED] incident, the Complainant alleged that the Student was subjected to negative comments because of X and was targeted by District staff because [X – REMAINDER OF SENTENCE REDACTED]. For example, on [X – DATE REDACTED], a coach allegedly referred to the [X - REDACTED] and X issues.³

Hostile Environment for the Student

It is undisputed that the alleged harassing incident with the Teacher occurred: During an exchange with the Student in the hallway in front of other students and staff, the Teacher made derogatory comments to the Student [X – REDACTED] and urged her to kill herself. [X – SENTENCE REDACTED.] The District is responsible for the Teacher’s conduct and for remedying its effects. While the District investigated the Teacher with respect to compliance with the Ethics Rules, it did not assess or address the environment created for the Student.

The video and witness summaries of the incident involving the Teacher demonstrate the immediate impact of the Teacher’s comments upon the Student. The Student lashed out physically at the Teacher after the Teacher made derogatory comments to her. The Student also received X, followed by X. The Complainant reported that the Student feels that [X – REMAINDER OF SENTENCE REDACTED]. Accordingly, OCR finds that the Teacher’s harassing act based on the Student’s disability was sufficiently serious to interfere with or limit the Student’s ability to participate in or benefit from the School’s program.

Conclusion

The District’s Section 504 procedures and a notice of nondiscrimination fail to comply with Section 504. OCR has also determined that the Student was subjected to harassment based on disability and that the District failed to take steps to eliminate the hostile environment to which the Student was subjected and its effects, in violation of Section 504 and Title II.

The District has entered into the enclosed Resolution Agreement (Agreement), pursuant to which the District will, among other steps, issue a written apology to the Student for the [X – DATE REDACTED] incident; offer to provide counseling services to the Student; and conduct a manifestation determination review of the [X – DATE REDACTED] incident and all disciplinary incidents during the 2014-2015 school year that resulted in more than 10 days of out-of-school suspension in the aggregate. In addition, the District is required to conduct an investigation to determine whether staff at the School have subjected the Student to other instances of harassment based on her disability, disability-related behaviors, or any perceived disability, including the additional incidents alleged by the Complainant. Further, the District will revise its notices of non-discrimination and Section 504 grievance procedures and implement, publish, and conduct annual staff training on the revised notices/procedures. Finally, the District is required to conduct an annual “climate check” with students and staff at the School to assess the presence of and effects of disability harassment.

³ The Resolution Agreement requires the District to investigate the additional alleged incidents of harassment.

OCR will closely monitor the District's implementation of this Agreement to ensure that it is fully implemented and that the District is in compliance with the statutes and regulations at issue in this case. If the District fails to fully implement this Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. The Complainant may file a private suit in federal court whether or not OCR found a violation.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. This letter 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 Complainant may file another complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive 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.

OCR is committed to a high-quality resolution of every case. If you have any questions regarding this letter, please contact Vahn Wagner, Senior Attorney, at (404) 974-9392 or Virgil Hollis, Compliance Team Leader, at (404) 974-9366.

Sincerely,

Melanie Velez
Regional Director

Enclosure (Signed Resolution Agreement)
cc: X, Esq. (w/ encl.)