



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 10, 2016

Mr. Forrest Claypool
Chief Executive Officer
Chicago Public Schools
42 West Madison
Chicago, IL 60602

Re: 05-16-1059

Dear Mr. Claypool:

This is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR) on November 12, 2015, against the Chicago Public Schools District #299 (District) alleging discrimination on the basis of disability and retaliation.

Specifically, the complaint alleges that the District subjected Student A, a high-school student with disabilities (XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX) who resides in the District's attendance area and was placed by the District in theXXXXXXXXXXXXXXXXXXXX (District A), to discrimination in that:

1. during the 2015-16 school year, the District failed to implement Student A's individualized education program (IEP) when it did not provide timely and reliable transportation between Student A's residence and the District A school she attended, thereby denying Student A a free appropriate public education (FAPE); and
2. the District treated Student A differently than non-disabled students and students with less severe disabilities when the District denied Student A the opportunity to participate in after-school extra-curricular activities because the District refused to provide Student A with transportation at a time other than immediately after the end of the school day.

In addition, the complaint alleges that the District retaliated against Student A because Student A's attorney engaged in protected activity on Student A's behalf when:

3. the District altered Student A's transportation schedule on or about XXXXXXXX XXXX, precluding her from participating in any after-school extra-curricular activities.

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 and Title II of the

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. Title II prohibits discrimination on the basis of disability by public entities. Section 504 and Title II also prohibit retaliation. As a recipient of Federal financial assistance and a public entity, the District is subject to these laws.

Applicable Standards

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

Discrimination generally

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

In determining whether a recipient subjected a student to different treatment based on disability, OCR considers whether there were any apparent differences in the treatment of similarly-situated students based on disability. If this is established, OCR assesses the recipient's reason for any differences in treatment of similarly-situated students to determine whether the reasons are legitimate, non-discriminatory and whether they are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the student in a manner that was consistent with established policies and procedures and whether there is any other evidence of discrimination based on disability.

Free Appropriate Public Education (FAPE)

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of

non-disabled persons are met based on the adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34-36. The implementation of an individualized education plan (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of providing FAPE.

When investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided as written in a student's IEP. If OCR finds sufficient evidence to conclude that a recipient has not implemented a student's IEP by failing to provide some or all of the services listed, OCR examines the extent and nature of the missed services, as well as other information, such as any efforts by the recipient to compensate for the missed services, to determine whether this failure resulted in a denial of a FAPE. Minor, temporary or infrequent deviations from an IEP generally do not amount to the denial of a FAPE.

In addition, the Section 504 regulation at 34 C.F.R. § 104.34(b) provides that, in providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that individuals with disabilities participate with nondisabled persons in such activities and services to the maximum extent appropriate to the needs of the individual with disabilities in question.

Pursuant to the Section 504 regulation at 34 C.F.R. § 104.33(c)(2), if a recipient places an individual with a disability or refers such an individual for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the individual or his or her parents or guardian if the individual were placed in the aid, benefits, or services operated by the recipient.

Pursuant to the Section 504 regulation at 34 C.F.R. § 104.35, a recipient must conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35 (b), of any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(b) requires that a recipient establish certain standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education and/or related services. The Section 504 regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. Section 504 and its implementing regulations do not specify a time frame for evaluating a student believed to be in need of special education and related services. In determining whether a recipient provided

a timely evaluation, OCR is informed by the regulations implementing the IDEA, as compliance with IDEA is one means of complying with Section 504. The IDEA regulations state, at 34 C.F.R. 300.301(c)(1)(i), that an evaluation must be completed within 60 days unless the state sets a different deadline. Illinois state regulations adopt the 60 day timeframe.

The Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient to “establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.” Compliance with the procedural safeguards of the IDEA is one means of meeting this requirement.

Retaliation

The Section 504 implementing regulation, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

A *prima facie* case of retaliation is established when it is determined that (1) an individual engaged in a protected activity (opposed a discriminatory policy, asserted protected rights, or participated in an OCR complaint or proceeding); (2) the recipient knew of this activity; (3) the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and (4) there is an inferable causal connection between the protected activity and the adverse action. To be considered adverse, an action must significantly disadvantage an individual or reasonably deter an individual from engaging in future protected activities.

If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the elements of a *prima facie* case of retaliation are met, OCR then considers whether the recipient presented a legitimate, non-retaliatory justification for taking the adverse action, and whether the reason is a pretext for retaliation. Pretext may be shown by evidence demonstrating that the explanation for the adverse action is not credible or believable or that treatment of the person was inconsistent with the treatment of similarly situated individuals or established policy or practice.

Background

District Transportation

addition, Student A’s IEP calls for her to be provided transportation to the School. Student A’s transportation plan requires that she be transported in a XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX.

During the 2014-15 school year, Student A participated XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX and CPS arranged her transportation service to pick Student A up at the School atXXXXXXXXXXXXXXXXXXXXXXXXX dismissal time. Employee A and Employee B told OCR that the District was able to accommodate the request to transport Student A from the School to her homeXXXXXX. because Student A’s “run” could not be combined with any other student “runs” because the School was so far removed from both the District boundaries and Student A’s home.

However, Employee A told OCR that during the 2015-16 school year, she identified two student “runs” that could be combined with Student A’s “run” to create a more efficient route for the SCR vehicle that transported Student A. Consequently, during the 2015-16 school year, Student A was assigned to XXXXXXXXXX which, in the morning, first transports Students B and C to School B (a District school), and then transports Student A to the School and, in the afternoon, first transports Student A from the School to her home, and then transports Students B and C from School B to their respective homes. Employee A told OCR that the SCR vehicle could not reverse the order of Students A, B, and C’s runs because of the arrival and dismissal times of the respective schools.

On XXXXXXXXXXXXXXX, Counsel for Student A and XXXXXXXXXXXXXXX¹ (Complainant’s Counsel) emailed counsel for the District (District Counsel A) requesting an IEP meeting to discuss the transportation plan in Student A’s IEP. Specifically Complainant’s Counsel advised District Counsel that Student A’s legal guardian wanted Student A to continue to participate in after-school extracurricular activities, most of which are located at the School, and be scheduled for a transportation time XXXXXXXX. When District Counsel A did not respond, Complainant’s Counsel followed up on her request on XXXXXXXXXXXXXXX and again on XXXXXXXXXXXXXXX

The District requested information from the School about Student A’s proposed after-school extra-curricular schedule, which the School provided to the District. In addition, on XXXXXXXXXXXXXXX, the School requested XXXXXXXXX, and, for that day, the District placed Student A on XXXXXXXXX which included runs for Students D and E. Employee A told OCR that Student A could not be permanently placed on XXXXXXXXXXXXXXX her homes to their respective schools based on the schools’ start times. The District informed the School that, after XXXXXXXXX it would not continue to pick up Student A using XXXX XXXX, but would provide her transportation on XXXXXXXX, which picked up Student A at the School at XXXXXXXX

¹ XXXXXXXXXXXXXXXXXXXXXXX.

On XXXXXXXXXXXXXXX, Counsel A emailed Counsel B and Employee B, XXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX, asking whether the District had responded to
Complainant's Counsel's request. Employee B told OCR that after receiving Counsel A's
email that he reviewed Student A's IEP and concluded that XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Employee B told OCR that he consulted with
Employee A and concluded that it was not possible to provide Student A with a XXXXX
XXXXXXX because the District would have to remove other students' runs from
XXXXXXX. However, the District did not communicate this decision to Complainant's
Counsel, either in writing or verbally.

On XXXXXXXXXXXXXXX, the Complainant's Counsel requested that the District mediate the
dispute over Student A's transportation through the Illinois State Board of Education (ISBE).
On XXXXXXXXXXXXXXX, the District informed Complainant's Counsel that it would not
participate in mediation because it concluded that transportation from extracurricular
activities was not required by Student A's IEP.

On XXXXXXXXXXXXXXX, the School's Principal emailed Employee A to indicate that there had
been transportation problems on XXXXXXXXXXXXXXXXXXXX. Specifically, the Principal
informed Employee A that:

- On XXXXXXXXXXX, Student A was not picked up from the School until XXXXX;
- On XXXXXXXXXXX Student A was not picked up from the School until XXXX;
- On X XXXXXXXXXXX, Student A did not arrive at School until XXXX; and
- On XXXXXXXXXXX Student A did not arrive at School until XXXXX.

Employee B told OCR the irregularities in Student A's transportation schedule were caused
by staffing changes at SCR, and that after XXXXXXX, they did not recur. On XXXXXX
XXXXX, Employee A emailed SCR about the irregularities, and an XXXXX are to ensure
more timely service.

XXXXXXXXXXXXXXXX, the District held an annual review of Student A's IEP. During the
review, Complainant's Counsel raised the issues of irregular transportation for Student A and
requested that the transportation plan be amended to provide transportation from the
extracurricular activities that Student A sought to enroll in. According to Complainant's
Counsel and Employee XX the IEP team did not discuss whether the irregular transportation
denied Student A FAPE or whether extracurricular activities were necessary to provide
Student A FAPE. The District provided the Complainant with its procedural safeguards at
the meeting. However, Employee B told OCR that he believed that the team implicitly
determined that extracurricular activities were not necessary to provide Student A with FAPE
because the team discussed both that (1) Student A was meeting her benchmarks; and (2) in
discussing new goals to be included in the plan the team did not indicate that extracurricular
activities were necessary to help Student A achieve any of the goals.

On XXXXXXXXXXXX, Student A did not have an aide on the bus, as required by her IEP. Employee B told OCR that he investigated the incident and determined that it was a one-time incident.

The Complainant's Counsel asserts that there were additional instances where transportation was not provided as specified in the IEP (either a late arrival/departure to/from the School or a failure to provide an aide on the bus), but has not yet provided attendance records or specific dates or instances where the transportation was not provided in accordance with the IEP.

Analysis

Allegation 1

The complaint asserts that the District discriminated against Student A on the basis of her disability when, during the 2015-16 school year, the District failed to implement Student A's IEP when it did not provide timely and reliable transportation between Student A's residence and the District A school she attended, thereby denying Student A FAPE.

The undisputed evidence demonstrates that on four dates in XXXXX and one day in XXXXXXXX the District did not provide transportation as specified in the IEP, twice picking up Student A from the School late, twice picking up Student A from her home late (and causing her to miss a total of at least one hour of instructional time), and once transporting her without an aide. The evidence demonstrates that the District, upon learning of the irregular pick up and drop off times, contacted the transportation vendor to ensure a more consistent transportation schedule for Student A. The Complainant's Counsel asserted that there were additional days on which transportation was not provided as scheduled.

Minor, temporary or infrequent deviations from an IEP generally do not amount to the denial of a FAPE. To the extent that the District did not provide transportation as scheduled for Student A, the failure to implement the IEP may have been *de minimis*. However, in order to make a determination regarding this allegation, OCR would require additional information from District A to confirm the amount of school that Student A missed because of transportation-related issues.

OCR also considered whether the District violated the Section 504 regulation at 34 C.F.R. § 104.35 when it did not convene an IEP team within 60 days of a September 3, 2015 request for a team meeting and at 34 C.F.R. § 104.34(b) when it did not consider whether extra-curricular activities were necessary to provide Student A with FAPE at the XXXXXXXXXXXX IEP meeting.

The undisputed evidence demonstrates that on XXXXXXXXXXXX, the Complainant's Counsel requested that the District convene an IEP team to discuss whether modifications to the IEP

were necessary to provide Student A with FAPE. In XXXXXXXXXXXX, the Complainant's Counsel requested that the District attend mediation through ISBE to address the Complainant's Counsel's request to modify the IEP. The District declined this request. Ultimately, the District convened an IEP team to conduct an annual review on XXXXXXXX XXXX. OCR interviewed two attendees of the meeting (Complainant's Counsel and Employee C), both of whom stated that although the team discussed whether to include extracurricular activities in Student A's IEP it did not evaluate whether extracurricular activities were necessary to provide Student A with FAPE.

Although the District did not hold an IEP meeting XXXXX after the Complainant's Counsel's initial request for an IEP meeting, the Complainant's Counsel also requested that the District attend mediation through ISBE to address the same concerns that she raised in her request for an IEP meeting. Under these circumstances, the District could have determined that the Complainant's Counsel's request for mediation superseded the request for an IEP meeting. In order to make a determination whether the District's delay in scheduling an IEP meeting violated the Section 504 regulation at 34 C.F.R. § 104.35, OCR would need to interview District counsel regarding the scheduling of the IEP meeting.

Further, although Complainant's Counsel and Employee C indicated that the team did not discuss whether participation in extracurricular activities was necessary to provide Student A with FAPE, Employee B, who did not participate in the IEP team meeting, told OCR that he believed that the team implicitly determined that extracurricular activities were not necessary to provide Student A with FAPE because the team discussed both that (1) Student A was meeting her benchmarks; and (2) in discussing new goals to be included in the plan did not indicate that extracurricular activities were necessary to help Student A achieve any of the goals. OCR was not able to schedule interviews with other members of the IEP team.

In order to make a determination whether the District's decision not to modify the transportation plan in Student A's IEP to allow her to participate in XXXXXXXX XXXXXXXXXXXXX violated the Section 504 regulation at 34 C.F.R. § 104.34(b), OCR would need to conduct additional interviews with the remaining members of the IEP team to determine the extent of the discussion about Student A's need to participate in after-school extra-curricular activities.

Prior to providing this information, the District requested to resolve allegation 1. Based on the above described information and the District's interest in resolving allegation 1, OCR drafted a resolution agreement to fully address the allegation and the above-described compliance concerns.

Allegation 2

The complaint alleges that the District treated Student A differently than non-disabled students and students with less severe disabilities when the District denied Student A the

opportunity to participate in after-school extra-curricular activities because the District refused to provide Student A with transportation at a time other than immediately after the end of the school day.

The District provided OCR information that it does not provide transportation from after-school extra-curricular activities to either disabled or non-disabled students' homes and thus there are no apparent differences in the treatment of similarly-situated students based on disability.

Further, OCR considered whether the District treated Student A consistent with its established policies and practices. Employees A, B, and C told OCR that the District seeks to maximize the usage of each XXX paratransit vehicle by assigning each vehicle multiple student runs. The District's designation of Student A on Route XXXX, which also served Students B and C, was consistent with the District's practice of maximizing the usage of that vehicle.

Consequently, OCR determined that there is insufficient evidence to support the allegation that the District discriminated against Student A as alleged.

Allegation 3

The complaint alleges that the District retaliated against Student A when it altered Student A's transportation schedule on or about XXXXXXXXXXXX, precluding her from participating in any after-school extra-curricular activities.

Complainant's counsel engaged in protected activity when she requested an IEP meeting on XXXXXXXXXXXX, to discuss whether the transportation plan in Student A's activity should be modified to allow her to participate in after-school extracurricular activities. In addition, Student A suffered an adverse action when the District informed Complainant's Counsel, on or about XXXXXXXXXXXX, that it would not provide transportation for Student A from the School to her home XXXXX., when Student A's extra-curricular activities ended, as it had done in prior school years. For purposes of analysis, OCR presumes that the adverse action is related to the protected activity, which occurred 19 days earlier. Therefore, OCR finds that the evidence is sufficient to establish a *prima facie* case of retaliation.

However, the District offered a legitimate, non-retaliatory reason for the adverse action, namely that it seeks to maximize the usage of each SCR paratransit vehicle by assigning each vehicle multiple student runs and placed Student A on XXXXXXXX, which also served Students B and C, consistent with this practice. Employees A and B told OCR that they examined other route options that might enable the District to transport Student A from the School to her home after the extra-curricular activities, but that they were unable to identify a feasible route without increasing the total number of XXXvehicles in use. OCR's investigation did not identify evidence to suggest that the District's reason was pretextual.

Consequently, OCR determined that there is insufficient evidence to support the allegation that the District retaliated against Student A as alleged.

Conclusion

On May 9, 2016, the District entered into an agreement which, when implemented, will resolve compliance concerns related to allegation 1, as described above. The agreement contains the steps to be taken and the dates for implementation. OCR looks forward to receiving the District's report confirming implementation of the agreement, which is due on June 30, 2016.

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 Complainant may file another complaint alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR would like to thank you and your staff for the courtesy and cooperation extended to OCR. If you have any questions regarding this letter, please contact Tom Okawara at 312-730-1597, or at Tom.Okawara@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

Enclosure

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cc: Susan O’Keefe, Deputy General Counsel
Dalila Bentley, EOCO Administrator
Julia Simmons, EOCO Investigator