



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10  
ATLANTA, GA 30303-8927

REGION IV  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

Mr. Dorsey E. Hopson, II  
Superintendent  
Shelby County School District  
160 S Hollywood Street  
Memphis, Tennessee 38112

Re: Complaint #04-13-1289

Dear Mr. Hopson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on April 24, 2013, against Memphis City Schools (District), now Shelby County School District, alleging discrimination on the basis of disability and retaliation.

Specifically, the Complainant alleged that the District discriminated against her son (Student) on the basis of disability by failing to implement the Student’s Individualized Education Plan (IEP) as follows:

1. Failing to provide the Student his XXXXXXXX XXXXXXXX for one week during the XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXX (XXXX); and
2. Retaliating against the Complainant for her protected activity by: (a) the former teacher (Teacher #1) failing to turn in the Student’s excused absences and marking the Student absent resulting in the Student receiving a truancy letter; (b) Teacher #1 failing to notify the Complainant that the Student had a XXXXXXXX XXXX and was XXXXXXXX XXX XXXXXXXX in XXXXX XXXX; (c) Teacher #1 harassing the Student about a reading book after he was moved to another teacher’s class; and (d) the Principal failing to attend the Student’s IEP meetings.

OCR investigated the complaint pursuant to 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 prohibits discrimination on the basis of disability by recipients of Federal financial assistance; and 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, which prohibits discrimination on the basis of disability by public entities. As a Recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

OCR investigated the following legal issues:

1. Whether the District denied the Student a free appropriate public education (FAPE) by failing to provide the Student with XXXXXXXX XXXXXXXX in math, reading, social studies and language arts for one week during the XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXX, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District retaliated against the Complainant because of her advocacy on behalf of the Student from XXXXXXXX XXXXXXXX XXX XXXX, when the District took the following actions: a) the Student's former teacher failing to turn in the Student's XXXXXXXX XXXXXXXX and marking the Student XXXXXXXX resulting in the Student receiving a truancy letter; b) the Student's former teacher failing to notify the Complainant when the Student had a XXXXXXXX XXXX and was XXXXXXXX XXX XXXXXXXX in XXXXX XXXX; c) the former teacher harassing the Student about a reading book after he was moved to another teacher's class; and d) the Principal failing to attend the Student's IEP meetings, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

In reaching a determination, OCR reviewed and analyzed documents pertinent to the complaint issues and interviewed the Complainant and District officials in this case. Based on the investigation, OCR found that the District was in noncompliance with respect to providing the Student with all of the XXXX XX XXXXX the Student missed when his XXXXXXXX XXXXXXXX administered the XXXX XXXX to XXXXX XXXXXXXX. OCR, however, found insufficient evidence to support a finding of noncompliance with respect to retaliation. Set forth below is a summary of OCR's legal standards, findings, and conclusions.

### **Regulatory Standards**

The Section 504 regulation at 34 C.F.R. § 104.33(a) and (b) requires a recipient operating a public elementary or secondary education program to provide a FAPE to each qualified person with a disability in the recipient's jurisdiction. The program must be designed to meet the individual educational needs of persons with disabilities as adequately as those of persons without disabilities are met. The regulation implementing Title II at 28 C.F.R. § 35.130(a) and (b)(1) contains similar provisions and is interpreted consistent with the standards set forth in the Section 504 regulations cited above and below.

The standards for determining the District's compliance regarding retaliation falls under the regulation implementing Section 504 at 34 C.F.R. § 104.61, which incorporates, by reference, Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. § 100.7(e). The regulation states that intimidating or retaliatory acts are prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI and Section 504, or because she/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Section 504 regulation. The

Title II implementing regulation at 28 C.F.R. § 35.134 similarly prohibits retaliation by public entities.

To determine whether retaliation has occurred, OCR must find that: (1) the Complainant engaged in a protected activity; (2) the recipient was aware of the protected activity; (3) the recipient took adverse action against the Complainant subsequent to or contemporaneous with the participation in a protected activity; and (4) there is a causal connection between the adverse action and the protected activity. If all of these elements are established, OCR then examines whether the recipient had a legitimate, nondiscriminatory and non-pretextual reason for taking an adverse action against the Student.

### **Background Information**

The Student is a XXXXX XXXX XXX XXXXXX at XXXXXXXXX XXXXXXXXXXXX XXXXXXX. When the Student was in XXXXXXXXXXXXXXX at the School, he was determined eligible to receive services in XXXXXXX/XXXXXXXX. The Student was subsequently determined to be XXXXX XXXXXXX XXXXXXX as a result of an evaluation conducted in XXXXXXX XXXX (specifically related to XXXXXXXXXXX XXXXXXX XXXXXXXXXXXXXXXXXXX XXXXXXX).

### **Factual Findings and Analysis**

**ISSUE 1 –Whether the District denied the Student a FAPE by failing to provide the Student with XXXXXXX XXXXXXX in math, reading, social studies and language arts for one week during the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33 and the Title II implementing regulation at 28 C.F.R. § 35.130.**

The Complainant informed OCR that the Student did not receive XXXXXXX XXXX, XXXXXXX, and XXXXXXX XXXX when XXXX was being administered.

The Student’s IEP does not provide for resource language arts. The Student’s IEP states that the Student was to receive XX XXXXXXX of XXXXXXX XXXXXXX and XX XXXXXXX of XXXXXXX XXXX five times per week. The Student’s XXXXXXX Teacher confirmed to OCR that the Student was to receive XXX XXXXX of XXXXXXX XXXXXXX per day and XXX XXXX of XXXXXXX XXXX per day in accordance with his IEP. She stated the Student made up three sessions but he still had two XXXXXXX XXXXXXX of XXXXXXX XXXXXXX reading and two XXXXXXX of XXXXXXX XXXX to make-up.

The Principal informed OCR that XXXX was conducted XXXXX XX-XX, 2013, and the XXXXXXX teachers assisted in administering the XXXX. He further informed OCR that XXXXX graders are not administered XXXX; and that the Student’s XXXXXXX teacher administered XXXX to students in upper level grades. He informed OCR that the week following the XXX was the make-up week for teachers to provide make up XXXXXXX XXXXXXX, and that the teachers were to hold the students longer to make up the sessions missed as a result of the one week missed during XXXX.

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

The Principal informed OCR that the Student's XXXXXXXX Teacher, to his knowledge, had the make-up sessions with the Student the following week after XXXXX. The XXXXXXXX XXXXXXXXXXXX informed OCR that the Student missed school the XXXXXXXX following XXXX, which was a make-up day for his XXXXXXXXXXXX XXXXXXXXXXXX and XXXX. The Student's XXXXXXXX Teacher informed OCR that the Student received his make-up sessions with the exception of two make-up sessions of XXXXXXXX and XXXX. However, OCR's investigation revealed that the "make up" sessions were conducted by adding 30 minutes to the Student's XXXXXXXX sessions during three days of the week following the XXXX - for a total of X make up hours (XX hours per subject).

## **Conclusion**

The Student missed X hours of XXXXXXXXXXXX XXXXXXXX and X hours of XXXXXXXX XXXX for a total of XX XXXXXXXX hours. However, the Student only received X make up hours combined. Because the Student was owed XX hours (X hours per subject) and only received X make-up hours, OCR concludes that the District failed to provide X make up hours (XX hours per subject). OCR, therefore, concludes that the District failed to fully implement the Student's IEP and is in noncompliance with Section 504 and Title II, with respect to this issue.

**ISSUE 2 – Whether the District retaliated against the Complainant because of her advocacy on behalf of the Student from XXXXXXXX through XXX XXXX, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.**

## **Protected Activity and Knowledge of Protected Activity**

The Complainant informed OCR that she advocated on behalf of the Student throughout the XXXX - XXXX school year. The Principal confirmed the Complainant's advocacy on behalf of the Student during the XXXX - XXXX school year, regarding Teacher #1 allegedly failing to provide the Student with a free appropriate public education.<sup>1</sup> The evidence established that the Complainant engaged in a protected activity, and District personnel had knowledge of her protected activity. Therefore, OCR proceeded to the next step of its analysis – whether the District subjected the Student to adverse actions.

## **Alleged Adverse Actions**

OCR next determined whether the District took adverse action against the Student contemporaneous with or subsequent to the protected activity. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Student in his ability to gain the benefits of its program.

---

<sup>1</sup> The Complainant's concerns regarding FAPE were investigated under another case, OCR Docket #04-13- 1254, in which OCR found insufficient evidence -- date opened, April 2, 2013; date closed July 30, 2013.

During the XXXX - XXXX school year, the Complainant alleged that the following adverse actions occurred: (a) the former teacher (Teacher #1) failed to turn in the Student's XXXXXXXX for XXXXXXXX and marked the Student XXXX resulting in the Student receiving a truancy letter; (b) Teacher #1 failed to notify the Complainant that the Student had a XXXXXXXX XXXX and was XXXXXXXX and XXXXXXXX in XXXXX XXXX; (c) Teacher #1 harassed the Student about a reading book after he was moved to another teacher's class; and (d) the Principal failed to attend the Student's IEP meetings.

*Adverse action (a)—failing to submit XXXXXXXX absence notes*

Regarding the XXXXXXXX absences, the Complainant informed OCR that Teacher #1 failed to turn in XX XXXXXXXX XXXXXXXX notes, or XXXXXXXX notes, to the School Secretary and the Student was deemed to have XXXXXXXX absences. She stated that the School Secretary provides attendance data to the District's truancy office, and because of the accrued XXXXXXXX absences she received a truancy letter. The Complainant informed OCR that she did not keep copies of the XXXXXXXX absence notes that she turned them in to Teacher #1.

OCR's investigation confirmed that the District's attendance records reflect that the Student had XX XXXXXXXX absences; and the Student's records did not include XXXXXXXX absence notes pertaining to the XX absences. Teacher #1 informed OCR that she does not recall the Student's specific number of XXXXXXXX absences; and that in the morning she inputs absences in the District's Student Management Solution System (Powerschool SMS), which is linked to the School Secretary's attendance website. Teacher #1 further informed OCR that she does not specifically recall the Complainant or the Student giving her any XXXXXXXX absence notes for the 2nd semester, but that the Complainant did give her XXXXXXXX absence notes for the 1st semester of school year XXXX - XXXX, which she turned in to the School Secretary.

Regarding the District's absenteeism procedures, Teacher #1 informed OCR that parents have three days to provide XXXXXXXX absences such as a doctor's note or a written note. Teacher #1 further informed OCR that if a parent or student brings in an excuse or doctor's note, she or her student helper will give the note to the School Secretary who will make the change in Powerschool SMS. She stated once she has sent in the attendance report via the Powerschool SMS, she cannot go back into Powerschool SMS and make changes, but the School Secretary has authorization and access to Powerschool SMS to make such changes. She stated further that she turned in all excuses that she received. OCR notes that at least XXXXX of the XXXXXXXX absences occurred while the Student was assigned to Teacher #2's class.

During the Complainant's rebuttal interview, she informed OCR that she gave the XXXXXXXX absence notes to the Student to give to his teacher and that he informed her that he turned in the XXXXXXXX absences to Teacher #1.

Based on the above, OCR concludes that there is insufficient evidence to show that the Complainant or the Student submitted the XXXXXXXX absence notes to Teacher #1, or that Teacher #1 failed to submit notes to the School Secretary. OCR, therefore, concludes, based on the preponderance of the evidence, that there is insufficient evidence to establish that an adverse

action occurred. Accordingly, because an adverse action has not been established, OCR will not proceed any further with the analysis of this issue.

*Adverse action (b)—failing to call the Complainant about a XXXXXXXX XXXX*

The Complainant previously asked Teacher #1 to call the Complainant if the Student becomes ill at school. The Student had a XXXXXXXX XXXX in XXXXX XXXX.<sup>2</sup> The Complainant's mother, who works in the XXXXXXXXXX, called the Complainant's XXXXXXX about the XXXXXXXX XXXX. The Complainant's XXXXXXX informed the Complainant that the Student had a XXXXXXXX XXXX. OCR confirmed that Teacher #1 did not call the Complainant about the XXXXXXXX XXXX. Based on the above, OCR concludes that an alleged adverse action occurred when the Teacher #1 failed to call the Complainant as requested in the Complainant's note to Teacher #1. OCR will, therefore, proceed with its analysis concerning adverse action (b).

*Adverse action (c)—harassing the Student about a reading book*

Teacher #1 informed OCR that she asked her class if she had gotten everyone's reading textbook. While responding, some students stated the names of classmates who had not returned the books. Teacher #1 asserts that she approached Teacher #2 and asked her if she would get the reading book for her so she could mark it off her textbook inventory. Teacher #1 stated that she did not ask the Student about the reading book and that she never received the reading book; she just forgot about it since the District adopted a new textbook reading series for school year XXXX - XXXX.

The Complainant informed OCR during the rebuttal interview that Teacher #1 asked Teacher #2 to get the reading book from the Student, and that Teacher #2 told Teacher #1 that she would get the book. The Complainant further stated that Teacher #2 told her that she would give the Student a reading book. The Complainant advised OCR that she talked to the Principal about the reading book and he told her not to worry about the reading book.

Based on the series of events described above, OCR was unable to conclude that the teacher "harassed" the Student as alleged. OCR verified and the Complainant affirmed that Teacher #1 asked Teacher #2 to get the reading book from the Student and did not interact with the Student about the book. OCR, therefore, concludes that Teacher #1 asking Teacher #2 to retrieve a book did not amount to an adverse action that significantly disadvantaged the Student in his ability to gain the benefits of its program. OCR, therefore, will not proceed further with an analysis of this issue.

*Adverse action (d)—failing to attend IEP meetings*

The Student had a total of XXXXX IEP meetings during school year XXXX - XXXX. The Principal did not attend XX of the Student's IEP meetings. Based on the above, OCR concludes

---

<sup>2</sup> Although the Complainant initially informed OCR that the incident occurred in April 2013, based on data from the District, OCR concludes that that incident actually occurred in March 2013.

that an adverse action occurred. OCR, therefore, will proceed with its analysis concerning adverse action (d).

### **Causal Connection**

OCR next examined whether a causal relationship exists between adverse actions (b) and (d) and the Complainant's participation in her protected activities. Causal connection can be inferred by establishing closeness in time between the date of the protected activities and the adverse actions, change in treatment of the individual after the District had knowledge of the protected activity, or different treatment of the individual compared to other similarly-situated persons.

The evidence shows that the Complainant actively advocated on behalf of the Student during school year XXXX - XXXX. All of the alleged adverse actions occurred within a few months after the protected activity; therefore, OCR concludes that a causal connection exists. OCR next analyzed the District's reason for its actions.

### **Legitimate, Non-discriminatory reason**

**Adverse Action (b):** Failing to notify the Complainant when the Student became XXX at school.

The Complainant alleged that she asked Teacher #1 during an IEP meeting at the beginning of the school year to ensure that she call her when the Student has a XXXXXXXX XXXX or is XXXXXXXX or XXXXXXXX. The Complainant informed OCR that in XXXXX XXXX, the Student had a XXXXXXXX XXXX in the cafeteria. The Complainant further informed OCR that the Student's XXXXXXXXXXXX who works in the cafeteria and learned of the XXXXXXXX XXXX, called the Complainant's XXXXXXXX who, in turn, called the Complainant.

Teacher #1 informed OCR that she was in her classroom during the lunch period at issue. She further informed OCR that the Student never told her that he had a XXXXXXXX XXXX. She stated she did not witness the Student XXXXXXXX or XXXXXXXX and the Student did not see the school nurse for a XXXXXXXX XXXX, XXXXXXXX or XXXXXXXX. Teacher #1 informed OCR that she and the other teachers have a duty free lunch in which lunch monitors watch the students during the lunch period.

Teacher #1 stated that when she went to pick-up the students from the cafeteria, the Student's XXXXXXXXXXXX told her that the Student had a XXXXXXXX XXXX. Teacher #1 stated that she would have called the Complainant, but the XXXXXXXXXXXX informed her that she had already made arrangements to contact the Complainant. Teacher #1 further informed OCR that when she went to pick-up her students from the cafeteria, the Complainant had already arrived to pick-up the Student, get his books, and sign him out. Based on the above, OCR concludes that the District had a legitimate, nondiscriminatory reason for Teacher #1 not contacting the Complainant, as alleged.

The Complainant confirmed to OCR during her rebuttal interview that the XXXXXXXXXXXX was aware of the Student's illness and that the Complainant, in turn, was notified by her XXXXXXXX

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

*www.ed.gov*

that the Student had a XXXXXXXX XXXX. The Complainant also confirmed that she picked up the Student early. On rebuttal, the Complainant was unable to refute Teacher #1's explanation about not being in the cafeteria at the time. While the Complainant contends that she asked Teacher #1 to call her if the Student starts XXXXXXXX or XXXXXXXX, Teacher #1 informed OCR that she did not see the Student XXXXXXXX or XXXXXXXX. Based on the above, OCR concludes that the District's proffered reason was not a pretext for discrimination.

Accordingly, under the preponderance of the evidence standard, OCR concludes that there is insufficient evidence to support a finding that the District retaliated against the Student in noncompliance with Section 504 and Title II, as alleged.

**Adverse Action (d):** Failing to attend the Student's IEP meetings.

The Complainant alleged that the Principal failed to attend the Student's IEP meetings as the local educational agency representative (LEA).

The Principal informed OCR that the Student had XXX IEP meetings which were held on XXXXXX XX XXXX, XXXXXXXX XX XXXX, XXXXXXXX XX XXXX, XXXXXXXX XX XXXX, XXXXX XX XXXX and XXX XX XXXX. He informed OCR that he attended all except one as the LEA. The Principal was not sure which one he missed, but stated that he likely missed it because he was either doing a teacher observation or attending a District-wide principal meeting at the District office. He further informed OCR that if he does not attend the IEP meeting, the Program Supervisor, Special Education for the Southeast Region will attend as the LEA. Based on the above, OCR concludes that the Complainant has provided a legitimate nondiscriminatory reason for missing an IEP meeting.

OCR next analyzed whether the Principal's stated reason was a pretext for discrimination. Under IDEA guidelines, which are interpreted consistently with Section 504, a LEA is required to attend a student's IEP meetings. There is nothing in the guidelines that mandates that the Principal serve as the LEA in attendance at all IEP meetings. The Principal missed one of the student's IEP meetings, but in his absence the Program Supervisor attended as the LEA representative.

The Program Supervisor, Special Education for the Southeast Region informed OCR that she attended the Student's IEP meetings as the LEA when the Principal could not attend. She does not recall how many of the Student's IEP meetings the Principal missed.

OCR's review of the Student's IEP signature pages reflects that the Principal attended XXXX of the Student's IEP meetings as the LEA representative. He did not attend XXX of the Student's IEP meetings on XXXXXXXX XX XXXX and XXXXX XX XXXX.

OCR's review of the School's teacher observation schedule shows that the Principal attended teacher observations on XXXXXXXX XX XXXX, XXXXXXXX XX XXXX, XXXXXXXX XX XXXX, XXXXX XX XXXX, and XXXXX XX XXXX. The Principal informed OCR that, when he did not attend the Student's IEP meetings he was either attending a meeting at the District office or he was conducting a teacher observation.

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

[www.ed.gov](http://www.ed.gov)

Based on the above, OCR concludes that the Principal had a legitimate, nondiscriminatory reason for not attending two of the Student's seven IEP meetings. The evidence showed that the Principal was conducting teacher observations during one of the IEP meetings at issue, and the Principal believes he was in District meetings during the other IEP meeting. The evidence indicated that persons knowledgeable about the Student attended all of her IEP meetings. In addition, the Principal attended the majority of the Student's IEP meetings (both before and after the missed IEP meetings). Based on the above, OCR concludes that the Principal proffered reason is not a pretext for retaliation as alleged.

Accordingly, under the preponderance of the evidence standard, OCR concludes that there is insufficient evidence to support a finding that the District retaliated against the Student in noncompliance with Section 504 and Title II, as alleged.

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.

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.

As noted above, OCR found compliance concerns with respect to Issue #1. Once the District implements the actions detailed in the attached Resolution Agreement, the District will be in compliance with Section 504 and Title II with respect to that issue.

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.

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 file a private suit in federal court whether or not OCR finds a violation.

If you have any questions or concerns regarding OCR's determination, please contact Scott R. Sausser, Esq., Compliance Team Leader, at (404) 974-9354.

Sincerely,

Cynthia G. Pierre, Ph.D.  
Regional Director

Enclosure