



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
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March 26, 2014

XXXXXX XXXXXXXX
XXXXXXXXXX XX XXXXXXXX
Anderson County School District
101 South Main St.
Suite 500
Clinton, TN 37716

Re: OCR Complaint #04-13-7137

Dear XX XXXXXXXX:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint which was filed on September 16, 2013, against the Anderson County School District (District), alleging discrimination on the basis of disability.

Specifically, the Complainant alleged that, during the 2012-2013 and/or 2013-2014 school years, the District discriminated against her son (Student) and other students with disabilities in the Student's XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX (XXX) at XXXXXXXX XXXXXXXXXXXXXXXXXXXX (School) as follows:

- 1) The District fails to provide a free appropriate public education (FAPE) by not including XXX students in field trips.
- 2) The District discriminates against students in the XXX by placing them in a pre-school classroom in the 2013-2014 school year that is not educationally appropriate for K-5th grade students.
- 3) The District discriminated against students in the XXX because, during the 2012-2013 school year, the District hired teachers and substitute teachers who were not highly qualified and failed to communicate with parents of XXX students when a non-highly qualified teacher was hired for four or more consecutive weeks.
- 4) The District discriminates against the Student and other students in the XXX by failing to implement their Individualized Education Program (IEP) in special area classes, such as art, physical education, and technology.
- 5) The District discriminates against the Student and other students in the XXX by not providing accessible playground equipment, such as accessible swings.

- 6) The District discriminated against the Student when it failed to timely and properly process his Tennessee Comprehensive Assessment Program (TCAP) scores, in Spring 2013.

OCR investigated this 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 (FFA); 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. The District is a recipient of FFA from the Department and a public entity. Accordingly, OCR has jurisdiction over this complaint.

OCR's investigation of the complaint included an analysis of the documentation provided by the Complainant and the District, an onsite visit to the School, and interviews with the Complainant and School and District personnel. On March 13, 2014, the Complainant informed OCR that she wished to withdraw allegations 2 - 5. In accordance with OCR's *Case Processing Manual (CPM)* §110(1), OCR accepted her withdrawal request for allegations 2 - 4¹. However, because OCR's investigation into allegation #5 revealed compliance concerns and had class implications, OCR did not accept the Complainant's request to withdraw that allegation. Therefore, OCR continued its investigation focusing on the following legal issues:

- 1) Whether the District discriminated against the Student and other XXX students when it failed to include them on field trips in the 2012-2013 and the 2013-2104 school years, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.4(a) and (b)(i-iii), and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i-iii).
- 2) Whether the District fails to provide accessible playground equipment, such as accessible swings, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.21 and the Title II implementing regulation at 28 C.F.R. § 35.149.
- 3) Whether the District discriminated against the Student when it failed to timely and properly process his Tennessee Comprehensive Assessment Program (TCAP) scores, in Spring 2013, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.4(a) and (b)(i-iii), and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i-iii).

Prior to the completion of the investigation, the District voluntarily offered to resolve the complaint. Pursuant to § 302 of OCR's *CPM*, a complaint may be resolved when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. Based on the foregoing, OCR accepted the District's request to resolve this complaint. Accordingly, the District agreed to implement the attached Resolution Agreement (RA) for legal issues #1 and #2 above. OCR, however, found insufficient evidence to support a finding of noncompliance with respect to the TCAP issue. Set forth below is a summary of OCR's legal standards, findings, and conclusions.

Legal Standards

¹ Allegations 2 and 4 concerned individual placement and educational decisions for the Student and other students in the same XXX classroom. OCR did not have any evidence that the parents/guardians of the other students in the XXX classroom complained or raised the same concerns for their individual children as the Complainant raised for her Student. For Allegation 3, the information gathered from the District prior to the Complainant's withdrawal did not show compliance concerns with the certification of the teachers in the XXX classroom.

The Section 504 regulation at 34 C.F.R. Section 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)(i-iii) prohibits: (i) denying a qualified disabled person the opportunity to participate in or benefit from an aid, benefit, or service; (ii) affording a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) providing a qualified disabled person with an aid, benefit, or service that is not as effective as that provided to others. The Title II regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i-iii) contains similar standards.

OCR applies a different treatment analysis to allegations involving incidents perpetrated by the recipient on the basis of disability. Under this analysis, OCR must first determine by a preponderance of the evidence whether students with disabilities were treated differently than one or more similarly situated students without disabilities with regard to a service, benefit, privilege, etc., from the recipient. If such different treatment is established, OCR must determine whether the recipient had a legitimate, non-discriminatory reason for its action(s) that would rebut the prima facie case against it. Finally, if one or more legitimate, non-discriminatory reasons for the different treatment is/are identified, OCR must determine whether the recipient's asserted reason(s) for its action(s) is/are a mere pretext for discrimination. Ultimately however, the weight of the evidence must convince OCR that actual discrimination occurred.

Background

The Student is currently in the X grade at XXXXXXXX XXXXXXXXXXXX XXXXXXX (School). His disability is XXXXXXXX XXXXXX, which impairs his mobility and requires that he use a XXXXXXXXXXXX during the school day. He receives instruction in the School's XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX (XXX), but attends special area classes with regular education students. The District developed the Student's current IEP on September 18, 2013. When he goes to PE, Art, Music, and Technology, the District provides the following related aids and services: permitting the Student to pace and have breaks; having an assistant present at all special classes; giving the Student preferential seating; being redirected when the Student gets frustrated or angry and hits himself; increasing the predictability of his schedule and giving directions in multiple formats. Because of his disabilities, the Student participated in the TCAP-Alternate Portfolio Assessment (TCAP-Alt PA), which is an alternate portfolio assessment to the TCAP exam.

Issue #3: Whether the District discriminated against the Student when it failed to timely and properly process his TCAP scores, in Spring 2013, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.4(a) and (b)(i-iii), and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i-iii).

The Student was administered the TCAP-Alt PA during the 2012-2013 school year. He took this version of the TCAP as required by his IEP. "The TCAP-Alt Portfolio Assessment is designed for students with significant cognitive disabilities and is based on alternate content standards....The decision for TCAP-Alt PA participation is an IEP team decision based on the needs of the individual student. All student work contained in a portfolio assessment must be performed by the student and in the presence of a teacher and/or paraprofessional."

<http://www.state.tn.us/education/assessment/TCAP-AltPortfolio.shtml>.

The TCAP Alt-PA required the XXX teacher to create a portfolio of the Student's work to be submitted to the Tennessee Department of Education (TNDOE). Teachers were to have submitted portfolios to TNDOE on February 11, 2013; and results returned to the District in July 2013. The District sent the results home in September 2013. The Complainant exchanged emails with the Principal in September 2013 expressing concerns about the Student's TCAP results.

OCR interviewed the District's XXXXXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX, the XXXXXXXX XXXXXXXXXXXXXXX in the District's XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX, and the District's XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX. They explained that the Student's 2012-21013 XXX teacher failed to submit all the XXX student portfolios last year. He accumulated several unexplained absences then ultimately, failed to show up to work at the School. Therefore, all the XXX students in his class received a non-proficient score due to the teacher's actions. As far as the TNDOE is concerned, the non-proficient score is a non-participatory score. Therefore, it reflects that the Student and other XXX students did not participate in the TCAP.

District officials informed OCR that this failure by the former XXX teacher could not have been predicted. His failure to show up to teach surprised them and, according to them, could not have been prevented. Their internal procedures have checkpoints in place and the administration conducted two spot checks of the students' portfolios. At that time, the teacher confirmed progress on finishing the portfolios. Additionally, he was paired with an experienced teacher throughout the process. However, in the end, in spite of these procedures, the teacher failed to submit the portfolios when they were due. After the incident and his failure to show up to work, the District terminated the teacher for breach of contract resulting from job abandonment in February 2014. As a result of the teacher's actions, the District informed him that they were pursuing the revocation of his teaching license with the TNDOE.

On November 15, 2013, the District's XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX sent letters to all XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX XXXXXXX and XXXXXXXXXXXXXXX reminding them about TCAP-Alt compliance, as a result of this incident. Their updated policy now includes additional spot checks. The District's XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX received an email from the TNDOE's, XXXXXXXX XX XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX, which stated the XXX students' TCAP-Alt-PA scores do not impact student level accountability. Thus, the Student did not receive a score due to the teacher's misconduct with the assessment and the Student was not negatively impacted due to that teacher's actions.

OCR finds that this incident was an aberration to the normal administration and processing of TCAP-Alt portfolio assessment, due to the inactions of the former XXX teacher who abandoned his position. TNDOE recognized this fact and found no fault by the District; according to the District and TNDOE, the Student's score/assessment was not negatively impacted due to the teacher's action. Based on this information, OCR found that the Student's TCAP-Alt PA was not timely or properly processed, which resulted in the Student being treated differently than students without disabilities. However, OCR finds that the District had a legitimate, non-discriminatory reason for what occurred because it was due to the XXX teacher's failure to fulfill his teaching responsibilities.

OCR next analyzed whether the District's proffered reason was a pretext for discrimination. Pretext may be established with evidence showing, among other things: (1) that the District's reasons for the Student's TCAP-Alt PA not being timely or properly processed were not believable; (2) that

similarly situated individuals were treated differently than the Student; and (3) deviation from the District's procedures or other guidelines concerning the subject matter of the proffered legitimate, non-discriminatory reason.

OCR determined that the District's reason for the Student's TCAP-Alt PA score being not timely or properly processed was believable, that all XXX students' grades were deemed non-proficient like the Student's, and the District did not deviate from its procedures when it checked to make sure the XXX teacher's portfolio progress was on time. OCR finds that no discrimination occurred and the Student was not negatively impacted due to the teacher's actions. Accordingly, OCR found insufficient evidence to establish a violation of Section 504 or Title II with regard to this allegation.

On March 25, 2014, OCR received the enclosed signed RA which, when fully implemented, will resolve the complaint. OCR will monitor the implementation of this RA to ensure that it is fully implemented. If the District fails to fully implement the RA, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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.

Pursuant to OCR procedures, we have reminded the District that 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.

OCR will proceed with monitoring the RA, effective the date of this letter. OCR is committed to a high quality resolution of every case. If you have any questions regarding this matter, please contact XX XXXXX XXX, General Attorney, at (XXX) XXX-XXXX, or XXXXX X XXXXXXXX, Team Leader, at (XXX) XXX-XXXX.

Sincerely,

Cynthia G. Pierre, Ph.D.
Regional Director

Enclosure