



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

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January 3, 2017

Jacqueline Byrd  
Superintendent  
Polk County School District  
1915 South Floral Avenue  
Bartow, Florida 33831

Complaint #04-14-1656

Dear Superintendent Byrd:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint that the Complainant filed on behalf of her son, the Student, against Polk County School District (District), on July 2, 2014, alleging discrimination on the basis of disability. Specifically, the Complainant alleged the following:

1. The District discriminated against the Student on the basis of disability when it failed to timely evaluate the Student for a Behavioral Intervention Plan.
2. The District discriminated against the Student on the basis of disability when the Principal excluded the Student from his field day activities and the awards ceremony because of the Student's disabilities.
3. The District discriminated against the Student on the basis of disability because it did not have a manifestation determination hearing when the student was excluded from school for more than 10 days.

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

OCR investigated the following legal issues:

1. Whether the District discriminated against the Student on the basis of disability when it failed to provide him with a free appropriate public education (FAPE) by failing to

timely evaluate him for a Behavioral Intervention Plan since the 2012-2013 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33, 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.

2. Whether the District discriminated against the Student on the basis of disability when it excluded him from field day activities on May 29, 2014, and an awards ceremony on June 3, 2014, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District discriminated against the Student on the basis of disability when it denied him a FAPE by failing to conduct a re-evaluation of the Student prior to a significant change in placement during the 2013-2014 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.

During the investigation, OCR reviewed documents provided by the District and conducted interviews with the Complainant and District staff. Before the conclusion of the investigation, the District expressed an interest in resolving Issues 1 and 2 by entering into a voluntary resolution agreement aligned with the information obtained during the investigation. OCR found insufficient evidence to establish noncompliance with Section 504 or Title II for Issue 3. Set forth below is a summary of OCR's findings.

### **Regulatory Requirements**

As the Title II implementing regulation provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations, OCR conducted its investigation in accordance with the applicable Section 504 standards.

Section 504 prohibits disability discrimination by organizations or entities that receive or benefit from Federal financial assistance, either from the Department or an agency that has delegated investigative authority to the Department. The regulations implementing Section 504 provide 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 that receives Federal financial assistance. The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a recipient that operates a public elementary or secondary program must provide an appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The term "appropriate education" is defined under 34 C.F.R. § 104.33(b) to mean the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to the Section 504 regulation's procedural requirements.

Further, pursuant to 34 C.F.R. § 104.35(a), a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of that section of any person who, because of disability, needs or

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is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Section 504 requires that a timely evaluation be conducted and provides that compliance with the Individuals with Disabilities Education Act (IDEA) is one means of complying with the provisions of Section 504. IDEA requires recipients to conduct an evaluation within 60 calendar days of receiving parental consent for the evaluation. 34 C.F.R. § 300.301. Thus, OCR considers the 60-day standard in assessing the reasonableness of a recipient's evaluation. Also, the exclusion of a student with a disability from his or her program for more than ten consecutive days, or for a total of ten or more cumulative days under circumstances that show a pattern of exclusion, constitutes a significant change in placement. Where such a change is occurring through the disciplinary process, districts must evaluate whether the misconduct was caused by, or was a manifestation of, the student's disability. If so, the district may not take the disciplinary action and should determine whether the student's current placement is appropriate. If the misconduct is not found to be a manifestation of the student's disability, the disciplinary action may be administered in the same manner as for non-disabled students.

To determine whether a recipient has subjected a person to different treatment, on the basis of disability, OCR considers whether there is evidence of intentional discrimination on the basis of disability; evidence of discriminatory intent may be direct or circumstantial. OCR initially examines whether there is direct evidence of discriminatory bias by a recipient based on a person's disability. Direct evidence includes conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. Any direct evidence of discrimination must show that discrimination motivated the denial of an educational benefit or other adverse action. OCR also looks at whether there is evidence that an individual was treated differently than students without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of education, services, benefits, or opportunities. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination based on disability. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient (such as the District) failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. To find noncompliance, the preponderance of evidence must establish that the recipient's actions were based on the person's disability.

In evaluating allegations of different treatment, OCR determines what action the recipient took against the alleged injured party, whether it followed its policies and procedures for taking such action and whether similarly situated individuals were treated differently. If the alleged injured party was treated differently, OCR will determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a

conclusion that a recipient (such as the District) failed to comply with a law or regulation enforced by OCR, or whether the evidence is insufficient to support such a conclusion.

**Issue 1: Whether the District discriminated against the Student on the basis of disability when it failed to provide him with a FAPE by failing to timely evaluate him for a Behavioral Intervention Plan during the 2012-2013 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33, 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.**

OCR's review of the evidence indicated that the Student was in the XXX grade during the 2012 – 2013 school year and he was in the XXX grade during the 2013-2014 school year. Further, the Student received hospital homebound (HH) services for the last XXXXX XXXXX of the 2013 – 2014 school year, as prescribed by his physician.

The Complainant alleged that she requested a Behavior Intervention Plan (BIP) for the Student “for over a year,” with her first request in spring of XXXX, but the District “dragged their feet” in conducting a Functional Behavior Analysis (FBA) for the Student and drafting a BIP for him.

OCR's review of the documentation obtained in this investigation indicated that the District completed an FBA for the Student on XXX XX XXXX, and a BIP was drafted and implemented for him on XXXXXXXXXXXX XX XXXX. According to the Academic and Behavior and Support Teacher (ABS Teacher) who was on the individualized education plan (IEP) team for the Student, at the end of the 2012-2013 school year, a request was made by the school to conduct an FBA for the Student. According to meeting documentation from an XXXXX XX XXXX, IEP meeting, the Complainant raised concerns about the Student's behaviors at the meeting. Further, the District's Assistant Superintendent corroborated that a request was made at the IEP meeting “for a BIP because of the Student's explosive behaviors and his lack of regard for authority.”

Thus, the ABS Teacher began the FBA, and she stated that, as the end of the school year approached, because the Student would be assigned to new regular education teachers and the ESE teacher was leaving, the ABS Teacher decided to wait until the next school year (2013-2014) to complete the FBA, stating that new teachers and a new setting could change the Student's behaviors. The ABS Teacher stated that the Complainant said that she approved of the completion of the FBA during the new school year, because the District kept the Complainant informed of the process. The ABS Teacher further stated that, at the second half of the 2013-2014 school year, on XXXXX XX XXXX, the Student started to exhibit behavioral issues, and also notified OCR that this was the first time she heard that the Student had any behavioral issues (since the end of the 2012 - 2013 school year). Thus, because of the Student's behaviors, the ABS Teacher resumed the FBA in XXXXX 2014 and completed his evaluation on XXX XX XXXX.

The District notified OCR that, from XXX XX XXXX, through XXXX X XXXX, the Complainant removed the Student from School for HH due to a physician's order indicating that, because of the Student's disabilities, he could not be in large groups or in an institutional setting. Because the Student was on HH, the ABS Teacher stated that she did not feel that there was a need for a BIP during the HH period. The ABS Teacher stated that the Complainant agreed to

postpone the creation of the BIP, so the BIP was not implemented until XXXXXXXXXXXX XX XXXX.

During an interview with the Complainant, she told OCR that at the XXXXX XX XXXX, IEP meeting she requested that the District conduct an FBA, although her request was not in the meeting minutes. The Complainant further stated that she did not consent to any of the District's postponements of completion of the FBA or the BIP.

Based upon a preponderance of evidence obtained thus far, OCR found that the Complainant requested a BIP as early as the 2012-2013 school year. Evidence established that the District began the FBA in XXXXX XXXX, but did not complete it until XXX XX XXXX, which is well beyond 60 days. Further, a BIP was not drafted and implemented until XXXXXXXXXXXX XX XXXX. Prior to the conclusion of interviews with staff, the District expressed an interest in voluntarily resolving this issue.

**Issue 2: Whether the District discriminated against the Student on the basis of disability when it excluded him from field day activities on XXX XX XXXX, and the awards ceremony on June 3, 2014, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130.**

The Complainant alleged that the Student was excluded from field day activities on May 29, 2014, and from an awards ceremony on June 3, 2014. The Complainant alleged that the District notified her that students not receiving services at the school cannot be on school property alone without a parent.

OCR's review of the evidence indicated that the Student was on HH during the field day and awards ceremony activities at the school. The District confirmed that the Student was required to sit out of field day events for approximately 20 minutes. Regarding the awards ceremony, during an interview with OCR, the Southeast Region ESE Senior Manager (ESE Manager) stated that the District did not exclude the Student from the awards ceremony. The Complainant confirmed that the District did not exclude the Student from the awards ceremony, but clarified that the Student chose not to attend. OCR did not continue with its legal analysis regarding the awards ceremony, since the Student chose not to attend.

OCR's review of the District's policy for HH students provides that a student may be alternatively assigned to the homebound or hospitalized program and to a school-based program due to an acute, chronic or intermittent condition as certified by a licensed physician. The policy does not address instances in which HH students are permitted to be on School property for events/functions. The Assistant Superintendent stated that three other students who are, or were, HH students were permitted to participate in school activities; Student 1 participated in Color Guard/ROTC on campus after school, and has not had to sit out of any events, such as School dances; Student 2, an HH student at the Davenport School of the Arts, a magnet school, participated in drama activities after school; and Student 3 attended prom and participated in graduation.

***Prima face case of different treatment***

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The preponderance of the evidence established that the Student, who is as an individual with a disability, suffered an adverse act when he was denied the opportunity to participate in the entirety of Field Day in May 2014, while he was on HH Services. The evidence further established that this was not a normal occurrence, and most HH students are allowed to participate in school related activities without a parent. For this reason, OCR determined that a prima facie case of different treatment was established, and proceeded with an examination of whether the District articulated a legitimate non-discriminatory reason for the exclusion.

#### Legitimate, Non-Discriminatory Reason

OCR next determined whether the District had a legitimate, non-discriminatory reason for requiring the Student to sit out of Field Day activities. According to the ESE Manager, on XXX XX XXXX, an IEP meeting was held in which the team discussed HH for the Student. During the meeting, the Complainant requested that, although the Student was going to be out of the school pursuant to HH during Field Day, she wanted him to attend the activities. The ESE Manager informed OCR that the IEP team agreed that the Student could attend the event and that the Complainant did not need to accompany the Student to the event.

The Student and his XXXXXXXXXXXX attended the school's Field Day. The Coach, who was running the activities, notified OCR that she saw the Student and did not expect him to be at the school, because he was on HH. The Coach was aware that the Student has an IEP and may need an XXXXXX for outdoor allergies such as bee stings, ant bites, and grass, but she did not know whether a parent needed to be with the Student at Field Day. The Complainant stated that the Student was without his XXXXXXXXXXXX for approximately 20 minutes during the activities when he went to retrieve the Complainant. The Coach stated that she was told by an Administrator that the Student could be at Field Day if his parent was present. Since the Coach observed that the Student was there without a parent present at that time, she conferred with staff and was advised to call the Complainant and inform her that the Student would have to sit out of events while he was without a parent; thus, the Student did not participate in events for approximately 20 minutes.

The Principal confirmed that the Student was required to sit out for a portion of Field Day as a safety issue, because the Principal knew that the Student requires an XXXXXX and had an allergy to grass. According to the Assistant Superintendent, when the Student had to sit out for 20 minutes during Field Day, that was an unusual occurrence; HH students are otherwise allowed to participate in school activities even if out on HH.

Prior to the completion of OCR's investigation, the District expressed an interest in voluntarily resolving this issue.

**Issue 3: Whether the District discriminated against the Student on the basis of disability when it denied him a FAPE by failing to conduct a re-evaluation of the Student prior to a significant change in placement during the 2013-2014 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130.**

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According to the Complainant, the District disciplined the Student on several occasions during the 2013 – 2014 school year, each time for one to five days for Level Five or Six behaviors. She stated that the Student’s disability manifests itself in violent outbursts and screaming; the Student cannot cope during manic episodes. The Complainant stated that she requested a manifestation determination hearing but the District refused.<sup>1</sup> She alleged that the Student was out of school for a total of ten days by the beginning of May 2014.

According to the Assistant Principal (AP), for the 2013-2014 school year, the Student was not suspended more than ten days; rather, the Student was suspended six full days and on two days, the Complainant was asked to pick up the Student early from school (one day at XX:XX pm, and the other day at XX:XX am). She stated that the District’s computer system could not input the two partial days, but believed that the total days of suspension including in-school suspension (ISS) and two half days of out-of-school suspension (OSS) was eight full schools days and two hours.

According to the documentation reviewed in this investigation, the Student received the following discipline: on XXXXXXXX X XXXX, the Student served one two-hour detention; on XXXXXXXX XX XXXX, the Student was picked up at XX a.m. for a disciplinary incident, which was counted as a ½ day OSS; on XXXXXXXX XX XXXX, the Student served one day of OSS; on XXXXX XX XXXX, the Student served one day of ISS; on XXXXX X XXXX, the Student served a ½ day OSS; on XXXXX X and X XXXX, the Student served two days of OSS; and on XXXXX XX – XX XXXX, the Student served three days of OSS. Thus, the evidence indicated that the total number of days the Student was in OSS and ISS was eight days (and 2 hours).

The Complainant provided no additional evidence to support her allegation that the Student was in OSS and/or ISS during the 2013 – 2014 school year in excess of ten days.

Based upon the evidence obtained during the investigation, the evidence is insufficient to establish that the District discriminated against the Student on the basis of disability when it denied him a FAPE by failing to conduct a re-evaluation of the Student prior to a significant change in placement during the 2013 - 2014 school year, because the Student was not excluded from school for more than 10 days. Therefore, there was no significant change in placement and no need for a manifestation determination.

Based upon a preponderance of evidence, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 or with Title II for Issue 3.

## **Conclusion**

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<sup>1</sup> In an interview dated June 10, 2015, the Complainant stated that she does not remember any specific date on which she requested a manifestation determination hearing, but clarified that she asked every time the school asked for her to pick up the Student.

The District requested to voluntarily resolve Issues 1 and 2 prior to the completion of OCR's investigation. OCR determined that there is insufficient evidence to support a finding of noncompliance with Issue 3. During the investigation, OCR also determined that the District failed to implement the Student's IEP when the Student did not receive the tutoring during summer 2013.

### **Proposed Resolution**

The District has agreed to implement the provisions of the attached Resolution Agreement (Agreement) which, when fully implemented, will resolve OCR's findings of noncompliance. The proposed Agreement will require the District to: 1) expunge the Student's records for any discipline that he received during any period in which he should have had a BIP (had one been timely implemented); 2) convene an IEP team meeting to determine whether compensatory educational services are warranted due to the District's failure to timely evaluate the Student for a BIP; and 3) conduct annual training of its staff, including administrators and teachers, regarding the requirements of Section 504 and Title II to provide students with disabilities with a FAPE, which shall include the provision of services to HH students while on District property.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation, and are consistent with applicable regulations.

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.

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.



If you have any questions regarding this matter, please contact the assigned OCR investigator, Lily Patel, Esq., at (404) 974-9361, or me, at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer  
Compliance Team Leader

Enclosure