



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

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**REGION IV**  
ALABAMA  
FLORIDA  
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TENNESSEE

March 25, 2015

Dr. Danny L. Weeks  
Director of Schools  
Dickson County School District  
817 N.Charlotte Street  
Dickson, Tennessee 37055

Re: Complaint #04-14-1742

Dear Dr. Weeks:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint that filed against the Dickson County School District (District), on September 8, 2014, alleging discrimination on the basis of disability, on behalf of the Student, a student at Centennial Elementary School (School), and his Parent. Specifically, the Complainant alleged the following:

1. The District failed to evaluate the Student for special education services;
2. The District punished the Student for absences that were caused by his disability by requiring him to either go to detention or denying him his "specials" (music, physical education and art) even though his Mother provided doctor's notes for each absence; and
3. The District is discriminating against students with disabilities by starting a rewards program for students who refrain from using the bathroom during class time.

As a recipient of Federal financial assistance from the Department, the District is subject to the requirements 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 based on disability. As a public entity, the District is also subject to the requirements of Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination based on disability by public entities. Accordingly, OCR has jurisdiction over this complaint.

OCR proceeded with an investigation of the following legal issues:

1. Whether the District discriminated against the Student on the basis of disability by failing to evaluate him for special education services, 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;

2. Whether the District discriminated against the Student on the basis of disability by punishing him for behaviors that are related to his disability, in noncompliance with the Section 504 implementing regulation 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 students with disabilities by instituting a rewards system based on not using the bathroom during class, 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.

During its investigation, OCR reviewed documents provided by both the Complainant and the District. OCR also interviewed the Complainant and District staff and afforded the Complainant an opportunity to rebut the evidence provided by the District. In reaching a determination, OCR reviewed the evidence under a preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that the District failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

After a thorough review of all of the available evidence, OCR has determined, by a preponderance of the evidence, that there is sufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to Issue #1 and 2 but insufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to Issue #3. The applicable legal standards, the facts gathered during our investigation, and the basis for OCR's determination are discussed below.

### **Applicable 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.

The regulation implementing Section 504 at 34 C.F.R. §104.35(a) and (c) require that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with paragraph (b) of this section of any person 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 person in regular or special education and any subsequent significant change in placement. In interpreting evaluation data and in making placement decisions, a recipient shall: (1) draw upon information from a variety of sources, including aptitude tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and

the placement options; and (4) ensure that the placement decision is made in conformity with the regulation at 34 C.F.R. §104.34.

As noted in Appendix A, Subpart D of the Section 504 regulation, “It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the “process” requirements of this subpart (concerning identification and location, evaluation, and due process procedures).”

The regulation implementing Section 504 at 34 C.F.R. §104.4(a)-(b)(1)(i)-(iv) and (vii) states that no qualified person with a disability shall, on the basis of the 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. A recipient, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford the qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others; (iii) provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others; (iv) provide different or separate aid, benefits, or services to persons with disabilities or any class of persons with disabilities unless such action is necessary to provide qualified persons with disabilities aid, benefits, or services that are as effective as those provided to others; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. Also, a student with a disability may be entitled to a reasonable modification of policies, practices, or procedures. The extent of a school district's obligation to make reasonable modifications is fact-dependent and requires a case-by-case analysis.

## **Background**

The Complainant stated that the Student is currently in the fourth grade at the School. The Student was diagnosed with ADHD in 2010 and suffered a traumatic brain injury in 2013, in addition to having dysgraphia (a writing disorder), migraines and cyclic vomiting syndrome. The Complainant stated that the Student was homeschooled from September 2012-October 2013.

### **Issue #1: Whether the District discriminated against the Student on the basis of disability by failing to evaluate him for special education services.**

The District referral process states that anyone, including the parent(s), guardian, or community professional may refer a student for screening and possible evaluation. A screening team of educational professionals considers screening information, previous evaluations, and teacher/parent input to determine if a comprehensive evaluation is needed.

The Complainant stated that in October 2013 the Parent decided to re-enroll the Student in the District at the School (where he had previously attended school). The Student was placed in the third grade and a Section 504 Plan was developed, based on his disability. The Parent stated that she requested an Individual Education Plan (IEP) but the School told her that the Student did not need it. However, the Parent stated that the Student was not meeting the benchmark for the state

wide tests for math and reading. The Parent stated that the Principal said that the Occupational Therapist would evaluate him, but this was never done. The Principal stated that she does not remember informing the Parent that the Occupational Therapist would evaluate the Student.

OCR interviewed School and District staff with regard to the Complainant and Parent's request for an evaluation of the Student. The Student's teachers all stated that they were aware of the Student's Section 504 Plan, that it was being implemented and he was doing well. District staff stated that when the Student returned to the School for the 2013-2014 school year, the Parent requested a meeting because the Student had suffered a brain injury. The Student's Section 504 Plan was modified in October 2013. District staff stated the Student's modified Section 504 plan included the following items to be implemented in the classroom and testing situations:

- Extended time on tests and assignments;
- Proximity seating;
- Dim lighting in class;
- Small group testing;
- Brief breaks; and
- An agenda book.

District staff stated that the Parent did not request an evaluation of the Student for special education services at that time. A review of the minutes of the October 2013 Section 504 meeting does not indicate that the Parent requested that the Student be evaluated for special education services. Also, the Principal told OCR that she does not remember informing the Parent that the Occupational Therapist would evaluate the Student.

District staff stated that the next Section 504 meeting was held in January 2014 to add a notation that the Student was allowed to participate in limited physical activities. His previous Section 504 Plan stated "no physical activity" because of his brain injury. The minutes of the January 2014 meeting do not indicate that the Parent requested that the Student be evaluated for special education services.

The next Section 504 meeting for the Student was held in September 2014 at the beginning of the 2014-2015 school year. District staff stated that the Parent and an advocate attended the meeting and the Parent presented the team with a private evaluation of the Student completed in February 2014. The Parent stated that the evaluation recommended occupational therapy and an IEP. A review of the private evaluation shows that it did recommend an IEP and occupational therapy. The Parent contends that she has been requesting an evaluation of the Student for some time because he was not meeting benchmark standards during state testing. The Parent stated that she did discuss having the Student evaluated but it was decided that since he was progressing, the team would wait nine weeks before determining if an evaluation would be done. The meeting notes were signed by the participants of the meeting including the Parent.

A review of the District's documentation shows that in a letter dated August 1, 2014, addressed to the Principal, the Parent requested that the Student be evaluated for special education services. The District stated that the request was submitted to the special education department. On September 18, 2014 a Section 504 meeting was convened. During the meeting, the Response to

Intervention (RTI) model was discussed. The Principal stated that the entire team agreed to continue with a Section 504 Plan, with appropriate accommodations and not pursue special education testing at the time. A review of the meeting notes shows that the team decided to complete an Individualized Healthcare Plan (IHP) for the Student's vomiting and Traumatic Brain Injury (TBI). The team also discussed alternative ways to make up excessive absences if the Student missed more than 10% of the school days as it could be related to his health issues. The meeting notes do not indicate when the IHP would be completed or indicate that the School would evaluate the Student for TBI. The notes also indicate that the Parent would monitor reports of the Student and at the end of the following nine weeks, the Parent would decide about requesting testing for IEP or Section 504 revision. The meeting notes were signed by both the Complainant and the Parent.

District staff stated that the next Section 504 meeting for the Student was convened on February 5, 2015. The Student's needs were assessed because of the Parent's request that the Student be evaluated for special education services. District staff stated that the necessary paperwork was completed by the Parent and the evaluation process started the same day.

### Conclusion

The evidence shows that the School was aware of the Student's TBI at the beginning of the 2013-2014 school year. The Parent requested a meeting because of the TBI and the Parent's concern about the Student not meeting benchmarks on the standardized tests. As a result, the School modified the Student's Section 504 Plan in October 2013. The School, instead of evaluating the Student for special education services, placed the obligation on the Parent to determine whether the Student should be evaluated after a nine-week waiting period. The evidence further shows that the School did not begin the process of evaluating the Student, until four months after the initial request from the Parent.

Based on the preponderance of the evidence, OCR has determined that there is sufficient evidence to support noncompliance with Section 504 or Title II as it relates to this allegation. The District has agreed to remedy this compliance issue with the attached signed Resolution Agreement (Agreement), which, when fully implemented, will resolve this first issue of the complaint. OCR will monitor the implementation of the agreement until the District is in compliance with the statutes and regulations at issue in the case.

### **Issue #2: Whether the District discriminated against the Student on the basis of disability by punishing him for behaviors that are related to his disability.**

The Parent stated that the Student's disability (the migraines and cyclic vomiting – migraines in the stomach) causes the Student to miss school because he needs to be hospitalized and has to be given fluids in order to control and stop the vomiting. When he misses School, a note is provided from the doctor every time. Despite this, the Student was made to serve detention after school or during his specials (art, music, P.E.). The Complainant stated that the School told the Parent that the Student was being sent to detention not as a punishment, but as a way to make up hours he had missed when he was sick, even though he had been provided with the assignments and completed them.

The School policy to help students make up for any excessive absences states, in part, as follows:

*“All absences over 9 per semester or 18 per year require a doctor’s note and those days must be made up in Saturday School or after school detention if your child is in grade 2-5. The Student is excused for the day or days of absences, not the material covered in class.”*

District staff stated that during the 2013-2014 school year the Student was referred to In School Suspension (ISS) to make up instructional time that he had missed, even though the Parent provided doctor notes for the absences. The Principal stated that she was following the Student Handbook rules for the absences and that the referral was not a punishment in any way. The Student was not given any disciplinary referrals for the ISS so it was not reflected as discipline. During the ISS time, the Student was given work that he had missed. The Principal stated that the Parent did not agree for the Student to make up work after school or during Saturday School, and as a result, the Student made up work during specials (music, art, P.E.) so as not to miss academic instruction.

District staff stated that during the September 2014 Section 504 meeting, everyone agreed that the team would find alternate ways to make up any absences for the Student over 10% of the total school days for the year. An email dated September 18, 2014, from the Director of Student Services to the Principal, states in part, that the Board Policy allows a school to develop an attendance procedure in order to encourage attendance and that the District supports the schools’ need to make up lost instructional time. The email also said that the attendance policy only applies if it is in reference to unexcused absences by the principal. The email further states that “the purpose is to make up the missed work and or instructional time missed.” If the student is passing and the work is being made up, then there may not be a need to make up lost instructional hours. If a school still imposes the requirement to attend Saturday School to make up instructional time, then it may be construed as being punishment rather than for instruction.

In a letter from the Assistant Principal dated May 2, 2014, the Parent was informed that the Student missed 23 days and that the School must have a doctor’s note to excuse any more days when the Student is absent for the remainder of the school year. The Parent was informed that the Student must attend the Saturday School Program in order to make-up the classroom instruction time missed. The Complainant stated that the Student’s teacher confirmed that the Student was provided with work during his absence. The work provided during the Student’s absences was completed and turned in. The letter from the Assistant Principal only indicates that classroom instructional time was missed.

### Conclusion

Even though the Student had already been provided with work during his absences, which he completed and turned in, the School stated that it was following the policy in placing the Student in the Saturday School Program because he was absent for 23 days. The Complainant stated and the Student’s teacher’s confirmed that the Student was receiving work during his absences. The School placed the Student in Saturday School in May 2014, due to absences; however, it did not



account for whether the Student was passing and work was being made up, as stated in the Director of Student Services' email. Additionally, the Student was required to make up instruction time during specials (music, art, P.E.)

A student with a disability may be entitled to a reasonable modification of policies, practices, or procedures. The District was made aware that the Student had disability-related absences. The Student had completed his work and therefore had no need to participate in the Saturday School program for the purpose of completing work.

Based on the foregoing, OCR finds sufficient evidence to support a finding of non-compliance with Section 504 and Title II with regard to Issue #2. The District has agreed to remedy this compliance issue with the attached signed Agreement, which, when fully implemented, will resolve this issue of the complaint. OCR will monitor the implementation of the agreement until the District is in compliance with the statutes and regulations at issue in the case.

**Issue #3: Whether the District discriminated against students with disabilities by instituting a rewards system based on not using the bathroom during class.**

The Parent stated that the Student has never had an accident at School but this year, after a "reward system" was implemented, he had an accident at School. The Parent stated that she has told the Student that he can go to the bathroom any time and he does not need a reward.

District staff stated that there is no School wide policy regarding use of the bathroom. District staff stated that the students at the School have several times during the day that the class goes to the bathroom as a group. In addition, in the Student's class, each week students get 3 bathroom passes that they may use if they have to use the bathroom during class. District staff stated that the students are encouraged to hold their passes during instructional time so that they do not miss any instruction. If a student has an emergency and has to go to the bathroom anytime during class, they do not have to use their passes and they are allowed to go immediately.

The District stated that in two classes, students who have all 3 of their bathroom passes at the end of the week are given a choice of a piece of candy from a "treat jar." The two teachers further stated that they do not penalize students with disabilities with respect to the bathroom policy. If a student has a disability that requires bathroom breaks or a student without a disability has a temporary medical condition such as an upset stomach or bladder infection, they are not held to the three bathroom passes to be rewarded with a piece of candy from the treat jar.

District staff stated this is done to try to get the students to stay focused and remain in the classroom as much as possible. District staff stated that on one occasion, the Student requested to go to the bathroom and he was told he could go, but he did not make it in time. No student is prevented or pressured from going to the bathroom. Additionally, a review of the Student's Section 504 Plan shows that there is no accommodation or related service in reference to the use of the restroom.

OCR contacted the Complainant on February 19, 2015, to determine if she had any additional information she would like to add to rebut the District's information. The Complainant did not have information that rebutted District witnesses' statements concerning this issue.<sup>1</sup>

### Conclusion

OCR determined that there was no School wide reward system but there were certain classes where students could receive treats for not using their bathroom passes. This is not meant as a punishment and students are not forbidden from using the bathroom if they have an emergency. Further, if a student with a disability-related need for bathroom breaks the teachers who use the system do not require the student to have three passes to receive the candy reward. Finally, there is not a provision in the Student's Section 504 Plan in reference to the use of the restroom. Based on the preponderance of the evidence, OCR finds insufficient evidence to support a finding of non-compliance with Section 504 and Title II with regards to this issue.

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. A complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact Michelle Vaughan, Attorney at 404-974-9398 or Virgil Hollis, Compliance Team Leader at (404) 974-9366.

Sincerely,

Deborah Floyd  
Acting Regional Office Director

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<sup>1</sup> The Complainant's response was that when she went to the meeting on February 5, 2015 with the Parent, the District was still very resistant to evaluating the Student, but the evaluation is currently being done and he has not been sent to ISS this school year.