



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

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ALABAMA  
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January 7, 2016

Ms. Claire Dryden  
Superintendent  
Cleburne County School District  
141 Davenport Drive  
Heflin, AL 36264

Re: OCR Complaint # 04-15-1015

Dear Ms. Dryden:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint, which the Complainant filed on November 14, 2013, against the Cleburne County School District (District), alleging retaliation on the basis of disability against the Student. Specifically, the Complainant alleged that the District retaliated against the Student when, during the 2013-2014 school year, after the Complainant engaged in protected activity, the District refused to allow the Student's paraprofessional (Aide) to meet him directly outside of Cleburne County High School (School) in the morning to escort him to his classroom.

OCR investigated the complaint pursuant to 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 in any program or activity receiving Federal financial assistance from the Department, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibit 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 Section 504 and Title II.

Based on the above allegations, OCR investigated whether the District retaliated against the Student when, during the 2013-2014 school year, it did not allow the Student's Aide to meet him outside the School in the morning and escort him to his classroom, thereby failing to comply 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.

OCR reviews evidence under the preponderance of the evidence standard. Under this standard, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

To reach a determination in this matter, OCR reviewed documents submitted by the Complainant and the District, and interviewed 6 witnesses, including the Complainant. Based on the evidence, OCR finds that there is insufficient evidence to find the District has failed to comply with Section 504 and Title II with regard to the issue raised by the Complainant. However, during the course of the investigation, OCR identified a compliance concern regarding the implementation of the Student's Individualized Education Plan (IEP) that the District agreed to resolve by entering into a Resolution Agreement. OCR determined that the District was not fully implementing the Student's IEP and therefore failed to comply with Section 504 and Title II. Below are the factual and legal bases for OCR's findings. Below are the factual and legal bases for OCR's findings.

### **Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the Title VI implementing regulation at 34 C.F.R. § 100.7(e). The Title VI implementing regulation provides that 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 this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

The Title II implementing regulation at 28 C.F.R. § 35.134 provides that no public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. OCR interprets the Title II regulation consistent with the Section 504 regulation.

To establish a prima facie case of retaliation, OCR determines whether: (1) the Complainant engaged in a protected activity under the laws OCR enforces; (2) the School was aware of the protected activity; (3) the School took an adverse action against the Complainant or the Student contemporaneous with or subsequent to the Complainant's participation in the protected activity; and (4) there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient has a legitimate, non-retaliatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is a pretext for retaliation.

### **Background**

During the first semester of the 2013-2014 school year, the Student attended Cleburne County High School (School) in the 9<sup>th</sup> grade. The Student is 16 years old and has a diagnosis of Autism Spectrum Disorder (ASD). The Student's IEP, in place at the time of the protected activity, is dated April 26, 2013. That IEP notes, in part, that the Student will receive small-group or one-on-one instruction in the areas of reading, math, language arts, social studies, and science; that he has a shortened school day to receive instruction in generalized Applied Behavioral Analysis (ABA) skills and independent living skills; and because he is a flight risk, the IEP provides that

the Student needs to have a staff member trained in ABA with him at all times throughout the day.

The Complainant alleges that, since elementary school, the Student's Aide met him in the morning at the Complainant's car. She further alleges that, after a dispute with the District regarding the Student's clothing and the lack of use of undergarments, the District retaliated against him by refusing to have the Aide meet him at the Complainant's car.

#### *Protected Activity*

In fall 2013, the Complainant stated the Student's Aide informed her that staff had been directed to look down the Student's pants to see if he was wearing underwear. The Complainant stated she confronted School personnel—the Aide and the ESE Coordinator—about this. The Complainant also stated her older son told her that other students did not wear underwear; and no one looked down their pants. The Complainant and the Principal met in August 2014 regarding the type of pants the Student should wear to school and whether he should wear underwear. The Principal informed the Complainant that not wearing underwear was a violation of the dress code. The Complainant informed the Principal that the Student had difficulty wearing underwear because he had sensory issues. Based on this information OCR finds the Complainant engaged in protected activity. Accordingly, OCR will proceed with the next step of the retaliation analysis.

#### *Knowledge of Protected Activity*

OCR interviewed the Student's Aide, who stated she never looked down the Student's pants and never saw anyone else do that. According to the Aide, either the Student's teacher or the Aide was with the Student at all times. She stated one could tell whether the Student had on underwear just by looking at him. She further stated the first time she heard of this allegation was after the Complainant filed a complaint with the Alabama Department of Education on August 12, 2014, seven months after the Complainant withdrew the Student from the District on January 10, 2014.

OCR also interviewed the Student's Teacher, the District Superintendent, School Principal, and the ESE Coordinator. All of them stated they knew nothing about the Complainant's allegation until after the Complainant withdrew the Student from the District in January 2014. In addition, the ESE Coordinator said she is the person who gives the Aide directions; and she never directed her to look down the Student's pants. Further, the Aide and the Student's Teacher informed OCR that one of them is with the Student all day.

The Complainant stated she spoke to both the Aide and the ESE Coordinator about the alleged instructions to School staff. She stated the ESE Coordinator stated she would speak to the Aide and direct the Aide to stop looking down the Student's pants.

Although there is insufficient evidence to show the District had notice of the Complainant's protected activity in fall 2013, as alleged, there is evidence that the Complainant, prior to fall

2013 engaged in protected activity on behalf of the Student. Thus, OCR will proceed to the next step in the retaliation analysis.

#### *Adverse Action*

Prior to fall 2013, the Student's Aide would meet him at the Complainant's car. At some point in fall 2013, the District determined that the Aide would no longer meet the Student at the Complainant's car. The Complainant then had to get out of her car to bring the Student inside the School to meet the Aide. Based on the above, OCR finds the District's actions adversely affected the Complainant.

#### *Causal Connection*

Because the District's actions regarding the Complainant constitute an adverse action, OCR next determined whether there was a causal connection between the adverse action and the Complainant's participation in the protected activity. Several types of evidence are considered in determining whether a causal connection exists, including: (a) closeness in time between knowledge of the protected activity and the adverse action; (b) change in treatment of the individual after the recipient had knowledge of the protected activity; or (c) treatment of the individual compared to other similarly situated persons.

The Complainant's protected activity occurred in August 2013 and the adverse action occurred in fall 2013. Accordingly, OCR concludes that there is close proximity in time between the date of the protected activity and the date of the adverse actions. Based on the above, OCR finds that there is sufficient evidence to conclude that there a causal connection exists between the protected activity and the adverse action. OCR will, therefore proceed to the next step of the retaliation analysis.

#### *Legitimate Non-discriminatory reason*

The District stated that it changed how the Aide met the Student in the morning due to safety reasons.<sup>1</sup> Because of the Student's disability, he is considered to be a flight risk. According to the Teacher, she was the Student's Aide for eight years. Prior to high school, she could control the Student's propensity to run in the mornings. She informed OCR that when he got to high school, he would run four to five times a week. The Aide informed OCR she found herself chasing after him into the street. The Superintendent stated that the Student is attracted to the sound of air conditioners. There were no air conditioners at the entrance to the middle school. However, air conditioners can be heard and are visible at the high school entrance; and the Student would run toward them. Once the Student ran toward the road, causing the District to offer the Complainant alternative options the District deemed to be safer. When the Complainant turned those down, the District decided that the Aide should no longer wait outside for the Student during morning drop off.

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<sup>1</sup> The Student's IEP did not specifically provide that the Aide was to meet the Student outside in the morning. It states that, while at school, he is to have a one-on-one aide.

The District also stated that another reason it decided to stop having the Aide meet the Student during drop off was that the Complainant was frequently late in bringing the Student to School. The Complainant agreed to have the Student at school each day at 9:00 a.m. Yet, the Complainant routinely arrived between 9:30 and 10:15 a.m. When that happened, the Aide could be in the front of the school waiting for more than an hour. When the District changed the procedure, the secretary would call the Aide when she saw the Complainant's car. That way the Aide could assist the Teacher in the classroom until the Student arrived.<sup>2</sup>

Based on the above, OCR finds the District has proffered a legitimate non-discriminatory reason for its actions. Next, OCR examined whether the District's reasons are a pretext to hide discrimination.

### *Pretext*

According to District personnel, before changing the practice of the Aide meeting the Student at the Complainant's car, they offered the Complainant several options. One option was for the Complainant to bring the Student to school when all other students arrived, around 7:30 a.m. At that time, there were numerous school personnel who could assist in getting the Student safely inside the School, including four coaches, whose duties included assisting disabled students into the School. The District also suggested that the Student ride the school bus with a paraprofessional and a trained bus driver. The District also asked the Complainant if her husband could bring the Student to school when he brings the Student's sibling to the nearby elementary school. Another suggestion proffered was to bring the Student to another entrance – one that was easier to enter, closer to the Student's classroom, and where a hall monitor was stationed. The Aide also stated that, in the mornings, the Complainant would carry the Student's iPad, lunch and drink bags. The Aide suggested to the Complainant that if the Student carried his belongings that might keep him from running so much. The Complainant also refused to consider this suggestion.

The Superintendent informed OCR that the decision to change the Aide's practice had nothing to do with the Complainant's complaints, but was instead based on safety considerations. She explained that the Student always arrived at school after classes began. Additionally, depending on the time the Complainant arrived in the morning, the District's Career Technical buses were arriving or departing from the School, which posed a risk to the Student if he ran. Further, student drivers at the high school leave school at various times of the day, posing more risks if the Student ran. Accordingly, if the Student ran, it could be dangerous for him, the Aide, and other students.

OCR asked if the duties of any other aides were changed. The ESE Director informed OCR that she had been in the District since 2012, and that the Student was the only student in the District who had a one-on-one aide during her tenure.

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<sup>2</sup> According to the Principal, the District asked the Complainant to call when she was five minutes away from the School; but she refused.

OCR attempted, without success, to contact the Complainant to rebut the District's assertions. Based on the above, OCR finds the District has provided information sufficient to conclude that the District's reasons for its actions are not a pretext to hide retaliation. Therefore, OCR concludes, based on the preponderance of the evidence, that the District did not retaliate against the Complainant in violation of Section 504 and Title II as alleged.

### **Implementation of the Student's IEP**

During the investigation, OCR reviewed the Student's IEP that was in effect during the 2013-2014 school year. The IEP states that, because the Student is a flight risk, an Applied Behavioral Analysis (ABA) trained staff person will be with him "at all times throughout the day." The District asserts that provision of the IEP means that District personnel will be with the Student once he enters the School and is signed in. However, OCR construed this provision to mean that once the Complainant arrives on School property, District personnel are to accompany the Student. This interpretation is consistent with the District's historical practice of having the Student's Aide meet the Student at the Complainant's car to assist him into the building. Therefore, when the District decided to change this practice, it should have convened an IEP meeting to discuss and document in a revised IEP whether the provision of an aide for the Student would include the aide meeting the Student at the Complainant's car when she arrived at school. If the Complainant disagreed with the provisions of the revised IEP, she could challenge the revision by requesting a due process hearing.

In order to address this compliance concern, the District signed the enclosed Resolution Agreement (Agreement). OCR will monitor the Agreement to ensure that the District complies with its terms.

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.

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 have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If the event 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, or if we can be of further assistance, please contact Scott R. Sausser, Compliance Team Leader, at 404.974.9354.

Sincerely,

Melanie Velez  
Regional Director