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

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ATLANTA, GA 30303-8927

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December 1, 2015

J. Alvin Wilbanks
Superintendent
Gwinnett County School District
437 Old Peachtree Road NW
Suwannee, Georgia 30024

Re: Complaint #04-15-1022

Dear Mr. Wilbanks:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Gwinnett County School District (District) on October 17, 2014, alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District discriminated against her son (Student) and other students with disabilities enrolled in the District's Supported Training and Rehabilitative Instruction in Vocational Education (STRIVE) Program by subjecting them to a shortened school day.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12131 *et seq*. (Title II), and its implementing regulation at 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 as a public elementary and secondary education system, the District is subject to these laws.

OCR investigated whether the District is denying students with disabilities who participate in the District's STRIVE Program—a vocational training program—a free appropriate public education (FAPE), by failing to provide them a full school day, thereby violating Section 504 and its implementing regulation at 34 C.F.R. § 104.33 (a) and (b), and Title II and its implementing regulation at 28 C.F.R. Section § 35.130 (a) and (b).

During the course of its investigation, OCR reviewed information regarding the STRIVE Program, including the Individualized Education Programs (IEPs) for students who participated in the program during the 2013-14 and 2014-15 school years, the bus schedules for these students, and the District's materials for the program. OCR also reviewed the school day schedules for traditional high schools in the District. Additionally, OCR conducted interviews with the Complainant and four members of the District staff—namely, (i) the Section 504/Title II Coordinator and Director of Compliance for Special Education and Psychological Services; (ii) the Coordinator for the Moderate, Severe and Profound Intellectual Disabilities program, and the STRIVE and ADAPT programs; and, (iii) two STRIVE case managers. Based on its investigation OCR has determined that the evidence is sufficient to support a finding that the District has violated Section 504 and Title II and Section

504's and Title II's corresponding regulations, by failing to provide students with disabilities enrolled in the STRIVE program with a full school day—that is, a school day comparable to the day provided to students without disabilities.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b)(1) requires a recipient to provide a FAPE to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the person's disability. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities and are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36, regarding educational setting, evaluation and placement, and procedural safeguards.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a) requires a recipient that operates a public elementary or secondary education program or activity to conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35(b) of a student 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 student in regular or special education and any subsequent significant change in placement.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(c) provides that, in interpreting evaluation data and in making placement decisions, a recipient: (1) shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all 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 Section 504's educational setting requirements.

The regulation implementing Section 504 at 34 C.F.R. § 104.36 provides that a recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Individuals with Disabilities Education Act (IDEA) is one means of meeting this requirement.

In addition, a student with a disability is not to be provided a shorter school day than his/her peers who are not disabled unless there has been a determination, through a process that comports with Section 504, that a shortened school day is necessary to meet the student's individual needs. The Title II implementing regulation at 28 C.F.R. § 35.130 is interpreted consistently with Section 504.

OCR evaluates evidence 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.

Factual Findings and Analysis

The Student participated in the STRIVE Program beginning with the 2012-13 school year until October 29, 2014, the day before his 22nd birthday. The Complainant alleged that the STRIVE Program day begins at 7:00 a.m. and ends at 12:30 p.m., while a typical day for a student in a traditional District high school begins at 7:10 a.m. and ends at 2:10 p.m. The Complainant also alleged that during the 5 and ½ hours of the STRIVE Program students receive a 30 minute break and a 30 minute lunch.

STRIVE Program Description

The District reports that the STRIVE Program is a community based, vocational training program available to all students in the District who have been provided an IEP that includes the STRIVE Program and who are transitioning from high school to adult life. A student's IEP team determines whether a student participates in the STRIVE Program. The STRIVE Program participants have typically completed four years of high school and their K-12 academic program as determined by the student's IEP.[1]

During the 2013-2014 school year, the District reported that 86 students participated in the STRIVE Program, while 101 students participated in the Program during the 2014-15 school year. Students in STRIVE do not attend a traditional high school for any part of the day; rather, they participate in two job sites during the week -- one site on Monday, Wednesday and Friday and a second site on Tuesday and Thursday. The evidence confirms that the work day begins at 7:00 am and ends at 12:30 pm. The IEPs of students assigned to STRIVE reflect the daily hours of service as 5 ½ hours (330 minutes) without mention of the rationale for the specific number of hours of service. District staff explained that the daily hours of the program, 5 ½ hours, were established long ago. The District maintained that the hours comply with the State's minimum requirement for instructional time and that the length of the STRIVE day provides an appropriate amount of instruction for the students participating in the program. However, the student IEPs do not reflect an individualized determination that each student needs a shortened school day. District staff explained that on occasion the daily length of the program has been reduced from 5 ½ hours to accommodate individual student needs; however, the length of the daily program has never been increased for any student.

STRIVE staff describe the program as an intensive program where students are engaged in instruction during all 5 ½ hours. Staff explained that students are supervised by a site instructor who begins working with the students as soon as they arrive at the job site, providing instruction and guidance to help students achieve independence in the workplace. Break times vary by job site, and students typically follow the schedule of other employees at the site. District staff explained, however, that when site employees take a small break from their work duties, STRIVE students are engaged in instruction by their site instructors who provide them guidance and direction based on their observations. At most sites, students and their site instructors meet at the end of the day for about 30 minutes to eat their lunch and discuss the work day. At some job sites, this meeting may take place earlier in the day based on the site's specific schedule and needs.

Length of the School Day at Traditional High Schools

A review of the length of the school day for the District's traditional high schools reveals that while all traditional high schools end the school day at 2:10 p.m., there is some variation in the start time for these schools, with most beginning at 7:10 a.m. or 7:20 a.m. A few of the District's high schools begin at 7:05 a.m.,

[1] Students with disabilities who are not placed in the STRIVE Program may be placed in the District's ADAPT (Assisting Developing Adults with Productive Transitions) Program, or may remain in their home school, for example, if they are pursuing a college preparatory track.

7:15 a.m., and 7:24 a.m. As an example, the "bell schedule," which reflects the school's daily schedule, for the Student's home school, Collins Hill High School (Collins Hill), shows that first, second, third, fourth and sixth periods at Collins Hill consist of 55 minutes of traditional instruction each. The fifth period consists of 26 minutes for lunch, 26 minutes for advisement and 56 minutes for traditional instruction.

The District's 2014-15 Choice Book, a high school planning guide for students in the District, defines the advisement program as a structured, non-graded portion of the day in which students receive school information and discuss grade-level appropriate topics with their advisor. The Choice Book also states that during the advisement class, the advisor discusses topics with students related to school, graduation, and career planning. During this advising period, students also receive progress reports, report cards, test results, and other school information.

After removing the time allotted for transition between classes and lunch, the instructional day for students at Collins Hills consists of 357 minutes. The District, however, maintains that the advisement period should also be removed because traditional academic instruction does not occur during this 26 minute period, resulting in an instructional day of 331 minutes. The District describes the advisement period as "essentially homeroom." Yet, the District explained that during one advisement period each week, students at Collins Hill receive a lesson related to school life, graduation and career planning; one advisement period is dedicated to watching the school news; two advisement periods are used to assign students to a classroom based on their need to receive tutoring or complete homework and other assignments independently; and the final advisement period is left to the teacher's discretion.

Analysis & Conclusion

A review of the evidence shows that the instructional day for the STRIVE Program consists of 330 minutes. While the instructional day for STRIVE students consists of the minimum amount of instructional time required by the State, the evidence reveals that the District generally provides students in the traditional high school setting with a significantly longer instructional day. For example, the instructional day at Collins Hill, the Student's home school, consists of 357 minutes, when lunch and transition between classes are removed. While the District asserts that traditional instruction does not occur during the 26 minute advisement period, the advisement period, as defined in the District's Choice Book and further described by the District, involves an important part of the instructional day, where students have the opportunity to receive information related to school life, graduation, career planning, school news, tutoring and time to work on school assignments.

Further, while the IEPs of students assigned to STRIVE reflect the daily hours of service as 5 ½ hours (330 minutes), the investigation revealed no evidence of a determination, through a process that comports with Section 504, that a shortened day is necessary to meet the students' individual needs. Because of the variation in starting times, the length of the instructional day at the different high schools varies, resulting in a loss of instructional time for STRIVE students of anywhere from 13 to 32 minutes per school day.

Based on the above, applying the preponderance of the evidence standard, OCR finds that the evidence is sufficient to establish that the District denied the Student and other students with disabilities in the STRIVE program a FAPE by providing them a shortened school day thereby failing to comply with Section 504 and Title II.

The District has agreed to enter into a resolution agreement and take corrective actions that include providing a written offer of compensatory services in the amount of 81 hours during the summer of 2016 for each student who participated in the District's STRIVE Program for a full day during the 2014-15 school year; increasing the

daily hours of service for STRIVE students by 26 minutes so that the instructional day for STRIVE students is comparable to the instructional school day for students in regular high schools, unless the student's IEP team has previously determined or determines through a process that comports with the Section 504 regulation, that a shortened school day is necessary to meet the student's individual needs; and training to administrators and teaching staff on the District's obligation under Section 504 and Title II to provide a full instructional day to students with disabilities unless the student's Section 504 team or IEP team determines, through a process that comports with the Section 504 regulation, that a shortened school day is necessary to meet the student's individual needs. These corrective actions are outlined in the enclosed resolution agreement which also contains monitoring provisions. When fully implemented, the agreement will resolve the identified compliance issues. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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 we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. 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.

Thank you for working with OCR to resolve this matter. This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions about this complaint, please contact Claudia Campo, Attorney, at (404) 974-9378, or Arthur Manigault, Compliance Team Leader, at (404) 974-9376.

Sincerely,

Melanie Velez
Regional Director

Enclosure: Resolution Agreement

cc: Victoria Sweeny (*via electronic mail only to vsweeny@thompson-sweeny.com*)