



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

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May 27, 2015

Nikolai P. Vitti, Ed.D.
Superintendent
Duval County Schools
1701 Prudential Drive
Jacksonville, Florida 32207

Re: OCR Complaint #04-15-1129

Dear Dr. Vitti:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Duval County School District (District) on January 5, 2015, alleging disability discrimination. Specifically, the Complainant alleged that the District discriminated against the Student, a student at Julia Landon College Preparatory and Leadership Development School (School), when the Principal decided that the Student's participation in football team tryouts would be postponed due to the Student's disability.

OCR is responsible for enforcing the following:

- 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 recipients of Federal financial assistance from the Department from discriminating on the basis of basis of disability.
- 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 on the basis of disability by public entities.

Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>. As a recipient of Federal financial assistance from the Department, the District is subject to Section 504. Because the District is a public entity, it is subject to Title II. Accordingly, OCR has jurisdiction over the complaint.

Based on the above, OCR investigated the following legal issue:

- Whether the District treated the Student differently on the basis of disability by postponing his participation in football team tryouts due to his disability, in

noncompliance with the regulation implementing Section 504 at 34 C.F.R. § 104.4(a)-(b)(1) and the regulation implementing Title II at 28 C.F.R. § 35.130(a)(b)(1).¹

In reaching its determination, OCR reviewed and analyzed documents pertinent to the complaint issue and conducted interviews with relevant individuals, including the Complainant and District administrators and staff. 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 failed to comply with the laws or regulations enforced by OCR or the evidence is insufficient to support such a conclusion. Based on its investigation, and applying the preponderance of the evidence standard, OCR has determined that there is insufficient evidence to support a finding of noncompliance against the District with respect to the different treatment issue investigated. However, OCR finds that there is sufficient evidence of non-compliance with respect to procedural requirements of Section 504 and Title II. The bases for this determination are set forth below.

LEGAL STANDARDS

The Section 504 implementing regulation at 34 C.F.R. §104.4(a) provides that no qualified disabled person 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 Federal financial assistance. The Section 504 implementing regulation at 34 C.F.R. §104.4(b)(1) states that 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 disabled person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford 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) provide a qualified disabled person 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 disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aid, benefits, or services that are as effective as those provided to others; or (vii) otherwise limit a qualified disabled person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

Pursuant to the Title II implementing regulation at 28 C.F.R. §35.130(a), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. The Title II implementing regulation at 28 C.F.R. §35.130(b)(1) states that a public entity, 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 individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified individual with a disability an opportunity to

¹ The original issue OCR opened concerned the District prohibiting the Student from trying out for the football team. However, upon opening the issue for investigation, OCR discovered, and both the Complainant and the District agree, that the Student was not prohibited from trying out, but his participation in tryouts was postponed. OCR adjusted the issue opened for investigation accordingly.

participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; (iv) provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others; or (vii) otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

Pursuant to 34 C.F.R. §104.35(c)(3), in interpreting evaluation data and in making placement decisions, a recipient shall 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.

Pursuant to 34 C.F.R. §104.36, 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.

Different treatment requires a finding of intentional discrimination on the basis of an individual's disability. Evidence of discriminatory intent may be direct or circumstantial. Absent direct proof of discriminatory motive, a disparate treatment inquiry frequently focuses on (1) whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently; and (2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. A recipient's nondiscriminatory justification can be overcome with a showing of pretext.

BACKGROUND

The Student is an eighth grader at the School, and he has Attention Deficit Disorder (ADD) and asthma. The Student has a Section 504 Plan dated November 7, 2014, that lists "ADD/ADHD" as the impairment. The Student also has an Individualized Healthcare Plan initiated on November 7, 2014, pertaining to his asthma. During the last week of August 2014, the Student was scheduled to try out for the School's football team. Football tryouts were held from August 25, 2014 to August 29, 2014. The Complainant alleges that the Student was denied the opportunity to participate in the full week of tryouts because on August 25, 2014, the Principal prohibited the Student from participating due to his asthma. According to the Complainant, the Student missed the first day and the majority of the second day of football tryouts. The Complainant argues that, because the Student had a Pre-participation Physical Evaluation Form (Physical Form), signed by the Complainant on August 20, 2014, on file which stated that the

Student was cleared to participate, the Principal's decision to prevent him from participating constitutes disability discrimination.

The Complainant filed an internal grievance with the District, alleging that the Student had been denied transportation, and the right to participate for the full four-day tryout due to his disability. The District investigated the following allegation:

“That [the Principal] discriminated against [the Student] on the basis of disability by influencing school athletic coaches, resulting in the student not being selected as a member of the school's football team.”

The investigation by the District included an interview by the Executive Director of Professional Standards to the Complainant, the Principal, the Regional Superintendent, the District Athletic Director, the School Athletic Director, and the Football Coach. The report was completed on September 18, 2014. The report concluded that there was no evidence that the Principal influenced the School's athletic coaches in their selection of students who participated in football team, no evidence that the Principal played a role in the decision to cut the Student during football tryouts or that his disability was a factor in the selection of the football team members, and that the Student sat out the first day of try outs until the District could get clarification regarding information received related to the student's asthma and possible associated risks and/or restrictions. Once the information was received, the Student was permitted to participate in the remaining three (3) days of tryouts.

Pursuant to OCR policy, OCR will dismiss a complaint in instances where 1) the allegations filed with OCR have been resolved through a recipient's internal grievance procedures, 2) all allegations were investigated, 3) any remedy obtained is the same as the remedy that would be obtained if OCR were to find a violation of the complaint, and 4) there was a comparable resolution process under comparable legal standards.

Because the allegation the District opened for investigation differs from the issue OCR opened for investigation, OCR performed its own investigation.

FACTUAL FINDINGS

To participate in football tryouts at the School, each Student must submit a completed Physical Form. The Physical Form is valid for 365 calendar days from the date of the evaluation. The Student submitted a completed evaluation form dated July 23, 2014, to the School. The Physical Form stated that the Student was “cleared without limitation.”

During the week of August 9, 2014, the School received a letter dated August 6, 2014, from the same medical practice that completed the Student's Physical Form. The letter stated that the Student needed to be dropped off at the same bus stop he is picked up from due to the Student's asthma. This letter was submitted to support the Complainant's request that the Student's afternoon bus stop be changed.

Football tryouts started on August 25, 2014, after school. While reviewing the list of students who were to participate in tryouts on August 25, 2014, the Principal noticed the Student's name was on the list. The Principal was concerned for the Student's health because the Complainant had told the School's Counselor that the Student was unable to walk 0.9 of a mile due to his asthma, and football tryouts involve strenuous physical activity. After discovering that the Student was scheduled to participate in football tryouts, the Principal contacted the School's Athletic Director and the District's Athletic Director. According to the Principal, they advised her not to allow the Student to try out until the District's Physician could speak with the Complainant and the Student's Physician.

The next day, August 26, 2014, the Principal received a telephone call from the District's Physician stating that the District's Physician had spoken with the Complainant and the Student's Physician. The District's Physician cleared the Student to try out.

The District and the Complainant differ with respect to whether the Student missed a portion of tryouts on the second day of tryouts, August 26, 2014. The District alleges that he participated in the full day of tryouts on the second day. However, the Complainant alleged that he missed a portion of the second day of tryouts while waiting to be cleared by the Principal.

During the first few days of football practice, the students trying out worked on conditioning. The students have three days of conditioning. This entails being able to run and sprint, as well as strength conditioning. If students make it past the conditioning phase, then they continue tryouts with the football equipment (i.e. helmets and shoulder pads). According to the School's Head Football Coach, cuts are not made by the Coaches until after the 3rd day of tryouts, but the students usually weed themselves out by not coming back to practice if they cannot do the agility drills. Once the students get equipment, the Coach's look at the students' ability to catch or throw. They post a "cut list" on the boys' locker room door. According to the School's Head Football Coach, the Student did not put forth enough effort at football tryouts. The Student did not make the football team.

ANALYSIS

Different Treatment

OCR examined whether the District—in excluding or denying the aggrieved person a program, service, or benefit—treated the Student differently. The Student was the only student who had submitted all of the required paperwork and was prohibited from participating in football tryouts at the beginning.² The Student was the only student who had a Physical Form stating that he was

² There was another student who the District did not allow to participate in football tryouts from the beginning. This student's Physical Form indicated that this student needed to be seen by a pediatric cardiologist. Once the student was cleared by the pediatric cardiologist, he tried out and made the team. This student missed three days of practice while awaiting clearance from the pediatric cardiologist, but he still made the team. The District argues that this student is similarly situated to the Student. However, because the Student was cleared without limitation to participate in football tryouts, and this student's Physical Form did not clear him until he had been evaluated by a pediatric cardiologist, the two students are not similarly situated.

cleared without limitation, yet was not allowed to participate in football tryouts from the outset. Consequently, OCR finds that the Student was treated differently.

Legitimate Non-Discriminatory Reason

The Principal asserts that the Student's participation in tryouts was postponed because she had received new medical documentation stating that, due to the Student's asthma, he needed to be dropped off at the same bus stop from which he is picked up. The Principal interpreted this to mean that the Student could not walk 0.9 of a mile home, but could only walk 0.2 of a mile home due to asthma. This documentation was dated August 6, 2014, and was more current than the medical clearance the Student had received, via the Physical Form, from the same medical practice dated two weeks earlier. The District asserts that the decision was made out of concern for the Student due to the severity of his asthma. OCR finds that given that the District had received more up-to-date medical documentation from the Student's health care provider, the District provided a legitimate non-discriminatory reason for postponing the Student's participation in tryouts.

Pre-text

The Student did not have any similarly situated comparators. There were no other students who were slated to participate in football tryouts who had conflicting medical documentation on file with the School. Moreover, all of the other students who submitted Physical Forms that cleared them without limitation were allowed to participate.

There were 88 students who participated in football tryouts. Of these 88 students, 10 are students with disabilities-- 4 are special education students with IEPs, and 6 are students that have Section 504 plans. Of the 10 students with disabilities who tried out for the football team, 6 were selected for the football team. For the reasons mentioned above, OCR finds that the District's proffered legitimate non-discriminatory reason is not a pretext for discrimination against students with disabilities.

Section 504/Title II Procedural Requirements

The Student is a qualified student with a disability.³ A "qualified" student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district. School districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.

³ For purposes of Section 504, a person with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. With respect to public elementary and secondary educational services, "qualified" means a person (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

A school district must, however, afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student. This means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity. In considering whether a reasonable modification is legally required, *the school district must first engage in an individualized inquiry to determine whether the modification is necessary*. This determination must be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

The School received the August 6, 2014 medical correspondence during the week of August 9, 2014. On August 25, 2014, the Principal, albeit after a conversation with the School's Athletic Director and the District's Athletic Director, made the decision to postpone the Student's participation in tryouts until she heard back from the District's Physician. The School did not convene a meeting of the Student's Section 504 team upon discovering that there was updated medical documentation about the Student prior to postponing the Student's participation in football tryouts. Consequently, OCR finds that the decision to postpone the Student's participation was not made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the options. Additionally, the School did not provide procedural safeguards upon making the decision.

CONCLUSION

With respect to the allegation that the District treated the Student differently on the basis of disability by postponing his participation in football team tryouts due to his disability, OCR finds that there is insufficient evidence of noncompliance with Section 504 and/or Title II. The District's receipt of medical documentation that was more recent than the Student's Physical Form constitutes a legitimate non-discriminatory reason to postpone the Student's participation in tryouts. Of the students who tried out for the football team, several were students with disabilities and over half of the students with disabilities who tried out were selected for the football team. Hence, OCR finds that the District's action was not a pre-text for discrimination against students with disabilities.

However, the District's decision to postpone the Student's participation in tryouts based on his disability was not made by the Student's Section 504 team and procedural safeguards were not provided. Consequently, OCR finds there is evidence of non-compliance with Section 504 and Title II. To remedy the non-compliance, the District has entered into the attached Resolution Agreement, which mandates that the District issue a written directive and make the School's staff available for training.

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. 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. 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.

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.

If you have any questions concerning this letter, please contact Daiquiri J. Steele, Esq. at (404) 974-9342 or the undersigned at (404) 974-9366.

Sincerely,

Virgil Hollis
Compliance Team Leader

Enclosure

cc: Ashley B. Benson, Esq.
Assistant General Counsel
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VIA EMAIL: ABenson@coj.net