



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

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ATLANTA, GA 30303-8927

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September 4, 2015

Ms. Luvenia W. Jackson
Superintendent
Clayton County School District
1058 Fifth Street
Jonesboro, GA 30236

RE: OCR Complaint #04-15-1238

Dear Ms. Jackson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint which the Complainant filed on March 9, 2015, against the Clayton County School District (District), alleging discrimination and retaliation on the basis of disability against her daughter (Student), a former student at Riverdale Elementary School (School).

Specifically, the Complainant alleged that the District discriminated and retaliated against the Student, a former student at Riverdale Elementary School (School) and the Complainant on the basis of disability. Specifically, the Complainant alleged that:

1. The District discriminated against the Student by not providing a person trained on diabetic maintenance to accompany her, causing her to miss four field trips during the 2014-2015 school year.
2. The District discriminated against the Student on the basis of disability when, during the 2014-2015 school year, it failed to provide nutrition information regarding its meals, causing the Student to be unable to participate in school lunch meals.
3. The District discriminated against the Complainant on the basis of disability when it failed to provide her with procedural safeguards at Section 504 meetings during the 2014-2015 school year.
4. The District retaliated against the Complainant and the Student when, on February 6, 2015, the District forced the Complainant to take the whole day off to accompany the Student on a field trip and when it refused to allow them to return to the School after the field trip.

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 American 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 a public entity. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to the provisions of Section 504 and Title II.

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

1. Whether the District discriminated against the Student on the basis of disability when it failed to provide her with equal access to field trips and lunch during the 2014-2015 school year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§104.33 and 104.4(a)(b)(1)(i-iii) and the Title II implementing regulation at 28 C.F.R. §35.130(a)(b)(1)(i-iii).¹
2. Whether the District discriminated against the Student and the Complainant when it failed to provide the Complainant with procedural safeguards during the 2014-2015 school year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.36 and the Title II implementing regulation at 28 C.F.R. §35.130.
3. Whether the District retaliated against the Student and the Complaint when, on February 6, 2015, it forced the Complainant to take an entire day off to accompany the Student on a field trip and when it refused to allow the Complainant and the Student access to the School after returning from the field trip in noncompliance 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 the preponderance of the evidence 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. After a thorough review of all of the evidence regarding Issues 2 and 3 and part of Issue 1, OCR has determined that there is insufficient evidence to support a finding of noncompliance. However regarding part of Issue 1, when OCR informed the District OCR needed additional evidence to determine whether the District was in noncompliance, the District requested to enter into a 302 resolution agreement to address any compliance concerns. The reasons for OCR's conclusions are found below.

Legal Standards

This Section 504 implementing regulation at 34 C.F.R. § 104.33 provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education

¹ Although OCR opened the equal access to field trips and equal access to lunch issues as one issue, for the purposes of this letter, OCR will analyze them separately.

and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

§ 104.4(a)(b)(1)(i-iii) of the Section 504 implementing regulation states 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. A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (i) deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; and (iii) provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others.

The Section 504 implementing regulation at § 104.36 states 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 handicap, 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. The Title II implementing regulations are interpreted consistent with the Section 504 standards.

The standard for determining a District's compliance regarding retaliation falls under the regulation implementing Section 504 at 34 C.F.R. § 104.61, which incorporates, by reference Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. § 100.7(e). The regulation states that intimidating or retaliatory acts are prohibited. 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 Title VI and Section 504, or because she/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Section 504 regulation. The Title II implementing regulation at 28 C.F.R. § 35.134 similarly prohibits retaliation by public entities.

Background

The Student has a diagnosis of diabetes. During the 2014-2015 school year, she was a fifth grade student at the School. During the 2014-2015 school year, the Complainant taught at the School. **(Tab B(1))**

Analysis and Conclusion

Issue 1

Whether the District discriminated against the Student on the basis of disability when it failed to provide her with equal access to field trips during the 2014-2015 school year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§104.33 and 104.4(a)(b)(1)(i-iii) and the Title II implementing regulation at 28 C.F.R. §35.130(a)(b)(1)(i-iii).

The Complainant alleged that during the 2014-2015 school year, the Student's Section 504 plans did not provide for someone trained in diabetes management to accompany the Student on field trips, causing the Student to miss field trips. She further stated that no one in the School is trained on how to dispense glucagon. **(Tab B(6))**

OCR reviewed the Student's March 24, 2014 Section 504 plan (Plan 1), which was in effect until the March 25, 2015 Section 504 plan (Plan 2) was developed. In pertinent part, Plan 1 specifically provided that a designee who knows how to administer an insulin pump must accompany her on field trips – either a nurse or a designee. **(Tab D(1)(b)(3))** During the 2014-2015 school year, the Student's Teacher accompanied the Student on field trips. According to the Teacher, she was trained in how to administer the insulin pump, ketone calculation, and in administering glucagon. **(Tab D(2)(b))**

During the 2014-2015 school year, the Student was eligible to attend four field trips. The Student attended three of those trips. According to District documentation, the Student was absent from school on December 15, 2014, the day of the Sheraton fieldtrip, although the Complainant previously gave written permission for the Student to participate. **(Tab D(1)(b)(4))** According to the Student's teacher, the Student had no problems related to her diabetes on any of the three field trips. **(Tab D(2)(b))**

In rebuttal, the Complainant stated that the District did not provide a designee to accompany the Student on field trips. She further states she never trained the Student's teacher on diabetes treatment; and that the Student did not go on at least one field trip because there was no designee and the Complainant could not take a personal day to accompany. **(Tab D(2)(i))**

Additionally, when OCR spoke to the School nurse who informed OCR she did not know the identity of the Student's designee(s). **(Tab D(2)(f))** Additionally, OCR spoke to two of the Complainant's witnesses who told OCR the Complainant mentioned several times during the 2014-2015 that there was no designee to accompany the Student on field trips.

When OCR informed the District it would need to conduct further interviews regarding this issue, the District requested to enter into a 302 agreement to resolve any OCR concerns regarding the District's compliance with Section 504 and Title II regarding this issue.

Issue 2

Whether the District discriminated against the Student on the basis of disability when it failed to provide her with equal access to lunch during the 2014-2015 school year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§104.33 and

104.4(a)(b)(1)(i-iii) and the Title II implementing regulation at 28 C.F.R. §35.130(a)(b)(1)(i-iii).

The Complainant alleged that, during the 2014-2015 school year, the District ceased providing nutrition information so that the Student's carbohydrate count could accurately be calculated. **(Tab B(6))**

Regarding this issue, the District provided documentation showing that information on nutrition is found on its website at <http://www.clayton.k12.ga.us/departments/schoolnutrition/menus.asp>. The School's website contains a link to the above site. Additionally, the District site provides nutrition information for each school in the District. The information has a nutrient analysis for breakfast and lunch at each school and includes, but is not limited to, the name of the food item, serving size, calories, cholesterol, carbohydrates, sugars and vitamin content. **(Tab D(1)(b)(5))** OCR visited the School's website to confirm the availability of nutrition information.

The School nurse informed OCR that she maintains the menus with nutrient analysis in her office and that the information is also available from the cafeteria supervisor. **(Tab D(2)(f))** Further, according to the Assistant Principal, the menus and nutritional information have been on the District/School's sites each school year since he came to the District in 2008. **(Tab D(2)e)**

Lastly, the Student's 2014-2015 Section 504 plan does not require the District to provide nutrition information as a part of the Student's related aids and services. **(Tab D(1)(b)(2))**

During rebuttal, the Complainant agreed that the Student's Section 504 plan does not require the availability of nutrition information.

Based on the above, OCR finds there is insufficient evidence to conclude the District is in noncompliance regarding this issue, as alleged.

Issue 3

Whether the District discriminated against the Student and the Complainant when it failed to provide the Complainant with procedural safeguards during the 2014-2015 school year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.36 and the Title II implementing regulation at 28 C.F.R. §35.130.

The Complainant alleged that the District failed to provide her with notice of her procedural safeguards in the 2014-2015 school year. **(Tab B(6))**

The documentation shows the District held one Section 504 meeting for the Student on March 25, 2015. **(Tab D(1)(b)(2))** According to the counselor, she is the person responsible for providing parents with notice of their procedural safeguards. She informed OCR that at both of the Student's Section 504 meetings in the 2013-2014 and 2014-2015 school years, she gave the Complainant procedural safeguards. **(Tab D(2)(d))** Additionally, the District provided documentation showing the Complainant signed on March 25, 2015, acknowledging receipt of her procedural safe guards. **(Tab D(1)(b)(2))**

In rebuttal, the Complainant stated she received her procedural safeguards and that she was referring to something else when she alleged she did not receive them.

Based on the above, OCR finds there is insufficient evidence to conclude the District is in noncompliance regarding this issue, as alleged.

Issue 4

Whether the District retaliated against the Student and the Complainant when, on February 6, 2015, it forced the Complainant to take an entire day off to accompany the Student on a field trip and when it refused to allow the Complainant and the Student access to the School after returning from the field trip in noncompliance 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.

The Complainant alleged that, on February 2, 2015, when she accompanied the Student to an event during the school day, the District retaliated against her by forcing her to take a full day off and prohibiting the Student and her from returning to the School. She stated she asked for leave from 10:00 am to 2:00 pm; but the School would not allow her to return. **(Tab B(6))**

The District's leave policy provides that employees can request and take several categories of leave – sick, personal and professional, jury duty and legal, military, bereavement, FMLA and medical. **(Tab D(1)(b)(7))** The Complainant took personal leave in order to accompany the Student on February 2, 2015. **(Tab B(6))**

The policy provides that employees have a maximum of three personal days per year of any accumulated sick leave. Requests for taking leave must be in writing and given at least seven days in advance of the requested date. Personal leave for hardship and emergencies may be granted by the principal and be supported by evidence of the hardship or emergency. **(Tab D(1)(b)(7))**

Protected Activity and Knowledge of Protected Activity

The Principal informed OCR that she met with the Complainant the night before the February 2, 2015 trip and told her she would attend the event with the Student.² According to the Principal, the Complainant did not voice any concerns about the next day. She further stated that, on the morning of the event, the Complainant told her that if the nurse could not go, she should attend to take care of the Student. The Principal said it was 9:00-9:25 am and that it was too late to get a substitute for the Complainant's class. The Principal told the Complainant that, if she was adamant about going, she would have to take ½ day of personal leave. **(Tab D(2)(a))**

Based on the above, OCR finds the Complainant engaged in protected activity; and that the District had knowledge of the activity. Accordingly, OCR will proceed with the next step of the retaliation analysis.

² The Principal stated she planned to go to the Hear our Voices competition even though it was not considered a field trip. The Student was attending because she participated in an individual competition. **(Tab D(2)(a))**

Adverse Action

The Counselor then drove the Complainant and Student to the competition (the Complainant did not have access to her own vehicle that day). According to the Counselor the event ended somewhere around 12:00 noon. She then drove the Complainant and the Student to a restaurant where she both the lunch for them and her. She informed OCR the Student did her carbohydrate calculations for the meal. She further stated that less than an hour after they arrived at the restaurant, the Complainant's male friend or relative picked up the Complainant and the Student. When she realized the Complainant did not intend to return to the School, the Counselor called the School, and spoke to either the Principal or Assistant Principal, asking if it was okay for her not to return them to the School. According to the Counselor, the Complainant's ride picked them up before she left the restaurant. **(Tab D(2)(d))**

The Principal informed OCR that, normally if a parent accompanies their child on a trip, the parent has to return to the school to sign the student out. The Principal stated that, when the Counselor informed the Counselor she was not returning to the School, she gave the Counselor permission to release the Complainant and the Student. According to the Principal and other District personnel, the Student always has extra medicine with her, along with a calorie counter book and snacks. **(Tab D(2)(a))** Further, the Principal and the Assistant both stated they did not tell the Complainant she could not return to school. **(Tabs D(2)(a) and D(2)(e))**

In rebuttal, the Complainant informed OCR that, the Assistant Principal called her into his office to tell her that, if she accompanied the Student to the event, she could not return to the School for the remainder of the day. She stated she would never refuse come back to the School of her own volition as she would consider that to be job abandonment. OCR also spoke to the Complainant's sister who told OCR that the Complainant called her the afternoon of the event and told her she was upset because she was told she could not return to school.

Based on the above, OCR finds that there is inconclusive evidence that the District subjected the Complainant to adverse action. Therefore, OCR will not continue with its retaliation analysis. OCR finds that the evidence regarding this issue is insufficient and that OCR cannot determine, by a preponderance of the evidence that the District retaliated against the Complainant, as alleged.

In order to address any compliance concerns regarding Issue 1, the District signed the attached Resolution Agreement (Agreement), dated September 2, 2015. OCR will monitor the Agreement to ensure the District's compliance with its terms.

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.

Please be advised that the District may not harass, coerce, 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.

Thank you for the cooperation your staff and legal counsel provided during the complaint resolution process. If you have any questions regarding this letter, please contact Pamela Simmons, Senior Attorney, at (404) 974-9364, or me, at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.
Compliance Team Leader

xc: Erika Robinson, Esq.

Enclosure