



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

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

September 28, 2017

Via Electronic Mail

XXXXXXX

Office of the Superintendent
Bartow County School System
65 Gilreath Road
Cartersville, GA 30121-5016

Re: OCR Complaint # 04-15-1431

Dear XXXXXXXX:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the complaint filed against the Bartow County School System (District), alleging discrimination on the basis of disability. Specifically, the Complainant alleged the following:

1. The District discriminates against students with disabilities at STARS by failing to provide them with a placement in an appropriate education setting; and if STARS is an appropriate education setting, by failing to ensure that the facility and services and activities provided therein are comparable to the other facilities, services, and activities of the District.
2. The District moved all of its preschool students from the STARS Building to its elementary schools, except for several special education preschool classes.¹
3. The physical condition of the STARS Building is not on par with other educational facilities in the District.

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 by recipients of Federal financial assistance; and, 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. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

¹ OCR originally opened for investigation the Complainant's similar allegation, regarding students in the Georgia Network for Educational and Therapeutic Support (GNETS) Program. On October 9, 2015, OCR referred the allegations pertaining to the GNETS Program to the U.S. Department of Justice, which recently completed an investigation of all the GNETS Programs in the State of Georgia.

OCR investigated the following legal issues:

1. Whether the District failed to provide Pre-Kindergarten students with disabilities placed at STARS with a placement in an appropriate education setting, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.34(a); and, the Title II implementing regulation at 28 C.F.R. § 35.130.
2. Whether Pre-Kindergartners with disabilities at STARS participated with individuals without disabilities in such activities and services to the maximum extent appropriate to the needs of the Pre-Kindergartners with disabilities, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.34(b); and, the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District failed to provide Pre-Kindergarten students with disabilities placed at the STARS Building with a placement in an appropriate education setting, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.34(c); and, the Title II implementing regulation at 28 C.F.R. § 35.130.

OCR's investigation included a review and analysis of the documents submitted by the Complainant and the District. OCR also interviewed the Complainant and 21 District employees including the XXXXXXXXXXXXXXXX. 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 the recipient (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 carefully considering all of the evidence obtained during the investigation, OCR determined that based upon a preponderance of the evidence there is insufficient evidence to support a finding of discrimination on the basis of disability, as alleged in Issues #2 and #3.

Prior to the conclusion of the investigation, the District requested to address Issue #3 with a voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's Case Processing Manual (CPM). The factual and legal bases for our determinations are set forth below.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.34(a) provides that a District shall educate, or shall provide for the education of, each individual with a disability in its jurisdiction with individuals without disabilities to the maximum extent appropriate to the needs of the individual with a disability. A recipient shall place an individual with a disability in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the individual with a disability in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places an individual with a disability in a setting other than the regular educational environment, it shall take into account the proximity of the alternate setting to the individual with a disability's home.

The Section 504 implementing regulation at 34 C.F.R §104.34(b) states that in providing or arranging for the provision of nonacademic and extracurricular services and activities, a recipient shall ensure that individuals with disabilities participate with individuals without disabilities in such activities and services to the maximum extent appropriate to the needs of the individual with a disability in question.

Section 104.34(c) provides that, if a recipient, operates a facility that is identifiable as being for individuals with disabilities, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient. The applicable Title II regulations are interpreted consistent with the applicable Section 504 regulations.

Background

The Complainant contends that the District moved all of its preschool students from STARS to its elementary schools, except for several special education preschool classes. The Complainant described the physical condition of the STARS Building as horrendous, bad and depressing, a building with painted windows.

In 2000, the District opened the STARS Preschool in the STARS Building and placed all of the preschool classes at this centralized location. After the 2011-2012 school year, the District stopped using the STARS Building as a centralized facility for the preschool classes. The District moved both the full time regular and special education preschool classes out of the STARS Building at the same time; all preschool classes, regular and special education, are now housed in the local schools, with the exception of the part-time class that remains at the STARS Building. The District has 12 elementary schools that house a total of 24 preschool classes. Seven (7) of the preschool classes are designated as special education preschool classes.

Allegation/Issue 1: Whether the District failed to provide Pre-Kindergarten students with disabilities placed at STARS with a placement in an appropriate education setting.

Factual Findings and Analysis

A District official informed OCR that a group of preschool age students with various disabilities meet in the STARS Building, where they can receive a myriad of services, but they are not full-time students. For the 2015-2016 school year, the group of students consisted of six students who were at the STARS Building for one to two days a week for two to four hours a day. These students attended daycares or private schools or come from home, and they meet at the STARS Building up to twice a week. There was a classroom area set up for them to use at the STARS Building. They also had an evaluation lab in the building. The students' respective IEP teams determined whether a student attended one or two days a week, and the amount of services that the student received.

OCR reviewed the IEPs of each of the seven (7) students² who received services at STARS for the 2015-2016 school year. The parents of each student were part of the IEP team. The IEPs for each of these students indicate that each of these students were three (3) years old at the time of their respective IEP meetings. According to the IEPs, regular pre-kindergarten classes in Georgia, referred to as the “GA Lottery Pre-K”, starts at four (4) years old. Further, the IEPs indicated that the respective IEP team considered all placement options for each student, and the IEP team explained why they decided upon a specific placement option for that particular student. For instance, one out of the seven students at STARS is in a private preschool. His parents wanted the student to continue at the private preschool, but for the District to provide the special education services at STARS; the District agreed. For the other six students, the IEP team considered a minimum of three (3) of the following placement options for each student, with at least five of these options considered for some students: (1) consultative, (2) collaborative, (3) co-teaching, (4) supportive services, (5) separate class, and (6) home instruction. The respective IEP teams explained why the student was not placed in the general education environment, and how interaction with peers without disabilities will be provided.

Appendix A, Subpart D at 34 C.F.R. Part 104 provides that “except under extraordinary circumstances, which do not apply here, the Department does not review the results of individual placements or assess the appropriateness of pedagogical decisions so long as the recipient complies with the procedural requirements of the Section 504 regulation concerning identification and location, evaluation, and due process procedures.” The IEPs and Minutes reflect that the District complied with the procedural requirements of Section 504.

Conclusion

Accordingly, based upon a preponderance of the evidence, OCR finds that the evidence showed that the IEPs supported placement at this facility. The District complied with Section 504 when determining placement. Appendix A applies here. The District considered all placement options. None of the parents, who were present at the IEP, objected to the placement of their respective students. In fact, the parents agreed with the placement of their respective students. No parent filed for a due process hearing. No parent objected to the placement of their child. No parent filed a complaint with OCR or any other agency. The Complainant is a former employee who did not have a child who attended a school in the district.

Allegation/Issue 2: Whether Pre-Kindergartners with disabilities at STARS participated with individuals without disabilities in such activities and services to the maximum extent appropriate to the needs of the Pre-Kindergartners with disabilities.

Factual Findings and Analysis

In providing nonacademic and extracurricular services and activities, a recipient shall ensure that individuals with disabilities participate with individuals without disabilities in such activities and

² There were only six students in the preschool class at the STARS Building at the time OCR conducted its visual inspection and interviews.

services to the maximum extent appropriate to the needs of the individual with a disability in question.

OCR interviewed the Principals and preschool teachers at six (6) of the District's elementary schools. OCR also conducted a visual site inspection of these schools and the STARS Building. All of the elementary schools inspected by OCR had the same number and type of special facilities and laboratories. However, the XXXXXX at these schools informed OCR that none of the preschool students go into the "special areas," such as the art rooms, computer labs, gyms, music rooms, and physical education. That is, no preschool class, regardless of whether it is a special or regular education class goes to the "special areas." A few of the XXXX mentioned that they may be able to go into the gym during inclement weather, and XXXX had the option to take XXXXXX into the sensory room, if their school had one.

The XXXXXXXXXXXX informed OCR that the special education preschool classes are housed in the local elementary schools, not in the STARS Building. He also stated that the STARS Building is used as a "clinical setting" to provide services, such as speech, occupational, or physical therapy to students. The XXXXXX informed OCR that a small or flexible group of preschool students come to the STARS Building for these specific services. These preschool students have a teacher and paraprofessional who are itinerant, but it is not a regular preschool class. Neither the students nor the teacher and paraprofessional are at the STARS Building on a full-time basis. The XXXXXXXXXXXX serves as the teacher, and she also goes to other schools and provides services. The XXXXXX further stated that some parents do not want their students with disabilities to be in school all day with other students. However, the parents do want their students to socialize with other students for a limited period during the day and receive services pursuant to their IEP.

Conclusion

Thus, based upon a preponderance of the evidence, OCR finds that the evidence showed that the preschoolers with disabilities participated with individuals without disabilities in such activities and services to the maximum extent appropriate to the needs of the preschoolers with disabilities.

Allegation/Issue 3: Whether the District failed to provide Pre-Kindergarten students with disabilities placed at the STARS Building with a placement in an appropriate education setting.

Evidence Thus Far

OCR conducted a visual site inspection of the six elementary schools referenced above and the STARS Building to assess the quality and condition of the facilities. The inspection included the preschool classrooms, special purpose rooms, core facilities, and the campuses as a whole. OCR also assessed the number and type of special facilities and laboratories, such as art or music rooms, science and computer labs, gyms, and media centers. The space utilization of the outdoor campus, e.g., playgrounds, the estimated average completion time for maintenance/repair requests, and the cleanliness of the facilities were also part of OCR's visual inspection.

All of the elementary schools inspected by OCR, regardless of the age of the facilities, were in very good to excellent condition. The schools were well maintained, clean, and had heating/air throughout the facilities, including the gyms. Each school had large outdoor campuses and two playgrounds. The elementary schools all had the same or similar footprint and size and housed the preschoolers and kindergarteners on the same hallway. The preschool classrooms were identical, except that the special education classrooms had adaptive equipment to meet the special needs of the students in those classrooms. All preschool classes—both regular and special education—were housed on the same hallway and grouped together in a cluster in the elementary schools. The preschool classrooms were on one end of the hallway, and the kindergarten classrooms were on the other end of the hallway.

All of the special education preschool teachers stated that their classroom facilities in the elementary schools were comparable or equal to the regular education preschool classroom facilities. One of the special education preschool teachers stated that her classroom was better because she had adaptive equipment for her students (e.g. pressure vests, adaptive chairs, etc.).

During OCR's visual inspection and assessment of the quality and condition of the STARS Building, OCR observed that the preschool classroom facilities were equal or comparable to those at the local elementary schools, except that there were no full time preschool classes for disabled or non-disabled students. The classroom was bright, clean and well maintained. The classroom was equipped with a Promethean Board and computers and I-Pads for use by the students. A XXXXXXXXXXXXX stated that she used to work in the STARS Building, and stated it was not dilapidated and had a lot of resources. This XXXXXXXXXX informed OCR that the STARS Building had a sensory room, while her school did not have one. The District stated that it completed its last renovation to the STARS Building in the summer of 2015, and that the STARS building had undergone several renovations during the past five years.

However, there were a couple of areas of concern in the STARS Building. First, the classroom had a small area set aside for a library that consisted of two small bookshelves and a sitting area, but no media, books or other resources. This library area was not comparable or equal to the quality and condition of the media centers that other preschoolers had access to at the elementary schools. All of XXXXXXXXXXXXX at the six elementary schools referenced above stated that they took all of their students to the media center at least once a week.

Second, the preschool classroom was located directly across from the restrooms, which were not comparable or equal to the restrooms at the elementary schools. The quality and condition of the restrooms were moderate in comparison to those at the elementary schools, which were in very good to excellent condition. Both restrooms were not well maintained like those in the elementary schools. For instance, an accessible stall in the boys' restroom did not have a door.

In addition, some window panes in a room that is part of the sensory room were painted dark and a few ceiling tiles were missing. The STARS Building had a very large sensory room for the preschool students that contained a large amount of equipment. It was twice the size of the sensory rooms at the local elementary schools. The sensory room also contained a dark room. The windows in the room had several window panes, many of which were painted. There was more than adequate sunlight in the room, as not all of the window panes were painted. When

asked why the panes were painted, District officials stated that the room was formerly a band room, and the windows were likely painted for acoustic purposes.

Finally, the STARS Building had a playground available for use by the preschool students, but the accessible swing appeared to be broken, and some of the rubber pavers did not connect, which left small spaces between them.

Prior to the conclusion of the investigation, the District requested to address this complaint allegation with a voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's Case Processing Manual (CPM).

Conclusion

The attached Agreement requires the District to: (1) conduct a self-assessment of all activities and services at the STARS Building to determine whether the activities and services are comparable to the other schools with Pre-K classrooms; (2) conduct a self-assessment of the STARS Building in terms of physical condition and make all renovations needed including, but not limited to specific items identified by OCR upon its visual inspection; (3) renovate the two restrooms in the STARS Building used by the preschoolers; and (4) address maintenance issues in the Sensory Room at the STARS Building; and make specified repairs and modifications to the playground located at the STARS Building.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and are consistent with applicable regulations. OCR will monitor the implementation of the agreement until the recipient is in compliance with the statutes and regulations at issue in the case.

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.

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 XXXXXXXXXXXX.

Sincerely,

XXXXXXXXXXXXXXXXXX
Compliance Team Leader

Enclosure