



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

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May 12, 2017

Dr. Shawn Joseph  
Director of Schools  
Metro Nashville Public Schools  
2601 Bransford Avenue  
Nashville, TN 37204

RE: OCR Complaint #04-15-1542

Dear Dr. Joseph:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on September 18, 2015 against Metro Nashville Public Schools (District), in which the Complainant<sup>1</sup> alleged that the District discriminated against her daughter (Student) on the basis of her disability and subjected the Student to retaliation.

Specifically, the Complainant alleged that the District subjected the Student, a student at a District high school (School), to discrimination on the basis of disability by denying the Student an opportunity to participate in competitive cheerleading. The Complainant also alleged that the District retaliated against the Student for the Complainant's advocacy on behalf of the Student by threatening to remove the Student from the cheerleading squad.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits 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, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits 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.

During the investigation, OCR investigated the following legal issues:

1. Whether the District, in denying the Student an equal opportunity to participate in competitive cheerleading, has discriminated against her on the

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<sup>1</sup> OCR identified the names of the Complainant and Student in previous correspondence and is withholding their names in this letter to protect their privacy.

basis of her disability, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(ii) and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(ii).

2. Whether the District, in threatening to remove the Student from the cheerleading squad, has engaged in retaliation 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.

Before OCR concluded its investigation, the District offered to resolve this complaint through a voluntary resolution agreement. Pursuant to OCR's *Case Processing Manual* at Section 302, a complaint may be resolved when, before the conclusion of an investigation, "the recipient expresses an interest in resolving the allegations and issues *and* OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation." Set forth below is a summary of the evidence obtained thus far, prior to the signing of the resolution agreement.

### **Legal Standards**

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) and (b)(1)(i)(ii) states that no qualified person with a disability 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 disability deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service or afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. The Title II implementing regulation is consistent with Section 504 and provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations.

To determine if different treatment occurred, OCR examines whether a *prima facie* case of discrimination existed. To establish a *prima facie* case of discrimination, OCR must find that the District treated the Student differently than similarly situated nondisabled students. If OCR finds a *prima facie* case of discrimination exists, it then determines whether the District has articulated a legitimate, nondiscriminatory reason for the different treatment. Once the District articulates a legitimate, nondiscriminatory reason for its actions, OCR determines whether the reason is merely a pretext for unlawful discrimination.

The Section 504 implementing regulation at 34 C.F.R. § 104.61 adopts the anti-retaliation provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title VI anti-retaliation regulation, as incorporated by Section 504, 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 a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation,

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proceeding or hearing under Section 504. The Title II implementing regulation, at 28 C.F.R. § 35.134, similarly prohibits retaliation by public entities.

A prima facie case of retaliation is established by showing that: (1) the Complainant engaged in a protected activity; (2) the District was aware of the Complainant's activity; (3) the District took adverse action against the Complainant contemporaneous with or subsequent to the protected activity; and (4) there was an apparent causal connection between the adverse action and participation in the protected activity. If the elements of a prima facie case are established, then OCR determines whether the District has a legitimate, nondiscriminatory reason for taking action adverse against the Complainant. The evidence is then analyzed to determine whether the proffered reason is a pretext for retaliation.

### **Summary of Investigation**

#### **1. Whether the District, in denying the Student an equal opportunity to participate in competitive cheerleading, has discriminated against her on the basis of her disability, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and (b)(1)(ii) and the Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(ii).**

The Student was seventeen years and in the twelfth grade at the School in the District when the Complainant filed this complaint. The Student has ADHD and dyslexia and had an Individualized Education Plan (IEP) and received various related aids and services. The Student has been a part of the School's cheerleading squad for three years but has never been chosen for the competitive squad. The competitive team is a select group of girls from the cheerleading squad who competes and performs more complicated routines than the entire cheerleading squad. Tryouts for the cheerleading team for the 2015-16 school year was held in April 2015. The Student made the cheerleading squad but was not selected for the competitive team--16 of the 21 cheerleaders were chosen to be on the competitive squad. The Student was selected as an alternate. The Complainant believes the Student should have been selected for the competitive squad for the 2015-16 school year.

OCR interviewed School officials including cheerleading coaches and they all deny that the Student was treated differently on the basis of disability and maintain that competitive cheerleaders are selected based upon position and skill. Specifically, a panel of judges including but not limited to the Coach and a coach from a local gym are responsible for selecting competitors based upon such factors as knowledge of rips, execution of stunts, leadership and consistency. The coaches felt the Student was a strong tumbler but did not perform stunts well. The District provided OCR with a template of the tryout score sheet which included categories and maximum amount of points that could be allocated. However the District could not provide OCR with actual score sheet or the names of the judges related to the cheerleading tryouts for 2015-16 school year. The District stated that the names of the judges and scoresheets were not retained for the 2014-15 and 2015-16 school years

OCR would need to conduct additional interviews including but not limited to judges and cheerleaders to complete the investigation.

Prior to the conclusion of OCR's investigation the District agreed to enter into a resolution agreement, when fully implemented would resolve this allegation.

**2. Whether the District, in threatening to remove the Student from the cheerleading squad, has engaged in retaliation 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 met with the School officials on August 28 and voice concerns that the cheerleading coaches were discriminating against the Student on the basis of disability. Furthermore, on September 7, 2015, the Complainant sent the principal of the School an email stating that the Coach was denying the Student an opportunity to compete due to the Student's ADHD. The Complainant maintains that both the Coach and the Student's coach at Premier had previously mentioned the Student's inability to focus as the reason for her not being selected for the competitive team. In this email, the Complainant included a link to OCR's link to the January 25, 2013 Dear Colleague Letter on the topic of public schools and their obligations under Section 504 to provide equal access to sports and other extracurricular activities to students with disabilities.

The Student was not dismissed from cheerleading squad. However the Student was suspended for two games, and placed on an improvement plan subsequent to the August 28, 2015 meeting and the September 7, 2015 email.

OCR reviewed the cheerleading bylaws (By-Laws) for the School, which set out the expectations for each cheerleading participant. Failure to meet the expectations results in demerits. The girls are expected to meet the expectations as soon as they are selected, including the summer between the school years. Failure to meet the rules set out in the By-laws results in demerits. The By-Laws state that one demerit will be given for tardy, inappropriate practice/performance uniform, unprepared for a game/performance, chewing gum in practice, chewing gum in uniform, failing uniform inspection, disrespect toward coach or team leaders/captains, forgotten props or accessories, inappropriate performance makeup, and insubordination. Three demerits will be given for unexcused absences, use of inappropriate language in uniform, gossiping in uniform, inappropriate conduct at a practice, game, or performance. Six demerits will be given for smoking in uniform and lack of minimal grade requirements. Automatic dismissal is the penalty for drinking [alcohol] or drug use in uniform. Accruing three demerit points result in a removal from a game or performance; another three demerits result in another sanction. Once a student has accrued 12 demerits, then she may be dismissed from the cheerleading squad at the discretion of the coach.

OCR also reviewed the demerit log for the cheerleading squad and found that a vast majority of the members had demerit points assessed. Only three girls did not have any demerits. Of those who had demerit points, they ranged from one to thirteen. The Student had accumulated six points at the time of the complaint; she incurred a three point demerit for an unexcused absence on June 1, 2015, two demerit points on June 10, 2015 for being tardy and not having a jersey, and one demerit point on September 9, 2015 for inappropriate practice/performance uniform. She later accrued another point in November 2015, for failing to submit her grades in a timely fashion. The demerit points assessed to the students are consistent with the corresponding values

laid out in the By-laws.

The Coach explained that the penalties for demerits are cumulative. For example, if a student accrues three demerit points, she is suspended for one game performance. Accruing another three points would result in a second game suspension and the additional penalty of a two-week suspension. The Student had accrued six points at the time the complaint was filed and in accordance with the By-laws; the Student was suspended for two games and given a two-week suspension.

Prior to the conclusion of OCR's investigation the District agreed to enter into a resolution agreement, when fully implemented would resolve this allegation. The agreement obligates the District to (1) review the Student's cheerleading disciplinary record and determine whether all demerits received by the Student on or after September 7, 2015 were consistent with the cheerleading bylaws received by the Student and remove any demerits that are inconsistent with the cheerleading bylaws; the District will provide OCR and the Complainant with a written description which details how its determination and the basis for such; (2) provide training to the School's administrators, cheerleading coaches, and other relevant School staff or agents regarding their responsibility to prevent discrimination and retaliation regarding the School's extracurricular activities pursuant to Section 504 and Title II and (3) develop a system that ensure that the documents which include criteria for selecting its cheerleading competitive squads, evaluation scores and names of judges are maintained for five years

### **Conclusion**

In accordance with Section 302 of OCR's *Complaint Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the allegation. Prior to completion of OCR's investigation, the District requested to voluntarily resolve the complaint allegations and OCR has determined that it is appropriate to resolve this issue with a Resolution Agreement (Agreement).

On May 11, 2017, OCR received the attached Agreement. When fully implemented, the Agreement will resolve the complaint allegations. The provisions of the Agreement are aligned with this complaint and the information obtained during OCR's investigation to date, and are consistent with applicable regulations. OCR will monitor the District's implementation of the Settlement Agreement. 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,

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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. OCR would like to thank you and especially Mr. Mark Murray for your cooperation. If you have any questions about this complaint, please contact G. Anthony Brown, Attorney, at (404) 974-9374 or me, at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.  
Compliance Team Leader

Enclosure  
cc: Mark Murray, Esq