



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

January 5, 2017

Ben Hill County Schools
509 West Palm Street
Fitzgerald, Georgia 31750

Re: OCR Complainant # 04-16-1109

Dear XXXXXXXX,

We have resolved the above-referenced complaint filed against the Ben Hill School District (District) alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District discriminated against her son (Student) when the District failed to timely evaluate the Student and provide the Complainant procedural safeguards during the 2014-2015 and 2015-2016 school years. The Complainant also alleged that the District discriminated against the Student during the 2015-2016 school year when staff at Ben Hill Primary School (School) repeatedly placed the Student in a makeshift card board cubicle away from his peers in the classroom, openly told students during class to ignore the Student, and denied the Student the opportunity to attend a field trip on November 24, 2015.

OCR enforces Section 504 of the Rehabilitation Act of 1973, 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, 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.

Based on the allegations, OCR opened an investigation of the following legal issues:

1. Whether the District denied the Student a free appropriate public education (FAPE) by failing to timely evaluate the Student during the 2014-2015 and 2015-2016 school years and by failing to provide procedural safeguards in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §§104.35(c) & 104.36 and the Title II implementing regulation at 28 C.F.R. §35.130.
2. Whether the District discriminated against the Student on the bases of disability when staff at the School repeatedly placed the Student in a makeshift card board cubicle away from his peers in the classroom, openly told other students in the class to ignore the Student, and denied the Student the opportunity to attend a field trip on November 24,

2015 in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44 and the Title II implementing regulation at 28 C.F.R. § 35.130.

Regarding Issue 1, before OCR concluded its investigation, the District offered to resolve this allegation 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." A summary of OCR's investigation thus far, which provides a sufficient basis for the resolution agreement, is set out below.

Regarding issue 2, in reaching a determination, OCR reviewed documents provided by the District and the Complainant. OCR also interviewed the District 504 Coordinator, the Student's Counselor, two paraprofessionals, and two teachers from the School. After carefully considering all of the information obtained during the investigation, OCR did not find sufficient evidence to support Issue 2. OCR's findings and conclusions for Issue 2 are discussed below.

Legal Standards

Failure to evaluate

The Section 504 implementing regulation at 34 C.F.R. § 104.35(a) states that a recipient shall conduct an evaluation of any person 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 person in regular or special education and any subsequent significant change in placement. OCR interprets Section 504 to require, when a child's doctor or parent has provided information indicating that a child is "regarded" as having a disability, recipients are to determine whether there is a "reason to believe" that the child, because of an actual disability, may need special education or related services, and thus would need to be evaluated. The opinion of the doctor or parent triggers the recipient's duty to evaluate the student and is a piece of information to be considered in that decision making process.

Although the Section 504 regulation does not contain a specific requirement regarding the timeliness of an evaluation, a recipient should conduct an evaluation within a reasonable period of time after it has reason to suspect that a student, because of disability, may need special education or related services. OCR may consider state law when determining whether a district has conducted a timely evaluation of a student.

The regulation implementing Title II is interpreted consistent with the regulation implementing Section 504. OCR interprets the regulation implementing Title II to require school districts to provide a FAPE to qualified individuals with a disability to the same extent required by the regulation implementing Section 504.

Failure to Provide Procedural Safeguards

The Section 504 implementing regulation, at 34 C.F.R. § 104.36, requires recipients to 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, the right to examine relevant records, and an impartial hearing. If parents/guardians request a disability evaluation, the recipient has two choices: it may either (1) evaluate the student in question within a reasonable period of time; or (2) decline to evaluate the student, because the district does not believe that the student has a disability. In the latter case, the district must explain to the parents/guardians the reason for the refusal and inform the parents that they have the right to challenge the refusal to evaluate the student by requesting an impartial hearing by a person knowledgeable about the requirements of Section 504.

Different Treatment

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified student with a disability shall, on the basis of their 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) provides 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 student with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified student with a disability 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 student with a disability 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 students with disabilities or to any class of students with disabilities unless such action is necessary to provide the students with disabilities with aid, benefits, or services that are as effective as those provided to others; (v) Aid or perpetuate discrimination against a qualified student with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity; (vi) Deny a qualified student with a disability the opportunity to participate as a member of planning or advisory boards; or (vii) Otherwise limit a qualified student with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

The Section 504 implementing regulation at 34 C.F.R. § 104.43(c) provides that no qualified student with a disability shall on the basis of disability be excluded from any course, course of study, or other or other part of its education program or activity.

The Title II implementing regulation at 28 C.F.R. §35.130(a) mandates 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.

Background

The Student was in kindergarten in the District, during the 2014-2015 school year, at the time his mother filed this complaint. The Student continues to attend school in the District. In April 2015, the Complainant submitted medical records to the District, which showed that the Student was diagnosed with pervasive developmental disorder and oppositional defiant disorder

Issue#1: Whether the District denied the Student a free appropriate public education (FAPE) by failing to timely evaluate the Student during the 2014-2015 and 2015-2016 school years and by failing to provide procedural safeguards in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §§104.35(c) & 104.36 and the Title II implementing regulation at 28 C.F.R. §35.130.

Summary of the Investigation

OCR's investigation to date show that during the 2014-2015 school year, the Student met or mastered all of his course subjects throughout the school year. With respect to the Student's behavior, the Student received only one formal discipline referral, and for the incidents which occurred in class, the Teacher implemented classroom strategies recommended by the Complainant, which effectively re-focused the student and allowed him to complete his work. District staff advised OCR that the Student's behavior during the school year was typical for that of a kindergarten and did not raise any concerns. The facts thus far also show that during the 2015-2016 school year, the Student continued to succeed academically, meeting all of the academic standards for first grade. Regarding his behavior, the evidence to date showed that his teachers and the Principal felt his behavior was consistent with the behavior of students in his age group during the 2015-2016 year as well, and the Student's behavior records show that the Student received three discipline referrals during this school year.

The facts obtained to date show that the Complainant requested a 504 Plan for the Student by letter on October 28, 2014 and during a meeting with the District 504 Coordinator on November 4, 2014. The facts also show that the Complainant again requested a 504 Plan for the student during a telephone call with the School Counselor on October 28, 2015.

The facts obtained thus far show that the District did not evaluate the Student during the 2014-2015 or 2015-2016 school years. In response to the Complainant's request for a 504 Plan on November 19, 2014, the School's Counselor asked the Complainant to submit medical records diagnosing the Student after which a meeting would be scheduled to discuss eligibility of the Student to receive a 504 Plan. The facts also show that this information was never submitted to the School. It is unclear from the information obtained thus far whether the Complainant requested a 504 Plan for the Student again in the 2014-2015 school year, but the Complainant did sign a form consenting to have a behavior specialist observe the Student in class.

For the 2015-2016 school year, the School Counselor tried to schedule appointments with the Complainant on three separate occasions to discuss evaluating the Student for a 504 Plan: October 28, 2015, November 19, 2015 and January, 6, 2016. Each time the School Counselor

reached out to the Complainant, the Complainant advised her that she would have to find a good time for her husband to attend, but she never provided a firm date. The facts thus far also show that the School Counselor advised the Complainant on January 6, 2016, that the Student had not been denied a 504 Plan because the School had not been able to meet and discuss Section 504 eligibility since the Complainant repeatedly failed to attend or confirm meeting dates and times. On January, 26, 2016 the school finally arranged to have a meeting with the Complainant, and even though the District gave the Complainant procedural safeguards, the Complainant asked that the evaluation of the student be delayed so that she could submit additional medical diagnoses for the Student. During a follow-up call with the Complainant in July 2016, the Complainant informed OCR that the School contacted the Complainant regarding an evaluation but denied the Student services.

Before OCR completed its investigation, the District requested to voluntarily resolve the complaint and based on the foregoing, OCR accepted the District's request to resolve this complaint and the District entered into the enclosed Resolution Agreement submitted to OCR on December 19, 2016, which when fully implemented, will resolve all of the allegations in this complaint. This agreement requires the District to 1) convene a Section 504 meeting to determine if the Student is eligible to receive related aids and services pursuant to Section 504, and if so, consider whether the Student is entitled to compensatory education for the 2015-2016 school year; and 2) conduct training to all relevant staff regarding the requirement to timely evaluate students suspected of needing or in need of related aids and services pursuant to Section 504, and to provide procedural safeguards and proper notice.

II. Whether the District discriminated against the Student on the basis of disability when staff at the School repeatedly placed the Student in a makeshift card board cubicle away from his peers in the classroom, openly told other students in the class to ignore the Student, and denied the Student the opportunity to attend a field trip on November 23, 2015 in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

Absent direct proof of discriminatory motive, a *prima facie* case of different treatment is established when a district treats a disabled student differently from similarly situated nondisabled students. To establish a *prima facie* case of different treatment based on disability, OCR determines whether 1) the student was a member of a protected class; 2) whether despite the student's eligibility to receive an educational service or benefit, he or she was denied and suffered an adverse act; and 3) whether the District treated nondisabled students different than the disabled student. OCR first examined whether a *prima facie* case existed for the Complainant's allegations that the District 1) placed the student behind a makeshift card board and told other students to ignore him and 2) denied the Student the opportunity to attend a field trip on November 23 2015.

Prima Facie Case

Placing the student behind a makeshift cardboard cubicle and telling other students to ignore him

Even though the Student did not receive special education services or have a 504 Plan during the relevant time period (school term-2015-2016), in April 2015, the Complainant submitted medical

records to the District, which showed that the Student was diagnosed with pervasive developmental disorder and oppositional defiant disorder. In addition, the record shows that the Complainant requested that the Student be evaluated for a 504 Plan in both the 2014-2015 and 2015-2016 years because of these medical conditions. For this reason, OCR determined that the Student was a member of a protected class as a disabled person for purposes of this analysis.

OCR next considered whether the preponderance of the evidence shows that the student was placed behind a makeshift cardboard partition when he became disruptive in class and his teachers told other students to ignore the Student when he was disruptive.

While, the evidence confirms that make shift cardboard partitions are used in the Student's classroom setting, they are used during tests to preclude students from looking at each other's work, not for behavior purposes. The evidence, which included photos of actual classrooms, also showed that each student in the Student's class had a make shift cardboard partition at his or her table while he or she was working. Information provided by all staff, who taught or interacted with the Student in the classroom, confirmed that the partitions were only used for testing purposes, and not to discipline the student for behavior problems. Regarding the allegation that the Student's teacher advised other students to ignore the Student, the teacher denied the allegation and stated that she believed there would be no need to ever do such a thing because the Student interacted well with the other students in the class.

OCR contacted the Complainant on July, 21, 2016 and she advised OCR that she would try to present another student in the class. She stated that she would have to get permission for the Student to talk to OCR, but she did not contact OCR again. However, she did confirm that that she never saw the cardboard partition being used to separate and isolate the student during behavior episodes. Also, in her original interview with OCR, she stated that she did not directly hear the teachers tell other students to ignore the Student.

CONCLUSION

The preponderance of the evidence does not show that the Student was placed behind makeshift cardboard partitions to control or manage his behavior. Instead, the evidence shows that cardboard partitions were used for all students during testing to prevent cheating or sharing of work. There was also no evidence to support the Complainant's claim that the Teachers told her that they used the cardboard partitions for the Student's behavior or told the other students to ignore him when he was in one of his moods. For these reasons, OCR concludes that the District did not subject the Complainant to an adverse action as alleged.

Because a prima facie case of disability based discrimination regarding the use of cardboard partitions and comments allegedly made by the Student's Teachers was not established, there is therefore no need to address justifications or pretext and OCR concludes that there is insufficient evidence to show that the District is in noncompliance with respect to Section 504 and Title II as alleged for this allegation.

Excluding the Student from the November 23, 2015 Field Trip

As indicated above, for purpose of this analysis, OCR determined that the Student has a disability and is a member of a protected class. An adverse act also existed, since the evidence

shows that the Student was not allowed to attend a field trip which was scheduled for November 23, 2015. The evidence also shows that for the Student's specific first grade class, the Student, who for purposes of this analysis is disabled, and another student, who had an IEP, were the only two students who were denied an opportunity to attend the field trip. No non-disabled student in the Student's class was denied an opportunity to attend the field trip. For this reason, OCR determined that the Student was treated differently than his non-disabled peers in his class, thus establishing all the requirements for a prima facie case.

Once, a prima facie case is established, OCR considers whether the District offered a legitimate nondiscriminatory reason.

Legitimate non-discriminatory reason

The Student's Teacher stated that the Student was excluded from the November 23, 2015 field trip because he kicked a student on November 6, 2015 and was disrespectful to his teacher on November 11, 2015. The School submitted a behavior contract, which was given to each first grader and was signed by both the Complainant and the Student which said that students would not be allowed to participate in the field trip if they participated in any behavior incidents. The Student did, and was denied an opportunity to attend the field trip as a result.

OCR determined that the District provided a legitimate reason for denying the Student an opportunity to attend the field trip.

Pretext

OCR is next required to examine the legitimate, non-discriminatory reasons given by the District for alleged different treatment for evidence of pretext. Pretext may be shown when, among other things: (1) the District's reasons for precluding the Student from attending the November 23, 2015 were not believable; (2) there was a deviation from the District's procedures or other guidelines concerning the subject matter of the proffered legitimate, nondiscriminatory reasons or (3) similarly-situated individuals were treated differently.

OCR first reviewed the Student's behavior records, which showed that he had two referrals during the month of November, 2015: one on November 6, 2015 for kicking a student on the bus, and one on November 11, 2015 for disrespecting his teacher. This evidence supports that the Student had behavior incidents, which would have precluded him from participating in the field trip pursuant to the behavior contract signed by the Complainant and the Student.

OCR next reviewed the School's field trip policy, which is located in the School's handbook. Consistent with the representation by staff that students can be excluded from field trips because of discipline incidents, the policy states that "students who have discipline behavior problems are subject to be eliminated from participation in field trips".

Finally, OCR reviewed evidence detailing the participation in or exclusion of similarly situated students¹ from the field trip to determine if the policy was applied equally to all students. Of the 27 first graders who were excluded from the November 23, 2015 field trip, 24 students were not receiving special education services, and 3 students were receiving special education services. From this evidence, OCR cannot discern a pattern of disability discrimination since approximately 89% of the students excluded from the field trip were not receiving special education services, while only 11% were.

OCR also reviewed the seven discipline referrals received by the entire first grade class during the month of November 2015. Of the seven discipline referrals, five referrals were for students who did not receive special education services, while only two referrals, including one for the Student, were for disabled students. All seven were excluded from the field trip on November 23, 2015. In addition, sixteen students were excluded from the field trip for behavior incidents, which did not result in a referral. Of those sixteen, only two were receiving special education services, while the remaining students were not. In both groups who were excluded from the November 23, 2015 field trip all were impacted by the District's policy to exclude students because of behavior incidents in the same way.

OCR contacted the Complainant to give her an opportunity to rebut but as indicated above, she did not respond to OCR's request. Therefore, based on the information provided by the District, OCR did not find evidence of pretext.

CONCLUSION

Based on the evidence gathered, OCR concludes that the District has provided a legitimate, nondiscriminatory reason for excluding the Student from the field trip on November 23, 2015 that was not a pretext for discrimination on the basis of disability. Therefore, OCR finds insufficient evidence to establish noncompliance with Section 504 and Title II as alleged.

Because the facts in the investigation show that the Student received corporal punishment at least once, OCR would like the District to consider recent findings released by the Department of Education in a letter on November 22, 2016 regarding the use of Corporal Punishment, which is attached to this letter. Specifically, the letter encourages District's to eliminate the practice of corporal punishment from schools, and instead promote supportive, effective disciplinary measures. OCR offers this letter to you as a resource.

Regarding Issue 1, OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. 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.

Regarding Issue 2, this concludes OCR's investigation of the complaint. This letter 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

¹ Overall enrollment numbers for the 296 first graders during the relevant time period included 277 students who were not receiving special education services and 19 students who were receiving special education services.

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.

Further, the Complainant may file a private lawsuit in federal court regardless of whether 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 that, if released, 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.

If you have any questions, please contact Cassandra Williams at 404-974-9393 or me 404-974-9408.

Sincerely,

April England-Albright, Esq.
Supervisory General Attorney

Enclosures