



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

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June 29, 2016

VIA U.S. MAIL

Gregory K. Adkins, Ed.D.
Superintendent
Lee County School District
2855 Colonial Blvd.
Fort Myers, FL 33966
Email: GregAD@leeschools.net

OCR Complaint #04-16-1127

Dear Dr. Adkins:

On December 7, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint filed by the (Complainant) against the Lee County School District (District) alleging disability discrimination, as well as retaliation. Specifically, the Complainant alleged the following:

1. The District discriminated against her son, Austin Haft (Student), a student at Patriot Elementary School (School), based on disability by failing to implement provisions of the Student's Individualized Education Plan (IEP) that require the District to provide the Student with a behavioral therapist, a gel seat, and a weighted vest.
2. The District failed to provide the Student with a free appropriate public education by frequently calling the Complainant to come pick the Student up from school for the remainder of the day, subjecting the Student to a shortened school day.
3. The District discriminated against the Student on the basis of disability by calling the Complainant to come pick him up from school for the remainder of the school day due to the Student's behavior, thereby significantly changing the Student's placement without a manifestation determination review (MDR).
4. The District retaliated against the Complainant for her advocacy on behalf of the Student's disability rights by calling her frequently to pick up the Student for the remainder of the day due to behavioral problems.
5. The District subjected the Student to a hostile environment based on disability by allowing the Assistant Principal to grab the Student by the arm, leaving a bruise, and allowing the Student's classmates to call him names, such as "Stupid."

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 prohibits recipients of Federal financial assistance (FFA) from the Department from discriminating on the 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 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 the laws above. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

Accordingly, OCR investigated the following issues:

- Whether the District failed to implement the Student's IEP by not providing the Student with a behavioral therapist¹, gel seat, and weighted vest, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33 and Title II and its implementing regulation at 28 C.F.R. § 35.130.
- Whether the District denied the Student a free appropriate public education by failing to provide him with a full school day, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33 (a) and (b), and the Title II implementing regulation at 28 C.F.R. Section § 35.130 (a) and (b).
- Whether the District failed to provide the Student with a MDR prior to a significant change in placement, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35(a), as well as the Title II implementing regulation at 28 C.F.R. § 35.130.
- Whether the District retaliated against the Complainant by calling her frequently to come pick the Student up for the remainder of the week, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61, which incorporates the prohibition against retaliation in the implementing regulation for Title VI of the Civil Rights Act of 1964 (Title VI) at 34 C.F.R. § 100.7(e), and in noncompliance with Title II and its implementing regulation at 28 C.F.R. § 35.134.
- Whether the District subjected the Student to a hostile environment based on disability, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4(a) and

¹ The District uses the term "behavior specialist" for its personnel in the District. The terms "behavioral therapist" and "behavior specialist" will be used interchangeably in this document.

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

In reaching its determination, OCR reviewed and analyzed documents pertinent to the complaint issue and conducted interviews with relevant individuals, including the Complainant, School administrators, faculty, 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 some of the complaint allegations.

BACKGROUND

The Student, a 1st grader at the School, is a student diagnosed with Attention Deficient Hyperactivity Disorder (ADHD), asthma, and hypotonia. During the 2015-16 school year, he was enrolled at the School. He had one set of teachers, Teacher A and Teacher B, during the first semester, but he was transferred into Teacher C's class during the second semester. The Student is exhibiting behavior problems, such as kicking other students, eloping from his classroom, eloping from the building, jumping over a property fence, jumping from stairwells, pulling paper off bulletin boards, and refusing to get on the school bus. The Student has an IEP dated November 16, 2015. The Complainant alleged that the District is not implementing the Student's IEP, is constantly calling her to pick the Student up from school prior to the end of the school day, and has subjected the Student to a hostile environment based on disability.

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 34 C.F.R. § 104.33(a), 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 disability. Section 104.33(b) requires that the education program be designed to meet the individual educational needs of persons with disabilities as adequately as those of persons without disabilities are met.

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 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.

The regulation implementing Section 504 at 34 C.F.R. § 104.35(a) states that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of Section 504 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. A change of placement can occur if a student is removed from the educational setting as a result of one or more related suspensions or expulsions totaling more than ten school days. Accordingly, Districts must first determine whether the conduct underlying the disciplinary action is a manifestation of the student's disability prior to changing their placement.

Under Section 504, a suspension for more than 10 consecutive days, or a total of 10 cumulative days in a school year under circumstances constituting a pattern of exclusion, constitutes a significant change in placement. The determination of whether a series of suspensions creates such a pattern of exclusion is made on a case-by-case basis. If it is determined that disciplinary actions involving a student with a disability constitute a significant change in placement, a District must conduct a reevaluation of the student pursuant to 34 C.F.R. § 104.35(a) prior to the significant change in placement. As a first step in the reevaluation, the District must determine whether the misconduct was caused by the child's disability. If the District determines that the student's behavior is a manifestation of the student's disability, the student may not be

disciplined and the District must determine whether the student's current educational placement is appropriate and, if not, make appropriate changes to the placement. If it is determined that the student's behavior resulting in the discipline is not a manifestation of the student's disability, the student may be excluded from school in the same manner as similarly-situated students without disabilities are excluded.

A student with a disability is not to be provided a shorter school day than his/her peers who are not disabled unless there has been a determination, through a process that comports with Section 504, that a shortened school day is necessary to meet the student's individual needs. The Title II implementing regulation at 28 C.F.R. § 35.130 is interpreted consistently with Section 504.

The Section 504 implementing regulation at 34 C.F.R. § 104.61, incorporating the procedural provisions of Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7, prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504.

The Title II implementing regulation at 28 C.F.R. §35.134 (a) provides that no private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by Title II, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title II. 28 C.F.R. §35.134 (b) no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by Title II.

To determine that there is a prima facie case of retaliation, OCR must find that: (1) the Complainant engaged in a protected activity; (2) the recipient was aware of the protected activity; (3) the recipient took an adverse action against the Complainant contemporaneous with or subsequent to the participation in a protected activity; and, (4) there is a causal connection between the adverse action and the protected activity. If these elements are established, OCR proceeds to determine if the recipient has a legitimate, non-discriminatory reason for its actions that is not a pretext for retaliation.

FACTUAL FINDINGS & ANALYSIS

Allegation 1 - Failure to Implement

The Complainant alleges that the District failed to implement three provisions of the Student's IEP—(1) providing the Student with a behavioral therapist (2) providing the Student with a weighted vest and (3) providing a gel seat. A review of the Student's IEP shows that the IEP does not contain a provision for either a Behavior Specialist, a gel seat or a weighted vest. During a rebuttal call, the Complainant admitted that the while she originally thought those

provisions were in the IEP, she later discovered they were not. For these reasons, OCR finds that there is insufficient evidence of non-compliance with respect to this allegation.

Allegation 2 - Shortened School Day

The tardy bell rings for students at 8:55am. Students are dismissed from school at 3:10pm. The Complainant alleged that she was called by School personnel on multiple occasions and told that she had to come pick the Student up from school prior to the end of the school day. The District asserts that there were instances in which the Complainant would come to the School and voluntarily check the Student out for the remainder of the day. A review of school sign out sheets from October 14, 2015 through January 6, 2015, shows that the Complainant check the Student out of school 12 times during that period. An appointment was listed as the reason for seven of these check outs, while “home” was listed as the reason for five of them. These sign out times with “home” as the reason occurred at 1:35pm, 1:50pm, 1:45pm, 2:00pm, and 3:05pm. The Principal stated that there were times when the Complainant was asked to come to the School when the teachers and administrators could not get the Student’s behavior under control. According to the Principal, on some of these occasions, the Complainant would voluntarily take the Student home since it was towards the end of the school day. The Assistant Principal stated that the Complainant was never called with the intention that she come pick up the Student from School.

The Complainant asserts that while there were instances, in which she was not expressly told to take the Student home, there were between 10 and 15 instances during the course of the 2015-16 school year in which either the Principal, Assistant Principal, or Guidance Counselor told her she had to take the Student home. She stated that this started occurring in or around October 2015, and the most recent incident occurred in May 2016. Teacher A and Teacher B co-taught the Student during the first semester of the school year. The Student was transferred to Teacher C’s classroom during the second semester. Both Teacher A and Teacher B acknowledge that there were instances in which the Complainant was called to come pick up the Student prior to the end of the school day, as does the Guidance Counselor. When asked about whether there were instances in which the Complainant was called to pick up the Student prior to the end of the School day, Teacher A stated that they made several calls home for the Student to be picked up due to behavior. Teacher B stated that this happened on a few days. She stated that before she asked the Complainant to pick the Student up, she would have the Complainant speak with her on the phone to see if that would help calm him down.

The Principal, Assistant Principal, Guidance Counselor, Teacher A, Teacher B, and Teacher C acknowledged that the Complainant was called on multiple occasions when the Student’s behavior was not under control. While the Principal and Assistant Principal claim that the Complainant was never told to pick the Student up from school, the Guidance Counselor, Teacher A, and Teacher B state that she was. For the reasons mentioned above, OCR finds the District in non-compliance with Section 504 and Title II with respect to this allegation.

Allegation 3 - Manifestation Determination Review

According to the Principal, the Student only received one day of Out-of-School suspension during the school year. He states that there was one occasion in which the Student was climbing on the outside of the stairwell and jumping off the stairs. This incident occurred on December 3, 2015, and the Student was suspended for the remainder of the day, but permitted to return to School the next day. The Complainant alleges that she was called to pick up the Student on multiple occasions and that those instances do not appear on the Student's discipline record. Additionally, there is no evidence that the Student was suspended for more than 10 consecutive school days, constituting a significant change in placement. Consequently, OCR finds that there is insufficient evidence of non-compliance with respect to this allegation.

Allegation 4 - Retaliation

There are two commonly recognized circumstances under which an individual engages in a protected activity, and thus is protected from retaliation. First, if the individual has opposed any act or policy that is unlawful under one of the laws that OCR enforces, the individual has engaged in a protected activity. Secondly, if the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, or proceeding or hearing conducted under the laws that OCR enforces, that individual has engaged in a protected activity. The Complainant alleged that the School's calling her to pick up the Student was done in retaliation for her advocacy on behalf of the Student. The District acknowledges that the Complainant advocated on behalf of the Student's disability rights throughout the school year. Hence, OCR finds that there was protected activity of which the District was aware that occurred in temporal proximity to the calls made to the Complainant to pick up the Student. OCR determined that the Complainant engaged in a protected activity, the District had knowledge of the protected activity and that a causal connection is established.

OCR next determined whether the District took adverse action against the Complainant contemporaneous with or subsequent to the protected activity. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Complainant or Student in their ability to gain the benefits of the recipient's program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further the protected activity, or if the individual was, because of the challenged action, precluded from pursuing their discrimination claims. OCR determined that the repeated calls to the Complainant could be construed as adverse action since it required the Complainant to come to the School. Thus, there is a prima facie case of retaliation.

However, the District proffered legitimate non-retaliatory reason for the calls was that the School personnel could not get the Student's behavior under control. Additionally, there were other students with disabilities in the same classroom as the Student whose parents had advocated on behalf of their children's disability rights. These other parents, although they had also advocated for their children, did not receive similar calls. OCR does not condone the District's decision to

deal with the Student's behavioral problems by constantly calling the Complainant; however OCR finds that the proffered reason survives a pretext for retaliation. For the aforementioned reasons, OCR finds that there is insufficient evidence of non-compliance with respect to this allegation.

Allegation 5 - Hostile Environment Based on Disability

The Complainant claims that the Student was subjected to a hostile environment on the basis of disability when the Assistant Principal to grab the Student by the arm, leaving a bruise, and allowing the Student's classmates to call him names, such as "Stupid." Upon learning of the allegation concerning the Assistant Principal grabbing the Student's arm, the Principal reported the incident to the District's Professional Standards Office, which initiated an investigation. The District's investigation found that there was probable cause for disciplinary action against the Assistant Principal. The Assistant Principal was reassigned to the District's Curriculum & Staff Development Department from January 2016 through the remainder of the School year, at which time her contract will be allowed to expire.

With respect to allegations that the Student's classmates called him names, the evidence shows that the name-calling was reported to Teacher A. Teacher A stated that upon hearing the allegation from the Student. She asked which students were calling him these names. Teacher A stated that she discussed the inappropriate behavior with those students and there were no further reports of name calling.

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed.

The Principal reported the allegations concerning the Assistant Principal to the District's Professional Standards Office, which immediately opened an investigation. The investigation was completed approximately 90 days after its initiation, and the Complainant was given a copy of the investigation results. The Assistant Principal was immediately disciplined. This discipline included separating the Assistant Principal and the Student and allowing her contract to expire at the end of the school year. Regarding the incident with the Student's classmates calling him names, the incident was reported to Teacher A, and she discussed the incidents with the accused students and no further incidents for name calling occurred.

For the reasons mentioned above, OCR finds that there is insufficient evidence of non-compliance with respect to this allegation.

Unalleged Non-Compliance Issues

FAPE Denial

Districts are required to provide students with a FAPE, which includes requires that the education program be designed to meet the individual educational needs of persons with disabilities as adequately as those of persons without disabilities are met. The District has failed to fulfil this requirement with respect to the Student. The School has consistently called the Complainant to come up to the School throughout the school year to help get the Student's behavior under control. The Student was observed by a Behavior Specialist May 5-12, 2015, and the Behavior Specialist participated in the November 2015 IEP. The Student has an IEP dated November 17, 2015, and has had IEP meetings held in November 2015, February 2016, and May 2016. According to Teacher C and the Complainant, no new or revised IEP resulted from the February 2016 IEP meeting. Given the number of times the Complainant has been called for behavioral issues with the Student, the Student's placement is obviously not adequate to provide him with an appropriate education. The District bears the responsibility of providing the Student with the special education or related services to ensure his educational needs are met. Constantly calling the Complainant to come to the School to calm the Student down is not an acceptable means to ensure his educational needs are met. For these reasons, OCR finds that the District has not provided the Student with a FAPE during the 2015-16 school year in noncompliance with Section 504 and Title II.

Field Trip

During the course of the investigation, OCR learned that the School asked the Complainant to attend a field trip with the Student. While some District personnel assert that this was a request, rather than a requirement, other personnel admit that the Complainant was told that she had to attend the field trip. The Complainant had produced a copy of a field trip information form for a trip to the zoo with the following hand-written on it: "[The Student] will need to be accompanied by a parent to attend this trip." Teacher C stated that she wrote this note on the form at the direction of the Principal.

The Complainant also provided OCR with an email chain between the Complainant and Teacher C dated May 20, 2016, in which the Complainant asked why she had to attend the field trip with the Student. Teacher C responded, "We requested that you, or another family member, accompany him to the zoo because of the safety concerns that occurred at the last trip. We are very concerned about his safety during this trip. We tried allowing him to attend on his own for the last trip and he ran into a parking lot with speeding cars and refused to get on the bus. Remember, you have already turned in money for your ticket and have filled out the volunteer form."

According to the Complainant and Teacher C, the Complainant paid to attend the field trip. However, on the date of the field trip, the Complainant experienced mechanical problems with her vehicle, so neither she nor the Student attended. According to the Complainant, the Student

takes the bus to School. However, he did not take the bus on the date of the field trip because the Complainant was going to drive him to the zoo since she was required to attend as well.

School districts are not required to mandate that the parent(s) of a student with a disability attend field trips as a requisite for the student to attend, unless the same is done for students without disabilities. Consequently, OCR finds that the Student has been subjected to different treatment on the basis of disability.

CONCLUSION

OCR finds insufficient evidence of non-compliance with respect to the allegations 1, 3, 4 and 5. OCR finds that the District is in non-compliance with Section 504 and Title II with respect to allegation 2, as well as unalleged issues regarding the provision of a FAPE and different treatment with respect to the field trip. To remedy the non-compliance, the District will enter into the attached Resolution Agreement (Agreement) which requires the District to reevaluate the Student's placement; evaluate the Student to determine if compensatory services are needed; provide the School's administrators, faculty, and staff with training on the School's obligations under Section 504 and Title II; and issue a written directive to the School's administrators, faculty, and staff concerning the prohibition of treating students with disabilities differently with respect to field trips.

* * *

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.

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.

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. A complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

OCR is committed to a high quality resolution of every case. If you have any questions regarding 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

cc: Robert Dodig, Jr., Esq.
Staff Attorney
Lee County School District
VIA EMAIL: RobertDo@LeeSchools.net