



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

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ATLANTA, GA 30303-8927

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September 8, 2016

Dorsey E. Hopson, II
Superintendent
Shelby County Schools
160 S. Hollywood Street
Memphis, Tennessee 38112

Re: Complaint #04-16-1134

Dear Superintendent Hopson:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed on December 10, 2015, against the Shelby County School System (District) alleging discrimination on the basis of disability (cerebral palsy). Specifically, the complaint alleged that the District discriminated against the Complainant and the Student, who was in the eighth-grade at Snowden Middle School (School) during the 2015-2016 schoolyear, by (1) denying the Student an appropriate education by failing to implement her Individualized Education Program (IEP) during the fall 2015 semester with regard to reading assistance accommodations during state testing; and (2) retaliating against the Complainant for advocating on behalf of Student for disability services from December 2014 until December of 2015, by: a) making the Student wait to empty her bladder (catherization) for several hours in September 2015; and b) filing a disingenuous report with the Department of Child Services (DFCS) in November 2015.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability and retaliation, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability and retaliation 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. Accordingly, OCR has jurisdiction over this complaint.

In reaching its determination, OCR reviewed and analyzed relevant documents provided by the Complainant and the District. OCR also conducted interviews with the Complainant, eight District personnel, and the Tennessee Department of Children's Services. 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 (such as 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 a thorough review of all of the evidence, OCR has determined that the District discriminated against the Student on the basis of disability, in violation of Section 504 and Title II, by failing to implement to the Student's IEP as alleged. OCR also determined that there is insufficient evidence to support a finding that the District retaliated against the Complainant and Student, in violation of Section 504 and Title II, as alleged in Issue 2. The factual and legal bases for our determinations are set forth below.

LEGAL STANDARDS

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b)(1), and the Title II implementing regulation at 28 C.F.R. § 35.130(a) requires a recipient that operates a public elementary or secondary education program or activity to provide a free appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of individuals with a disability as adequately as the needs of individuals without a disability are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program is one means of meeting the standard.

Pursuant to 34 CFR 104.33, OCR considers the following factors when determining whether a District failed to implement a student's IEP: 1) the Student has been identified as a student with a disability; 2) the Student's 504 team or IEP team determined that he needs the special education or related services of concern (resource classes in math, reading, social studies and language arts) to meet his individual disability-related needs; 3) the District failed to provide the special education or related services of concern; and 4) if the answer to 3 is "yes," whether the District provided make-up services.

Retaliation is prohibited under the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq. The Title VI regulation at 34 C.F.R. § 100.7(e) prohibits retaliation for engaging in a protected activity. The regulation implementing Title II at 28 C.F.R. § 35.134 contains a similar prohibition against retaliation.

To establish a prima facie case of retaliation, OCR uses a four step analysis: (1) whether the complainant engaged in a protected activity protected by the laws OCR enforces; (2) whether the District was aware of the protected activity; (3) whether the District took adverse action against the Complainant subsequent to participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient has a legitimate, non-discriminatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

FACTUAL FINDINGS AND ANALYSIS

Issue #1: District's Failure to implement the Student's IEP.

During the 2015-2016 school year, the Student was a fourteen year old, enrolled in the eighth grade at the School. The District identified the Student as a student with a disability (cerebral palsy) and provided the Student with an IEP for the 2015-2016 year. The Student's IEP, among other provisions, provides for the Student to receive "read aloud assistance" for State and District mandated tests including the District Assessment 1. The District does not dispute that the Student's 2015-2016 IEP allows the Student to receive "read aloud assistance" during State/District mandated tests in general. On October 26, 30, and November 4, 2015, the Student was given a District mandated assessment test, NWEA-MAP¹, which is designed to identify a student's area of need for intervention in preparation for Tennessee's C-Cap test (state-wide assessment). The

¹ NWEA-MAP is the Northwest Evaluation Association Measure of Academic Progress.

Principal, who is a member of the Student's IEP Team, also confirmed that the "read aloud assistance" provision falls under the "Special Accommodations" designation found in the State/District mandated test section of the Student's IEP. While the Student did not complete or take all portions of the NWEA-MAP assessments, the Student's IEP required that the District provide read aloud assistance on all District and State assessments. the Student's IEP required that the District provide read aloud assistance on any portions of the District assessments administered on October 26, 30, and November 4, 2015.

Despite the requirement of the Student's IEP that the Student receive "read aloud assistance" on state mandated tests, the Student was not provided this assistance on the NWEA-MAP given by the District on October 26, 30, and November 4, 2015. During interviews by OCR, School staff each confirmed that the Student was not provided read aloud assistance during the portions of the NWEA-MAP given on these dates.² In addition, the daily entry journal for the Student's Special Education Assistant showed that the Assistant asked the Student's Teacher on each of these days whether she could provide read aloud assistance to the Student, and each time the Student's Teacher said no.

OCR next examined whether the District responded to the denial or failure to implement the Student's IEP. The District does not dispute that the Student was denied read aloud assistance when taking the NWEA-MAP District mandated assessments in late October, but contends that NWEA-MAP did not allow for anyone to receive aids and services unless the State approved a unique accommodations request. The District further contends that it did not make the decision as an IEP Team to refuse the Student read aloud services for the NWEA-MAP assessments; rather, it followed the administrative guidelines given by the State which says that only individuals approved for a "Unique Accommodation" by the State could receive aids and services for NWEA-MAP.

Section 504 requires Districts to provide notice to parents explaining any evaluation and placement decisions affecting their children. Moreover, a termination or reduction of a related aids and service can constitute a significant change in placement under Section 504, which could trigger an obligation by the District to re-evaluate the student. Even though the District contends that it did not make a formal decision via an IEP meeting to deny the Student read aloud services during the NWEA MAP Test, their repeated denial of the service during the tests had the same impact of a denial. This denial constituted a significant change in related aids and services in the Student's IEP which required an IEP meeting and notice to the Complainant of her due process and procedural safeguards. An IEP meeting or notice of procedural safeguards was not provided to the Complainant or the Student until November 9, 2015, and the actual meeting did not occur until January, 2016, approximately seven weeks after the Student took the NWEA-Map tests in the fall of 2015.

Conclusion

Based on the preponderance of the evidence, OCR has determined that the District failed to implement the Student's IEP when it denied the Student reading assistance in the classroom in October and November 2015, thus, denying the Student a FAPE in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33 and Title II, as alleged.

ISSUE #2: Retaliation

The Complainant alleged that the District retaliated against her when: a) it failed to provide catheterization services for hours in September 2015; and b) when it reported the Complainant to DFCS. When determining

² Relevant School staff include the Student's Special Education Assistant (SEA), the Student's Language Arts teacher who administered a portion of the assessment to the Student, the Student's Special Education Case manager..

whether retaliation has occurred, OCR first determines whether a prima facie case of retaliation exists using the following four step analysis:

A. District's alleged failure to provide catherization services

Protected Activity

An individual has engaged in a protected activity, and thus is protected from retaliation if: 1) the individual has opposed any act or policy that is unlawful under one of the laws that OCR enforces; or 2) 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.

From December 2014 to February 2015, the Complainant contacted the School and District to complain about numerous issues including the School keeping the Student on homebound services for longer than necessary without sufficient homebound instruction, not allowing the Complainant to view the Student's educational records, and not providing vision services or an additional teacher for math class as discussed during an IEP meeting. The School and District staff responded to Complainant's emails.

Accordingly, OCR has determined that the Complainant engaged in a protected activity and that the District had knowledge of the protected activity.

Adverse Action

OCR next determined whether the District took adverse action against the Complainant contemporaneous with or subsequent to the protected activity. To determine whether an action is adverse, OCR determines whether the District's action significantly disadvantaged the Complainant/Student's ability to gain the benefits of the recipient's program.

The Complainant alleged that on September 17, 2015, the Student did not receive catherization services for hours. She based this belief on a call she received from the School's Nurse on that day, whereby the School Nurse allegedly advised the Complainant that she was concerned that the Student had not come to the clinic at the usual time for her catherization. During an interview, the Student's Caseworker acknowledged that she had considered and discussed with the Complainant altering the Student's catherization schedule to maximize the Student's time in the classroom during instruction, but stated that the Student never missed receiving the services, and the change did not occur. OCR also interviewed the School nurse who allegedly contacted the Complainant regarding a concern that the Student had not been brought to the clinic at her usual time, and she reported that she did not recall telling the Complainant that the Student was late coming to receive catherization services. She also confirmed that the Student received her services on time on that day.

OCR reviewed the Nurse's daily log, which shows that on September 17, 2015, the Student received catherization services at 10:30am and 1:30pm, which is her noted schedule. OCR also reviewed an email sent by the Complainant to the Nurse after school on the day in question (September 17, 2015), and the Complainant did not state that the Student's catherization services were delayed or denied on that day. The Complainant only responds to the Teacher's request to have the services moved towards the end of the class period. This is consistent with the Case Manager's and Nurse's assertion that the School only wanted to explore moving the catherization schedule and reached out to the Complainant to inform her. The School's Nurse, Complainant, and the Special Education Case Manager each corroborate that when the Nurse contacted the Teacher and Case Manager regarding the need for the Student to see the Nurse for her services, the Student was permitted to go to the Nurse to receive the services.

OCR offered the Complainant the opportunity to provide any additional information regarding this matter and the Complainant was unable to provide OCR with any information which showed that the Student's catheterization services were not provided or delayed for significant hours on September 17, 2015, or any other day.

Conclusion

The preponderance of the evidence shows that the School considered and discussed altering the Student's catheterization schedule. However, the evidence does not indicate that the Student was denied or delayed catheterization services on September 17, 2015. Instead, the clinical log of the Student's catheterization services indicates that the Student received her services twice that day at the regularly scheduled time. Therefore, OCR has determined that there is insufficient evidence to show that the District subjected the Student to an adverse action as alleged.

B. District's alleged filing of an incident report to DFCS

Protected Activity and Knowledge of Protected Activity

On November 4, 2015 the Complainant spoke with the School Vice Principal to complain that the Student's read aloud services which are required by the Student's 2015-2016 IEP was denied to her during testing at the school that day, and that she believed that the Student was sick as a result. Thus, Complainant engaged in protected activity. The Vice Principal immediately contacted the District's Office of Assessment, thus, the District had knowledge of the protected activity. Accordingly, OCR has determined that the evidence is sufficient to support a conclusion that the Complainant engaged in a protected activity and that the District had knowledge of the protected activity.

Adverse Action

OCR next determined whether the District took adverse action against the Complainant contemporaneous with or subsequent to the protected activity.

The Complainant alleged that she was referred to DFCS between November 4 and November 7, 2015. However, The District maintains that it did not report the Complainant to DFCS and that no District employee complained to DFCS about the Complainant. The Principal informed OCR that the School maintains a policy/procedure which requires all School staff to notify the Principal upon filing a report with DFCS related to a student at the School along with the report number. As of March 27, 2016, no such reporting had occurred. When asked, the Complainant was not able to provide any additional information and stated that she never received any communications or documents from DFCS, which documented who filed the report. OCR was therefore not able to obtain sufficient information to substantiate the Complainant's allegation that the District reported her to DFCS.³ Consequently, there is insufficient evidence to show that the District made any report about the Complainant to DFCS, as alleged.

Conclusion

³ State law requires all persons to report suspected cases of child abuse or neglect, and the Student was in contact with medical staff and relatives during the alleged period the report was made as well as District staff.

The evidence does not show that the District referred the Complainant to DFCS or filed a complaint with DFCS. For this reason, OCR cannot substantiate that the District subjected the Complainant to an adverse action as alleged. As a result, OCR has determined that the preponderance of evidence is insufficient to support that the District retaliated against the Complainant and Student in violation of Section 504 and Title II, as alleged.

Resolution Agreement

In order to resolve the noted compliance concerns regarding the District's failure to implement the Student's IEP, the District voluntarily agreed to take corrective actions outlined in the enclosed Resolution Agreement (Agreement). The corrective actions include: determining whether the Student requires compensatory education and training for District administrators and staff on the requirements of Section 504/Title II. OCR will monitor the implementation of the 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.

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 provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please be advised that 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 about this complaint, please contact the assigned investigator, Ms. Edget Betru, Esq., at (404) 974-9351, or by email at edget.betru@ed.gov, or the Compliance Team Leader, Ms. Wendy Gatlin, at (404) 974-9356.

Sincerely,

/ s /

Melanie Velez
Regional Director