



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

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ATLANTA, GA 30303-8927

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November 7, 2017

VIA U.S. MAIL

Dr. Bryan Johnson
Superintendent
Hamilton County Department of Education
Superintendent's Office
Hamilton County Schools
3074 Hickory Valley Road
Chattanooga, TN 37421

Re: Complaint #04-16-1187

Dear Dr. Johnson:

On January 28, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint filed by the Complainant on behalf of her son (Student), who attended Orchard Knob Middle School (School), against the Hamilton County School District (District) alleging disability discrimination. Specifically, the Complainant alleged the following:

1. From the beginning of the 2015-2016 school year until October 27, 2015 and from December 1, 2015 until March 11, 2016, the District failed to implement the provisions of the Student's BIP, as incorporated in his 504 Plan, with respect to the Five Point Behavioral Scale, Yollar and SWBS Modifications, and positive behavioral intervention programs.
2. The Complainant further alleges that the District harassed the Student and her on the basis of the Student's disability status when:
 - a. On October 27, 2015, the Principal, who was aware of the Student's ODD disability, unnecessarily provoked the Student in such a way that the Student's response resulted in a 20-day suspension;
 - b. On November 3, 2015, the Principal improperly converted the Student's annual 504 meeting to a manifestation determination meeting without notifying the Complainant until the meeting started; and,
 - c. The Assistant Superintendent interfered with the Complainant's ability to request a due process hearing by declining to provide her with information on how to get a due process form.
3. The District denied the Complainant procedural safeguards when:

- a. The Principal failed to give her adequate notice of a manifestation determination meeting held on November 3, 2015.
- b. The Director of the iZone School failed to provide her with access to the Student's educational records in response to her requests, which started in January 2016.
- c. The Assistant Superintendent failed to permit her to file a request for a due process hearing.

As a recipient of Federal financial assistance from the Department and as a public education entity, the District is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 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.

OCR initiated an investigation of the following legal issues:

- Whether from the beginning of the 2015-2016 school year until October 27, 2015 and from December 1, 2015 until March 11, 2016, the District failed to implement the provisions of the Student's BIP, as incorporated in his 504 Plan, with respect to the Five Point Behavioral Scale, Yollar and SWBS Modifications, and positive behavioral intervention programs in violation of Section 504 and its implementing regulation at 34 C.F.R. § 104.61 and Title II and its implementing regulation at 28 C.F.R. § 35.134.
- Whether the District subjected the Student and the Complainant to harassment on the basis of the Student's disability status when (i) On October 27, 2015, the Principal, who was aware of the Student's ODD disability, unnecessarily provoked the Student in such a way that the Student's response resulted in a 20-day suspension; (ii) On November 3, 2015, the Principal improperly converted the Student's annual 504 meeting to a manifestation determination meeting without notifying the Complainant until the meeting started; and, (iii) The Assistant Superintendent interfered with the Complainant's ability to request a due process hearing by declining to provide the Complainant with information on how to get a due process form in violation of Section 504 and its implementing regulation at 34 C.F.R. § 104.61 and Title II and its implementing regulation at 28 C.F.R. § 35.134.
- Whether the District denied the Complainant procedural safeguards when (i) the Principal failed to give the Complainant adequate notice of a manifestation determination meeting held on November 3, 2015; (ii) The Director of the iZone School failed to provide the Complainant with access to the Student's educational records in response to the Complainant's requests, which started in January 2016; and, (iii) The Assistant Superintendent failed to permit the Complainant to file a request for a due process hearing in violation of Section 504 and its implementing regulation at 34 C.F.R. § 104.61 and Title II and its 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 (Agreement). Pursuant to OCR's *Case Processing Manual* (CPM) 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." OCR agreed with the District's proposed voluntary resolution pursuant to Section 302 of the CPM. Set forth below is a summary of the evidence obtained prior to the signing of the Agreement.

Legal Standards

A. FAPE

The Section 504 regulation at 34 C.F.R. §§ 104.33(a) and (b) requires a recipient that operates a public elementary or secondary education program to provide each qualified person with a disability within its jurisdiction a free appropriate public education (FAPE) regardless of the nature or severity of the disability. A FAPE is defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Improvement Act is one means of meeting the standards established by the regulation for provision of a FAPE. The Title II implementing regulation is interpreted consistently with the standards set forth in the regulation implementing Section 504 in this regard.

B. Disability Harassment

A District's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A District may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the District had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the District's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a District must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an 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. If an investigation reveals that discriminatory harassment has occurred, a District must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

C. Procedural safeguards

Pursuant to 34 C.F.R. §104.36, public K-12 schools must provide procedural safeguards in evaluating or placing students who because of disability, need or are believed to need special instruction or related services. These safeguards include notice, an opportunity for the parents or guardians to examine relevant records, an impartial hearing with opportunity by the parents/guardians and/or counsel, and a review procedure.

Background

During the 2014-2015 academic year, the Student was 13 years old and in the seventh grade at the School located in Hamilton County, Tennessee.

Evidence before OCR indicates that the Student had ADD, ODD, and a mood disorder. Documents produced in connection with the complaint state that students who have ADD and ODD may experience anger outbursts, temper tantrums, and the inability to think things through as well as the inability to connect a consequence with an action.

The Student had a Section 504 Plan for the period August 29, 2014 through August 28, 2015 for his ADD and ODD-mood disorder. The Plan incorporated a behavior intervention plan (BIP) that listed the following accommodations, among others: an emotional scale, an adult mentor, a specified personal space, private criticism, visual supports, adult-directed choices, and quiet spaces. The emotional scale was a five-point scale; each point had a distinct meaning. For instance, three meant, "I need help to calm down. Remind me to take a breath and count to 10. Give me some time before you ask me questions. I might want to pray." Five meant, "Help me leave the area and calm down. I might need to go to an empty room. I might want to be alone."

Evidence to date establishes that on the morning of October 27, 2015, the Complainant and the School Guidance Counselor agreed to have a 504 Plan meeting on November 3, 2015, given the Plan's expiration in August 2015.

Summary of the Investigation Conducted To Date

A. Student Behavioral Incident on October 27, 2015

On October 27, 2015, the Student had a tantrum while in History class. The Student threw supplies and engaged in other disruptive behavior, which led the Student's History teacher to refer the Student to the administration for discipline. Once referred to the office, the Student met with the Principal, whom the Complainant says knew of the Student's ODD and who, according to the Complainant, provoked the Student by getting into the Student's face. Documents produced by the District indicate that during this meeting, the Student verbally assaulted the

Principal by saying that "he was going to sprang on [him]." Shortly thereafter, the Complainant picked the Student up from the School. The Principal informed the Complainant that the District was giving the Student a long-term suspension for his threat. The District, however, provided the Complainant with a *Notice of Suspension of Ten (10) School Days or Less* form indicating a short-term suspension for reasons not involving the Student's interaction with the Principal. The *Notice of Suspension* form indicates that the District suspended the Student for five days only (*i.e.*, from October 27, 2015 through November 2, 2015) for disrupting the learning environment. In addition, the *Notice of Suspension* form indicates that the Student had not been identified as a student with a disability.

B. Section 504 Team Meeting

The evidence to date further establishes that on November 3, 2015, the Student's 504 team convened. Upon the Complainant arrival to the November 3, 2015 meeting, the team notified the Complainant that the purpose of the meeting had changed. Specifically, the team explained that they would not convene a general 504 meeting but, instead, would conduct a manifestation meeting to discuss the Student's October 27, 2015 behavior. At the meeting, the Complainant also voiced concerns that the teachers were not implementing the five-point behavioral scale. The Complainant told OCR that two teachers, including the Student's History teacher, admitted in the meeting that they had not been using the scale, because they were too busy trying to control their classes. During the meeting, District personnel gave the Complainant a *Notice of Expulsion of More Than Ten (10) School Days* form. This *Notice*, which the Principal completed, indicated that the Student verbally assaulted the Principal. The Principal did not answer the question on the form asking if the Student had been identified as a student with a disability. District personnel also gave the Complainant a *Notice of Parent and Student Rights and Procedural Safeguards*. On the signature page, the Guidance Counselor wrote, "Notice of procedural safeguards were printed and I was going to review before she signed this; was able to review after this was written." The Complainant wrote that the team had neither provided nor explained the *Notice* to her during the meeting. Ultimately, the team, with the exception of the Complainant, agreed to a 20-day suspension and attendance at an alternative school.

On December 1, 2015, the District held a Level I appeal meeting. The Committee decided that the Student could return to School effective immediately and that the Dean of Students would check on the implementation of the 504 Plan.

C. The Complainant's Request for Records

In January 2016, the Complainant met with the District's Director of Innovation Zone Schools (Director), who agreed to excuse the absences that the Student incurred during the suspension. The District reported that the District addressed the situation with the Principal in response to the Complainant's concerns." Around this same timeframe, the Complainant requested a copy of the Student's records.

Meeting Notes indicate that District personnel assured the Complainant that they would make copies of the Students records available to the Complainant by March 17, 2016.

Other evidence indicates that several months later, in October 2016, the Director notified the Complainant that she was *resending* a copy of the Student's file via mail, return receipt requested.

Prior to the conclusion of the investigation, the District requested to voluntarily resolve the complaint pursuant to OCR CPM section 302.

As noted above, the Student had a Section 504 Plan in place but the evidence reviewed, to date, does not substantiate that the District implemented the Student's Section 504 Plan. Additionally, the team did not properly notify the Complainant when they convened a manifestation determination meeting; they did not provide the Complainant with her procedural rights; and, finally, the District did not provide the Complainant with access to the Student's requested records. Prior to the District's request to resolve the complaint, OCR had not made a determination concerning whether any action taken by the District resulted in the Student's failure to receive a FAPE.

Conclusion

Based on the foregoing, OCR accepted the District's request to resolve this complaint. The District entered into the enclosed Agreement on October 25, 2017, which when fully implemented, will resolve all of the allegations in this complaint. This Agreement requires the District to, among other steps, (1) expunge the October 2015 suspension and all related records from the Student's academic and/or disciplinary record and transcript; (2) provide the Student's parent(s)/legal guardian with access to the Student's educational records; (3) issue the Student's parent(s)/legal guardian a letter assuring them that, if the Student were ever to reenroll, the District will after providing proper written notification to the Student's parents, convene a group of knowledgeable persons, including the parents (if they elect to attend), to determine whether the Student is entitled to compensatory and/or remedial services for any failure to implement the Student's BIP during the 2015-2016 school year and for the October 2015 suspension period that occurred during the 2015-2016 school year; and, (4) provide training of administrators, teachers, counselors, and any other staff at the School involved in the provision of a FAPE to students with disabilities regarding the District's policy and obligations under Section 504 and Title II, and the prohibition against harassment.

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 duly authorized OCR officials 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. 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.

OCR appreciates the District's cooperation in this matter and looks forward to receiving the monitoring reports, as required by the enclosed Agreement. If you have any questions, please contact Ms. Reid at (404) 974-9386 or at michelle.reid@ed.gov, or Arthur Manigault, Compliance Team Leader at (404) 974-9376.

Sincerely,

/s/

Melanie Velez
Atlanta Office Director

Enclosure

cc: XXX Esq. (w/enclosure)