



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

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ATLANTA, GA 30303-8927

REGION IV  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

October 19, 2016

Beverley Levine  
Superintendent  
Oglethorpe County School District  
735 Athens Road  
Lexington, GA 30648

Re: Complaint # 04-16-1409

Dear Superintendent Levine:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its case resolution process of the above-referenced complaint filed on April 22, 2016, against the Oglethorpe County School District (District), in which the Complainant alleged that the District discriminated against her son (Student), who attended XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXX School (School) during the 2015-16 school year, on the basis of disability. Specifically, the Complainant alleged that the District denied the Student a free appropriate public education (FAPE) when, (1) from September 2013 to March 2016, the District failed to evaluate the Student for a suspected disability upon the Complainant's requests; and, (2) from August 2015-March 2016, the District imposed disciplinary sanctions on the Student by placing him in the XXXXXXXX without determining whether his behavior was related to his disability.

OCR investigated this complaint under 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. The District receives Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdiction over this complaint.

OCR investigated the following legal issue:

Whether, from September 2013 through March 2016, the District failed to properly evaluate the Student for special education and related services, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.33, 104.35, and Title II at 28 C.F.R. § 35.130.

During its complaint resolution process, OCR reviewed evidence submitted by the Complainant and the District and interviewed the Complainant. A finding that a recipient has violated one of

the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). Prior to the conclusion of the investigation, the District requested to address the complaint allegation with the attached voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's *Case Processing Manual*. Provided below is an analysis of OCR's investigation thus far of the legal issue.

## **Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no person, on the basis of disability, shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity that receives Federal financial assistance. The regulation implementing Title II contains a similar provision at 28 C.F.R. § 35.130(a). The Title II regulation, at 28 C.F.R. § 35.130(b)(7), also requires school districts to make reasonable modifications in policies, procedures or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity.

The Section 504 regulation, at 34 C.F.R. § 104.33(a) and (b), requires recipient school districts to provide a FAPE to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of nondisabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and procedural safeguards. Implementation of an IEP developed in accordance with IDEA is one means of meeting these requirements.

To be eligible to receive a FAPE under Section 504, a student must have a mental or physical impairment that substantially limits one or more major life activities. See 34 C.F.R. § 104.3(j). Pursuant to Section 504 and Title II, major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function. Thus, under Section 504, a student may qualify as having a disability even if the student's impairment does not substantially impact academic performance.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires recipient school districts to conduct an evaluation in accordance with the requirements of 34 C.F.R. § 104.35(b) 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. The regulation further requires that tests and other evaluation materials include those tailored to assess specific areas of educational need. In addition, at 34 C.F.R. § 104.35(c), the Section 504 regulation requires a district, in interpreting evaluation data and making placement decisions to: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher

recommendations, physical condition, social or cultural background, and a captive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with 34 C.F.R. § 104.34, which requires placement of a qualified student with a disability with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability. Title II and its implementing regulations are interpreted consistent with these Section 504 regulations.

The regulation implementing Section 504 at 34 C.F.R. § 104.36 requires a recipient that operates a public elementary or secondary education program or activity to establish and implement, with respect to actions regarding the identification, evaluation or educational placement of persons who, because of disability, need to be believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the persons parents or guardian and representations by counsel, and a review procedure.

### **Evidence Obtained Thus Far**

On XXXXX XX XXXX, after providing written notice to the Complainant, the School convened a Section 504 team meeting, which the Complainant attended in addition to the following District staff members: the Student's teacher, a School assistant principal, a School counselor, the District's Coordinator of Student Support, a social work intern, a School psychologist, and a School social worker. According to minutes from the meeting, the team gathered "to discuss [the Student's] progress in XXX grade both academically and behaviorally, to review outside testing reports, address parent concerns, and determine if [the Student] meets the eligibility requirements for a 504 Plan." The minutes indicate the team considered a psychological evaluation, dated XXXXXX XXXX, that includes a diagnosis of attention deficit hyperactive disorder (ADHD) for the Student.

The team determined the Student met eligibility requirements for a Section 504 plan, and the following accommodations are listed in the plan: Implement Behavior Intervention Plan, Check in/Check out intervention, weekly meetings with the social work intern, assignment of a mentor to the Student, a monitored cool-down spot, and access to Social Skills support. The plan further noted that "[a]dditional testing is being recommended" for the Student. On XXX XX XXXX, a School psychologist completed an additional evaluation on the Student in response to the Complainant's concerns regarding the Student's attention and concentration.

During an XXXX XX XXXX, meeting, the team developed a behavioral intervention plan for the Student, which included a card system the Student would use "as a way for [the Student] to leave the classroom and cool down but not be sent to the hallway." Specifically, "when [the Student] feels upset/angry, he will leave card on his desk and report directly to [the School counselor's] office." The plan notes that the Student's teacher will call the office when the Student leaves the classroom, office personnel will then monitor his transition from the classroom to the counselor's office, and the teacher will be notified upon the Student's arrival.

On XXX XX XXXX, the School convened a meeting to determine whether the Student required special education services. Attendees of the meeting included the Complainant, the Student, the Student's teacher, a special education teacher, the District's Coordinator of Student Support, a School assistant principal, the School psychologist who completed the Student's XXX XXXX evaluation, and the District's Director of Teaching and Learning. In making its determination, the team considered the Student's medical, behavioral, and academic history, including teacher observations, grades, the Student's accommodations in place through his 504 plan, input from the Complainant, and the results of the Student's XXX XXXX evaluation. Based on this information, the team concluded that the Student did not qualify for special education services.

The Complainant acknowledged during a conversation with OCR that she had received her procedural safeguards rights, including notice of her ability to challenge the team's determination through a due process hearing, in March 2016. She also stated that she was satisfied with the provisions of the Student's Section 504 plan as it relates to his behavior, including his behavior plan. However, the Complainant maintained that she had requested an evaluation for the Student on numerous occasions beginning in 2013, but it was only in March 2016 that the District first evaluated the Student and provided the Complainant notice of her procedural safeguard rights.

OCR reviewed an XXXXXXXX X, 2013, email from a School assistant principal to the Complainant, which read:

As you know, you and I have had trouble reaching each other over the phone. I know you have mentioned wanting to discuss a 504 or IEP for [the Student.] I would love to meet with you to discuss these options. I have been following [the Student's] progress pretty closely since you first expressed your concerns. He is currently passing everything with only social studies (79) falling below 80%. His teachers have also reported that his behavior has been much better since the first couple of weeks of school. He has been going to PRIDE on Fridays and his grades do not appear to be impacted by behavioral issues. We do follow the Response to Intervention process at our school to offer support to children who are struggling academically or behaviorally . . . Our first step in moving toward a 504 or IEP would be to meet to discuss [the Student's] disability and how it is impacting his learning. Please let me know if there is a time that you would be able to meet with [the Student's] teachers and me to discuss your concerns . . .

In a reply sent the following day, the Complainant advised the assistant principal that she had visited the Student's doctor and "had paperwork." The Complainant also indicated that she was low on gas, XXXX X XXXXXXXX, and would "come if weather permits." The assistant principal responded, saying, "It's good to hear from you. I'll look forward to seeing you when it is convenient for you." On XXXXXXXX XX, 2013, the Complainant replied that she had no gas and hoped to meet the following month. In response, the assistant principal wrote, "Thanks for letting me know. We did receive a copy of his test results. I have shared the recommendations with his teachers. We will monitor his progress carefully . . ."

OCR also reviewed a “Meeting Summary,” dated XXXXXXXX XX, 2013, and completed by the assistant principal, in which he wrote:

[The Complainant] would like for [the Student] to have an IEP or 504 plan to help him in school. She has been unable to come in and visit with us, but we have communicated with her through e-mail. At this time, [the Student] is passing all his subjects with 80% or higher. He has had no disciplinary problems. His teachers report that [his] ADHD does not inhibit his learning. Teachers do provide preferential seating to allow him to be away from distractions, but this isn’t always required. He seems to enjoy working for Patriot Bucks as rewards. At this time, we see no need to increase interventions.”

### **Reasons to Resolve Pursuant to Section 302**

The evidence OCR reviewed thus far supports a conclusion that the District conducted special education evaluations in March and April 2016 of the Student, which included the development of a behavior intervention plan that comport with the Section 504 regulations. However, OCR noted potential compliance concerns with respect to the process by which the District determined the Student did not require an educational plan in October 2013, including concerns regarding: whether the District provided the Complainant an opportunity to meaningfully participate in the evaluation process; whether the individuals who participated in the evaluation process included individual(s) knowledgeable about the evaluation data; and whether the District provided the Complainant notice of her procedural safeguard rights. To complete its investigation, OCR would need to conduct interviews with District staff to gather additional information to determine whether the District provided an appropriate and timely evaluation of the Student upon the Complainant’s requests prior to March 2016.

### **Resolution Agreement**

The attached Agreement requires the District to (1) convene a group of individuals knowledgeable about the Student, the meaning of the evaluation data, and the placement options to determine whether the Student needs compensatory and/or remedial services as a result of the District’s timeliness of the evaluation of the Student that comports with the Section 504 regulations between the 2013-14 school year until March 2016; and (2) provide training to School staff involved in the identification, evaluation, and placement of students with disabilities regarding the District’s responsibilities under Section 504 and Title II, and specifically the District’s obligation to identify and timely evaluate all students within its jurisdiction who, because of a disability, need or are believed to need regular or special education or related aids and services.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and are consistent with applicable regulations. OCR will monitor the implementation of the agreement until the recipient is in compliance with the statutes and regulations at issue in the case.

### **Conclusion**

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 possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact Daniel Sorbera, Investigator, at (404) 974-9466, or me at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer, Esq.  
Compliance Team Leader

Enclosure

cc: Dan Murphy, Esq.