



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

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ATLANTA, GA 30303-8927

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September 5, 2017

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

Re: OCR Complaint #04-16-1433

Dear Mr. Hopson:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Shelby County School District (District) on May 3, 2016, alleging discrimination on the bases of disability and retaliation. Specifically, Dominique Maretin (Complainant) alleged that the District discriminated against your son (Student) who attended Mitchell High School (School) in April 2016; and retaliated against him in April 2016 by suspending him from school for the remainder of the school year.

OCR enforces 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 recipients of Federal financial assistance from the Department from discriminating on the basis of disability, 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. As a recipient of Federal financial assistance from the Department, and as a public entity, the District is subject to Section 504 and Title II.

OCR investigated the following legal issues:

1. Whether the District discriminated against the Student during the 2015-2016 school year when it failed to evaluate the Student for a disability, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35(a), and Title II and its implementing regulation at 28 C.F.R. § 35.130(a).
2. Whether the District retaliated against the Student in April 2016 when it suspended the Student for the remainder of the year in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61.

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. In investigating in this matter, OCR reviewed and analyzed documents submitted by the Complainant and the District. Prior to the completion of OCR's investigation, the District agreed to a voluntary resolution agreement that when fully implemented will resolve the potential compliance concerns raised in this complaint.

Legal Standards

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 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.

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.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title VI regulation provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by a law enforced by OCR, or because he 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, similarly prohibits retaliation by public entities.

To establish a prima facie case of retaliation, OCR uses a four step analysis: (1) whether the complainant engaged in an activity protected by the laws OCR enforces; (2) whether the University was aware of the protected activity; (3) whether the University took adverse action against the Complainant contemporaneous with or subsequent to the participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the

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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.

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.

Summary of Investigation

Based on the data provided by the District, the Student was in the 10th grade at the School during the 2015 -2016 school year. The Complainant stated that the Student had a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), combined type: The Complainant further stated that her aunt had power of attorney over her son during the time she was absent from the Student (January 26-April 25, 2016). The Complainant further alleged that, on May 9, 2106, she requested an evaluation be conducted on her son on May 9, 2016. The Complainant further alleges that the IEP that the Student currently has in place is a similar IEP from when he was in middle school.

Documentation provided by the District and a review of the Student's IEP dated April 8, 2016 indicates that the Student was designated as other health impaired. The IEP further states that the Student's behaviors and deficiencies in reading comprehension impeded his academic success in the general curriculum. The IEP further indicates that the Student makes poor social choices and often does not handle conflict well.

A review of the District's policies and procedures shows that an expulsion can vary in length from 11 days to the remainder of the year or one calendar year for state mandated expulsions. The policy has safety assessments when a student's infractions involve a credible substantive threat of harm, or assault resulting in serious bodily injury to student or staff. A review of the Student's discipline records indicate that the student was suspended three times during last school year:

- March 8, 2016 - No paper work on this incident
- February 19, 2016 --10 days, caught cutting class in gym
- April 21, 2016- Suspended for the rest of the school year for fighting.

Prior to the completion of OCR's investigation, the District agreed to voluntarily resolve this issue and OCR has determined that it is appropriate to resolve this issue with a Resolution Agreement (Agreement). In accordance with Section 302 of OCR's *Complaint Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the allegation.

The District agreed to enter into an Agreement which obligates the District to offer the Complainant, in writing, an opportunity to reenroll the Student into the Program at the School's before and after care program. Upon the Student's return, the District will conduct, with written parental consent an assessment of the Student to determine if his conduct in the program is a manifestation of his disability

The District will also have a meeting to determine if the Student requires compensatory education because of his expulsion. If compensatory education is deemed necessary, the District will, in writing, offer the education to the Complainant/Parent, detailing how the District will provide the compensatory education to the Student

Conclusion

On August 30, 2017, OCR received the attached Agreement. When fully implemented, the Agreement will resolve the complaint allegations. The provisions of the Agreement are aligned with this complaint and the information obtained during OCR's investigation to date, and are consistent with applicable regulations. OCR will monitor the District's implementation of the Agreement. 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.

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. OCR would like to thank the District for its cooperation. If you have any questions about this complaint, please contact Darryl Dennis, Senior Investigator, at (404) 974-9358, or me, at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.
Compliance Team Leader

Enclosure