



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

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ATLANTA, GA 30303-8927

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September 27, 2017

J. Alvin Wilbanks,
Superintendent
Gwinnett County School District
437 Old Peachtree Road NW
Suwanee, GA 30024

Re: Complaint #04-16-1542

Dear Superintendent Wilbanks:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has concluded its investigation of the above-referenced complaint, filed on June 26, 2016, against Gwinnett County School District (the District), in which the Complainant alleged discrimination and retaliation under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), as well as discrimination and retaliation under Title VI of the Civil Rights Act of 1964 (Title VI). Specifically, the Complainant alleged:

1. The District engaged in discrimination on the basis of disability against the Student, who formerly attended Chattahoochee Elementary School (School) by failing to evaluate the Student, despite the Complainant notifying the District of the Student's disability and requesting that the District obtain records of the Student's disability from his previous school district;
2. The District discriminated against the Student on the basis of race and disability when the Student's mathematics and reading teachers stated that he was "lazy."
3. The District retaliated against the Student for his parents' advocacy when his mathematics teacher assigned him to study hall and/or the principal's office during recess so that he could catch up on missing assignments;

OCR investigated this case under the authority of:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the prohibition against retaliation provided for in the Title VI regulation at 34 C.F.R. § 100.7(e).

- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.
- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance. The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

OCR investigated the following legal issues:

- 1) Whether the District discriminated against the Student on the basis of disability by failing to timely evaluate him, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35(a) and the Title II implementing regulation at 28 C.F.R. § 35.130.
- 2) Whether the District discriminated against the Student on the basis of race by treating him differently than other students when his mathematics and reading teachers referred to him as "lazy," in noncompliance with the Title VI implementing regulation at 34 C.F.R. §100.3(a)(b)(1)(ii and iii).
- 3) Whether the District discriminated against the Student on the basis of disability by treating him differently than nondisabled students when his mathematics and reading teachers referred to him as "lazy," in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.4(a)(b)(1)(ii-iii) and the Title II implementing regulation at 28 C.F.R. §35.130(a)(b)(1)(ii-iii).
- 4) Whether the District retaliated against the Student because of the Complainant's advocacy by assigning him to study hall or the principal's office to complete assignments during recess, in noncompliance with the Title VI implementing regulation at 34 C.F.R. §§100.7 or the Section 504 regulation at 34 C.F.R. §104.61.

During the course of its investigation, OCR reviewed information provided by the Complainant and the District, including the District's Section 504 procedures and policies, its notice of nondiscrimination, the Student's records and academic file, and correspondence with the Complainant. In addition, OCR reviewed materials from the Complainant, including records from medical providers and other school districts and correspondence with the District. OCR also conducted several witness interviews, including with the School's principal, assistant principal, school counselor, and several of the Student's teachers. OCR also interviewed the Complainant and her husband. OCR examined all evidence in this matter under the preponderance of the evidence standard, which requires the weight of the evidence to show that a particular fact or event was more likely than not to have occurred.

At the conclusion of the investigation, OCR found insufficient evidence of a violation of Section 504, Title II, and Title VI with regard to Issues 2, 3, and 4, as noted above. However, with regard to the issue of whether the Student was timely evaluated by the District (Issue #1), OCR found, by a preponderance of the evidence, that the District was in noncompliance with Section 504 and Title II, as alleged. The enclosed, executed Resolution Agreement addresses this compliance concern.

Failure to Evaluate

Section 504, at 34 C.F.R. §104.35(a) provides, in relevant part, that: a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, 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. To determine if there was a failure to evaluate, OCR reviews whether the individual in question meets the definition of a qualified person with a disability, whether the District conducted an evaluation, and whether the District consistently provided services, if the individual needed them. Where services are not provided, OCR reviews the District's legitimate, non-discriminatory reason for not providing them.

Different Treatment

The Title VI implementing regulations at 34 C.F.R. §100.3, the Section 504 implementing regulations at 34 C.F.R. §104.4, and the Title II implementing regulations at 28 C.F.R. §35.130, all contain prohibitions forbidding recipients of federal financial aid and public entities from discriminating against individuals on the basis of race (Title VI) or disability (Section 504 and Title II).

Title VI's implementing regulation, 34 C.F.R. §100.3 provides, in relevant part, that: "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies." Likewise, the Section 504's implementing regulation at 34 C.F.R. §104.4 states: "No qualified [...] person [with a disability] 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." OCR interprets the Section 504 implementing regulations and Title II implementing regulations to require the same obligations of recipients falling under their jurisdictions.

To determine whether or not different treatment has occurred, OCR examines: (1) Whether the individual is in a protected class (e.g. African-American, or a qualified person with a disability); (2) Whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently than similarly situated students of other races or non-disabled students; (3) Whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment; and (4) Whether the recipient's rebuttal/nondiscriminatory justification can be overcome with a showing of pretext.

Retaliation

Retaliation is prohibited under the Title VI regulation at 34 C.F.R. §100.7, which is incorporated by reference into the Section 504 regulation at 34 C.F.R. § 104.61. These regulations provide 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 she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504.

To establish a prima facie case of retaliation, OCR uses a three-part analysis, examining: (1) whether the Complainant engaged in a protected activity under the laws OCR enforces; (2) whether the District took a materially adverse action against the Complainant; and, (3) 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.

Background

The Complainant is the mother of an African-American student who was in Fourth grade at Chattahoochee Elementary School (the School) in the District during the 2015-2016 school years. The Student was a recent transfer to the District and, while the Complainant did not identify him in the transfer paperwork as a student in need of Section 504 or special educational services, she did make an appointment with and speak to the School's counselor in August 2015 to provide information that she believed would be helpful to her son's new educators.

Issue 1: Failure to Evaluate

34 C.F.R. §104.35 requires that recipients of FFA evaluate a student who “. . .needs or is believed to need special education or related services. . .” Accordingly, OCR first examined whether there was reason for the District to suspect that the Student was a student with a disability in need of services. All parties agreed that the Complainant spoke with the school counselor early in the 2015-2016 school year and advised the counselor that the Student was very shy and had issues with social anxiety. Additionally, in each of their interviews with OCR, the Student's teachers expressed concerns that the Student did not complete his work, was disorganized, and did not work up to what they considered to be his full potential. Records reviewed by OCR demonstrate that the Student's grades were borderline failing for significant portions of the school year, particularly in Math, Language Arts, and Science. Interviews also revealed that his teachers felt that he needed to be kept in from recess on a regular basis to finish his school work. At the end of the year, the Student was referred to the Student Study Team (SST) for further discussion. The evidence in this case supports a finding that the District had reason to suspect the Student was someone with a disability and was required to evaluate him.

Next, OCR looked at whether the Student was evaluated and, if so, did the District then provide the services indicated necessary by the evaluation on a consistent basis. The parties agree that the Student was never evaluated for services by a group of knowledgeable individuals as provided for in 34 C.F.R. §104.35, and that he was never consistently provided with services in the context of a Section 504 or IEP plan.

In the Student's case, the information transmitted to the School by the Complainant, along with the Student's teachers' observations that he consistently struggled to complete his work across all subjects, and had to be kept in nearly every day at recess for this reason, as well as his borderline failing grades for much of the year, should have triggered a Section 504 evaluation for the Student by a team of persons knowledgeable about the Student. "A school district must evaluate a student if it has reason to believe the student has a disability and the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges."¹ For all of these reasons, OCR finds by a preponderance of the evidence that the District violated its obligations under 34 C.F.R. §104.35 in this case.

Issues 2 & 3: Different Treatment on the Bases of Race and Disability

OCR first examined whether the Student is part of a protected class. The evidence in this case demonstrated that the Student is an African-American student and possibly a qualified person with a disability. Accordingly, the Complainant has established, for the first prong of the different treatment analysis, that he is a member of the class of individuals protected by Title VI and Section 504.

OCR next examined whether the Student was subjected to a materially adverse action. The Complainant in this matter alleges that the Student's first math and reading teachers treated him differently by stating that he was "lazy." The District and teachers involved in the alleged incidents denied making the alleged statement. OCR could not find, and the Complainant could not identify, any witnesses or other evidence to corroborate this allegation. Accordingly, based on the conflicting version of events, and in the absence of any third-party witnesses or corroborating evidence regarding this allegation, OCR could not find that the weight of the evidence showed that this act was more likely than not to have occurred. Based on the above, OCR was unable to establish, by a preponderance of the evidence, the adverse action element of this issue. Accordingly, OCR found insufficient evidence of a violation for Issues 2 and 3, as alleged.

Issue 4: Retaliation

OCR first analyzed whether the Complainant engaged in protected activity. The Complainant and the District agree that the Complainant spoke to the school counselor in August and September 2015 about the Student's shyness and social anxiety, and that she requested that the

¹ Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, U.S. Department of Education, Office for Civil Rights, December 2016 at 12.

counselor obtain the Student's medical records. This information is sufficient to establish a "protected activity" for the retaliation analysis in this case.

OCR next analyzed whether the Student was subjected to a materially adverse action. During interviews with OCR, the School's principal acknowledged that the Student had been referred for his lunchtime study sessions and the Student's teachers confirmed that he had been kept in from recess several times during the school year, likely starting as early as October 2015, though the School did not keep records of students kept in from recess to finish their homework. These referrals for extra work-time, when viewed from the perspective of the Complainant, constitute a materially adverse action on the part of the District that satisfies the second prong of the retaliation analysis.

Next, OCR analyzed whether there is a causal connection between the protected activity and the materially adverse action. Here, there is—the temporal proximity between the Complainant's conversation with the school counselor and when the Student likely began losing recess privileges is sufficiently close in time to satisfy this third prong of the Complainant's *prima facie* retaliation case.

Next, OCR examined the District's legitimate, non-discriminatory reason for its alleged adverse action against the Student. The District's proffered reason for its actions was the School's practice in fourth grade to keep students in from recess who were struggling to complete their homework at home. Every teacher that OCR interviewed mentioned this, along with the School's perception that many of their students had insufficient support at home to finish homework and that fourth grade was an academically "loaded" year, in which there was not enough time to cover the material required.

Next, OCR examined whether the stated reason was a pretext for retaliation. Pretext can be found through deviation from policies, procedures, or practices, among other things. The School disclosed to OCR a letter to fourth grade parents that discussed this policy. In addition, the teachers to whom OCR spoke stated that many students were kept in from recess for this purpose. However, the District was unable to provide to OCR a list of students who had been kept inside from recess during the 2015-2016 school years because the School did not keep such records. Looking at all of this evidence in totality, OCR had no information that comparator students whose parents did not engage in protected activity were treated differently from the Complainant's Student, nor was there any information discovered by OCR during the investigation that created an inference that the Student was kept in from recess for reasons other than those articulated by the District. For these reasons, applying the preponderance of the evidence standard, OCR finds insufficient evidence that the District retaliated against the Complainant or the Student to constitute a violation of either Title VI or Section 504 in this case.

Conclusion

In conclusion, OCR found by a preponderance of the evidence that the District violated Section 504's implementing regulation at §104.35 by failing to evaluate the Student during the 2015-2016 school year. On the other hand, OCR found insufficient evidence of a violation of Section 504, Title II, and Title VI with regard to Issues 2, 3, and 4, as noted above.

The Resolution Agreement signed by the District addresses the issue on which OCR found a violation by providing for training on Section 504's requirements regarding evaluation of students suspected of having disabilities for the staff and administrators involved in this case. The Resolution Agreement also requires the District to invite the Complainant, who has moved away from the District, to re-enroll in the District if the family relocates back into the District. If this occurs, the District will convene an evaluation of the Student by a group of knowledgeable persons and also consider whether the Student qualifies for compensatory educational services at the District's expense.

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 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 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. 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.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this matter, please contact Robyn Painter, Esq., at (404) 974-9345, or me at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.
Compliance Team Leader

Enclosure: Resolution Agreement