



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

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August 18, 2017

Mr. William Husfelt
Superintendent
Bay District Schools
1311 Balboa Avenue
Panama City, FL 32401-2080

Re: OCR Complaint #04-16-1630

Dear Mr. Husfelt,

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint the Complainant¹ filed against the Bay County School District (District) on August 29, 2016, alleging discrimination on the basis of disability on behalf of the following students: Student A, Student B, Student C, Student D, Student E, Student F and Student G.

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 a public entity, the District is subject to Section 504 and Title II.

OCR investigated the following legal issues:

1. Whether the District failed to evaluate the Students and determine the Students' eligibility for special education services, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35(a)-(c); and the Title II implementing regulation at 28 C.F.R. § 35.130(a).

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 interviewed the Complainant and the District and analyzed

¹ OCR identified the names of the Complainant and Students in previous correspondence and is withholding their names in this letter to protect their privacy.

documents submitted by the Complainant and the District. Prior to the completion of OCR's investigation, the District agreed to a voluntary resolution agreement for Student A and Student B that when fully implemented will resolve the compliance issues raised by the allegation for these two students. Additionally, after a thorough review of the evidence available, OCR has determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II as alleged for Students C, D, E, F, and G. The factual and legal bases for OCR's determination are set forth below.

Legal Standards

The Section 504 regulation at 34 C.F.R. § 104.35(a) states 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 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. § 104.35(b) states that a recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services which ensure that: (1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; (2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and (3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure). § 104.35(c) states that in interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive 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 § 104.34.

The Title II regulation at 28 C.F.R. § 35.130(a) states that 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.

Finding of Facts for Student C, D, E, F, G,

Background: ESE Policies and Procedures:

The District's Exceptional Student Education (ESE) policies and procedures specify that general education intervention procedures are initially used for students who need additional academic or behavioral support. This is a multi-tiered system (MTSS) that generally requires the District to keep the parent involved and informed about the intervention procedures, observe the student in the educational environment, and review social, psychological, medical and anecdotal records including sensory screenings and diagnostic assessments. The interventions selected for implementation are determined by the Student's problem solving team. A student with multiple discipline referrals may be referred for MTSS behavioral supports which range from Tier 1 to Tier 3, Tier 1 being the least amount of intervention and Tier 3 being the most. The policies state that a parent or a District can initiate an evaluation for special education services. If a school based team determines a student's response to intervention data indicates that the Student requires an evaluation, consent from the parent will be required.

Student C

Student C is not currently enrolled in a Bay District School. Student C attended the District schools from the 2012-13 school year to the 2015-16 school year. The last grade attended at a District school was 3rd grade. During Student C's last semester, an MTSS Tier 2 Targeted instruction plan for behavior was implemented from February 28, 2016 to June 3, 2016. The plan included social skills groups for twenty minutes every week for fourteen weeks and behavior goals were assigned. An evaluation was requested by the parent and grandmother on March 31, 2016 but prior to consenting to the evaluation, they wanted to meet with the school's counselor. The team scheduled a meeting for April 18, 2016 to address this issue. However, prior to this meeting taking place, the grandmother called the school and stated she wanted to cancel the meeting and that she did not want any evaluations conducted. Therefore no referral was completed based on the rescission of the request and no consent provided.

Analysis and Conclusion: Student C

When an evaluation was requested by the parent and grandmother, the District followed their procedures and set up a meeting to further discuss the evaluation request. With the rescission of the request and no formal parental consent for an evaluation, the District did not proceed with an evaluation in compliance with their ESE policies. Based on the above, OCR concludes that the District had reason to suspect that Student C may have a disability necessitating an evaluation based on a request by Student C's guardian. However, Student C's guardian withdrew the request and her consent to evaluate. Based on the above, OCR finds there is insufficient evidence that the District violated Section 504 and Title II as it relates to Student C.

Student D

Student D was enrolled in Bay District Schools from 2006-2011. Student D was then enrolled in a private school for the 2011-12, 2012-13, 2013-14, and 2014-15 school years. The Student returned to the District for the 2015-16 and 2016-17 school years. The Student had 1 discipline referral in the 2015-16 school year and 1 discipline referral in the 2016-17 school year. The Student was initially evaluated by the District on April 9, 2009. The evaluation included behavioral observations, hearing, vision, and speech screenings, and other intelligence tests. Individualized Education Plan (IEP) services and accommodations were implemented in the 2009-10 and 2010-11 school years. Accommodations included repeating/clarifying directions, reading allowable text per the student's request (but not for reading tests), extended time, letting the Student read aloud, and use of manipulatives for math assignments and tests. When Student D rejoined the Bay District Schools in the 2015-16 school year, a consent for a reevaluation was requested and obtained on September 1, 2015. The reevaluation criteria used was classroom data, information from the classroom teachers, parent input, observational data, and State and/or District assessment data. The Student had an IEP in place for the 2015-16 school year and 2016-17 school year.

Analysis and Conclusion: Student D

Documentation provided to OCR by the District shows that the District conducted a timely evaluation and reevaluation when the District suspected Student D needed special education or related services. The evaluations drew upon a wide variety of sources and were tailored to Student D's specific areas of need. Furthermore the District had an IEP in place during the school years that Student D was enrolled in District schools since his initial 2009 evaluation. Based on the above, OCR finds there is insufficient evidence that the District violated Section 504 and Title II as it relates to Student D.

Student E

Student E attended District Schools (Kindergarten) for one year (2015-16 school year) before he withdrew and enrolled in a private school. During the 2015-16 school year, Student E accumulated three disciplinary referrals typically for not following instructions. The Student was given in school suspension for an incident where the Student showed his private parts to another student on May 16, 2016. The Student withdrew from District schools on June 1, 2016. No documentation was provided by the Complainant regarding request for an evaluation made by him or the parent and no evaluation was recommended by School staff.

Analysis and Conclusion: Student E

OCR could not establish that the Complainant or the parent requested an evaluation for Student E. Furthermore, based on the preponderance of the evidence, OCR found that the four disciplinary incidents were not of the nature that the District was obligated to evaluate Student E for special education services. Based on the above, OCR finds there is insufficient evidence that the District violated Section 504 or Title II as it relates to Student E.

Student F

Student F is currently in the third grade at a District School. Student has been enrolled in the District since 2013. The Student has 1 disciplinary incident in the 2013-14 school year, 7 incidents in the 2014-15 school year and 1 disciplinary incident in the 2016-17 school year. These incidents ranged from disrespectful behavior to a physical altercation. OCR found no evidence that an evaluation was recommended by the problem solving team or by the Complainant or Student F's parent. On January 8, 2016 the Student's classroom teacher met with the parents of Student F to discuss his behavior issues. The meeting notes indicate that the Student has problems with self-control when he has personal disagreements with his peers. A Tier 2 MTSS intervention plan was implemented for Student F on February 4, 2016. The Student's progress was measured weekly with an online research game that assesses social and emotional skills and provides intervention based on the results. In a March 2, 2016 meeting between the School, parents, and the Complainant, Student F's behavior was discussed. The notes reflect that the purpose of the meeting was to discuss his behavior and reasons for the prescribed punishment. There was no mention of special education service evaluations in the meeting notes. The Complainant provided his personal notes taken on his cell phone that state on March 3, 2016, that he wanted to follow up with the District regarding a psychological and behavioral evaluation. There is no evidence of any follow up regarding evaluations by the Complainant or the District.

Analysis and Conclusion: Student F

The findings indicate that Student F had seven disciplinary incidents in the 2015-16 school year since enrolling in the District and the District staff did not recommend Student F for evaluation for special education and related services. However, the District took steps to address the disciplinary incidents related to Student F. Specifically, the District followed its policies regarding intervention by placing Student F in the District's MTSS program which included behavioral supports. Student F was removed from MTSS when his behavior improved. The Complainant's personal notes and the District's official meeting notes do not reflect any discussion of special education services or a referral for special education services. OCR could not establish that District received a request from the Complainant or a parent to evaluate Student F for special education services. Therefore, OCR finds that there is insufficient evidence that the District violated Section 504 or Title II as it relates to Student F.

Student G

Student G was attending the first grade at a District School in the 2016-17 school year. Student G has been in the District school system since Kindergarten in the 2015-16 school year. The District has no record or recollection of a request for an evaluation from the parent or the Complainant and the District did not recommend Student G for an evaluation. Student G had 3 discipline referrals in the 2015-16 school year and 2 in the 2016-17 school year. None resulted in out of school suspension. The referrals were for disorderly behavior and not following instructions. The Complainant did not provide any information or documentation that there was an evaluation requested by him or the parents.

Analysis and Conclusion: Student G:

Student G had five disciplinary incidents in the 2015-16 school year. The District did not recommend Student G for evaluation for special education and related services. However, based on the preponderance of the evidence, OCR could not determine that Student G's disciplinary referrals were such that the District should have evaluated him for special education and related services. Based on the above, OCR finds there is insufficient evidence that the District violated Section 504 or Title II as it relates to Student G.

Summary of Investigation for Student A and B

Student A

Student A was in the 9th grade during the 2016-17 school year and had been enrolled with the District from 2006-present. During the 2015-16 school year, Student A was suspended for 23 total days for 5 separate disciplinary incidents and had been suspended for out of school suspension for 1 day in the 2016-17 school year. The type of incidents in the 2015-16 school year include not following instructions, talking and off task, disrespectful to teachers, an incident where Student A touched another female student inappropriately in a sexual manner, disruptive behavior, dress code violations, and physically fighting with peers. Student A was in the District's general education intervention multi-tiered support system. Student A had a Tier 2 intervention plan during the 2014-15 school year but was not in the MTSS system in the 2015-16 school year.

Student B

Student B was in the 7th grade in the 2016-17 school year and has been enrolled at the District schools since 2009. Student B had a total of 17 total disciplinary incidents from the 2013-14 school year to the beginning of the 2016-17 school year. These incidents included classroom disruption, running in the hallway, disrespectful behavior towards school administrators, not following instructions, and an incident on the bus in which he made inappropriate sexual comments and gestures. An evaluation was conducted for Student B in 2008 for speech concerns but the Student was deemed ineligible for services at the time because he had no delays and was within the average range. Aside from the 2008 evaluation, no other evaluation has been conducted. In the 2016-17 school year, the Student was in the School's MTSS system with a Tier 2 Behavior Plan.

Based on the above series of events, OCR had concerns about a possible need for the District to evaluate Students A and B. However, prior to the completion of OCR's investigation, the District agreed to voluntarily resolve this issue with respect to Students A and B, 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 provide proper written notification to Student A and Student B's parents that the District is willing to conduct a comprehensive evaluation of the Student to determine whether or not the Student needs related aids and services. If eligible, the School will, with a group of knowledgeable persons including the parent/guardian, will determine whether the Students need compensatory education. Additionally, the Agreement requires the District to provide training to the School's Section 504 Coordinator(s), administrators, and other relevant staff who have responsibility for implementing the District's ESE and Section 504 services for students.

Conclusion for Students A and B

On August 14, 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 Eulen Jang, Attorney, at (404) 974-9467, or me, at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.
Compliance Team Leader

Enclosure

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness
by fostering educational excellence and ensuring equal access.*

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