



**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

March 3, 2017

XXXX
Superintendent
Decatur County School District
100 South West Street
Bainbridge, GA 39817

Re: OCR Complaint #04-16-7082

Dear XXXX,

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Decatur County School District (District) on September 16, 2016, alleging discrimination on the basis of disability and retaliation. Specifically, the Complainant¹ alleged that the District discriminated against your granddaughter (Student) on the basis of disability when West Bainbridge Elementary School (School) failed to provide the Student with related aids and services for her disability and retaliated against the Student when it reduced her grades and mistreated her.

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. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During investigation, OCR investigated the following issues

1. Whether the District, in failing to provide the Student with related aids and services for her disability, denied the Student a free and appropriate public education in noncompliance with the Section 504 implementing regulation at 34 C.F.R. Section 104.33(a) and the Title II implementing regulation at 28 C.F.R. Section 35.130; and

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

2. Whether the District retaliated against the Student and the Complainant when the Complainant requested disability related services in February of 2016 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 reaching a determination in this matter, OCR reviewed and analyzed documents submitted by the Complainant and the District. OCR also conducted four interviews with the Complainant and members of the District's staff. Prior to the completion of OCR's investigation, the District agreed to a voluntary resolution agreement that when fully implemented will resolve the compliance issues raised by this allegation.

Legal Standards

The Section 504 regulation at 34 C.F.R. §104.35 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 a 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 Section 504 regulation, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. 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 non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

The Section 504 regulation incorporates the procedural provisions of the Title VI Civil Rights Act of 1964 (34 C.F.R. § 100.7(e)), which prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

A prima facie case of retaliation is established by showing that: (1) an individual experienced an adverse action caused by the Recipient; (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the

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protected activity. If the elements of a prima facie case are established, then OCR determines whether the District has a legitimate, nondiscriminatory reason for taking action adverse against the Complainant. The evidence is then analyzed to determine whether the proffered reason is a pretext for retaliation.

Summary of Investigation

Issue 1: Whether the District, in failing to provide the Student with related aids and services for her disability, denied the Student a free and appropriate public education.

The Student was in the second grade at the School during the 2015-2016 school year. The School first became aware that the Student had an intestinal disorder when the Complainant informed the Student's classroom teacher of this. The District received a note from the Student's doctor on February 11, 2016 directing the District to allow the Student to be excused to the bathroom whenever she needed to use it. In the 2015-16 school year, the Student's homeroom teacher allowed the student to use the bathroom when she needed to go; but each of these trips was limited to three to five minutes. After an additional doctor's note was sent on August 8, 2016 stating that the Student should be allowed to use the bathroom for more than three minutes, the Student's classroom teacher now allows her to go the restroom for as long as she needs. There are multiple documented instances from both the Student's 2015-16 school year teacher and the Student's 2016-17 school year teacher that show that when the Student was allowed to go the bathroom, she would oftentimes play in the bathroom, put on makeup and change clothes instead of using the restroom. The District acknowledges that it has not evaluated the Student.

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. Prior to completion of OCR's investigation, the District requested to voluntarily resolve this issue and OCR has determined that it is appropriate to resolve this issue with a Resolution Agreement (Agreement).

Issue 2: Whether the District retaliated against the Student and the Complainant when the Complainant requested disability related services.

As stated above, the District first became aware that the Student had a urinary disorder in late 2015 when the Complainant informed the Student's classroom teacher. The District received a note from the Student's doctor on February 11, 2016 and August 8, 2016 stating that the Student should be allowed to use the restroom when she needs to go and that she should be allowed to use the restroom for more than three minutes. The Student does not have any disciplinary referrals for the 2015-16 and 2016-17 school years. The Student made the following final grades in the 2015-16 school year: Reading – 91, English – 88, Math – 81, Science – 86, Social Studies – 90. In the 2016-17 school year, the Student's report card was: Reading – 86, English – 94, Math – 73, Science – 83, Social Studies – 82. In February of 2016, the District investigated an allegation by the Complainant that the Student was thrown against a bus wall by a District bus driver. The District reviewed bus video footage and stated that the incident was not as the Complainant described. However, the videotape was not provided to OCR because it had been

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recorded over per the District's policy. When OCR called the Complainant for rebuttal, the Complainant insisted that the date the bus driver incident occurred was on May 17, 2016. However, records from the District show that this incident did not occur in May; nor is there any documentation showing a bus incident or disciplinary incident in May of 2016. Additionally, the Complainant's documentation of the Student's May 17, 2016 hospital visit after she was allegedly thrown against the bus by the bus driver states that the doctor found that there was no evidence for abuse or recent injury and her x-rays were negative.

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. Prior to completion of the retaliation analysis, the District agreed to voluntarily resolve the issue in the complaint and OCR has determined that it is appropriate to resolve this issue with an agreement.

The District agreed to enter into an Agreement which obligates the District to notify the Complainant that the District is willing to evaluate the Student (with the Complainant's permission) to determine if the Student is eligible to receive related aids and services specifically related to the Student's intestinal disability. If the Student is eligible to receive services, within one week of its determination an Individualized Education Program (IEP) or Section 504 team (Team) will develop an IEP or 504 Plan to reflect the related aids and services needed by the Student. The District further agreed to provide the Complainant with notice of procedural safeguards, including the right to challenge the Team's determination through an impartial due process hearing. The District will provide the Complainant with a meaningful opportunity to provide input into these determinations and notice of the determinations made. The District also agreed to convene a group of knowledgeable persons to determine whether the Student needs compensatory and/or remedial services as a result of the District's failure to provide appropriate regular and/or special education or related services. If so, the group will develop a plan for providing timely compensatory and/or remedial services and the District will provide the Student's parent/guardian notice of the procedural safeguards including the right to challenge the group's determination through an impartial due process hearing. Finally, the District agreed to provide training to relevant administrators and staff involved in the provision of a FAPE to students including the Section 504 requirements for evaluating students, the necessity to include persons knowledgeable about a student on the evaluation team and the prohibition against retaliation.

Conclusion

On March 3, 2017, OCR received the attached Agreement. When fully implemented, the Agreement will resolve the complaint allegation. The provisions of the Settlement 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 Settlement 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 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.

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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 their cooperation, especially Dr. Linda Lumpkin. 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
Compliance Team Leader

Enclosure

cc: Linda Lumpkin, Assistant Superintendent