



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

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**REGION IV**  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

March 17, 2017

VIA REGULAR AND ELECTRONIC MAIL

Dr. Michael Daria  
Superintendent  
Tuscaloosa City Schools  
1201 21<sup>st</sup> Avenue  
Tuscaloosa, AL 35401

Re: OCR Complaint No. 04-16-7084

Dear Dr. Daria:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on September 19, 2016, in which the Complainant alleged that the District discriminated against her daughter (Student) and other students with disabilities on the basis of disability.

The U.S. Department of Education (Department) is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 704, and its implementing regulations, at 34 C.F.R. Part 104, which prohibit discrimination against individuals with disabilities and retaliation from recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, at 28 C.F.R. Part 35, which prohibit public entities from discriminating and retaliating against individuals with disabilities. As a recipient of Federal financial assistance and a public entity, the District is subject to these laws. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR investigated the following legal issues:

1. Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to implement her Individualized Education Program Plan (IEP) (i.e., failed to provide her with a computer), in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.35, and Title II, at 28 C.F.R. § 35.130.
2. Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to conduct an evaluation prior to a significant change in placement (i.e., from mainstream in grades K-5 to self-contained in grade six), in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.35, and Title II, at 28 C.F.R. § 35.130.

3. Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to educate her with students without disabilities to the maximum extent appropriate, in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.34, and Title II, at 28 C.F.R. § 35.130.
4. Whether in fall 2016, the District discriminated against students with disabilities in XX XXXXX sixth-grade self-contained class at the School by failing to permit them to participate in Homecoming Court activities (i.e., failed to provide the students with applications for Homecoming Court and ballots to select Homecoming Court candidates), in noncompliance with Section 504, at 34 C.F.R. § 104.4, and Title II, at 28 C.F.R. § 35.130.

During the course of this investigation, OCR reviewed evidence provided by the Complainant and the District, including correspondence, student records, and the District's policies and procedures. OCR also interviewed the Complainant and District staff.

OCR evaluates evidence under a preponderance of the evidence standard; in order to establish a violation the evidence must be sufficient to prove that it is more likely than not that a violation occurred. Based on its investigation, OCR determined that there is insufficient evidence to establish a violation of Section 504 or Title II for Issues 1 - 3 in this complaint, and sufficient evidence to establish a violation of Section 504 and Title II for Issue 4.

## **Legal Standards**

### *Free Appropriate Public Education*

The Section 504 regulation, at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. When evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: (1) whether the district evaluated the student in accordance with Section 504 requirements and determined that the student was a qualified individual with a disability as defined by Section 504; (2) whether the student's needs were determined on an individualized basis by a group of persons knowledgeable about the student and the information considered; and (3) whether the placements, aids, and services identified by the district through this process as necessary to meet the student's individual needs were or are being provided. If they have not been provided, OCR will determine the district's reason for failing to do so and the impact of the failure.

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 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 any significant change in placement. The evaluation prior to a significant change in placement, like the initial evaluation, shall be in accordance with the regulatory requirements of § 104.35(b). Section 104.35(d) permits recipients to employ

reevaluation procedures consistent with the Individuals with Disabilities Education Act, which make clear that a significant change in placement may not be made on the basis of old evaluation data. OCR has determined that changing a student's placement to a more restrictive environment constitutes a significant change in placement.

The Section 504 regulation, at 34 C.F.R. § 104.34, states that a recipient that operates a public elementary or secondary education program or activity shall educate students with disabilities with nondisabled students to the maximum extent appropriate to the needs of the student with a disability. The Section 504 regulation, at 34 C.F.R. § 104.37(a), states that a recipient institution shall provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. Section 504 also requires that, in providing or arranging for the provision of nonacademic and extracurricular services, recipient and public entity institutions shall ensure that persons with disabilities participate with non-disabled persons in such activities and services to the maximum extent appropriate to the needs of the disabled person.

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

#### *Different Treatment*

OCR applies a different treatment analysis to allegations involving incidents perpetrated by the recipient on the basis of disability. Under this analysis, OCR must first determine by a preponderance of the evidence whether the student was treated differently than one or more similarly situated students without a disability with regard to a service, benefit, privilege, etc., from the recipient. If such different treatment is established, OCR must determine whether the recipient had a legitimate, non-discriminatory reason for its action(s) that would rebut the prima facie case against it. Finally, if one or more legitimate, non-discriminatory reasons for the different treatment is/are identified, OCR must determine whether the recipient's asserted reason(s) for its action(s) is/are a mere pretext for discrimination. Ultimately however, the weight of the evidence must convince OCR that actual discrimination occurred.

#### **Factual Findings and Analysis**

**Issue 1: Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to implement her Individualized Education Program Plan (IEP) (i.e., failed to provide her with a computer), in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.35, and Title II, at 28 C.F.R. § 35.130.**

The Complainant alleged that the Student's IEP stipulated that she was to get a computer for the 2016 – 2017 school year, but that the District did not provide her with one. OCR's review of the evidence obtained in this investigation indicated that the Student was in the sixth grade at XXXXXXXX XXXXXX XXXXXX (School) during the 2016 – 2017 school year. Further, on September 9, 2015, the Student's IEP team identified her as a student with a disability

("XXXXXXXXXXXX XXXXXXXX") and made placement decisions for her. OCR's review of the Student's IEP, applicable from XXXXXX XX, 2016, to XXX XX, 2017, indicated that the Student's IEP did not provide for the related aid of a "computer," or any related aid related to a computer or any technological device. OCR, however, investigated to determine whether the Student's IEP team may have agreed to provide her with a computer and neglected to include the computer in the Student's written plan.

In its narrative response to OCR's request for documentation in this investigation, the District stated that the Student's IEP team did not agree to provide her with a personal computer. Further, the District stated that all sixth-grade students at the School were given a Chromebook laptop computer in December 2016, including the Student, as a system-wide technology initiative.

During interviews with the Student's IEP team members, none of the team members corroborated that the team agreed to provide the Student with a computer in her IEP as a related aid. Additionally, one staff member stated that on December 6, 2016, the students in her class all received a Chromebook laptop. She also stated that, in order for each student to receive the computer, their parent(s) had to attend a Chromebook camp. Staff stated, and the Complainant confirmed, that the Complainant attended the camp and the Student received a Chromebook.

During an additional interview with the Complainant, she reiterated that the IEP team agreed in the XXX XXXX IEP meeting that the Student was to receive use of a computer to assist her with taking notes in her classes, but that the District neglected to add the computer to the IEP as a related aid. The Complainant, however, was unable to provide evidence to corroborate that the team agreed to provide the Student with a computer as a related aid.

Based on the preponderance of the evidence obtained in this investigation, the evidence did not establish that the District failed to implement the Student's IEP by failing to provide the Student use of a computer; in particular, the Student's IEP did not contain a computer as a related aid. OCR was also unable to find evidence that the IEP team agreed upon use of a computer as a related aid, but neglected to add it to the Student's plan. Further, OCR confirmed that the Student received a laptop computer, along with all other sixth-graders, in early December 2016. Accordingly, OCR found insufficient evidence to establish a violation of Section 504 or Title II with regard to this issue.

**Issue 2: Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to conduct an evaluation prior to a significant change in placement (i.e., from mainstream in grades K-5 to self-contained in grade six), in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.35, and Title II, at 28 C.F.R. § 35.130.**

The Complainant alleged that the Student was placed in a self-contained classroom upon entering the sixth grade, for the 2016 – 2017 school year. She stated that in grades Kindergarten - fifth, the Student was in regular, inclusive classrooms for all of her classes. The Complainant alleged that the District failed to conduct an evaluation prior to changing the Student's placement to the self-contained classroom upon entering the sixth grade.

OCR's review of the Student's 2016 – 2017 IEP, applicable after XXXXXXXX X, XXXX, states the following under a heading of "Least Restrictive Environment," "03-79%-40%."<sup>1</sup> The IEP further provides that the Student will receive instruction in the self-contained classroom for all core subjects, and will be with her nondisabled peers for all nonacademic and extracurricular activities with supports. The Student's IEP applicable from XXXXXXXX XXXX through XXXXXXXX X, XXXX, states the following under the heading of "Least Restrictive Environment," "04 – less than 40% of the day inside the reg ed environment." The Student's fifth-grade IEP provided for "03-79%-40% of the day in the reg ed environment" under "Least Restrictive Environment." Both the fifth grade IEP and the IEP applicable for the first part of sixth grade, from XXXXXXXX XXXX through XXXXXXXX X, XXXX, allocated the Student's time in Reading and Math to occur "daily" in the self-contained classroom; and English/Language Art, Science and Social Studies "weekly" in "classroom and/or resource room" with special education supports.

In the District's response to OCR, it alleged that there was no significant change of placement of the Student; the Student was in self-contained in fifth grade at XXXXXXXX XXXXXXXX XXXXXXXXXX and her placement in her sixth grade year at the School was exactly the same.

During an interview with OCR, special education staff explained any duration of time a student is with his/her peers counts towards the placement level and may include physical education, lunch, extracurricular activities or electives, as well as core subject. Staff stated that, even for those core subjects identified in the fifth grade IEP as taking place in the regular education "classroom," because those subjects were still outlined under the *Special Education* heading in the IEP, those services/subjects were still provided by special education staff, which could include a special education teacher, para professional or an aide. Further, English/Language Arts, Science and Social Studies instruction could have occurred in a regular education classroom with special education supports, or in a resource classroom.

Regardless, OCR determined that the Student was not educated in general education classrooms for all of her classes in the fifth grade, as alleged by the Complainant. The only difference between fifth and sixth grades was that in fifth grade, the Student was educated in the general education classroom, or in a resource room, with supports for English Language Arts, Science and Social Studies. Also, her placement level in fifth grade was 03, her placement level in sixth grade until XXXXXXXX X, XXXX, was 04, and her placement level after XXXXXXXX X, XXXX, was 03. OCR determined that a placement change from 03 to 04 does not constitute a significant change in placement, which required an evaluation.

The Complainant stated that she disagrees with the team's decision regarding the Student's placement; she believes that the Student is not being educated accordingly and is capable of receiving services in the general education setting.

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<sup>1</sup> Note that the IEP team changed the Student's placement from 04 to 03 at the Complainant's request on XXXXXXXX X, XXXX, due to concerns that the Student was not spending sufficient time in the general education environment; thus, after XXXXXXXX X, XXXX, the Student began attending XXXXXXXX for one day each week in the general education environment with special education supports.

Based on the preponderance of the evidence obtained in this investigation, the evidence did not establish that the Student was not subjected to a significant change in placement from her fifth to sixth grade years; thus, no evaluation was required. Accordingly, OCR found insufficient evidence to establish a violation of Section 504 or Title II with regard to this issue. In addition, Appendix A, Subpart D, of the Section 504 implementing regulation provides that it is not the intention of the Department, except in extraordinary circumstances that do not apply here, to review the result of individual placement and other educational decisions so long as the school district complies with the process requirements of Section 504 (concerning identification and location, evaluation, and due process procedures). Because the evidence did not establish that the District failed to evaluate the Student pursuant to a significant change in placement, OCR will not review the Student's placement; the Complainant may request the District conduct such review pursuant to a due process hearing.

**Issue 3: Whether, for the 2016 – 2017 school year, the District discriminated against the Student on the basis of disability by failing to provide her with a free appropriate public education when it failed to educate her with students without disabilities to the maximum extent appropriate, in noncompliance with Section 504, at 34 C.F.R. §§ 104.33 and 104.34, and Title II, at 28 C.F.R. § 35.130.**

The Complainant alleged that the Student received services in the general education setting from Kindergarten through fifth grade; therefore, by educating her in a self-contained classroom for the sixth grade, the District is failing to educate her with students without disabilities to the maximum extent appropriate.

OCR reviewed the District's policies for the provision of Section 504 services to students with disabilities and determined that the District's *Section 504 Procedural Safeguards* addresses the parents'/guardians' right for their child to be educated with children who are not disabled to the "maximum extent appropriate."

As discussed above in Issue 2 regarding the Student's placement, for fifth grade she received services for Reading and Math daily in the self-contained classroom; and English Language Arts, Science and Social Studies weekly in the general education classroom or resource room with special education supports. Thus, she was not educated in the general education setting for all of her classes in fifth grade. In addition, her placement level for fifth grade was 03, her placement level in sixth grade until XXXXXXXX X, XXXX, was 04, and her placement level after XXXXXXXX X, XXXX, was 03.

Further on XXXXXXXX X, XXXX, the IEP team met "to discuss mom's concern and/or request for [the Student] to have the opportunity to go out to a couple general education classes with her same-aged peers. Due to concerns with behavior and language/information processing an aide will assist [the Student] in the general education classes. The LRE was moved to 03 LRE for XXXXXXX XXXXXXX and XXXXXXX." The meeting minutes provide additional detail for the above statements, as follows:

Parent initial thought was Student would be in “inclusion” classroom versus self-contained classroom. Discussed concerns with [the Director of Special Education] early in planning for [the Student] to be prepared for more inclusion in classroom. Mom feels that concerns have not been addressed yet in the year and feels she has been avoided by those she has brought concerns to. Team discussed set up of general education collaborative classes and [Special Education Teacher’s] classroom environment at XXXXXXXX. Discussed possibility of trying placement for exposure to content and concerns raised regarding language and vocabulary/background knowledge. Processing of language might require additional instruction (XXXXXXX services). Team agrees that given the opportunity, Student will at least have access. Move to 03 for LRE for XXXXXXXX/XXXXXX XXXXXXXX.

In the District’s response to OCR’s request for evidence, it stated that pursuant to the XXXXXXXX X, XXXX, IEP meeting, which occurred after the OCR complaint was filed, the team agreed to amend the Student’s IEP to allow her to also participate in XXXXXXXX XXXXXXXX and XXXXXXXX, to specifically address the Complainant’s concern that the Student spend more time with her nondisabled peers in addition to already participating in lunch, physical education, and electives with general education students.

During interviews with IEP team members, staff stated based on the Student’s individual needs, the team agreed on XXXXXXXX X, XXXX, for the Student to take one XXXXXXXX class each week in a regular education classroom to see if she was ready; if she did well, then additional days of XXXXXXXX in the regular education classroom could be added to her placement or a day or more of XXXXXXXX XXXXXXXX in the regular education classroom with special education supports. When OCR asked team members if the Student was being educated with her nondisabled peers to the maximum extent appropriate to her individual needs, staff stated that the Complainant wanted the Student to spend more time in the general education environment, but the team did not feel that was appropriate for her; some of the team members agreed that the Student was spending enough time in the general classroom before the slight change in placement on XXXXXXXX X, XXXX. Staff stated that they have observed that the Student needs direct one-on-one assistance in most everything that she does and doing work independently can be challenging for her. In particular, staying on task and getting distracted is a big issue for the Student that can impede her educational instruction.

The Complainant had no additional information to provide regarding this allegation.

Based on the preponderance of the evidence obtained in this investigation, the evidence did not establish that the Student’s IEP team failed to educate her to the maximum extent appropriate for her individual needs; in particular, the evidence established that the team considered the Student’s needs and abilities when making placement decisions for her. Accordingly, OCR found insufficient evidence to establish a violation of Section 504 or Title II with regard to this issue.

**Issue 4: Whether in fall 2016, the District discriminated against students with disabilities in XX XXXXX sixth-grade self-contained class at the School by failing to permit them to participate in Homecoming Court activities (i.e., failed to provide the students with applications for Homecoming Court and ballots to select Homecoming Court candidates), in noncompliance with Section 504, at 34 C.F.R. § 104.4, and Title II, at 28 C.F.R. § 35.130.**

The Complainant alleged that the District did not provide applications for Homecoming Court or ballots to vote for Homecoming Court candidates to any students in the Student's sixth-grade self-contained class. She stated that the applications and ballots were provided to other students who were not receiving services in a self-contained setting. The Complainant further stated that she received confirmation from the Student's self-contained Teacher that her students did not receive Homecoming Court applications or ballots.

#### *Different Treatment*

The District's response to OCR stated that the self-contained students were not denied Homecoming Court applications or ballots. In particular, the District stated that each morning from August 16, 2016, through August 31, 2016, the following announcement was read at the School: "Homecoming will be September 13, 2016! If you would like to be a part of the 2016 EMS Homecoming Court, come by the office or room 812 to pick up an application packet! The fee is \$25 which includes the 2016 EMS Homecoming shirt! Applications due by August 31, 2016!"

OCR reviewed an email dated August 15, 2016, with the subject "please announce" from the District's Homecoming sponsor to the Principal requesting that she make the announcement cited above. The Principal confirmed that she made the above announcement to the School in the morning and the afternoon from August 16 through August 31, 2016. She stated that applications were not passed out; rather, students were directed per the announcement to Room 812 or the main office to pick up applications. She stated that the pupils in the Student's self-contained class had the same opportunity to apply for Homecoming Court and to vote for candidates. The Student's teacher confirmed that her students were notified about Homecoming applications through the above announcement.

The District also stated that on September 12, 2016, the entire school voted on the Homecoming Court candidates using a Google forms survey, which was distributed to the Student's class. Further, voting was anonymous, so it is not possible to determine which students voted. The District also stated that in the 2015 – 2016 school year, a student in the same self-contained class applied for and won a position on the Homecoming Court.

Staff stated that the Homecoming ballot was distributed to all students at the School through their google accounts. OCR reviewed an electronic version of the ballot. Further, OCR reviewed an email that went to staff on September 11, 2016, stating:

Tomorrow is Homecoming! We have created a Google forms survey for each pod to use for voting. In 6th grade, [a sixth grade

teacher] will be sending the out the forms. In 7th grade, [a seventh grade teacher] will be sending out the forms. In 8th grade [an eighth grade teacher] will be sending out the forms. Please take a few moments of your time to have the students complete this survey. **ALL voting must be done today.** The form is short (6th and 7th grade have 3 questions; 8th grade has 2) therefore it will not take up much instructional time.

After further investigation, the District stated that no one in the Student's self-contained classroom received the electronic Homecoming ballot, so the entire class was not able to vote in the Homecoming Court election.

Based on this information, OCR determined that the self-contained students were treated differently with regard to their opportunity to vote in the Homecoming Court candidates.

#### *Legitimate, Non-discriminatory Reason*

The District stated that the reason the self-contained students were not provided with the ballot was because this was the first year the School used electronic ballots for voting, rather than paper ballots, and due to the new process the exclusion of the Student's class was an unintentional oversight. In particular, the electronic ballots were sent to the sixth-grade core subject teachers and the students were to vote as they rotated through their classes. The students did not receive the ballot because they did not leave the classroom for core subjects.

Based on the preponderance of the evidence obtained in this investigation, the evidence did establish that the Student and her classmates in the self-contained class were treated differently when they were denied the opportunity to vote for Homecoming Court candidates. Further, OCR determined that the District failed to articulate a legitimate, non-discriminatory reason for the failure to ensure equal access to the self-contained students in the Homecoming activities. Accordingly, OCR found sufficient evidence to establish a violation of Section 504 or Title II with regard to this issue.

#### **Conclusion and Proposed Agreement**

In conclusion, OCR found insufficient evidence to establish a violation of Section 504 or Title II for Issues 1 - 3 in this complaint, and sufficient evidence to establish a violation of Section 504 or Title II for Issue 4.

Accordingly, the attached agreement (Agreement) will require the District to take the following actions to remedy the compliance concern regarding the failure to ensure equal access to students with disabilities in voting for Homecoming Court candidates: (1) draft procedures outlining the process ensuring equal participation in all Homecoming Court activities; and (2) provide training pursuant to Section 504 and Title II for all School faculty and staff regarding the mandate to ensure that no student, 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 of the

District. The provisions of the Agreement are aligned with the complaint allegation and the information obtained during the investigation is consistent with applicable regulations.

On March 9, 2017, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the issue. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. 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. 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.

The regulations OCR enforces protect individuals who file a complaint with OCR or participate in an OCR complaint investigation. Recipients may not retaliate or take any adverse actions against individuals based upon their having filed a complaint or provided assistance to OCR. Individuals who believe they have been subjected to retaliation or other adverse action because of their participation in any OCR compliance activity may file a complaint with OCR.

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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Stephanie Pessin, at (404) 974-9343, or me, at (404) 974-9367.

Sincerely,



Ebony Calloway-Spencer, Esq.  
Compliance Team Leader

cc: Dave Ryan, Esq., via electronic mail