



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

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ATLANTA, GA 30303-8927

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January 18, 2018

Mr. James T. Russell
Superintendent of Schools
Volusia County School District
P.O. Box 2118
DeLand, FL 32721

Re: OCR Complaint # 04-16-7095

Dear Mr. Russell:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Volusia County School Board (District). The Complainant alleged that the District discriminated against the Student, a student in the District, in the following ways:

1. The District failed to evaluate the Student for educational services pursuant to Section 504, failed to conduct a manifestation proceeding prior to a significant change of placement between January 2015 and June 2016, and failed to provide procedural safeguards.
2. The District failed to investigate disability-related bullying.

OCR investigated this complaint pursuant to: 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. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. 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. The District is a recipient of Federal financial assistance and is a public entity. Accordingly, it is subject to the requirements of the foregoing statutes and their implementing regulations.

Based on the complaint allegations, OCR investigated the following legal issues:

1. Whether the District failed to (a) evaluate the Student for eligibility for special education services or (b) conduct a manifestation proceeding prior to a significant change of placement, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.35 and Title II and its implementing regulation at 28 C.F.R. § 35.130.

2. Whether the District failed to provide procedural safeguards, in noncompliance with Section 504 and its implementing regulation 34 C.F.R. § 104.36 and Title II and its implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District discriminated against the Student on the basis of disability by subjecting the Student to a hostile environment when the District failed to take appropriate responsive action to redress disability-based harassing conduct directed towards the Student when she was physically assaulted on the school bus and called derogatory names, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4 and Title II and its implementing regulation at 28 C.F.R. § 35.130.

OCR reviews evidence under the preponderance of the evidence standard. Under this standard, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion. OCR's investigation included a review and analysis of the documents submitted by the Complainant and the District and interviews of the Complainant and District staff. After a thorough review of the evidence available, OCR has determined that with regard to Issue #1a, there is sufficient evidence to support a finding of noncompliance with Section 504 and Title II, as alleged. Regarding Issues #1b, #2 and #3, OCR has determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II, as alleged. The bases for OCR's determinations are set forth below.

I. REGULATORY AND LEGAL STANDARDS

EVALUATION

The implementing regulation of Section 504 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 to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Section 504 at 34 C.F.R. §104.33 (b) states that for the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

The implementing regulation of Section 504 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 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 implementing regulation of Section 504 at 34 C.F.R. §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 handicap, 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).

The implementing regulation of Section 504 at 34 C.F.R. §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.

PROCEDURAL SAFEGUARDS

The implementing regulation of Section 504 at 34 C.F.R. §104.36 states that a recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

DISABILITY HARASSMENT

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified student with a disability shall, on the basis of their 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.

The Section 504 implementing regulation at 34 C.F.R. § 104.4(b) provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) Deny a qualified student with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) Afford a qualified

student with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;(iii) Provide a qualified student with a disability an aid, benefit, or service that is not as effective as that provided to others;(iv) Provide different or separate aid, benefits, or services to students with disabilities or to any class of student with disability unless such action is necessary to provide the student with a disability with aid, benefits, or services that are as effective as those provided to others;(v) Aid or perpetuate discrimination against a qualified student with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity; or (vii) Otherwise limit a qualified student with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

The implementing regulation of Title II at 28 C.F.R § 35.130 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.

Disability harassment under Section 504 includes intimidation or abusive behavior toward a student based on disability that is sufficiently serious that it creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

II. Factual Analysis and Conclusions of Law

Issue #1 – a) Failure to Timely Evaluate the Student and b) Failure to Conduct a Manifestation Determination Hearing

a. Failure to Timely Evaluate the Student

Factual Findings and Analysis

The Complainant alleged that the District did not timely evaluate the Student. Specifically, the Complainant alleged that the Student's father (Father) had been raising concerns about the Student's behavior, academics and hearing deficits for years and the District only took action after the Complainant, an attorney, became involved.

To determine whether the District failed to provide the Student with a timely evaluation for services pursuant to Section 504, OCR considered: (1) whether the District had reason to believe that the Student might, because of a disability, need special education or related services or needed to be evaluated, (2) whether there exists any evidence that shows the District's conducted an evaluation that complied with the Section 504 standards, and (3) whether the District provided procedural safeguards and notice of parental rights.

In order to determine whether the District timely evaluated the Student, OCR reviewed documents provided by the Complainant and the District, as well as conducted interviews with the Complainant, the Student, the Father and several District employees. The preponderance of the evidence showed that there were multiple documented concerns about the Student's progress in school as it related to her academic performance, hearing, and behavior which would have notified the District that the Student may have, because of a disability, needed special education or related services earlier during the 2015-2016 school year.

Before the 2015-2016 school year, the Student had been retained once in the second grade and then was administratively promoted to the third grade, meaning she was already showing academic deficiencies performing at grade level by the time she reached the fourth grade in August 2015. During the 2015-2016 school year, the evidence showed that she failed every major class and showed signs of failing immediately into the school year, as her grades at every reporting period consisted of Fs and Ds despite the PST efforts made by the Elementary School (School) starting in October of 2015. Special education services were discussed on several occasions but there was no eligibility determination made during the regular school year despite these conversations.

Even after the School began the PST process in October of 2015, the interventions did not help and notes from a meeting held in December of 2015 showed that the Student was severely or moderately below performance in every major subject. The notes indicated that she did not have the vocabulary to understand grade level material and was "unable to master any curriculum at the 4th grade level". These notes further indicated that leading into the 2015-2016 school year, the Student was not functioning at a fourth grade level. Despite the overwhelming evidence that the Student was not performing at grade level and was struggling academically at the beginning of the 2015-2016 school year, the evidence showed that eligibility of the Student to receive related aids and services due to a learning disability was not determined until June 9, 2016.

The District also had knowledge that the Student failed multiple hearing tests and that she had profound hearing loss in one ear. Even though (1) the Student repeatedly failed hearing tests in 2012, 2013, 2014 and 2016, (2) an audiologist recommended teachers to use a microphone and to provide the Student with preferential seating in class, and (3) the Student was failing academically during the relevant time period, there is no evidence that the District evaluated the Student after 2011 to determine whether the Student's hearing impairment constituted a disability, and if so, whether she needed special education or related services because of that disability. In fact, the evidence suggests that instead of relying on a team of knowledgeable people to determine whether the Student's hearing loss was contributing to her poor academic performance throughout the years, the District relied solely on the Student's Teacher, who believed that the Student could hear because the Student never said otherwise and the Student did not appear to have difficulty with her hearing. This same Teacher advised OCR that she did not always wear a microphone in class, and the School Principal advised OCR that the Teacher was not required to wear one all the time.

The District should have also been aware that the Student's behavior may have been a result of a possible emotional or behavioral disability. Prior to the 2015-2016 school year, the Student had threatened to harm herself twice, and notes from these years indicated that Student had problems interacting with other students, got upset easily, and disrupted the class by throwing fits and

crying. During the 2015-2016 school year, the Student's Teacher remarked on the Student's inability to control her emotions and had concern for the Student's welfare as early as September of 2015. On February 11, 2016, the Student again threatened to hurt herself and the School Counselor expressed concern about the student's well-being, as the Student was crying and screaming uncontrollably, refused to listen to adults and would not accept correction or criticism.

The Student also accumulated 15 discipline referrals during the 2015-2016 school year for actions such as fighting on the bus, leaving the classroom without permission and being disrespectful to her teacher. Despite the Student's father giving consent for a Functional Behavioral Assessment on December 13, 2015, a discussion regarding possible ESE intervention for behavioral concerns did not occur until April of 2016, and actual related aids and services were not put in place until a meeting in June of 2016. The evidence showed that the School's efforts to address the Student's behavior included a few anger management sessions with the School Counselor, Counselor-led de-escalation efforts with the Student in class, and conferences with the father during March and April of 2016.

In rebuttal, the District asserted that its duty was to provide an evaluation within 60 days of consent for an evaluation from the Father. The evidence showed that the Father gave consent for a speech/language, psychoeducational and hearing assessment on January 20, 2016. The assessment was apparently completed by March 28, 2016. However, no placement decisions or education plans were put into place until June 9, 2016, almost five months after consent was obtained. OCR does not agree with the District's contention that it completed its evaluation of the Student within 60 days, as it had cumulative data prior to obtaining consent from the Student's father which demonstrated that the Student may have needed special education services well before the placement decision was made.

The District also contended that it was simply following its PST process; however the PST process should not delay the evaluation and placement of a student who has demonstrated a need for special education and/or related aids and services. In this case, the evidence showed that the Student was receiving some sort of PST intervention as early as October 2015, and her Father was involved in a PST meeting in December 2015, yet eligibility and placement decision was not determined until the Summer of 2016.

Conclusion

The preponderance of the evidence showed that the Student had a physical impairment as she was deaf in one of her ears. The District was aware of this impairment. The District also had reason to suspect that the Student may have had a behavioral, learning and/or emotional disorder. The District had ample reason to believe that the Student's diagnosed and suspected impairments might have constituted a disability and, based on one or more disabilities, she might have been in need of special education or related services. While the District did give PST supports, the evaluation process was untimely, the PST supports were ineffective, the District failed to consider appropriate evaluation materials and the PST process did not address the Student's known impairment of deafness in one ear.

For the above reasons, OCR determined that the District was in non-compliance with Section 504, as alleged.

b. Failure to Conduct a Manifestation Determination Hearing

Factual Findings and Analysis

The Complainant alleged that the District did not conduct a manifestation determination hearing before expelling the Student from the School.

To determine whether the District should have conducted a manifestation determination hearing before expelling the Student, OCR considered: (1) whether the Student has been identified as a student with a disability; (2) whether the Student was subjected to a disciplinary exclusion that constituted a significant change in placement; (3) whether the District: re-evaluated the Student to determine whether the conduct is a manifestation of the student's disability prior to imposition of discipline that constituted a significant change of placement; (4) whether in making the manifestation determination the District used a process that comports with the Section 504 regulation at 34 C.F.R. § 104.35; (5) what determination the team made; (6) if the team concluded that the misbehavior was a manifestation of the Student's disability, whether the District nevertheless imposed the exclusionary discipline; and (7) if the Student's 504/IEP team concluded that the misbehavior was a manifestation of the Student's disability, whether the District continued the evaluation, following the requirements of §104.35 for evaluation and placement to determine whether the Student's current educational placement is appropriate.

As stated previously, OCR determined that the District failed to timely evaluate the Student pursuant to Section 504. Initial evidence provided to OCR by the Complainant and Recipient showed that the Student was subjected to disciplinary exclusion when, after a fight on a school bus on April 14, 2016, the Student was suspended for 10 days and recommended for expulsion. However, the District subsequently submitted its corrected records, which showed that after the bus incident on April 14, 2016, the Student was not suspended for 10 days, nor was she expelled. She was suspended for 9 days. In addition to one day of out-of-school suspension on October 6, 2015, the Student was suspended for a total of 10 days. OCR construes any disciplinary exclusion greater than ten days to constitute a significant change in placement.

Because a significant change in placement requires *more than* 10 days, the District was not required to conduct a manifestation determination hearing. Accordingly, OCR determined that there was insufficient evidence that the District was in non-compliance with Section 504, as alleged.

Issue #2 – Failure to Provide Procedural Safeguards

Factual Findings and Analysis

The Complainant alleged that the District failed to provide the Father with procedural safeguards.

The evidence showed that in October 2015, the Student's teacher had an in-person conference with the Father at the School, where she suggested PST, working in small groups and the Student giving her best effort even when it was a struggle. There was another in-person conference with

the Father in November 2015, where the Teacher discussed the PST process as well as bus behavior and ways to help student fit in better with her classmates.

The Father was given notice of a PST meeting on December 3, 2015, where he was advised that the Student needed to be screened for hearing, vision and speech. He was also present during the December 3, 2015 PST meeting and he was allowed to give his input. During this meeting, the Student's Father gave consent for Functional Behavioral Assessment on December 13, 2015. He also gave consent for assessments for speech/language, psychoeducational needs and hearing and the forms provided to him on January 20, 2016 advised him that he had a right to procedural safeguards under the Individuals with Disability Act and attached the procedural rights as well. Furthermore, during the IEP meeting dated June 9, 2016, the Student's Father acknowledged receiving his notice of procedural safeguards.

Conclusion

Section 504 requires a District to have a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

Even though OCR determined that the District did not timely evaluate and determine eligibility and placement of the Student, the evidence did show that during the 2015-2016 school year, when School staff met with the Father to discuss academic deficiencies or the need to evaluate the Student, he was provided procedural safeguards.

For the above reasons, OCR determined that there was insufficient evidence that the District was in non-compliance with Section 504, as alleged.

Issue #3 – Failure to Address Disability-Based Bullying

Factual Findings and Analysis

The Complainant alleged that District discriminated against the Student on the basis of disability by subjecting the Student to a hostile environment when the District failed to take appropriate responsive action to redress disability-based harassing conduct directed towards the Student when she was physically assaulted on the school bus and called derogatory names. Specifically, the Complainant alleged that the District did not act when other students called the Student ugly and poor and told her that she Ebola.

To determine whether the District subjected the Student to a hostile environment and failed to responsive action to redress disability-based harassment, OCR considered: (1) whether the Student was subjected to unwelcome comments or conduct based upon her protected class status (disability), (2) whether the conduct was sufficiently serious to deny or limit the Student's ability to benefit from or participate in the educational program, (3) whether Recipient knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

OCR interviewed the School staff and reviewed all of the disciplinary referrals, investigative notes, incident reports, and PST meeting notes related to the Student in order to determine if the Student had been subjected to unwelcome comments based on her disability. The evidence showed that during the 2015-2016 school year, the Student engaged in several fights with some of her peers on the bus. Her record included 15 discipline referrals and 9 of those were related to altercations on the bus. While the preponderance of the evidence establishes that the Recipient had notice that the Student was involved in altercations with different students on the bus at least nine times and was advised by the Student's father at least once on record that she was being picked on by boys during the 2015-2016 school year, there was no evidence that these altercations were based on the Student's disability.

Firstly, none of the disciplinary referrals or investigative notes related to these referrals or incident reports noted any reference related to the Student's disability. Secondly, staff at the School did not hear or witness the Student being harassed because of her disability. In addition, the reports made by the Student's Father regarding harassment to District staff only stated that, "boys were fighting the Student" and did not reference comments related to the Student's hearing or other disabilities. Moreover, in an interview with OCR staff, the Student's father and the Student described derogatory comments related to "Ebola" and being "ugly" or "poor", none of which were related to the Student's disability.

Conclusion

The preponderance of the evidence did not corroborate that the Student was subjected to unwelcome comments based on her disability. For this reason, the District's obligation to investigate whether disability harassment was occurring was not triggered, nor was the District's obligation to convene a 504 meeting to determine if the Student's FAPE was denied.

Based on the foregoing, OCR finds that the evidence is insufficient to establish that the District is in noncompliance with Section 504 and Title II as alleged.

III. RESOLUTION

To remedy the noncompliance issues, outlined in Issue 1(a), the District has agreed to implement the provisions of the attached Resolution Agreement (Agreement) which, when fully implemented will resolve the compliance concerns. In the agreement, the District committed to take the following actions: (1) the District will evaluate the Student for her hearing loss and revise the Student's IEP as necessary to accommodate her hearing loss, (2) the District will convene a team of knowledgeable persons and determine whether the Student requires compensatory and/or other remedial services as a result of not being timely evaluated during the 2015-2016 school year, and (3) the District will provide training to all staff at Elementary School regarding the requirements of Section 504 implementing regulations at 34 C.F.R. 104.35 and 104.36 and Title II, with respect to the requirement to timely evaluate and determine eligibility and placement of a Student for related aids and services pursuant to Section 504.

Regarding Issue 1(a), 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.

Regarding Issue 1(b), 2 and 3, 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.

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.

If you have any questions about this complaint, please contact Jamila Montaque, at 404-682-3342 or the undersigned at 404-974-9408.

Sincerely,

April England-Albright, Esq.
Supervisory General Attorney

Enclosure
cc: Andrew Thomas