



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10  
ATLANTA, GA 30303-8927

REGION IV  
ALABAMA  
FLORIDA  
GEORGIA  
TENNESSEE

April 1, 2017

Mrs. Margaret Taylor Allen  
Office of the Superintendent  
Montgomery Public Schools  
307 S. Decatur Street  
Montgomery, Alabama 36104  
[superintendent@mps.k12.al.us](mailto:superintendent@mps.k12.al.us)

**Re: OCR Complaint No. 04-17-1004**

Dear Mrs. Allen:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint that the Complainant filed against the Montgomery County Schools in Alabama (District), alleging discrimination on the basis of disability and retaliation. Specifically, she alleged that the District retaliated against her for her disability advocacy work on October 4, 2016, when she was not permitted to enter an IEP/Manifestation meeting for her client for 45 minutes without justification.

The Complainant also filed this complaint on behalf of the Parent and the Student, who attended XXXXXXXX (School), alleging that the District was failing to provide a free appropriate public education (FAPE) for the Student by not providing the Student any related aids or services while he is on homebound placement, and failing to properly evaluate the Student for behavioral services despite several behavioral incidents.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990, 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 financial assistance from the Department, the District is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether the District retaliated against the Complainant after her disability advocacy efforts, by delaying her entrance into a due process/manifestation determination meeting for her clients, the Parent and Student, in violation of the Section 504 implementing regulation at § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

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

[www.ed.gov](http://www.ed.gov)

2. Whether the District denied the Student a FAPE by failing to provide any related aids and services while he is on homebound placement, in violation of the Section 504 implementing regulation at § 104.33, and the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District failed to timely and appropriately evaluate the Student for a potential need for behavioral services despite several behavioral incidents, in violation of the Section 504 implementing regulation at §§ 104.35-36, and the Title II implementing regulation at 28 C.F.R. § 35.130.

During the course of OCR's investigation, OCR interviewed the Complainant via email, as she requested, and she did not send any additional documentation for OCR to consider. OCR reviewed the documentation provided by the District, including the District's evaluation and placement, as well as homebound placement policies and procedures; the special education file for the Student from January 1, 2015 forward, including all meeting notes and Individualized Education Programs (IEP) and supporting documents for the Student as well as discipline referrals; homebound placement documentation pertaining to the Student; and internal/State Department of Education complaint documents regarding the Student. OCR interviewed the Homebound Teacher and the District Zone Coordinator for Special Education.

OCR reviews evidence under a preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates the evidence obtained during an investigation to determine whether the greater weight of the evidence was sufficient to support a conclusion that the recipient failed to comply with a law or regulation enforced by OCR, or whether the evidence was insufficient to support such a conclusion.

After a thorough review of all of the available evidence, OCR has determined, based on the preponderance of the evidence, that there is insufficient evidence to establish non-compliance with respect to allegations #1 and #3 raised in this OCR complaint. The basis for OCR's determination for allegations #1 and #3 are set forth below. Prior to OCR completing its investigation of allegation #2, the District offered to resolve this allegation through a voluntary resolution agreement. A brief summary of the evidence gathered for allegation #2 at the point when the District offered to resolve, is also set forth below.

## **Legal Standards**

### **Issue 1: Retaliation**

The regulation implementing Section 504 at 34 C.F.R. § 104.61, incorporates the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. Sections 2000d *et seq.*, at 34 C.F.R. § 100.7(e), which provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation or other matter in connection with a complaint. The regulation implementing Title II at 28 C.F.R. § 35.134, likewise prohibits

retaliation against persons who have filed complaints or otherwise engaged in activities protected by the regulations.

### Issue 2: Free Appropriate Public Education

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) and (b)(1) and (2) requires a recipient to provide each qualified person with a disability in its jurisdiction a free appropriate public education (FAPE), regardless of the nature or severity of the person's disability. A FAPE is defined in the Section 504 regulations as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of other persons are met. The provision of a FAPE must also be based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this standard.

### Issue 3: Re-evaluation

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires that a recipient evaluate any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in a regular or special education program. The Section 504 regulation at 34 C.F.R. § 104.35(b) requires a recipient to establish standards and procedures for the evaluation and placement of students with disabilities. The regulation implementing Section 504 at 34 C.F.R. § 104.35(c) requires that in interpreting evaluation data and in making placement decisions, a recipient shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; and 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. The Section 504 regulation at 34 C.F.R. § 104.35(d) states that a recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this requirement. However, the regulation does not require an evaluation to be initiated within a specific timeframe. OCR interprets the regulation to require that evaluations be conducted in a reasonable time period, so that disabled students are not denied a free appropriate public education (FAPE).

As set forth in Appendix A, Subpart D of the Section 504 regulation, it is not the intent of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the process requirements of Section 504. The appropriate forum for raising these concerns is through the impartial due process hearing procedures in the District.

Title II offers no greater protection than Section 504 with respect to the complaint allegations; therefore, OCR investigated this complaint applying the Section 504 regulations.

## **Factual Findings and Analysis**

### ***Background Information***

The Complainant is an advocate who represents the Parent and Student for this OCR complaint as well as for internal proceedings with the District. At the time the OCR complaint was filed, the Student had an IEP for XXXXX and was also under a behavioral plan.

### **Issue 1: Retaliation**

To establish retaliation, OCR must find that: (1) the recipient took adverse action contemporaneous with, or subsequent to, the protected activity; (2) the recipient knew that the individual engaged in a protected activity or believed that the individual might engage in a protected activity in the future; (3) there is some evidence of a causal connection between the protected activity and the adverse action; and (4) the recipient cannot provide a legitimate, nondiscriminatory and non-pretextual reason for its action. If OCR finds evidence that one element is not met, OCR will stop its analysis and not proceed to look at the other required elements of retaliation.

### **Adverse Action**

For OCR to determine that a recipient subjected an individual to an adverse action, the recipient's action must significantly disadvantage the individual as to his or her status within the program, or his or her ability to gain the benefits or educational opportunities of the program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims.

The Complainant alleged that when she arrived about 15 minutes late for a meeting at the School on XXXX, and identified her name and purpose of her presence (to attend an IEP meeting for the Student and Parent) the individual left the counter and walked down the hall. Even though it appeared as if the front desk staff person was reporting her arrival, the Complainant stated that she ended up waiting at least 20 minutes before being permitted to enter the meeting. When asked if any decisions had been made before she arrived in the meeting, the Complainant stated that to her knowledge no decisions had been made. She also stated that she was able to participate in the meeting. The Complainant asserts that her delayed arrival is retaliation by the Special Education Director to prevent the Complainant from further advocacy/protected activity.

The Zone Coordinator for Special Education (Coordinator), who was present at this XXX meeting, explained in her OCR interview that since they knew the Parent had an Advocate (e.g. the Complainant) and she seemed to be looking at her phone before the meeting started, team members asked the Parent if the Complainant or someone else was coming to the meeting, and

the Parent said no. Because team members were not sure what to do, they decided to wait an additional 15 minutes, starting the meeting at 9:45am, instead of 9:30am. The Coordinator indicated that after the meeting started and the behavior at issue was discussed, a decision was made by the team, outside the presence of the Complainant, that the behavior (fight) was not a manifestation of the Student's disability, which was listed only as XXX at the time. Once the Complainant entered the meeting, approximately 15 minutes later, the Coordinator stated that the Complainant verbally informed the team about the Student's recent additional diagnoses including XXXXXXXXXXXX, and she also stated that the Student was off his medications. The team then determined, based on this new information, that the behavior was a manifestation of the Student's disabilities. The Coordinator described the meeting as very productive and that the Parent and the Complainant were in agreement.

The official meeting notes provided by the District are consistent with the Coordinator's explanation provided. According to the notes, the meeting was set to begin at 9:30 am but began at 9:45 am, and the purpose of the meeting was to review/revise the IEP and conduct a manifestation determination (MDR) review. The Parent was given her rights and stated she had no questions. The General Education Teacher then gave a statement about the Student's behavior during her observations of him. The Parent asked what happened the day of the fight the Student engaged in which was the subject of the MDR and the Special Education Teacher explained what he saw the day of the fight. The Behavior Specialist discussed the behavior of the Student and then the Parent gave a brief description of his medication. Next, the minutes indicate that the Parent disagreed with the School's determination that the Student's disability was not a factor in the incident at School. The minutes reflect that the Complainant joined the meeting at this point and there was a discussion about the Student's additional medical conditions and all of the medications he is prescribed. Frequency charts were recommended for his behaviors and all the effects of the Student's medications were discussed.

The minutes also reflect that the Student would schedule a new appointment with a doctor to get new medication and would ask for a health plan from the School nurse. Based on the new information verbally provided by the Complainant, the IEP team determined that the Student's behavior was due to his disability, and a health plan and crisis plan would be created. Another IEP meeting would be held after the Student sees the doctor to review a new plan for him. The Parent was in agreement to move forward with a new plan and the Complainant agreed to rescind the due process paperwork submitted.

The preponderance of the evidence shows that while the Complainant was not present at the beginning of the meeting and a decision was made, that decision was reversed once the Complainant did enter the meeting and the revised decision was based on the Complainant's information and participation in the meeting. Based on the above, OCR finds that the Complainant not entering the meeting until a few minutes later, did not result in any disadvantage for the Complainant, and certainly did not prevent further protected activity by the Complainant nor hamper any rights of the Parent or Student, especially since the evidence shows that she attended subsequent meetings with the School to advocate for the Student after this meeting. Moreover, OCR finds that a reasonable person under the circumstances described, particularly with respect to what happened afterwards, would not be deterred from further protected activity based on the alleged act. In summary, the alleged act, even if true, was not

sufficient to meet the legal standards to constitute an adverse action under the applicable laws OCR enforces. Therefore, OCR will not proceed further in its retaliation analysis because the first element is not met, and OCR concludes there is insufficient evidence to support a finding of retaliation, as alleged.

**Issue 2: Denial of FAPE for failure to provide special education related aids and services during homebound services.**

As stated above, the District offered to resolve this allegation prior to OCR completing its investigation. Pursuant to OCR's *Case Processing Manual* at Section 302, a complaint may be resolved when, before the conclusion of an investigation, "may be resolved at any time when, before the conclusion of an OCR investigation, the recipient expresses an interest in resolving the allegations and issues *and* OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation." Set forth below is a summary of the evidence obtained thus far, prior to the signing of the resolution agreement.

The Complainant contended that as of XXXXXX, the Student had been on homebound placement for about a month and the District had yet to provide any IEP services to the Student. On follow-up later in the investigation, the Complainant stated that the Student did not receive Homebound services until early XXXXX and the Homebound Teacher does not stay longer than 15-20 minutes and does not understand Math to teach the Student.

Records provided by the District indicate that the IEP meeting to determine whether the Student would receive homebound placement occurred on XXXXX. OCR interviews indicated that there was a homebound teacher assigned to the Student in XXXX, but she only visited twice. Additional information provided by the District also shows that the current Homebound Teacher did not start until XXXXXX, because the District had trouble finding a homebound teacher who met the qualifications specified by the Complainant and who was available for the job. The current Homebound Teacher is XXXXXXXXXX. All of the District's homebound teachers are certified teachers in either special or regular education, according to the Coordinator.

According to the interviews and the Student's homebound placement records, the Student has continued to receive visits from the Homebound Teacher most every week since XXXXX. The Coordinator also indicated that the District intended to hold an IEP meeting at the end of the school year to determine how many make up hours the Student needed for the homebound instruction missed since XXXXXX.

OCR did not complete the investigation, because the District voluntarily agreed to resolve this matter. Based on the foregoing, OCR accepted the District's request to resolve this complaint and the District entered into the enclosed Resolution Agreement submitted to OCR on March 31, 2017, which when fully implemented, will resolve allegation #2 in this complaint.

This agreement requires the District to 1) hold an IEP meeting to determine whether school-based mental health services are needed, and determine how the Student's special education services will be provided by a Special Ed teacher or paraprofessional while the Student is on homebound, as well as amend the IEP accordingly; 2) hold another IEP meeting at the end of the

school year to determine how many hours of homebound placement need to be made up since XXXX and develop a plan to provide such hours no later than August 2017; 3) revise its 2015 Homebound Manual, to specify that for students with a disability who are eligible for Section 504 services, the student's IEP Team/Section 504 Team must make an individualized determination of whether that student with a disability needs their special education services to be provided by a Special Ed teacher or paraprofessional while on homebound placement in order to ensure the District meets its legal obligation to provide that student with a free appropriate education (FAPE) and if so, the IEP should be amended to detail how such special education services will be provided while on homebound placement to ensure a FAPE continues to be provided; 4) revise its 2015 Homebound Manual and Application Forms, to provide a new homebound instruction log form which will be required by all Homebound instructors to document the homebound services they provide, by briefly summarizing on such log form, a breakdown of the regular and special education (if applicable) services provided each day, with time and duration of service listed; and 5) after approval by OCR, publication of the new revised Homebound Manual and training for applicable staff on this revised Homebound Manual.

**Issue 3: Failure to evaluate/re-evaluate the Student for behavior issues**

The Complainant contended that services related to the Student's disorders are not being addressed, and there have been discipline referrals for behavior problems and no Behavior Plan.

OCR obtained records from the Student's special education file beginning from January 2015 forward. Contrary to the Complainant's allegation, the record included an IEP in which the Student had been evaluated for behavior problems XXXXXXX, as well as numerous references to the Student's behaviors. The evidence also shows that every IEP and IEP meeting thereafter addressed the behavioral concerns. Sometimes the team found the behavior had improved and sometimes they found it had worsened and they adjusted the IEP and behavioral services.

The Section 504 regulation at 34 C.F.R. § 104.35 requires that a recipient evaluate, and periodically re-evaluate, any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the placement of the person in a regular or special education program. The evidence establishes that the District met on four occasions after XXXXX to review the Student's progress or lack thereof regarding behavior problems. Because the preponderance of the evidence establishes that the Student's behavior problems were considered and evaluated/re-evaluated on several occasions, there is insufficient evidence of noncompliance with regard to this allegation.

OCR notes that the concerns regarding what type of services should be included in the IEP and what types of special programs are needed for a specific disability or series of disabilities constitute placement decisions, and therefore, filing a due process complaint is the proper forum for challenging such decisions. As set forth in Appendix A, Subpart D, of the Section 504 regulation, it is not the intention of the Department, except in extraordinary circumstances, to review the results of individual placement and other educational decisions, so long as the District complies with the "process" requirements of the Section 504 regulation concerning identification and location, evaluation, and due process procedures. The documentation indicates the Complainant/Parent was provided their due process rights.

With respect to issue #2, OCR will monitor the District's implementation of the attached 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. Further, the Complainant may file a private lawsuit in federal court regardless of whether OCR finds a violation.

With respect to issues #1 and #3, this concludes OCR's investigation and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

OCR has advised the District that it may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This concludes OCR's consideration of this complaint. If you have any questions about this complaint, please contact Ms. Angela Collins, Senior Attorney, at (404) 974-9346, or the undersigned at (404) 974-9408.

Sincerely,

/s/

April England-Albright, Esq.  
Supervisory General Attorney

Enclosures