



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS REGION IV  
61 FORSYTH ST., SOUTHWEST, SUITE 19T10  
ATLANTA, GEORGIA 30303-8927

Region IV  
Alabama, Florida  
Georgia, Tennessee

April 25, 2017

**Via US & Electronic Mail**

Dr. Mark Bazzell  
Superintendent  
Pike County School District  
101 W. Love Street  
Troy, Alabama 36081

Re: Complaint # 04-17-1048

Dear Dr. Bazzell:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Pike County School District (District). The Complainant alleged that the District discriminated against her son (Student) a 6<sup>th</sup> grade student at Pike County Elementary School (School) on the basis of disability (attention deficit hyperactivity disorder combined type (ADHD), sleep disturbance, over anxious disorder, and oppositional defiant disorder (ODD)) when it failed to implement the Student's Section 504 educational plan (Plan) provisions to provide daily updates and to permit the Student to retake tests where he received a grade of lower than 60.<sup>1</sup>

As a recipient of Federal funds from the Department, the District is subject 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, which prohibit discrimination on the basis of disability. As a public entity, the District is subject to the provisions of Title II of the Americans with Disabilities Act of 1990 (Title II), 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. Accordingly, OCR has jurisdiction over this complaint. Additional information about the laws OCR enforces is available on our website at [www.ed.gov/ocr](http://www.ed.gov/ocr).

OCR investigated the following legal issue:

1. Whether the District discriminated against the Student by failing to provide him with a free, appropriate, public education (FAPE) in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b).

During the course of the investigation OCR also opened an investigation into an issue of which it became aware as a result of review of the District's data.

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<sup>1</sup> Late in the complaint investigation the Complainant modified this allegation of her complaint to allege that the Plan required that the Student have an opportunity to retake all tests where he received a 60 or below.

2. Whether the District discriminated against the Student by failing to timely evaluate him to determine whether he needs or is believed to need a functional behavioral assessment (FBA) to meet his needs pursuant to the Section 504 implementing regulation at 34 C.F.R. Section 34 C.F.R. § 104.35.

Before OCR concluded its investigation of this complaint, the District offered to resolve the Complainant's allegations through a voluntary resolution agreement. Pursuant to OCR's *Case Processing Manual* at Section 302, a complaint may be resolved when, before the conclusion of an 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."

## **Legal Standards**

### Free Appropriate Public Education (FAPE)

Pursuant to the regulation implementing Section 504 at 34 C.F.R. § 104.33, a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. 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 are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36. Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

### Evaluation and Placement

Pursuant to 34 C.F.R. § 104.35, 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 handicap, 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."

## **Summary of the Investigation**

As noted above, the Complainant alleged that the District failed to implement the Student's Plan by failing to provide daily communication and failing to provide the Student with an opportunity to retake all tests for which the Student received below a 60.

OCR obtained documentation from the District to ascertain the scope of the Student's Plan as well as the required elements. The documents show that the Student has had a Plan in place since 2014 which was created based on review of the Student's medical documentation, consideration of parent input as well as teacher and administrator observation. The Plan elements have changed over the school years, but have included, but not been limited to: testing in the afternoon, small group setting, additional time, close proximity to the teacher, remediation, timer to finish activities, time

out, increased communication with the Complainant as well as an opportunity to retake assessments for which the Student received less than a 60 (once) to be recalculated with his first grade.

Before OCR concluded its investigation of the Complainant's allegation regarding compliance with, and implementation of, the Student's Plan, the District offered to resolve this allegation of the complaint through a voluntary resolution agreement (Agreement). Based on the foregoing, OCR agreed to enter into an Agreement to resolve Issue One under Section 302 of the case processing manual (CPM).

During OCR's review of the data produced by the District, OCR found that the Student's October 6, 2014 Plan included notes by School staff that two staff members would work together to complete a FBA for the Student through interviews, student surveys, and observations in all settings, and that the team will meet to create a thorough behavior intervention plan (BIP) and a behavior progress chart once the FBA is completed. The Complainant signed the notes stating that she gave permission for a full FBA on February 18, 2015. OCR found that the file contained no documentation to establish that a FBA occurred, and the District conceded that the Student has not been provided with a full FBA to date. Because the data was sufficient to determine that the District had failed to conduct a timely evaluation of the Student for a FBA OCR finds that the District is in non-compliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35 and OCR has entered into Agreement terms under Section 303 of the CPM to resolve this noncompliance.

The District entered into the enclosed Agreement and submitted it to OCR on April 24, 2017. The enclosed Agreement, when fully implemented, will resolve all of the allegations in this complaint and the following compliance concerns identified during the course of the investigation.

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. Further, the Complainant may file a private lawsuit in federal court regardless of whether 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. In the event that OCR receives 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.

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.

OCR appreciates the District's cooperation in this matter and looks forward to receiving the monitoring reports, as required by the enclosed Agreement. If you have any questions, please contact Colleen Grogan, General Attorney at 404-974-9395.

Sincerely,

Andrea de Vries  
Compliance Team Leader

Enclosure.