



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

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ATLANTA, GA 30303-8927

REGION IV  
ALABAMA  
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July 18, 2017

**Via United States Mail**

Dr. Eric Jones  
Superintendent  
Jackson-Madison County School District  
310 North Parkway  
Jackson, Tennessee

Re: Complaint No. 04-17-1219

Dear Dr. Jones:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed with our office against the Jackson-Madison County School District (District) on January 19, 2017, alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District discriminated against her son (Student), a student at XXXXX XXXXXXXX XXXXXXX XXXXXXX (School), by failing to timely evaluate the Student, implement his Section 504 Plan, and conduct a manifestation determination review (MDR) at his disciplinary hearing. The Complainant also alleged that the District failed to provide a copy of due process rights and retaliated against her by refusing to communicate with her via electronic mail and failing to provide immediate notification to Complainant about the Student being disciplined.

OCR is responsible for enforcing 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 based on disability, as well as 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 based on disability by a public entity. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to the requirements of both Section 504 and Title II. Accordingly, OCR has jurisdiction over this complaint. 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 the District discriminated against Student by failing to provide a free appropriate public education (FAPE) when it failed to timely evaluate and implement the Student's

Section 504 plan in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33 and Title II and its implementing regulation at 28 C.F.R. § 35.130.

- 2) Whether the District discriminated against the Student by failing to conduct an MDR after more than 10 days of suspension, 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.
- 3) Whether the District discriminated against the Complainant when it failed to provide her with due process rights, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.36 and Title II and its implementing regulation at 28 C.F.R. § 35.130.
- 4) Whether the District retaliated against the Complainant by refusing to communicate with her via electronic mail and failing to provide immediate notification to the Complainant about the Student being disciplined, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61 and Title II and its implementing regulation at 28 C.F.R. § 35.134.

During the course of the investigation, OCR reviewed documents submitted by the Complainant and the District. OCR corresponded with the Complainant via electronic mail and spoke with Complainant on March XX, 2017 regarding clarification of the complaint. The District provided documentation, including the Student's Section 504 documentation, disciplinary records, the policies and procedures regarding discipline and Section 504, and the Student's attendance report. Prior to the conclusion of OCR's investigation, the District expressed interest in voluntarily resolving this complaint. The applicable legal standards and OCR's findings of fact thus far in the investigation are summarized below.

#### **A. Legal Standards**

Section 504 and its implementing regulation at 34 C.F.R. § 104.33 state at subsection (a) that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education 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. The Section 504 regulation at 34 C.F.R. §104.33 (b) states that 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 persons with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

Section 504 and its implementing regulation at 34 C.F.R. § 104.35 specify at subsection (a) that a recipient that operates a public elementary or secondary education program shall conduct an

evaluation in accordance with the requirements of subsection (b) 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.

OCR considers the expulsion or suspension of a student with disabilities for more than 10 consecutive school days as a significant change in placement under the Section 504 regulation at 34 C.F.R. § 104.35(a). Additionally, a series of suspensions that are each 10 days or fewer in duration may create a pattern of exclusion that constitutes a “significant change in placement.” The determination of whether a series of suspensions create a pattern of exclusion that constitutes a significant change in placement must be made on a case-by-case basis. Among the factors considered in making this determination are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from school.

In order to implement an exclusion that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student in accordance with the Section 504 regulation at 34 C.F.R. § 104.35. The first step in the reevaluation includes a determination by a group of persons knowledgeable about the student of whether the behavior is a manifestation of the student’s disability. If it is determined that the misconduct is a manifestation of the student’s disability, the student may not be excluded and the evaluation team must determine if the student’s current educational placement is appropriate.

The Section 504 implementing regulation at 34 C.F.R. § 104.36 provides that a recipient shall establish and implement, with respect to actions regarding the identification, evaluation, and placement of persons with disabilities are in need of or are believed to be in need of special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for participation by parents or guardian to examine relevant records, an impartial hearing with an opportunity for participation by parents or guardian and counsel, and a review procedure.

The Title II implementing regulation at 28 C.F.R. §§ 35.130(a) and (b)(1)(i), (ii), and (vii) contain substantially the same general prohibitions against disability discrimination as the above Section 504 provisions. As stated in the Title II implementing regulation at 28 C.F.R. § 35.103, this regulation shall not be construed to apply a lesser standard than the standard applied under Section 504.

Title VI of the Civil Rights Act of 1964, which is incorporated by reference by Section 504, specifically its implementing regulations at 34 C.F.R. §§ 100.3-100.10, provides at § 100.7(e) against retaliation as follows: “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 section 601 of the Act or this part, or because he has made a complaint, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

## **B. Background and Preliminary Findings**

Student was in the XXXXX grade during the 2016-2017 academic school year. A review of “The Student Attendance Report,” provided by both the Complainant and the District, shows that the Student was placed on out-of-school suspension (OSS) on XXXXXXXX XX, 2016 through XXXXXXXX XX, 2016 (five school days) for accumulated violations. The XXXXXXXX XXX XXXXXXXXXXXXXXX (XXXXXXXXXXXX) developed a functional assessment and behavior plan for the Student on XXXXXXXX XX, 2016. The behavior plan required teachers to intervene early when the Student becomes angry, annoyed, or upset; to encourage the Student to make better choices when he had done something wrong; ask the Student to explain why he believes his behavior occurred; all the Student to receive individual counseling as needed; and have an opportunity to earn rewards weekly.

On or about XXXXXXXX XX, 2016, Complainant left paperwork at the School requesting the development a Section 504 Plan for the Student and requesting a meeting with the XXXXXXXXXXXXXXX Documentation provided shows an “Invitation to a Meeting” (Invitation) dated XXXXXXXX XX, 2016. The Invitation indicates that there is going to be a meeting at the School to discuss a Section 504 evaluation, identification and services. However, the Invitation does not indicate the date or time of the meeting. It is noted on the Invitation that it was mailed certified two (2) times but came back as unsigned. The District provided copies of two mailed certified receipts; however, one is dated before XXXXXXXX XX, 2016. The Invitation also notes that “parent did not attend.” The XXXXXXXXXXXXXXX stated that he wrote a Section 504 Plan for Student after receiving the paperwork on XXXXXXXX XX, 2016.

A review of the Student’s Section 504 Plan shows that the plan was developed by the XXXXXXXXXXXXXXX on XXXXXXXX XX, 2016. The Section 504 Plan provides for accommodations including preferential seating, extended time testing, allowing the Student to work alone if needed, reinforcement of positive behavior, and allowance for breaks as needed. The Section 504 Plan also shows that the plan was only signed by the XXXXXXXXXXXXXXX. There is evidence that the XXXXXXXXXXXXXXX provided the Student’s teachers with information concerning the accommodations; however, the memorandum indicating the Student’s teachers were provided with the information is undated.

On XXXXXXXX XX, 2017 through XXXXXXXX 23, 2017 (five school days), the Student was given OSS for XXXXXXXX XX XXXXXXX XX X XXXXXXX and being disruptive. This brought the total of OSS days for the Student to 10 school days for the current academic school year. According to the Complainant, the School never contacted her regarding a Section 504

meeting as of late XXXXXXXX 2017, when she inquired at the school. The Complainant filed a series of School level complaints on XXXXXXXX XX, 2017, concerning the lack of a Section 504 Plan for Student and not being contacted for a meeting. The XXXXXXXXXX responded by letter dated XXXXXXXX XX, 2017. The XXXXXXXXXX informed the Complainant that a Section 504 Plan was developed for the Student on XXXXXXXX XX, 2016. The letter also talks about the difficulty in contacting the Complainant.

On XXXXXXXX XX, 2017, the Student was suspended for 10 days OSS for striking a teacher in the back, to be served beginning XXXXXXXX XX and ending on XXXXX X, 2016. In addition, the Student was referred for a disciplinary hearing. OCR reviewed a copy of the Suspension/Disciplinary Form which contains information concerning the discipline (Suspension Notice). The Suspension Notice includes a note that there was no answer when the School attempted to contact the parent by phone on XXXXXXXX XX, 2017. Complainant spoke with the XXXXXXX XXXXXXXXXX XXXXXXXXXX on XXXXXXXX XX, 2017 after he contacted her by email to inform her of the incident, the Student's suspension, and also to set up a meeting for XXXXXXXX XX, 2017 to address the Student's Section 504 Plan. Complainant also received the Suspension Notice, which she provided to OCR.

A meeting was convened on XXXXXXXX XX, 2017 with the assistance of the District's XXXXXXX XXXXXXXXXX XXXXXXXXXX. The Complainant stated that she never received the Notice of Section 504 Procedural Safeguards (Notice) at this meeting. The District provided a copy of the Notice, but it is not signed by the Complainant. It is noted that the model forms for the District include a "Model Receipt of Notice of Procedural Safeguards and Rights" which was not included in the documentation for Student's individual Section 504 file.

The Student Attendance Report shows that the Student was placed on a total of 20 days OSS at the time of his disciplinary hearing. The Disciplinary Hearing Authority (DHA) committee recommended that the Student be remanded to an alternative school for the remainder of the 2016-2017 school year and the first 30 days of the 2017-2018 school year. The referral to the DHA document does not indicate that a manifestation determination review was conducted at the time of the hearing. The evidence indicates that the Section 504 Plan predates the DHA hearing, which took place on XXXXX X, 2017, and for which no MDR was conducted.

After the hearing and decision, the Complainant appealed. On XXXXX XX, 2017, the District issued a reversal of the DHA's decision and returned Student to School beginning XXXXX XX, 2017. The reversal letter did not indicate the reasons for the reversal, only that the XXXXXXXXXXXXXXXXXXXX had reviewed the appeal and the DHA records for the hearing.

Prior to the completion of the investigation, the District agreed to resolve the complaint allegations addressed above through a voluntary resolution agreement which when fully complied with would address the compliance issues 1, 2, and 3.

### **Retaliation**

The Complainant alleged that District retaliated against her by refusing to communicate with her via electronic mail and failing to provide immediate notification to the Complainant about the Student being disciplined.

In order to make a finding of retaliation, the preponderance of the evidence must show that there was an adverse action, a protected activity, notice of the protected activity to the alleged retaliator, and a causal connection between the protected activity and adverse action. If these foregoing elements are met, the recipient may provide evidence of a legitimate, non-discriminatory reason for the adverse event which is not merely a pretext for the adverse action. If OCR determines that any element is missing, OCR will conclude that there is insufficient evidence to support a finding of retaliation.

### **Adverse Action**

OCR determined whether the District took adverse action against the Complainant. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Complainant in their ability to gain the benefits of the recipient's program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if the challenged action could reasonably be considered to have acted as a deterrent to further the protected activity, or if the individual was, because of the challenged action, precluded from pursuing their discrimination claims. Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.

The Complainant alleged that the School did not contact her by electronic mail as was her stated preference and that they failed to notify her by way of electronic mail of the XXXXXXXX XX, 2017 incident and the ensuing suspension. A review of the documents shows emails provided by both the Complainant and the District with the XXXXXXXX XXXXXXXX XXXXXXXXXX who emailed the Complainant at X:XX a.m. on XXXXXXXX XX, 2017 asking her to call him about something very important. There is another email from the XXXXXXXX XXXXXXXX XXXXXXXXXX that same day, copying the Complainant, stating that he spoke with the Complainant that day about the XXXXXXXX XXXX incident, the suspension, and the disciplinary hearing set for XXXXX X, 2017.

In addition, in response to the Complainant's allegation that the School refused to contact her by email, in the XXXXXXXX XX, 2017 letter in response from the XXXXXXXXXX concerning the Complainant's school level complaints, the XXXXXXXXXX explains that the Complainant requested work for the Student via email. The XXXXXXXXXX responded that the Student's

work would be ready for pickup that Friday. When the Complainant did not come to the School, the XXXXXXXXXX sent an email reminder. The Complainant asked that the work be mailed. The XXXXXXXXXX explained that the Student had textbooks and workbooks so it would need to be picked up.

With respect to refusing to communicate with her via electronic mail, the evidence shows that the School communicated with the Complainant in a variety of methods to include emailing, phone, and mail. With respect to the District failing to provide immediate notification to the Complainant about the Student being disciplined, the evidence shows that the morning after the incident, the School contacted that Complainant concerning the Student being disciplined. Although the Complainant's preferred method of communication may have been by email, the evidence shows that the School communicated with the Complainant in a variety of methods and no evidence that the method of communication significantly disadvantaged the Complainant in their ability to gain the benefits of the recipient's program or was considered to have acted as a deterrent to further the protected activity. Based on the foregoing, OCR concludes that there is insufficient evidence that the District retaliated against the Complainant in noncompliance with Section 504 and Title II as it relates to this allegation.

### **C. Conclusion**

Pursuant to Section 302 of OCR's Case Processing Manual (CPM), a complaint may be resolved prior to the conclusion of the investigation if the recipient expresses an interest in resolving the issues and OCR determines that it is appropriate to resolve them with an agreement during the course of the investigation. In this case, the District expressed interest in voluntarily resolving the complaint. OCR has received the enclosed, executed Resolution Agreement (Agreement) from the District, which, when fully implemented, will resolve this complaint. 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. Furthermore, the District is advised that the Complainant may file a private suit whether or not OCR finds a violation.

This concludes OCR's investigation of the complaint 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.

Please be advised that the District 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.

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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 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. Therefore, we are closing this complaint effective the date of this letter. OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact Mimi Loughlin, Investigator/General Attorney, at (404) 974-9444 or the undersigned, at (404) 974-9366.

Sincerely,

Virgil Hollis  
Compliance Team Leader

Enclosure (Executed Resolution Agreement)

cc: XXXXXXX XXXXXXX, Esq.  
Attorney for the District  
*Via electronic mail only*