



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

June 2, 2017

**Via First Class and Electronic Mail**

Dr. Shawn Joseph

XXXX

2601 Bransford Avenue

Nashville, TN 37204

Re: Complaint # 04-17-1264

Dear Dr. Joseph:

On January 18, 2017, the U.S. Department of Education (Department), Office for Civil Rights (“OCR”), received the above-referenced complaint filed by XXXX (Complainant) against the Metro Nashville Public School District (District) alleging discrimination on the basis of disability against her Student. Specifically, the Complainant alleged that the District contracts with the YMCA Fun Company to provide before and after care services for students at Oliver Middle School (School). Between August 2016 and December 2016, the School failed to implement the Student’s Individualized Education Program (IEP) requirement that the Student have a one-on-one aide during his participation in before and after school care through the YMCA Fun Company. In addition, the Complainant alleged that from January 3, 2017 to present, the School denied the Student the benefits of, and excluded him in from participation in, the before and after school program operated by the YMCA Fun Company.

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 opened an investigation of the following legal issues:

1. Whether the District denied the Student a free appropriate public education (FAPE) by failing to implement the requirements of his IEP in the context of the School’s before and after school program between August 2016 and December 2016, in non-compliance with the Section 504 implementing regulation at 34 C.F.R. § 104.33 and the Title II implementing regulation at 28 C.F.R. § 35.130.

2. Whether the District discriminated against the Student on the basis of disability by denying him the benefits of, and excluding him from participation in the YMCA Fun Company, a program and/or activity operated by the District, in noncompliance with the Section 504 implementing regulations at 34 C.F.R. §§ 104.4 and 104.37<sup>1</sup> and the Title II implementing regulations at 28 C.F.R. § 35.130.

In reviewing the Student's Individualized Education Program (IEP), OCR determined that complaint allegations did not implicate educational services for the Student, and thus his receipt of FAPE. Therefore, OCR did not proceed with an investigation of issue 1. Issue 1 is dismissed as of the date of this correspondence. The regulatory subsections at issue in this complaint were clarified with counsel for the District during OCR's investigation and negotiations.

## **Legal Standards**

Pursuant to the regulation implementing Section 504 at 34 C.F.R. Part 104.4, no qualified person with a disability shall, 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 which receives Federal financial assistance. A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others . . . or 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.

With respect to non-academic services, the Section 504 implementing at 34 C.F.R. § 104.37 states that a recipient shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

The regulation implementing 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. Further, a public entity, in providing any aid, benefit, or

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<sup>1</sup> OCR's February 28, 2017 data request letter incorrectly cited the Section 504 regulation at 34 C.F.R. § 104.21. The appropriate regulation is included in this correspondence. In addition, the correct regulatory subsections were discussed with counsel for the District throughout the course of OCR's investigation.

service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service or afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.

In addition, pursuant to the Title II implementing regulation at 28 C.F.R. § 35.130(b) (7) (i), a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

### **Summary of the Investigation**

On April 24, 2017, prior to OCR completing its investigation, the District sought to resolve the complaint 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."

Prior to the District's request to resolve the allegations, the facts established that the District maintains a contract with YMCA of Middle Tennessee (YMCA) to provide before, after, and summer school services at several District schools, including Oliver Middle School (School), where the Student is enrolled. The YMCA's before and after school program at the School operates as the "YMCA Fun Company." The qualifications for participation in the YMCA's programs within the District are limited to meeting the YMCA's age requirements and enrollment in a District school where the YMCA operates a before, after, or summer school program.

The Student is served by the School through an IEP, which, in part, requires that he have one-on-one support to complete activities in each of his classes. Prior to the commencement of the 2016-2017 school year, the Complainant executed enrollment documents to secure the Student's participation in the YMCA Fun Company. Therein, she identified the Student's disability, his inclusion instructional placement, and his need for a one-on-one aide.

According to **XXXX**, prior to the Student's enrollment in the YMCA Fun Company it was determined, in conjunction with the Complainant, that the Student required a one-on-one aide to fully participate. Notwithstanding, the Student was permitted to participate on a trial basis between August and December 2016 without an aide. As of December 2016, **XXXX** determined that the Student could no longer participate without an aide. At that time, the YMCA did not have sufficient staffing to provide a one-on-one aide for the Student. Therefore, beginning in January 2017, the Student was excluded from participation in the YMCA Fun Company until an aide could be hired. As of the resolution of this matter, the YMCA had not hired an aide. The Student's exclusion from the YMCA Fun Company spanned from January through May 2017.

Between December 2016 and February 2017, the Complainant filed complaints with YMCA and School staff about the Student's discriminatory exclusion. OCR could not conclude, based on the evidence available, what, if any, action the District took as a result of the Complainant's allegations of discrimination.

The District entered into the enclosed Agreement and submitted it to OCR on May 26, 2017. The enclosed Agreement, when fully implemented, will resolve all of the allegations and 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 Cerrone Lockett, General Attorney at 404-974-9318.

Sincerely,

Andrea de Vries  
Compliance Team Leader