



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

REGION IV

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

August 1, 2017

Samantha M. Fuhrey, Ed. S.
Superintendent
Newton County Schools
P.O. Box 1469
2109 Newton Drive, NE
Covington, GA 30014

Re: OCR Complaint #04-17-1280

Dear Ms. Fuhrey,

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Newton County School District (District) on February 9, 2017, alleging discrimination on the basis of disability and retaliation. Specifically, the Complainant¹ alleged that the District discriminated against the Student by failing to evaluate her for disability services, failing to conduct an appropriate evaluation prior to assigning her to an alternative school, and retaliating against the Student when it removed her from school and placed her in an alternative setting due to the Student's disability.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit recipients of Federal financial assistance from the Department from discriminating on the basis of disability, and Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 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 Federal financial assistance from the Department and a public entity, the District is subject to Section 504 and Title II.

OCR investigated the following legal issues:

1. Whether the District discriminated against the Student when it failed to evaluate the Student when it learned the Student had ADHD in noncompliance with 34 C.F.R. § 104.35(a)-(c) and the Title II implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District denied the Student a free and appropriate education (FAPE) by assigning her to an alternative school without first conducting an appropriate evaluation, including a determination of whether the conduct in question was related to her disability,

¹ OCR identified the names of the Complainant and Student in previous correspondence and is withholding their names in this letter to protect their privacy.

thereby violating Section 504 and its implementing regulation, 34 C.F.R. § 104.35 and Title II and its implementing regulation, 28 C.F.R. § 35.130.

3. Whether the District retaliated against the Student when it removed her from school and placed her in an alternative setting due to the Student's disability in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.130 and § 35.134.

OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. In investigating in this matter, OCR reviewed and analyzed documents submitted by the Complainant and the District. During the investigation, the Complainant clarified that when she alleged retaliation she actually meant that the District improperly removed her daughter based on the manifestations of her disability addressed above in Issues One and Two. Due to this clarification, OCR did not proceed further with this allegation. Prior to the completion of OCR's investigation, the District agreed to a voluntary resolution agreement that when fully implemented will resolve the compliance issues raised by this allegation.

Legal Standards

The Section 504 regulation 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 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. § 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 disability, 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).

Additionally the Section 504 regulation at 34 C.F.R. § 104.61 states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 also apply to this part. These procedures can be found in §§100.6-100.10 and part 101 of this title. Title VI § 100.7(e) states that intimidatory or retaliatory acts are prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any

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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.

Summary of Investigation

Based on the data provided by the District, the Student was in the sixth grade at Clemens Middle School (School) during the 2016-2017 school year. The Complainant states that the Student has ADHD and had been taking medication for it. In a contact log provided by the District, the Complainant and the School's Assistant Principal met on November 2, 2016 where the Complainant expressed that the school is calling too much and the teachers know that the Student is on medicine. On January 27, 2017, the Student and another student were suspended from school and charged with fighting and campus disturbance. In a letter sent home to the Complainant, the School stated that the maximum penalty for this violation is long-term suspension or expulsion. A disciplinary hearing was scheduled at the Newton County Board of Education on February 9, 2017. The decision reached in the disciplinary hearing for the Student was that she would be expelled from all regular Newton County Schools and activities for the remainder of the 2016-17 school year and that she may be eligible to enroll in the alternative program during the period of this expulsion.

Prior to the completion of OCR's investigation, the District agreed to voluntarily resolve this issue and OCR has determined that it is appropriate to resolve this issue with a Resolution Agreement (Agreement). In accordance with Section 302 of OCR's *Complaint Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the allegation.

The District agreed to enter into an Agreement which obligates the District to provide proper written notification to the Complainant that the District is willing to conduct a comprehensive evaluation of the Student to determine whether or not the Student's needs for related aids and services and compensatory education. Additionally, the Agreement requires the District to provide training to the School's Exception Student Education (ESE) and Section 504 Coordinator(s), administrators, and other relevant staff who have responsibility for implementing the District's ESE and Section 504 services for students.

Conclusion

On July 26, 2017, OCR received the attached Agreement. When fully implemented, the Agreement will resolve the complaint allegations. The provisions of the Agreement are aligned with this complaint and the information obtained during OCR's investigation to date, and are consistent with applicable regulations. OCR will monitor the District's implementation of the Agreement. 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.

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

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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.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. OCR would like to thank the District for its cooperation. If you have any questions about this complaint, please contact Eulen Jang, Attorney, at (404) 974-9467, or me, at (404) 974-9354.

Sincerely,

Scott R. Sausser, Esq.
Compliance Team Leader

Enclosure

cc: Harben, Hartley & Hawkins, LLP