



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

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ATLANTA, GA 30303-8927

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May 9, 2018

Mr. Matthew Massey
Superintendent
Madison County Schools
1275 Jordan Road
Huntsville, AL 35811

Re: Complaint #04-17-1300

Dear Superintendent Massey:

On February 22, 2017, the U.S. Department of Education, Office for Civil Rights (OCR), received the above-referenced complaint filed by the Complainant against Madison County Schools (District). The Complainant alleged that the District discriminated against her daughter, the Student, a student at Sparkman High School (School), on the basis of disability and retaliation. Specifically, the Complainant alleged that the District:

1. failed to provide the Student with a free and appropriate public education (FAPE) when it:
 - a. failed to evaluate the Student when her attendance and academic performance suggested a need for evaluation during the 2014-2015 school year, and
 - b. failed to evaluate the Student for Central Auditory Processing Disorder since November 2016.
2. failed to provide Student with a free and appropriate public education (FAPE) when it failed to implement provisions of her Individualized Education Plan (IEP) by:
 - a. failing to implement the check-in/check-out, and notetaking (for History class) provisions in her Behavior Plan.
 - b. failing to implement the speech-language therapy, collaborative class, test-taking (for History class), and make-up work provisions required in her IEP.
 - c. failing to implement the provisions of her Health plan when she was: penalized by being marked Tardy for visiting the Nurse's office at the beginning of the school day and leaving the Student alone with suspected low blood sugar on November 8, 2016.
3. retaliated against the Student by engaging in the following activities based on the Complainant filing for mediation: (1) inaccurately recording the Student's attendance records, (2) filing Truancy charges against the Complainant, (3) serving the Complainant with Truancy summons twice, (4) advising the Truancy court referee that the District suspects the Student is being abused at home, (5) failing to recommend dismissal of Truancy charges pursuant to provisions in mediation agreement, (6) marking the Student tardy for visiting the Nurse's office at the beginning of the school day.

4. refused to make an exception to its illness check-out policy needed by the Student because of her diabetes on October 18, 2016.

As a recipient of Federal financial assistance from the Department, the District is subject to the provisions of 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 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. 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 by public entities. OCR has jurisdiction over this complaint pursuant to Section 504 and Title II.

Based on the complaint allegations, OCR initiated an investigation of the following legal issues:

1. Whether the District failed to evaluate the Student to determine her eligibility for special education, related services, or accommodations during the 2014-2015 school year and since November 2016, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.33, 104.35, and 104.36 and the Title II implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District denied the Student a free and appropriate public education (FAPE) by failing to implement provisions of the Student's Individualized Education Plan (IEP), Behavioral Intervention Plan (BIP) and Health Plan during the 2016-2017 school year, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.33 and the Title II implementing regulation at 28 C.F.R. § 35.130.
3. Whether the District retaliated against the Complainant and/or Student by engaging in the following activities based on the Complainant filing for mediation: (1) inaccurately recording the Student's attendance records, (2) filing Truancy charges against the Complainant, (3) serving the Complainant with Truancy summons twice, (4) advising the Truancy court referee that the District suspects the Student is being abused at home, (5) failing to recommend dismissal of Truancy charges pursuant to provisions in mediation agreement, and (6) marking the Student tardy for visiting the Nurse's office at the beginning of the school day, 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. § 35.134.
4. Whether the District refused to make reasonable modifications to its illness check-out policy on October 18, 2016 when the modifications were necessary to avoid discrimination on the basis of disability, in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(7).

On December 13, 2017, the District requested to voluntarily resolve some allegations in the above referenced OCR complaint in accordance with Section 302 of OCR's *Complaint Processing Manual*. OCR accepted the District's proposal regarding the allegations that OCR had not yet made a determination. Prior to the District's proposal, OCR reviewed documents

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provided by the District and interviewed the Complainant and eight members of the District's staff. After carefully considering all of the information obtained during the investigation, OCR found compliance concerns related to: (1) the provision of speech/language therapy pursuant to the Student's IEP and (2) the collaborative class provision of the Student's IEP. OCR found insufficient evidence to support a finding that the District was in noncompliance with Section 504 and Title II as it related to all other allegations. Set forth below is a summary of OCR's findings.

I. Legal Standards

FAPE: Failure to Evaluate

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a district shall provide a free appropriate public education (FAPE) to each qualified student with a disability, regardless of the nature or severity of the person's disability. The regulation, at 34 C.F.R. § 104.35, defines appropriate evaluation and placement procedures.

School districts must have standards and procedures to evaluate students who may have a disability and need special education or related services. The evaluation of a student, however, must be individualized. Although Section 504 does not require a specific process, the standards and procedures must meet certain requirements. Specifically, the evaluation standards and procedures must ensure that:

- Evaluations consist of more than IQ tests;
- Evaluations measure specific areas of educational need. These could include speech processing, inability to concentrate, and behavioral concerns;
- Tests are selected and administered to the student in a manner that best ensures that the test results accurately reflect the student's aptitude or achievement or other factor being measured, rather than reflect the student's disability, except where those are the factors being measured;
- Tests and other evaluation materials are validated for the specific purpose for which they are used; and
- Tests are appropriately administered by trained personnel.

The Section 504 regulations, at 34 C.F.R. § 104.35(c), provide that in interpreting evaluation data and in making placement decisions, a recipient shall:

1. draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,
2. establish procedures to ensure that information obtained from all such sources is documented and carefully considered,
3. 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 implementing regulation at 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. A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, 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).

In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) 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, and (4) ensure that the placement decision is made in conformity with 104.34. 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 Education for the Handicapped Act is one means of meeting this requirement.

Title II implementing regulation at 35 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.

FAPE: Failure to Implement

The regulation implementing Section 504 at 34 C.F.R. §104.33(a), (b)(1) and (2), requires a recipient that operates a public elementary or secondary education program or activity to provide a FAPE to each qualified individual with a disability within its jurisdiction, regardless of the nature or severity of the individual's disability. The provision of an appropriate education is defined as the provision of regular or special education and related aids and services that are designed to meet the educational needs of individuals with disabilities as adequately as the needs of individuals without a disability are met and that satisfy the requirements of the regulation at 34 C.F.R. §§ 104.34, 104.35, and 104.36 (educational setting, evaluation and placement, and

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procedural safeguards). Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these standards.

The District's failure to implement aids, services, accommodations, or modifications identified in the IEP of a student with a disability may deny the student a FAPE and, thus, violate Section 504 and Title II. Yet, not every failure to implement an aid, service or accommodation/modification in an IEP automatically constitutes a denial of an appropriate education. OCR takes into consideration the frequency of the failure to implement and what impact the failure had on the student's ability to participate in or benefit from a school district's services, programs and activities. To find a denial of FAPE, there has to be a significant loss of services, not a de minimus loss.

As the Title II implementing regulation provides no greater protection than the Section 504 implementing regulation with respect to the complaint allegations, OCR conducted its investigation in accordance with the applicable Section 504 standards.

Retaliation

Retaliation is prohibited under the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, at 34 C.F.R. § 100.7(e). The Title VI regulation 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.

When investigating a complaint of retaliation, OCR determines whether: (1) an individual engaged in a protected activity; (2) the recipient had notice of the protected activity; (3) the recipient took a materially adverse action against the individual contemporaneous with or subsequent to the protected activity; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation.

If all four elements are established, an initial or *prima facie* case of retaliation exists. OCR then inquires whether the recipient had a legitimate, non-retaliatory reason for taking the adverse action. If so, the evidence is analyzed to determine whether the proffered reason is merely an excuse or pretext for retaliation.

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.

Reasonable Modification

28 C.F.R. § 35.130(b)(7)(i) states that “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.” Pursuant to the regulation implementing the ADA, at 28 C.F.R. § 35.164, public entities are not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

In circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

II. Background and Analysis

1A. Whether the District failed to evaluate the Student to determine her eligibility for special education, related services, or accommodations during the 2014-2015 school year.

The Complainant alleged that the Student had a Section 504 plan (504 plan) during the 2014-2015 school year that addressed the Student’s diabetes maintenance but did not address disability-related attendance.

The Student’s 504 plan was created on January 30, 2014, during the 2013-2014 school year. The Student was re-evaluated and a second 504 plan was created on February 5, 2015, during the 2014-2015 school year. Both 504 plans state that the Student “has a chronic medical condition – Type 1 diabetes – that may impact her ability to be successful due to missed instruction in the classroom.” Under the section entitled “areas of educational impact” both 504 plans state that the Student must be able to leave the classroom to monitor blood glucose levels and treat hypo/hyperglycemia and state that the Student may miss school due to medical needs or concerns. Under the section entitled “related services and accommodations,” both 504 plans state that the Student must be permitted to leave the classroom to see the nurse at any time for diabetes related issues; must be permitted to take restroom breaks, get water, test her blood sugar, or treat hypo/hyperglycemia and therefore may require extra time to complete assignments; and will not

be penalized for absences or tardies required for medical appointments or time necessary to maintain glucose control. The Complainant signed agreeing with both 504 plans.¹

Analysis

The Student was re-evaluated and had a 504 plan during the 2014-2015 school year that addressed the Student's disability maintenance, stated that the Student would be given extra time to complete assignments if she experienced hypo/hyperglycemia, and stated that the Student would not be penalized for absences or tardies related to her disability.

Conclusion

Based on the foregoing, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

1B. Whether the District failed to evaluate the Student for Central Auditory Processing Disorder since November 2016.

The Mediation Agreement dated August 20, 2015, stated that the District would fund an evaluation by the private speech-language pathologist (private SLP 1), to include reimbursement to the Complainant for transportation costs associated with the evaluation.

On August 31, 2015, the Director of Special Education sent a letter to the private SLP 1, stating that the District agreed to fund an independent reading evaluation and speech/language evaluation for the Student. The letter stated that the Complainant would make contact to schedule the appointment and requested that the written report be provided to the Complainant and the District. The letter goes on to state that payment for the evaluation will be approved once the report is received by the District.

The Complainant was unable to take the Student to private SLP1 due to her work schedule. Therefore, she requested to take the Student to a different private speech-language pathologist (private SLP 2) than the one identified in the Mediation Agreement. The District agreed.

On November 8, 2016, an independent speech/language evaluation of the Student was conducted by private SLP 2. Following the evaluation by private SLP 2, the Complainant received the evaluation report, which is not dated, stating:

A private audiological evaluation by a certified audiologist is also an option for Libby's family if they would like to rule out Central Auditory Processing Disorder (CAPD). This is typically not a service that is the responsibility of a school system and would be the financial responsibility of the family. If she does meet the criteria for this diagnosis it will help her IEP team to develop and provide guidance for classroom accommodations.

¹ The signature pages for both Section 504 plans included separate sections where the Section 504 Team members could sign stating that they either agree or disagree with the Section 504 plan. The Complainant signed in the agree section for both the January 30, 2014 and February 5, 2015 Section 504 plans.

The Complainant obtained an independent CAPD Evaluation of the Student on December 15, 2016.

The Complainant alleged that she requested that the District evaluate the Student for CAPD. However, the Complainant was unable to produce any corroborating evidence that she requested the CAPD evaluation. During an interview with OCR, the District's Resource Specialist stated that the Complainant did not request that the District evaluate the Student for CAPD. The Resource Specialist stated that the Complainant provided the District with a copy of the Student's speech/language evaluation and CAPD evaluation for the first time during the Student's IEP meeting in January 2017.

Meeting and Conference Notes dated January 11, 2017 state "[w]e received the IEE from Madison Speech Associates."

In the Mediation Agreement dated January 18, 2017, the District and the Complainant agreed that the audiologist would attend the IEP meeting to discuss the CAPD evaluation and the speech/language evaluation and that the IEP team would consider the results. Thereafter, the results of both evaluations were incorporated into the Student's March 2, 2017 IEP.

Analysis

The Complainant obtained an independent speech/language evaluation of the Student on November 8, 2016 that suggested that "a private audiological evaluation by a certified audiologist [could] rule out Central Auditory Processing Disorder." The speech/language evaluation report stated that "this is typically not a service that is the responsibility of a school system and would be the financial responsibility of the family." Thereafter, the Complainant obtained a private Auditory Processing Evaluation of the Student on December 15, 2016.

The Complainant alleged that she requested that the District evaluate the Student for CAPD. However, the Complainant's data and District's data did not provide any evidence of such a request. During an interview with OCR, the District's Resource Specialist stated that the Complainant did not request that the District evaluate the Student for CAPD. The Resource Specialist stated that the District did not receive a copy of the speech/language evaluation until after the Complainant obtained the auditory evaluation.

Conclusion

OCR evaluated the conflicting accounts and determined that the available evidence did not establish that the District failed to evaluate the Student for Central Auditory Processing Disorder. Therefore, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

2A. Whether the District denied the Student FAPE by failing to implement provisions of the Student's BIP related to check-in and check-out during the 2016-2017 school year.

The Student's BIP dated November 19, 2015, stated that she would check-in with a trusted adult each morning to review her homework and planner; discuss important dates, events, or

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assignments that need to be turned in. The Student was to check-out with her teacher every afternoon to discuss her homework assignments and review, brainstorm, and write-down the work she believed she could complete while at home.

On March 2, 2017, the Student's BIP stated that she would check-in with a trusted adult each morning in order to preview the day, identify parts of day she is anxious about, and reflect on strategies she will use to cope with those situations. The Student was to check out with a trusted teacher at the end of the day to review her day, identify areas where she needs assistance, discuss any problems, and discuss any positive aspects of her day.

The Student's Case Manager² was responsible for implementing the check-in and check-out portion of the BIP. The Resource Specialist stated that she was present when the Case Manager was trained and instructed on how to implement check-in and check-out procedure.

During an interview with OCR, the Complainant and Student alleged that the Case Manager did not properly implement the check-in and check-out procedure. Specifically, the Student alleged that the Case Manager just asked the Student to sign the sheet and did not have a conversation.

During an interview with OCR, the Resource Specialist stated that the Complainant expressed a concern that the check-in and check-out procedure was not occurring. The Resource Specialist stated that she immediately investigated the matter. During the Resource Specialist's investigation with the Student, the actions and interaction between the Student and Case Manager, as described by the Student, depicted the proper check-in process. The Resource Specialist also stated that subsequent to the Complainant's informal complaint, she observed the check-in and check-out process between the Case Manager and Student, and observed that it was a collaborative and interactive process. The District provided OCR with copies of the check-in and check-out sheets initialed by both the Case Manager and the Student.

Analysis

The Complainant and Student alleged that the check-in and check-out procedure was not being properly implemented, as it was not a collaborative process or discussion. The Resource Specialist alleged that she received a contemporaneous informal complaint regarding the check-in and check-out procedure and immediately investigated the matter. The Resource Specialist alleged that she interviewed the Student and determined that the check-in and check-out procedure was being properly implemented. The Resource Specialist also alleged that she personally observed the check-in and check-out process being properly implemented by the Case Manager.

Conclusion

OCR evaluated the conflicting accounts and determined that the available evidence did not establish that the check-in and check-out procedure was not properly implemented. Therefore, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

² The Student's Case Manager was no longer employed by the District at the time of the OCR interviews.

2B. Whether the District denied the Student FAPE by failing to implement provisions of the Student's IEP related to taking tests in the Resource Room during History class in March 2017.

During an interview with OCR, the Student alleged that her test taking accommodations were not properly implemented when the History Teacher denied her requests to go to the sensory room (Resource Room) on two occasions around March 2017.

The Student was enrolled in U.S. History class between January and May 2017. The Student's IEP dated January 11, 2017 states that the Student "has communication needs that are addressed in a small group or individually in the speech resource room. [The Student] is given access to resource/behavioral support for stress and anxiety."

The Student's IEPs dated March 2, 2017 and May 8, 2017 state that the Student "may test in a small group environment" as an accommodation for assessments. The location listed on the IEP for this accommodation is the Resource Room.

The Resource Specialist stated that she investigated the Complainant's informal complaint that the Student was not allowed to go to the Resource Room during tests and discovered that the History Teacher³ had forgotten to instruct the Student to go to the Resource Room and the Student did not ask to go.

Analysis

The IEP provisions use permissive language stating the student may test in a small environment in the Resource Room, but does not state that it is requirement for all testing. The Student alleged that there were two occasions where she was not permitted to go to the Resource Room to take her tests during History class. The Resource Specialist alleged that she received an informal complaint regarding this allegation and upon investigation found that the History Teacher did not preclude the Student from going to the Resource Room. Specifically, she found that the Student did not ask the History Teacher to go to the Resource Room and the History Teacher did not directly instruct the Student to go to the Resource Room to take her test.

Conclusion

OCR evaluated the conflicting accounts and determined that the available evidence did not establish that the test taking provisions of the Student's IEP were not properly implemented. Therefore, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

³ The History Teacher was no longer employed by the District at the time of the OCR interviews.

2C. Whether the District denied the Student FAPE by failing to implement provisions of the Student's IEP related to receiving notes for History class in March 2017.

The Student's IEP dated March 2, 2017 states that the Student would receive "notes in History and skeletal notes in other courses."

During an interview with OCR, the Student stated that she receives complete notes for History, but she did not receive them until two days after class.

OCR interviewed the Resource Specialist⁴ who stated that on March 3, 2017 she trained the History Teacher regarding implementation of the added IEP provision. She stated that the History Teacher fully implemented the notes provision in the IEP. Additionally, the Resource Specialist stated that the District ensured that the Student had the opportunity to make-up missed work or assignments. Therefore, if the Student was absent from History class she would receive notes from days prior.

Analysis and Conclusion

The Student's IEP states that she would receive notes for History class, but does not specify when the Student would receive them. The Student stated that she received complete notes for History class within two days after class. Based on the fact that the IEP does not designate when the Student would receive the History notes, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

2D. Whether the District denied the Student FAPE by failing to implement provisions of the Student's IEP related to speech therapy.

The Student's IEPs dated May 11, 2016, September 19, 2016, and January 11, 2017 stated that the Student would receive Speech/Language therapy from the Speech Language Pathologist (SLP) once per week for twenty-five minutes. On January 18, 2017, the District and Complainant entered into a mediation agreement, which stated that the Student would increase the Student's speech/language services to two times per week for thirty minute sessions. On March 2, 2017, the Student's IEP was amended to increase the Student's Speech/Language services to two times per week for thirty minute sessions. Thereafter, the Student's IEP dated May 8, 2017 stated that the Student would receive Speech/Language services two times per week for thirty minute sessions.

The SLP's notes from the 2016-2017 school year indicate that at the beginning of the school year, in August 2016, the Student was scheduled for speech/language therapy sessions once per week for twenty-five minutes. The Student missed all of these sessions, primarily due to the Student's absence on the date and time when she was scheduled for speech/language therapy.

In October 2016, the weekday for services was changed to once per week on Wednesday at 10:00 am. The first session was missed on October 12, 2016 due to the SLP's absence due to

⁴ The History Teacher was no longer employed by the District at the time of the OCR interviews.

illness. However, this session was made-up on October 14, 2016. During this October 14, 2016 session, an additional five minutes of services was also provided. The next Wednesday, October 19, 2016, the Student missed the session due to the Student's absence. Thereafter, between October 26, 2016 and November 30, 2016, the Student received speech/language services once each week and five additional minutes of services were provided during those sessions. On December 7, 2016 and December 14, 2016, the Student was not provided speech/language services due to the Student's absence. On January 4, 2017, the Student missed speech/language therapy because she was participating in a parent-teacher conference. The SLP attempted to make-up the session on January 5, 2017, but the Student was absent. Thereafter, January 6, 2017 was a snow day. On January 11, 2017 and January 17, 2017, the Student received speech/language services.

As noted above, the mediation agreement was signed January 18, 2017 requiring that the Student be provided speech/language services two times per week. The Student received speech/language services on Tuesday and Thursday during the week of January 23, 2017. The week of January 30, 2017, the Student received services once because the SLP was absent on the date of the second session. The week of February 6, 2017, the Student received services once because the Student was absent on the date of the second session. The week of February 13, 2017, the Student missed both sessions due to the Student's absence. The week of February 20, 2017, the Student missed both sessions because Tuesday was a teacher-planning day and Thursday the SLP called for the Student in both class and the resource room and was advised that the Student was meeting with an Administrator at their scheduled session-time. The week of February 27, 2017, the Student received services once because the Student checked out of school prior to the second session. The week of March 6, 2017, the Student received services twice during the week. The week of March 13, 2017 was spring break. The week of March 20, 2017, the Student received services once because the Student was absent on the date of the second session. The SLP scheduled a make-up session but the Student was off-campus at the time agreed upon for the make-up session. The week of March 27, 2017, the Student missed both sessions due to the Student's absence. The week of April 3, 2017, the Student missed both sessions – one due to the Student's absence and the second because the Student participated in another activity during her scheduled speech/language therapy. The SLP scheduled a make-up session on April 7, 2016 and the Student was absent that day. The week of April 10, 2017, the Student missed both sessions due to the Student's absence. The SLP scheduled a make-up session but the Student was absent on that date. The week of April 17, 2017, the Student missed both sessions due to the Student's absence. The week of April 24, 2017, the Student received services once because the Student was absent on the other scheduled date. The week of May 1, 2017, the Student received services once because the Student was absent on the other scheduled date. The week of May 7, 2017, the Student received services twice during the week. The week of May 15, 2017, the Student received services twice during the week. The week of May 21, 2017, the Student did not receive services during the final week of school.

Analysis

The District attempted to provide speech therapy services to the Student but many sessions were missed, primarily due to the Student's absence. The Student was scheduled to receive services from the SLP once per week for twenty-five minutes between August 2016 and January 18,

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2017. From January 19, 2018 through May 25, 2017, the Student was to receive services twice per week for thirty minutes each.

Based on the SLP notes, the Student missed fourteen 25 minute sessions between August 2016 and January 18, 2017. Only one of those sessions, October 16, 2016, was made-up. The Student missed twenty 30 minute sessions between January 19, 2017 and May 25, 2017. The SLP attempted some make-up sessions. However, the make-up sessions were unsuccessful due to the Student's absence from school. The SLP notes indicate that cumulatively, thirty minutes of additional service make-up time was provided throughout the school year.

OCR needed to review additional evidence to confirm the SLP's records and obtain explanations from the SLP regarding make-up sessions and the provision of additional service time. However, on December 13, 2017, prior to conducting this interview, the District expressed a desire to resolve this allegation during the investigation.

Conclusion

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 and OCR agrees to the resolution of the matter in this manner. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving the allegation, and OCR agreed. Subsequent discussions with the District resulted in the District signing the enclosed Resolution Agreement which, when fully implemented, will resolve this allegation. The provisions of the Resolution 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 Resolution Agreement.

2E. Whether the District denied the Student FAPE by failing to implement provisions of the Student's IEP related to collaborative classes.

The Student's May 11, 2016 and March 2, 2017 IEPs state that she will be in a collaborative class for Math and English for access to a special education teacher. This is listed as a daily supplementary aid with no service time requirement to be provided in the Resource Room.

On May 8, 2017, after the OCR complaint was filed, the Student's IEP was revised to state that the Collaborative Special Education Teacher would provide support to the Student on a daily basis in her general education classes, as needed in the subjects of Math and English. The Collaborative Teacher will approach the Student and check for understanding of assignments and concepts. The total amount of service time is listed as fifteen minutes daily in the general education classroom setting.

During an interview with OCR, the Student stated that she did not have a Collaborative Teacher for a period of two or three months during the 2016-2017 school year.

According to the Student's academic transcript, the Student was enrolled in the following classes during the 2016-2017 school year:

Term 1

Geometry A
Physical Science
Health Education

Term 2

Geometry A
Physical Science

Term 3

English 10
US History to 1877

Term 4

English 10
Geometry B
US History to 1877

During an interview with OCR, the Collaborative Teacher stated that she began the Collaborative Teacher position at the beginning of the Spring 2017 semester. She served as the Collaborative Teacher for the Student during the entire Spring 2017 semester for Math and English. As a Collaborative Teacher her responsibilities included checking for understanding and providing assistance. She stated that the Student had math class first block and she entered late every day after going to the Nurse to check her blood glucose levels. The Collaborative Teacher ensured the Student understood directions and provided assistance so the Student could make-up missed work. The Collaborative Teacher stated that she provided services for the entire Math block unless she had to attend an IEP meeting or administer testing. The Collaborative Teacher stated that the Student often had makeup work for English due to absenteeism, so they generally completed the makeup assignments in the Resource Room. The Collaborative Teacher stated that she generally provided services during English class for one hour.

During an interview with OCR, the Resource Specialist explained that all 9th grade students at the School with a Collaborative Teacher provision in their IEP are enrolled in a co-teaching classroom with two teachers (a general education and special education teacher) who teach together the entire class period. After 9th grade, the School's collaborative teachers are not in class the entire class, only enough time to ensure that the service time and goals are met. The School has a total of six collaborative teachers, including the Collaborative Teacher and the Sensory Unit Teacher.

Analysis

The Student's May 11, 2016 IEP states that she will be in a collaborative class for Math and English for access to a special education teacher. This is listed as a daily supplementary aid with no service time requirement to be provided in the Resource Room.

The Collaborative Teacher began employment in this capacity beginning in January 2017.

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OCR has not assessed how the collaborative class provision was implemented during the fall semester of 2016, when the Student was enrolled in Geometry A, or how the collaborative class provision was implemented when the Collaborative Teacher was unavailable due to assessments.

Moreover, the District explained that the same IEP language was interpreted to have one meaning during the 2015-2016 school year and another meaning during the 2016-2017 school year. The information collected by OCR thus far does not demonstrate whether or not all individuals responsible for implementing the IEP had the same understanding of how to interpret the provision. The evidence also does not demonstrate that the provision was clear enough to ensure that the Complainant had adequate notice of the team's decision in order to enable her to challenge the decision through the IEP team or due process.

Conclusion

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 and OCR agrees to the resolution of the matter in this manner. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving the complaint, and OCR agreed. Subsequent discussions with the District resulted in the District signing the enclosed Resolution Agreement which, when fully implemented, will resolve this allegation. The provisions of the Resolution 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 Resolution Agreement.

2F. Whether the District denied the Student FAPE by failing to implement provisions of the Student's Health Plan when she was left alone in a classroom on November 8, 2016.

The Student's 2016-2017 Individualized Health Plans (Health Plan) for diabetes includes an Emergency Action Plan, which states "never send a child with suspected low blood glucose anywhere alone!" Otherwise, the Health Plan does not state that the Student cannot be left alone. During an interview with OCR, the Student said that she left math class to go to the Resource Room, but when she arrived at the Resource Room, there were not any teachers in the classroom. The Student sent a text message to the Complainant notifying her that she was in the Resource Room without a teacher.

The Complainant provided contemporaneous text messages between herself and the Student wherein the Student alleged that she was left alone in a classroom for approximately 40 minutes. In the text message exchange, the Student stated that her blood glucose at the time was 123. The Health Plan does not designate that any action be taken with a blood glucose of 123 unless the Student is about to exercise. The Health Plan indicates that a blood sugar of 100 or below is "low".

During an interview with OCR, the Resource Specialist stated that on November 8, 2016 there was an assembly and the Student was late coming to class. There was a note on the door telling the Student to go to the other Resource classroom and had the room number. However, the Student did not read the note and went into the classroom. The Complainant notified the

Resource Specialist and she immediately contacted the Assistant Principal and the Assistant Principal immediately went into classroom and took the Student to the appropriate room. The Assistant Principal called the Resource Specialist back and explained what happened.

Analysis and Conclusion

The Student has a Health Plan. However, it only states that the Student should not be sent anywhere alone if she is suspected of having low blood glucose. Here, there is no evidence that District staff had reason to suspect that the Student had low blood glucose. Furthermore, the Health Plan indicates that the Student's blood glucose is low at readings of 100 or below. The Student's blood glucose at the time was 123. Based on the foregoing, OCR determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II with regard this allegation.

Allegation 3: Retaliation

Factual Findings

1. Inaccurately recording the Student's attendance records

The District's Attendance Policy is included in the Student Code of Conduct. The Attendance Policy states that all students between ages 6 and 17 are required to attend school each day. The Attendance Policy goes on to state that Attendance Staff will investigate all cases of non-attendance. The investigation may require the Attendance Staff to bring criminal prosecution against the parent or custodian.

The Attendance Policy includes a section regarding truancy, which states that the following guidelines will be used and steps will be taken to handle truancy by students of Madison County:

1. Upon the first unexcused absence, a warning will be issued as follows:
 - a. Parent/custodian will be notified by Principal (or designee) that the student is truant and the date(s) of truancy via School Messenger or letter .
2. Upon the fifth (5th) unexcused absence, the parent, custodian, or person having control of the child, shall do the following:
 - a. Receive a Notice of Violation of the Compulsory Attendance Law form the District Attendance Staff
 - b. Participate in the early warning program
 - c. Participate in a home visit conducted by a district social worker to discuss attendance requirements.
3. Upon the seventh (7th) unexcused absence, and no later than ten (10) school days after the seventh (7th) unexcused absence, the Attendance Staff (District Social Worker) will meet at the school with the student, parent, and Principal (or designee) to discuss attendance violations. Failure to participate in the conference within the specified period may result in a complaint/petition being filed with the Court against the parent/custodian, under Code of Alabama (1975), 16-28-12(c).

4. Any unexcused absences following the parent meeting in number three (3) above will result in a complaint/petition being filed with the Court against the parent/custodian or the child, whichever is appropriate.

During an interview with OCR, the Complainant alleged that the District retaliated against her, for filing for mediation based on the Student's disability, by inaccurately recording the Student's records so they could file truancy charges against her. The Complainant alleged that the Student regularly missed a lot of school during the 2014-2015 and 2015-2016 school years and the Complainant never received any truancy warnings or letters until the District knew she intended to file for mediation. In September 2016, the Complainant met with the Attendance Social Worker and advised her that the Student's attendance record had days where it reflected an excused absence with a doctor's note but she had not provided the School with a doctor's note. Afterward, the Attendance Social Worker had the coding of the days changed from excused to unexcused and filed Truancy Charges. The Complainant alleged that during the September 19, 2016 meeting she told the Attendance Social Worker that she would be filing for mediation.

During an interview with OCR, the Attendance Social Worker stated that during the 2014-2015 school year the social worker at the middle school was monitoring the Student's attendance. However, the Student's attendance did not improve, so the case was referred to the Attendance Social Worker, a central office employee, around April 21, 2015. The Attendance Social Worker contacted the Complainant who explained that the Student was diabetic, but that her absences were primarily because the Student did not want to go to school. The Attendance Social Worker advised that she works with truancy cases and expressed the importance of the Student attending school. The Student was hospitalized around April 22, 2015. Thereafter, on May 15, 2016, the Complainant, Principal, Attendance Social Worker, and Counselor met to discuss the Student's attendance. During the meeting, the Complainant expressed concern about the Student missing so much school that she was not ready to go to the next grade. The truancy laws were explained and it was reiterated that the Student had to go to school.

On September 19, 2016 the Attendance Social Worker met with the Complainant to create an attendance plan because the Student was in violation of the attendance policy regarding unexcused absences. During the meeting, the Attendance Social Worker made an agreement with the Complainant and Student that the Student could not have any more unexcused absences or the District would file truancy charges. This agreement permitted the Student to have excused absences. Both the Complainant and Student signed the early warning "Unexcused Absence Conference Form" agreeing that they understood that additional unexcused absences could result in a petition being filed in Juvenile Court.

During the meeting, the Complainant also expressed concern that the Student's attendance record was incorrect. The Complainant stated that the Student's attendance records had excused absences based on doctor notes but she had not turned in doctor notes. The Complainant advised the Attendance Social Worker that the Student did not attend school because she refused to attend school. The Attendance Social Worker told the Complainant that after the meeting they would correct it. After meeting, the Attendance Social Worker and Complainant reviewed the hardcopy attendance file and there were no doctor notes. So, the attendance records were

corrected solely based on the Complainant's request to change the absences from excused absences to unexcused absences.

The Student was absent on September 21, 2016, September 22, 2016, and September 26, 2016. The Attendance Social Worker called the Complainant and asked why the Student was absent. The Complainant said the Student did not want to go to school and she could not physically make her attend school. The Attendance Social Worker notified the Complainant that she would file truancy charges and the Complainant requested not to be served at work. Per the Complainant's request, the Attendance Social Worker made arrangements for the Complainant to be personally served at the School by the School Resource Officer.

On September 26, 2016, the Complainant was served with Truancy charges.

On November 28, 2016, the Complainant's Attorney submitted a request to the District's Attorney to mediate allegations that the District failed to provide FAPE to the Student. Thereafter, the District participated in a mediation with the Complainant and her Attorney and came to an agreement on January 18, 2017.

On February 9, 2017, the Complainant sent an e-mail to the Resource Specialist disputing specific dates on the Student's attendance record. Specifically, the Complainant alleged the attendance records on the following dates were incorrect:

- 12/7/16
- 12/12/16
- 12/14/16
- 1/9/17
- 1/18/17 (Complainant alleged Student should only absent for mediation purposes)

The District's data response included the following evidence:

- 12/7/16 – A note from the Student's dentist excusing the Student from School for her dental appointment.
- 12/14/16 – A handwritten note from the Complainant stating that she checked the Student out at 9:07 am on December 14, 2017.
- 1/9/17 – An e-mail from a District employee to another District employee stating that the Student is absent because she is sick. Thereafter, on January 10, 2017, a handwritten parent note from the Complainant stating that the Student was absent on January 9, 2017 because she was sick due to a cold.
- 1/18/17 – A handwritten note stating that the Student was late because her pump was not working properly and thereafter she was checked out to attend mediation.

The Complainant provided OCR with evidence that the December 12, 2016 attendance record was corrected by the District.⁵ This corrected record provided by the Complainant is consistent with the final attendance records provided to OCR by the District in its data response to OCR.

⁵ A printout of the Student's attendance record dated February 8, 2017 showed that the Student was checked out at 8:49 am and absent the remainder of the day. The Complainant also provided a corrected version of the

During an interview with OCR, the Attendance Social Worker and Resource Specialist stated that if any attendance inaccuracies were raised by the Complainant, they were corrected

2. Filing Truancy charges against the Complainant

As stated above, the District's truancy policy states that after seven unexcused absences a meeting will be scheduled with the student, parent, Attendance Social Worker, and Principal. After the meeting, further unexcused absences will result in a complaint/petition being filed with the Court against the parent or the child.

Here, the Student exceeded seven unexcused absences and the required meeting was conducted on September 19, 2016. During the meeting, the Complainant and Student signed the early warning "Unexcused Absence Conference Form" agreeing that they understood that additional unexcused absences could result in a petition being filed in Juvenile Court.

The Student was then absent on September 21, 2016, September 22, 2016, and September 26, 2016.

During an interview with OCR, the Attendance Social Worker stated that she called the Complainant and asked why the Student was absent. The Complainant responded that the Student did not want to go to school and the Complainant could not physically make her attend school.

On September 26, 2016, the Complainant was served with Truancy charges.

3. Serving the Complainant with Truancy Summons twice

The Complainant alleged that the District served her Truancy Summons twice to embarrass and harass her. She stated that she requested not to be served at work, and the Attendance Social Worker agreed to allow her to meet the SRO at the School and sign acknowledging personal service on September 26, 2016. Thereafter, the Complainant alleged she was served the exact same papers again at her house.

On September 26, 2016, the Attendance Social Worker contacted the Complainant to notify her of the decision to file truancy charges. The Complainant requested not to be served at work. Per the Complainant's request, the Attendance Social Worker made arrangements for the Complainant to be personally served at the School by the SRO.

The evidence shows that the Complainant was served with the truancy summons on September 26, 2016. On October 4, 2016, the Complainant was served with a notice of the court date, which was not part of the original summons. On November 7, 2016, the Complainant received a letter notifying her that the court date had been changed.

Student's attendance record dated February 24, 2017 where the record for December 12, 2016 was revised to show the Student was checked in at 8:49 am and attended school the remainder of the day.

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During an interview with OCR, the Attendance Social Worker stated that upon receiving notice that the Complainant said she was served twice, she contacted the warrant magistrate to find out what happened. She stated that she was advised that the prior procedure was for the Sheriff's Deputy to verify the mailing address because the court date was sent via mail. However, the Sheriff's Department had problems with parents saying they never received the notice in the mail. Therefore, the Sheriff's Department changed their procedure to personally serve notice of court date.

The SRO only served the Summons, not the notice of the court date.

4. Advising the Truancy Court that the District suspects the Student is being abused at home

The Complainant alleged that someone from the District advised the truancy court referee that the District suspected that the Student was being abused.

During an interview with OCR, the Attendance Social Worker denied that she or any other District staff advised the Truancy Court of suspected abuse. Moreover, the Attendance Social Worker advised that she and other District personnel are mandatory reporters, so if they suspected abuse they are legally obligated to immediately notify the Department of Family and Children Services immediately, not wait to report this information to the Truancy Court.

There is no reference to abuse or suspected abuse in the Attendance Social Worker's court report.

5. Failing to recommend dismissal of Truancy charges pursuant to provisions in mediation agreement

The January 18, 2017 Mediation Agreement stated if the Student "continues to maintain consistent school attendance, the District agrees to report to the Truancy Court and recommends the dismissal of the pending truancy complaint at the next scheduled hearing."

The Complainant alleged that in February at the next truancy court hearing, the Truancy Officer did not recommend that the charges be dropped. She also alleged that in February 2017 after the court date, the Resource Specialist met the Complainant in the parking lot at the Complainant's job and said "I don't believe the Truancy Officer recommended the charges be dropped."

During an interview with OCR, the Attendance Social Worker stated that she recommended that the truancy charges be dropped in the hearing on February 9, 2017. However, she stated that the Judge assigned a Guardian Ad Litem (GAL) to the Student who recommended that the Court not dismiss the charges. Ultimately, the Court made the decision not to drop the charges.

The Attendance Social Worker recommended that the charges be dropped in her February 9, 2017 Court Report. Specifically, the Attendance Social Worker wrote "[i]f it is satisfactory to the court I request the charges against mom be dropped with payment of court cost."

6. Marking the Student tardy for visiting the Nurse's office at the beginning of the school day

The Complainant alleged that the District marked the Student tardy in retaliation for her filing for mediation in order to negatively influence the Truancy Court to take action against the Complainant.

According to the School's attendance policy as written in the Sparkman High School Student Handbook, a student is tardy to class if they are not in class when the tardy bell rings at 8:30 am.

The Student's May 11, 2016 IEP includes the following related services in the Nurse's Office with a fifteen minute daily service time:

- [The Student] will have her blood sugar levels monitored by the Nurse for control of Diabetes.
- [The Student] will work with the Nurse on her goals as part of her Individualized Health Plan.
- [The Student] will receive assistance with all tasks of Diabetic management during [the] academic day and extra-curricular activities.

The Student's 2016-2017 Health Plan states that the Student will receive daily snacks at the Nurse's Office at 8:30 am.

During an interview with OCR, the Attendance Office Clerk explained that any student is either present or absent. If absent, their absence is either excused or unexcused. School starts at 8:30 am. Attendance is tracked by class period. Therefore, if a student is not present in their first block classroom with their body in a seat they are marked absent. If said student is the building they bring a note from the person they were with (ex. nurse, attendance office, etc.) then the absence is changed to tardy (excused or unexcused). If the tardy is excused there is no penalty. The school has to track the whereabouts of all students to accurately account for the amount of time the student misses from instruction. Therefore, the tardy serves as a place holder.

During the 2016-2017 school year, the Student was coded as tardy-excused for occasions where she was present at School, but physically in the Nurse's office at or before 8:30 am.

The Attendance Social Worker's initial report to the Court in November 2016 included the following statement "[the Student] is sometimes tardy but is excused when tardy due to high blood sugar." Thereafter, the Attendance Social Worker's court reports reported the total number of days the Student was tardy by school year, without delineating whether they were excused or unexcused.

Analysis

Protected Activity/Knowledge of Protected Activity

The Complainant engaged in a protected activity in June 19, 2015, when her Attorney advocated for the Student to receive an evaluation under IDEA to determine whether the Student is eligible

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for an IEP. The District participated in mediation with the Complainant and her Attorney and came to an agreement on August 20, 2015. Thereafter, the Complainant engaged in protected activity again on November 28, 2016, when her Attorney alleged the District failed to provide FAPE to the Student by failing to appropriately implement the Student's IEP and failing to provide the Student with the appropriate accommodations and supports. Thereafter, the District participated in a second mediation with the Complainant and her Attorney and came to an agreement on January 18, 2017.

Adverse Actions

In determining whether an action is adverse, OCR examines whether the recipient engaged in an act of intimidation, threat, coercion, or discrimination that is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. OCR makes this determination on a case-by-case basis and in light of all the facts and circumstances of the case.

1. Inaccurately recording the Student's attendance records

Based on the factual findings above, OCR finds that there is insufficient evidence that the Complainant was subject to an adverse action by the District inaccurately recording the Student's attendance records. Although the evidence does show inaccuracies with the Student's attendance record, those items were corrected immediately at the Complainant's request. The Complainant alleged that the District inaccurately recorded the Student's attendance records so that they could file truancy charges against her. However, the evidence shows that truancy charges were filed based on absences that occurred after the attendance records were corrected. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

2. Filing truancy charges against the Complainant

The District filed truancy charges against the Complainant on September 26, 2016. OCR finds that filing truancy charges against the Complainant constitutes an adverse action. OCR will, therefore, analyze the next steps of the retaliation elements with regard to this adverse action.

3. Serving the Complainant with truancy summons twice

Based on the factual findings above, OCR finds that there is insufficient evidence that the Complainant was subject to an adverse action wherein she was served with truancy summons twice as alleged. The evidence shows that the Complainant was served with two separate documents, a summons and court date. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

4. Advising the Truancy Court that the District suspects the Student is being abused at home

Based on the factual findings above, OCR finds that there is insufficient evidence that the Complainant was subject to an adverse action wherein the District advised the truancy court that they suspected the Student is being abused at home as alleged. The Attendance Social Worker denied stating that she suspects the Student is being abused at home. There is no reference to abuse or suspected abuse in the Attendance Social Worker's court report. The Complainant was unable to provide evidence to support the allegation occurred. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

5. Failing to recommend dismissal of truancy charges pursuant to provisions in mediation agreement

Based on the factual findings above, OCR finds that there is insufficient evidence that the Complainant was subject to an adverse action wherein the District failed to recommend dismissal of the truancy charges as alleged. The Attendance Social Worker stated that she recommended dismissal of the truancy charges and the Attendance Social Worker's February 9, 2017 court report recommended dismissal of the truancy charges. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

6. Marking the Student tardy for visiting the Nurse's office at the beginning of the school day

Based on the factual findings above, OCR finds that there is insufficient evidence that the Complainant was subject to an adverse action when the District marked the Student absent for visiting the Nurse's office at the beginning of the school day. Although the Student was marked tardy if she was in the Nurse's office at or before 8:30 am, the tardies were excused and the Student was not penalized by the School. The Complainant alleged the consequence was the Truancy Court having a negative impression because only overall tardies were reported without delineating which were excused or unexcused. However, the Attendance Social Worker's initial report to the Court in November 2016 included a statement that "[the Student] is sometimes tardy but is excused when tardy due to high blood sugar." Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

Causal Connection

OCR next considered whether there was a causal connection between the Complainant's protected activities and the District filing truancy charges. The Complainant engaged in protected activities on the following dates:

- June 19, 2015 when she filed for mediation,
- August 20, 2015 when the Complainant participated in mediation with the District,
- November 28, 2016 when the Complainant filed for a second mediation, and
- January 18, 2017 when the Complainant participated in a second mediation with the District.

The Attendance Social Worker likely had knowledge of the protected activity because she worked closely with the Resource Specialist in an attempt to improve the Student's attendance. The Resource Specialist was aware that the Complainant filed for and participated in mediation in 2015. The District took adverse action (filing truancy charges against the Complainant) subsequent to the protected activities in June and August 2015. OCR finds that there is a causal connection based on the District staff's knowledge of protected activity at the time they took the adverse action.

Legitimate Nondiscriminatory Reasons for the Action

OCR next considered whether the District had legitimate nondiscriminatory reasons for filing the truancy charges. The District alleged that truancy charges were filed against the Complainant based on the District's Attendance Policy. The District alleged that as of September 19, 2016 the Student was in violation of the attendance policy regarding unexcused absences. During the meeting, the Attendance Social Worker made an agreement with the Complainant and Student that the Student could not have any more unexcused absences or the District would file truancy charges. This agreement permitted the Student to have excused absences. Both the Complainant and Student signed the early warning "Unexcused Absence Conference Form" agreeing that they understood that additional unexcused absences could result in a petition being filed in Juvenile Court.

The Student was absent on September 21, 2016, September 22, 2016, and September 26, 2016. The Attendance Social Worker called the Complainant and asked why the Student was absent. The Complainant said the Student did not want to go to school and she could not physically make her come to school. Based on the Student's unexcused absences following the agreement on September 19, 2016, the District filed truancy charges against the Complainant on September 26, 2016.

Pretext

OCR next examined whether there is evidence that the District's articulated reason is a pretext for discrimination. Pretext may be shown by evidence that: (1) the explanation for the adverse action is not credible or believable; (2) the individual was treated differently than other individuals who were similarly situated but had not engaged in a protected activity; or (3) the treatment of the individual was inconsistent with established practice or policy.

OCR found that the District presented credible evidence to support their assertion that the truancy charges were filed against the Complainant based on the Attendance Policy and based on the Student's failure to comply with the terms of the September 19, 2016 "Unexcused Absence Conference Form" agreement.

OCR has received no evidence that the Complainant was treated differently than other individuals who were similarly situated but had not engaged in a protected activity.

Conclusion

Based on the foregoing, there is insufficient evidence that the District filed truancy charges against the Complainant in retaliation for the Complainant filing for or participating in mediation. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

4. Whether the District refused to make reasonable modifications to its illness check-out policy on October 18, 2016.

Factual Findings

During an interview with OCR, the Nurse stated that the procedure at the School regarding sending students home due to illness is to exclude a child with a fever over 100 or gastrointestinal issues. In the case of fever or gastrointestinal issues, the parent/guardian is contacted, the student is sent home, and the absence is excused. This excused absence is no different than a student who is absent or checked out sick and brings a doctor's note upon return to school.

On October 18, 2016, the Student went to the school nurse complaining of pain from a urinary tract infection (UTI). The Student also sent a text to the Complainant requesting to be checked out due to pain from the UTI. The Complainant contacted the Nurse who told the Complainant that she could not send the Student home without a fever or vomiting. The Complainant checked the Student out of school and took her to the doctor where she was diagnosed with a UTI. The Student's attendance records show that the absence on October 18, 2016 was excused with a doctor's note, a copy of which is included in the records.

The text message exchange between the Complainant and Nurse reads as follows, in part:

- Complainant – Can you please check on [the Student]? She is texting me asking me to come get her.
- Nurse – She's with me. Not feeling well from UTI. Crying. She doesn't have a fever but I know she feels bad. Do you think the [doctor] treating UTI would have school excuse.
- Complainant: We are treating at home with AZO. I am trying to get her a doctor appointment right now. Honestly, no offense to you, I have just about had all I can take of this attendance stuff. This happens every time she gets her period and now that I have forced her to go today, I think we can see why she has a hard time when she gets her period.
- Nurse: I am sorry I just told her I could not send her home without a fever or vomiting. She says it feels like a UTI.
- Complainant: I will be there in a few to get her. I will not subject my child to this. I will take my child to the doctor and have her medically treated. Obviously if a child is crying in pain and is diabetic on top of it, it shouldn't matter if they are vomiting or have a fever. Something is wrong!

During interviews with OCR, the Nurse and Resource Specialist stated that the District has no knowledge of the Student having frequently recurring UTI's as a result of her diabetes. Additionally, the Resource Specialist stated that the Complainant has not provided medical records illustrating a pattern of UTI's.

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Analysis

In this case, the Student was suffering from a UTI but was not sent home by the Nurse based on School procedure. The Student sent a text to the Complainant who immediately contacted the Nurse. Therefore, OCR was unable to determine whether the Nurse would have complied with the procedure of contacting the Complainant. Ultimately, the Complainant checked the Student out of school and took her to the doctor. This resulted in an excused absence. If the Student had been sent home by the Nurse, the Student's attendance record also would have reflected an excused absence.

There is no evidence that the District is aware of a pattern of UTI's in the Student based on her diabetes.

Conclusion

Based on the foregoing, there is insufficient evidence that the District refused to make a reasonable modification to its illness policy as alleged. Accordingly, OCR finds that there is insufficient evidence to support a finding that the District is in noncompliance with Section 504 and Title II, with regard to this allegation.

Conclusion

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 and OCR agrees to the resolution of the matter in this manner. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving the complaint, and OCR agreed. Subsequent discussions with the District resulted in the District signing the enclosed Resolution Agreement which, when fully implemented, will resolve the allegations in the above-referenced complaint. The provisions of the Resolution Agreement are aligned with this complaint and the information obtained during OCR's investigation to date, and are consistent with applicable regulations.

OCR will proceed with monitoring the Agreement, effective the date of this letter. OCR will monitor the District's implementation of the aforementioned 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.

This letter sets forth OCR's determination in an individual 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. OCR's formal policy statements are approved by a duly authorized OCR 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 provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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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. If this happens, the Complainant may file another complaint alleging such treatment.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this matter, please contact Adrienne Harris at (404) 974-9370.

Sincerely,

Andrea de Vries
Compliance Team Leader