



**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
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September 27, 2017

Dr. Patricia S. Willis
Superintendent
Duval County Public Schools
1701 Prudential Drive
Jacksonville, FL 32207

Re: Complaint # 04-17-1308

Dear Superintendent Willis:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its complaint resolution process regarding the above-referenced complaint filed against Duval County Public Schools (District) in which the Complainant alleged that the District discriminated against XXX XXXXXXXXXX (Student), who attends XXXXX XXXXXXX XXX XXXXXXXXXX XXXXXXXXXX (School), on the basis of disability. Specifically, the Complainant alleged that during the 2016-2017 school year: (1) the Student's XXXXX teacher (Teacher) did not allow her to participate in XXXXX performances on the basis of the Student's disability; and (2) the Teacher subjected the Student to disability-based harassment by making derogatory remarks to her, and the District failed to respond appropriately to the harassment.

OCR is responsible for enforcing 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 discrimination on the basis of disability by recipients of Federal financial assistance; 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. The District receives Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdiction over this complaint.

OCR initiated an investigation of the following legal issues:

1. Whether the District subjected the Student to different treatment on the basis of disability when it did not allow her to attend XXXXX performances throughout the 2016-2017 school year, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130; and
2. Whether the District discriminated against the Student on the basis of disability by subjecting her to a hostile environment when the Student's XXXXX teacher made derogatory remarks to the Student and when the District failed to take prompt and equitable steps to respond to allegations of disability-based harassment against the

Student, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130.

During the course of its investigation thus far, OCR reviewed evidence submitted by the Complainant and the District and interviewed the Complainant and the Student. A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). Prior to the conclusion of the investigation, the District requested to address the complaint allegations with the attached voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's *Case Processing Manual*. Provided below is an analysis of OCR's investigation thus far of the legal issues.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) states that 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. Pursuant to 34 C.F.R. § 104.4(b)(1)(i), (ii), and (vii), a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) 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; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i), (ii), and (vii) provide similar protections to a qualified person with a disability.

Findings of Fact

District Policies and Procedures

The District's "Prohibiting Discrimination and Harassment" policy, located in the District's Board Policy Manual (Manual) and published online, contains a provision prohibiting harassment on the bases of race, color, national origin, age, sex, gender, and disability, among others. The Manual defines harassment as any "verbal or physical conduct that denigrates or shows hostility toward an individual."

A policy in the Manual entitled, "Procedures for Filing Complaint of Discrimination, Sexual Harassment, or Other Forms of Illegal Harassment," describes the District's grievance procedure for filing and investigating a complaint alleging discrimination and harassment on the basis of actual or perceived disability, among other bases. To file a complaint, any person who believes he or she has been discriminated against or placed in a hostile environment on the basis of disability should, within sixty days of the alleged occurrence, file a written or oral complaint with the Office of Equity and Inclusion / Professional Standards (OEI/OPS) Executive Director

(Executive Director).¹ The complaint should include a description of the alleged discrimination or harassment as well as the time frame in which the alleged discriminatory actions occurred. Within thirty days of receipt of the complaint, the OEI/OPS will conduct an investigation and forward the findings to the Superintendent; the complainant and respondent will also be notified in writing of the outcome of the investigation. Both parties may request a review of the findings from the OEI/OPS within ten days of receipt of the outcome of the investigation, in which case the Superintendent shall, within ten days of receipt of the appeal request, make a final determination as to whether there is reasonable cause to believe a discriminatory practice occurred.

The Manual states that a substantiated allegation of discrimination or harassment against a student will result in disciplinary action for that student “as outlined in the District’s Anti-Bullying policy and the Code of Student Conduct.” With respect to a substantiated allegation against an employee, the Manual states that the employee may be subject to disciplinary actions, including termination or referral to law enforcement.²

Factual Background

During the 2016-17 school year, the Student was enrolled in the XXXXXXXX grade at the School and received services pursuant to an Individualized Education Program (IEP). OCR reviewed an IEP, revised on April 3, 2017, which identifies the Student’s primary exceptionality as Other Health Impaired and her secondary exceptionalities as Gifted and Specific Learning Disabled. The IEP includes, as examples, the following academic accommodations: extra time for tests and assignments, repeated and clarified directions, and peer tutoring in mathematics. In addition, an Individualized Health Care Plan (Plan), initiated on XXXXXXXX XX, XXXX, specifies XXXXXX-related health services the School agreed to provide the Student. In particular, the Plan includes various “health goals” (e.g., “avoid XXXXXX events and/or XXXXXXXX triggers,” “maintain a calm and safe environment,” and “student will learn to identify early warning signs of XXXXXX XXXXX”) and “nursing interventions” (e.g., “educate school staff on XXXXXX management and appropriate medical responses,” “provide emotional support,” and “educate staff on student’s triggers/possible triggers”). There is no language in the IEP or Plan restricting the Student’s participation in any School class or activity; in fact, the Complainant provided OCR with a summary of a XXXXXXXX XX, XXXX, doctor’s office visit, which states that the Student can participate in all her “regular exercise activities,” including XXXXXXXX.

Evidence Obtained Thus Far

The Complainant alleged that on XXXXXXXX XX, XXXX, while practicing for a pageant at the School, the Student suffered an XXXXXX-related episode which resulted in treatment at a

¹ According to the Manual, if the complaint is against the Executive Director, the Superintendent, or another member of the School Board, the complaint may be filed with the Office of General Counsel, which will arrange for an investigation.

² The District’s grievance procedures’ compliance with Section 504 standards is currently being addressed in a Resolution Agreement pursuant to another OCR complaint, #04-13-1130.

nearby Emergency Room. The Complainant maintains that, on XXXXXXXX XX, XXXX, the Teacher, after learning of this incident, told the Student in front of her class that she had been cut from a performance scheduled for the following day because “he could not have her hyperventilating and ruining the performance.” Subsequently, the Complainant claims that she reached out to several District staff members raising concerns about the Teacher’s comments and his intent to cut the Student from the performance. Despite an assurance from the Assistant Superintendent that the Student would not be cut from the performance, the Complainant alleges that the Teacher did not allow the Student to participate.

OCR reviewed an email, dated XXXXXXXX XX, XXXX, the Complainant sent to the Assistant Superintendent, School Principal, and School Assistant Principal, in which the Complainant wrote, “today in front of the entire class, [the Teacher] says to [the Student] that he is cutting her from the performance tomorrow because he does not want her hyperventilating.” The Complainant also alleged that the Teacher said the Student “lacked class” and called her “mediocre.” The Assistant Superintendent replied to the Complainant the same day, writing, “I am calling [the Principal] now. She will not be cut from the performance.”

In a XXXXXXXX XX, XXXX, email to the Superintendent, the Complainant reiterated the concerns she raised in the XXXXXXXX XX, XXXX, email, and stated that the Teacher cut the Student from the XXXXXXXX XX, XXXX, performance. The Complainant also wrote that she filed a complaint with OCR. In a reply sent to the Complainant on XXXXX X, XXXX, the Superintendent said that the information the Complainant provided had been forwarded to the Executive Director, who had initiated an investigation into the Complainant’s allegations. The evidence shows the Complainant also submitted a “Bullying or Harassment Incident Form” on XXXXXXXX XX, XXXX, in which she reported the same allegations as those contained in her emails to District staff.

The evidence shows that, during the 2016-2017 school year, the Student attended two courses taught by the Teacher: XXXXXXXX XXXXX and XXXXXXXX XXXXX. Both classes were electives and consisted of, in part, performances that took place outside of the classroom setting. According to documentation provided by the District, XXXXX students who have “not demonstrated mastery on the repertoire exam and/or have failed vocal and/or choreography tests and/or have not come to the required rehearsals” may be disallowed from participating in a given performance.

The District provided a chart to OCR depicting the students in the Student’s XXXXX classes taught by the Teacher and the XXXXX performances in which each did or did not participate during the 2016-2017 school year. With respect to the XXXXXXXX XX, XXXX, performance, the chart indicates the Student did not participate due to an unsatisfactory performance on a XXXXX and XXXXXXXXXXXXXXXX repertoire exam; the chart notes the Student was “invited to go and observe” that performance.

OCR interviewed the Student regarding the Teacher’s alleged conduct. The Student recalled that, upon entering class late on XXXXXXXX XX, XXXX, the Teacher told her that she could not XXXX in a concert scheduled for the next day because he could not have her hyperventilating during the performance. The Student said that after the Teacher dismissed the

class, he spoke with the Student and two of her classmates (Students A and B) in front of a School counselor to advise the students that they would not be XXXXXXXX in the following day's scheduled performance. In addition, the Student said the Teacher explained why each student would not be performing, as follows: the Student could not perform because of her XXXXXX, Student A could not perform because she would often get sick during practice sessions,³ and Student B could not perform because of her grades. The Student further denied that her performance on a repertoire exam impacted the Teacher's decision to now allow her to sing during the XXXXXXXX XX, XXXX, concert; instead, she claimed that there was no repertoire exam corresponding to the performance in question and that every student was originally scheduled to perform during it.

According to a memorandum provided by the District, the Principal conducted an investigation into the issues the Complainant raised in her emails to District staff and her formal complaint. Specifically, the memorandum indicates the Principal investigated the following allegations: (1) the Teacher bullied the Student by making comments about her in front of her class (e.g., saying she could not perform because the Teacher does not want her hyperventilating) and cutting her from a XXXXXXXX XX, XXXX, performance due to her XXXXXX; (2) the Student, along with other XXXXX members, was prohibited from entering a classroom to prepare for a performance; and (3) no one from the School has communicated with the Complainant about her concerns.

The Memorandum, which states that the investigation began on XXXXXXXX XX, XXXX, and concluded on XXXXX X, XXXX, reads as follows:

Principal interviewed three (3) students regarding alleged harassment and inappropriate conversations about other students. None of these students had knowledge of such conduct by [the Teacher]. These students also had no knowledge about students being excluded from performing on XXXXXXXX XX.

The Principal also spoke with the counselor who was present during the conversations with three (3) other students who were not selected to participate in the performance. Medical concerns were given as partial rationale for the non-participation in the event. These students were advised of this decision in a meeting separate from the other XXXXX members.

An interview conducted with [the Teacher] revealed that he did not specifically address [the Student] to board the bus for the performance on the date in question. He made an announcement to all students who were present at the time and told them to board the bus.

The Principal indicated that [the Teacher] could have been more clear (*sic*) in both his reasoning for non-selection, as well as his directions to rejoin the performance. Both concerns were addressed with [the Teacher], and he was advised of expectations regarding future interactions with [the Student.]

³ The Student said the Teacher ultimately allowed Student A to perform, but not the Student or Student B.

Contrary to [the Complainant's] assertion, [the Assistant Superintendent] communicated with her via email on XXXXXXXX XX, XXXX, advising that she would speak with the Principal and that [the Student] would not be "cut from the performance." In a subsequent email to the Principal, [the Assistant Superintendent] advised that [the Student] could not be pulled due to her illness. She advised the Principal that [the Teacher] must "reinstate the student in the performance." The Principal replied, "Understood."

Outcome: No discipline; verbal warning by Principal.

It appears that the matter was addressed at the school level. [The Teacher] was counseled about his behavior and his actions addressed.

No further action will be taken by the OEI/PS.

OCR also reviewed email correspondence between the Principal and the Executive Director in which the Principal advised the Executive Director of the process and results of his investigation. OCR did not encounter any additional documentation pertaining to the School's investigation, including any indication the Complainant and the Teacher were notified in writing of the results of the Principal's investigation. In addition, during her interview with OCR, the Complainant denied ever learning of the results of the School's purported investigation. The Student also denied ever speaking to School staff pursuant to its investigation.

Information Needed to Complete the Investigation

Regarding Issue 1, the Complainant alleged that, on XXXXXXXX XX, XXXX, the Teacher subjected the Student to different treatment on the basis of disability when he cut her from a XXXXX performance scheduled for the following day. While the evidence confirms that the Teacher disallowed the Student from XXXXXXXX in the XXXXXXXX XX, XXXX, XXXXX event, based on the evidence available to OCR at this time, there is conflicting information as to why the Teacher made this determination. According to the performance summary chart, only the Student's unsatisfactory performance on a repertoire exam precluded her from participating in the performance, a claim the Student denies. However, according to the Memorandum, a School counselor reported that "[m]edical reasons were given as partial rationale for non-participation in the event."

As noted above, Section 504 and Title II prohibit a recipient from, on the basis of disability, denying a qualified person with a disability the opportunity to participate in or benefit from any aid, benefit, or service offered by the recipient. OCR would likely consider a determination to prohibit the Student from participating in a XXXXX performance based on her asthma unlawful discrimination under Section 504 and Title II. However, in order to resolve the seeming conflict in the evidence identified above and to reach a conclusion with a respect to this issue, OCR would need to request additional documentary evidence, including the repertoire exam grades for all XXXXX students pertaining to the XXXXXXXX XX, XXXX, performance; and interviews with the Teacher, counselor, and Principal.

For Issue 2, the Complainant alleged the Teacher subjected the Student to disability-based harassment when he announced in front of the Student's class that he could not have the Student hyperventilating and ruining a scheduled XXXXX performance, and the District failed to respond appropriately to the alleged harassment.

Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II. OCR may find a violation of Section 504 and Title II if a recipient has created or fostered a disability-based hostile environment, i.e., harassing conduct (e.g., physical, verbal, graphic or written) that is based on disability and that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by the recipient. Harassment must consist of more than casual or isolated incidents to create a disability-based hostile environment. Further, a determination of whether conduct is "severe" or "pervasive" must examine the gravity as well as the frequency of the harassing conduct. A recipient has violated Section 504 and Title II if it has effectively caused, encouraged, accepted, or failed to correct a disability-based hostile environment of which it has actual or constructive notice.

When responding to notice of possible disability-based harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that disability-based harassment created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

The Complainant first placed the School on notice of a potentially hostile environment for the Student in emails sent on XXXXXXXX XX XXX XX, XXXX, in which the Complainant discussed incidents of alleged disability-based harassment by the Teacher. Subsequently, on XXXXXXXX XX, XXXX, the Complainant filed a formal grievance, which contained similar allegations. While the evidence shows the Principal conducted an investigation of these allegations, OCR has concerns with whether the School's investigation, as it is presented in the Memorandum, complied with the requirements of Section 504 and Title II.

The Memorandum and the email correspondence between the Principal and Executive Director are the only pieces of evidence the District submitted describing the School's investigation; however, OCR is unable to determine based on the details within these documents whether the Principal's investigation was sufficient to determine if the discrimination and harassment alleged by the Complainant occurred. For example, because no records of interviews pursuant to the investigation were provided to OCR, it is unclear what questions the Principal asked the three students to determine whether they witnessed any of the alleged harassment. Additionally, although the Principal gave the Teacher a verbal warning as a result of his investigation, the Memorandum does not make any findings on the particular allegations the Principal opened for investigation. Further, there is no indication that the Student or Complainant were interviewed as part of the investigation and given the opportunity to present witnesses or other evidence.

There is also no evidence that the Complainant and Teacher were provided written notice of the outcome of the investigation or that either party was given the opportunity to appeal the investigative findings, as set out in the District's grievance procedure.

While OCR noted concerns with the District's investigation as discussed above, the evidence currently available to OCR is not sufficient to reach a determination concerning whether a hostile environment existed and whether the District failed to respond adequately. To make a compliance determination with regard to this issue, OCR would need to gather additional evidence, including, but not limited to, interviews with School students and District staff, including the Principal, Assistant Superintendent, counselor, and Teacher; as well as any additional data the District maintained pursuant to its investigation of the allegations raised by the Complainant.

Resolution Agreement

Based on the totality of evidence available to OCR at this time, including all documents contained within the initial data response received by OCR and interviews with the Complainant and Student, as well as the District's request to resolve this complaint prior to the conclusion of the investigation, OCR has determined that entering into a 302 voluntary resolution agreement addressing both legal issues opened for investigation is appropriate.

The attached Agreement requires the District to: (1) complete an investigation that comports with the requirements of Section 504 and Title II of all allegations of discrimination and harassment based on disability raised by the Complainant, to include providing the Complainant and Student the opportunity to provide witnesses and other evidence and providing written findings of the investigation to the Teacher and the Complainant; and (2) provide training to School staff and administrators regarding (a) Section 504 and Title II's prohibition against discrimination and different treatment on the basis of disability, (b) the District's commitment to having a school environment free from all harassment, and (c) the District's responsibility under its own policies and Section 504 and Title II to address allegations of disability-based harassment.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation thus far and are consistent with applicable regulations. OCR will monitor the implementation of the Agreement until OCR has determined the District has fulfilled the terms of this Agreement and is in compliance with Section 504 and its implementing regulation at 34 C.F.R. §§ 104.4, and the Title II implementing regulation at 28 C.F.R. §35.130, which were at issue in this case.

Conclusion

This concludes OCR's investigation of this complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy, and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR

official and made available to the public. A complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR is committed to a high quality resolution of every case. If you have any questions regarding this letter, please contact Daniel Sorbera, Investigator, at 404-974-9466, or the undersigned, at 404-974-9367.

Sincerely,

Ebony Calloway-Spencer
Compliance Team Leader

Enclosure