



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

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ATLANTA, GA 30303-8927

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March 15, 2018

J. Alvin Wilbanks
Superintendent
Gwinnett County Public Schools
437 Old Peachtree Road NW
Suwanee, Georgia 30024

Re: Complaint # 04-17-1316

Dear Superintendent Wilbanks:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against Gwinnett County Public Schools (District). Therein, the Complainant alleged that the District failed to provide the Student with a free and appropriate public education (FAPE) when it failed to implement provisions of his Individualized Education Program (IEP), including but not limited to checking his work frequently for understanding, providing an extra set of books, providing copies of notes and study guides, providing extra time, breaking material down, and providing a Study Skills course. Additionally, the Complainant alleged that the District retaliated against the Student when, following the Complainant's refusal to sign a contract relinquishing her rights to bring claims under Section 504, the District withdrew an offer to provide a compensatory service of transferring the Student to another school.

As a recipient of Federal financial assistance from the Department, the District is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability. As a public entity, the District is subject to the provisions of Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. Accordingly, OCR has jurisdiction over this complaint. Additional information about the laws OCR enforces is available on our website at www.ed.gov/ocr.

OCR opened the following legal issues for investigation:

1. Whether the District denied the Student a free and appropriate public education (FAPE) by failing to implement provisions of his Individualized Education Program (IEP), including but not limited to checking his work frequently for understanding, providing an extra set of books, providing copies of notes and study guides, providing extra time, breaking material down, and providing a Study Skills course, from August

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2015 through Spring 2017, 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.

2. Whether the District retaliated against the Student when, in May, 2017, following the Complainant's refusal to sign a contract relinquishing her rights to bring claims under Section 504, the District withdrew an offer to transfer the Student to another school, 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.

Legal Standards

Issue 1:

The Section 504 regulation at 34 C.F.R. §104.33 (a) states that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability.

The Section 504 regulation at 34 C.F.R. §104.33 (b) states that provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting the standard established in 34 C.F.R. §104.33(b)(1)(i).

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 FAPE standards.

Issue 2:

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, proceeding, hearing, or other matter in connection with a complaint; or for the purpose of interfering with any right or privilege secured by the statutes and regulations enforced by OCR.

OCR interprets the regulations it enforces, consistent with case law regarding analogous provisions, to require satisfaction of the following three elements to find a prima facie case of retaliation: (1) an individual experienced an adverse action caused by the recipient; *and* (2) the recipient knew that the individual engaged in a protected activity or believed the individual

might engage in a protected activity in the future; *and* (3) there is some evidence of a causal connection between the adverse action and the protected activity.

After OCR has been able to infer a causal connection between the protected activity and the adverse action, an inference of unlawful retaliation is raised. OCR will then determine if the recipient has identified a facially legitimate, non-retaliatory reason for the adverse action. The recipient's facially legitimate, non-retaliatory reason must be clear, reasonably specific, and of such a character to justify the recipient's action. If the recipient identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation.

Title II contains statutory language explicitly prohibiting retaliation, stating that, “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.”¹ The Section 504 regulation incorporates the Title VI retaliation prohibition at 34 C.F.R. § 100.7(e), which states that no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing.

Factual Findings and Conclusions

Issue #1

The Complainant alleged that the District denied the Student FAPE, by failing to implement provisions of the Student's IEP plan from August 2015 through the present. Specifically, the Complainant alleged that the following provisions were not implemented: checking Student's work frequently for understanding, providing an extra set of books, providing copies of notes and study guides, providing extra time, breaking material down, and providing a Study Skills course.

In examining allegations of failure to implement a student's special education plan, OCR analyzes whether a student has been identified as a student with a disability; whether the student's IEP team determined that the student needs special education or related services of concern to meet his individual disability-related needs; whether the district failed to provide the special education or related services of concern which had been previously approved by the educational team; and, if yes, whether the district provided make-up services.

OCR found that the Student is identified as a student with a disability, with a “significant development delay,” and that the Student was entitled to an IEP during the 2015-2016 and 2016-2017 school years. Specifically, the Student was entitled to the accommodations of checking his work frequently for understanding, providing an extra set of books, providing copies of notes and study guides, providing extra time, breaking material down, and providing a Study Skills course, during the 2015-2016 and 2016-2017 school years under his IEPs .

¹ 42 U.S.C. § 12203(a).

OCR interviewed seven (7) of the Student's teachers over the 2015-2016 and 2016-2017 school years, as well as five (5) additional central office staff and administrators familiar with the Student, and reviewed documentation provided by the District.

Regarding checking Student's work frequently for understanding and breaking material down into manageable parts, OCR found that each teacher was able to provide specific examples of breaking material down to make it more manageable and of checking the Student's understanding of concepts in their courses.

Regarding the provision of extra time, OCR found that three teachers, Teacher 1, Teacher 2, and Teacher 3, stated that extra time was available for the Student and all students, regardless of whether effort is shown. Teacher 4 provided specific examples of how he determined the Student was showing effort in order to receive extra time. Teacher 5 stated there were approximately five or six occasions where he determined the Student was not showing effort (for example, the assignment was left completely blank), and the Student therefore did not receive extra time. Teacher 6 stated that extra time was available if the Student requested it, but he did not do so.

Regarding the provision of copies of the notes and study guides, the language of the IEPs do not specify that notes or study guides must be individually created for the Student or distributed with a certain frequency. Several teachers stated that course materials (e.g., unit packets or study guides) were posted online for students to review. Teacher 2 stated that his course did not have study guides. Teacher 1 stated that hard copies of study guides were provided to the Student. The language of the IEP requires "copies" of any notes or study guides, but does not specify hard or electronic copy

Regarding the provision of an extra set of books for the Student, the District explained that all texts are available online. However, the language of the IEP calls for an "extra set" of the books, and the Complainant's position is that this required hard copies of the textbooks, which she states is better for the Student. The District's Special Education Coordinator confirmed that the Student received his physical textbooks late due to the fact that they had to be requisitioned from the central office, and that he initially received an incorrect textbook. Several teachers could not confirm receipt of the textbooks by the Student (e.g., Teacher 1) or the date of the receipt of the textbooks (e.g., Teacher 5). The Complainant specifically alleged that the Student did not receive a math (Algebra) textbook until late February or early March during the 2016-2017 school year, and the District could only confirm that the Student received the correct textbooks by March.

Regarding the Study Skills course, OCR found that the District failed to implement the Study Skills course for the Student from the beginning of the fall 2016 semester until approximately September 28, 2017. To compensate for the failure to implement the Study Skills course, the District agreed to provide the Student with 30 hours of private tutoring services as well as summer courses over 2017 and 2018, at no charge. The District confirmed the provision of 30 hours of private tutoring and provided the 2017 summer school course for the Student. While the District made an offer for the summer school course in 2018, the District did not enter into a formal agreement with the Complainant regarding the summer school course in 2018.

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Therefore, OCR found insufficient evidence that the District failed to implement the IEP provisions of checking work frequently for understanding, breaking work into manageable parts, providing copies of notes and study guides, and providing extra time on assignments, during the 2015-2016 and 2016-2017 school years. Regarding the provision of an extra set of textbooks, OCR finds that the language of the Student's IEP did imply that the Student would receive extra *physical* copies of the textbooks, and that there is sufficient evidence of a delay in the Student receiving an extra set of textbooks during the 2016-2017 school year.

Finally, OCR finds that the District did initially fail to implement the Student's Study Skills course during the 2016-2017 school year, but notes that the District has taken steps to provide compensatory services to the Complainant for this issue. However, the District has not entered into an agreement with the Complainant to confirm the offer of a summer school course in 2018.

To resolve this matter, the District will convene an interim meeting on behalf of the Student, contingent upon his enrollment in the District, to ensure parties share an understanding of the terms of the IEP (e.g., whether, in the future, textbooks are required in hard copy or can be provided online), and to determine if any additional compensatory services are needed following the delay in extra sets of textbooks. The District will provide the Complainant with written confirmation that the Student is entitled to a summer school course in 2018, contingent upon his enrollment in the District. Additionally, OCR notes that the District conducted comprehensive Section 504 and Title II training for school administrators and special education staff in August, 2017.

Issue #2

The Complainant alleged that the District retaliated against the Student when, following the Complainant's refusal to sign a contract relinquishing her rights to bring claims under Section 504, the District withdrew an offer to provide a compensatory service of transferring the Student to another school.

When OCR investigates retaliation allegations, it uses a four-part prima facie analysis. A prima facie case of retaliation is established by showing: 1) an individual engaged in a protected activity (e.g., opposed a discriminatory policy, asserted protected rights, or participated in an OCR complaint or proceeding); 2) the recipient was aware of, or had knowledge of, the protected activity; 3) the recipient took adverse action against the individual contemporaneously with or subsequent to the individual's participation in the protected activity; and 4) there was an inferable causal relationship between the adverse action and the individual's participation in the protected activity.

Once OCR has established a prima facie case of retaliation, OCR examines whether the recipient can articulate a legitimate, non-discriminatory reason for its action. If the recipient asserts a reason for its actions, OCR analyzes whether the reason articulated by the recipient is a pretext, or cover-up, for retaliation.

OCR found that the Complainant engaged in protected activity of which the District was aware when she communicated with the District throughout the 2015-2016 and 2016-2017 school

years, alleging that the Student's IEP accommodations were not fully implemented in email correspondence and in IEP meetings.

OCR further finds that the District and the Complainant agreed to preliminary resolution terms to compensate for the failure to implement the Study Skills course for the Student, as required under his IEP, from the start of the fall 2016 semester until approximately September 28, 2016. On May 5, 2017, the District sent the Complainant an agreement to provide 30 hours of tutoring from a private service, as well as summer school courses in both summer 2017 and summer 2018. The District additionally agreed to allow the Student to transfer to School 2. In exchange, the District required the Complainant to sign a District Agreement that included terms of confidentiality and a release of liability from disability discrimination claims leading up to the District Agreement date. The Complainant did not agree to these terms and did not sign the District Agreement.

Following the Complainant's refusal to sign the District Agreement, the District no longer approved the transfer for the Student to School 2. The District explained that School 2 was not a school accepting transfer students on the "permissive transfer list," a determination made based on available seats. A school's presence on the permissive transfer list is required for students in the District to transfer into another District school. The District made an exception for the Student in offering to allow the transfer, in order to reach an agreement with the Complainant regarding the failure to implement the Study Skills course issue. Because the ability to transfer to School 2 is not a right the Student, or any student in the District has, but rather, was an exception made for the Student in good faith to reach a resolution, OCR finds that the Student did not experience an adverse action when the offer to approve his transfer request was withdrawn.

Therefore, OCR finds insufficient evidence that the District retaliated against the Student when, following the Complainant's refusal to sign a contract relinquishing her rights to bring claims under Section 504, the District withdrew an offer to provide a compensatory service of transferring the Student to another school, in noncompliance with the Section 504 implementing regulation.

Conclusion

Accordingly, OCR finds, using the preponderance of the evidence standard, that there is insufficient evidence to support a finding the District is in noncompliance with Section 504 and Title II for Issue #2 as alleged. However, OCR found a compliance concern regarding Issue #1, in which the District has agreed to enter into the enclosed Agreement.

OCR will monitor the District's implementation of the Agreement in this case to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. Further, the Complainant may file a private lawsuit in federal court regardless of whether OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will

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seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

OCR appreciates the District's cooperation in this matter and looks forward to receiving the monitoring reports, as required by the enclosed Agreement. If you have any questions, please contact Katherine Dunn, General Attorney at 404-974-9363.

Sincerely,

A handwritten signature in blue ink that reads "Andrea Marie de Vries". The signature is written in a cursive, flowing style.

Andrea de Vries
Supervisory Attorney

Enclosure: As stated