



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

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ATLANTA, GA 30303-8927

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June 7, 2018

**Via U.S. Mail**

Dr. Meria J. Carstarphen, Superintendent  
Atlanta Public Schools  
130 Trinity Ave SW  
Atlanta, GA 30303

Re: OCR Complaint No. 04-18-1040

Dear Dr. Carstarphen:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on October 17, 2017, against Atlanta Public Schools (the District). Specifically, XXXX, (the Complainant) filed the complaint on behalf of her granddaughter, XXXX (the Student) in the District. The Complainant alleges that the District discriminated and retaliated against the Student on the basis of disability.

**Jurisdiction**

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

**Allegations**

Based on the allegations, OCR investigated the following legal issues:

1. Whether the District failed to provide the Student a free appropriate public education (FAPE) during the Fall 2017 at Carver High School, in violation of Section 504 and its implementing regulation at 34 C.F.R. §§ 104.33 and 104.35, and Title II and its implementing regulation at 28 C.F.R. § 35.130.
2. Whether the District retaliated against the Student in August 2017 when she was denied enrollment at Drew Charter School due to the Complainant's previous advocacy, in non-

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

compliance 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.

### **Summary of Investigation**

Regarding allegation #1, before OCR completed its investigation, the District expressed a willingness to resolve allegation #1 by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement related to allegation #1.

Regarding allegation #2, OCR reviewed documents provided by the Complainant, the District, and State Department of Education; and interviewed the Complainant, District and Charter School staff and two State Department of Education staff. After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support the Complainant's allegation. OCR's findings and conclusions related to allegation #2 are discussed below.

### **Background**

The Student was in the ninth grade during the 2017-18 school year at Carver Early College High School. She previously attended Centennial Academy, which is also in the District. According to the Student's Individualized Educational Plan (IEP) dated November 9, 2017, the Student's disabilities are XXXX Disability and XXXX Impairment. The Complainant is the Student's XXXX, who has educational power of attorney for the Student, while the Student resides with her mother, who is the custodial parent.

**Allegation #1:** Whether the District failed to provide the Student a FAPE during the Fall 2017 at Carver Early College High School, in violation of Section 504 and its implementing regulation at 34 C.F.R. §§ 104.33 and 104.35, and Title II and its implementing regulation at 28 C.F.R. § 35.130.

### **Legal Standards**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

### Investigation to date

The Complainant alleged that the District failed to implement the Student's IEP during the 2017-18 school year at Carver Early College. Specifically, the Complainant stated that the Student did not receive Extended School Year (ESY) services, a paraprofessional for classes, reading and math intervention services or speech therapy.

OCR did not complete the investigation to determine whether the District denied the Student a FAPE by failing to implement her IEP, prior to receiving the request from the District to resolve this matter. However, OCR's investigation identified areas of concern, including documentary evidence from the IEP and IEP meetings that discussed when ESY services would be provided, that paraprofessional support was required 100% of the time in the general education classroom per the Student's IEP, and that the speech language pathologist was unavailable. The District has agreed to resolve these concerns.

### Resolution Agreement

To remedy the allegation raised by the complaint, the District agreed to implement the provisions of the attached Resolution Agreement (Agreement), which when fully implemented, will resolve the issue in this complaint. Pursuant to the terms of the Agreement, the District will convene an IEP meeting to determine whether the Student requires compensatory and/or remedial services for the 2017-18 school year.

The Agreement is aligned with the complaint allegation and the information obtained thus far and is consistent with applicable regulations under Section 504 and Title II. OCR will monitor the District's implementation of the 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.

**Allegation #2:** Whether the District retaliated against the Student in August 2017 when she was denied enrollment at Drew Charter School due to the Complainant's previous advocacy, in non-compliance 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

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the District took an adverse action against the Complainant; and, 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines

whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District's reason for its action is a pretext, or excuse, for unlawful retaliation.

### Factual Findings

The Complainant alleged that the Student was denied enrollment at Drew Charter in retaliation for her prior disability advocacy. Specifically, the Complainant stated that the Student applied for the Drew Charter School lottery, and was selected, but by the end of July 2017 the District denied the Student enrollment at Drew Charter School. The Complainant claimed that the Student was homeless since the Student's mom had lost her apartment, and the Student was staying temporarily with her dad, who is the non-custodial parent, when the School's Social Worker went to his house. The Complainant said that Drew Charter School told her they did not have to comply with the McKinney Vento Act related to homelessness status.

The District contends that the Student was denied enrollment at Drew Charter School because the Student's mother, and custodial parent, could not provide an address within the District and that the Student's mother never presented that she was homeless, until after Drew Charter denied enrollment. Specifically, the District contends that the Student's initial lottery application listed a P.O. box, and after she was granted an enrollment spot Drew Charter School requested a physical address for verification of residency within the District, which is the standard procedure. The District stated that at first a physical address was provided, but upon investigation they determined that the Student did not live there, then a second physical address was provided and the resident of that address denied that the Student lived there also. Next, Drew Charter School informed the family that they could not verify either of the two previous addresses and requested an additional address, but none were provided. On August 8, 2017, Drew Charter School issued a letter to the parent informing her that the Student was not eligible to enroll.

The Drew Charter employee who went to the second physical address stated that on August 7, 2017, when he went to the address the resident acknowledged being the father of the Student, but when he asked if the Student resided there he told him no the Student did not live with him, but on the other side of town with her mother. The Drew Charter employee stated that the Student was not present during his visit.

The Student's mom acknowledged to OCR that she moved in July 2017 from the first physical address provided due to a break in from a neighbor's son. She said that the second address provided was the Student's father's address. She said during the summer the Student resided with him, the Complainant, and friends, while she found a new address. The Complainant said that since January 2018 she has resided with the Student in Norcross, Georgia, which OCR notes is outside of the District. She acknowledged that homelessness status was not alleged until after Drew Charter denied enrollment on August 8, 2017.

The District's homelessness coordinator said that if the Student had presented as homeless to Drew Charter School and the District earlier during the enrollment process then she could have assisted them with the enrollment at Drew Charter School as a homeless student. The Georgia

Department of Education, (GA DOE) investigated a similar complaint from the Complainant related to the Student’s homelessness status and enrollment at Drew Charter School.<sup>1</sup> OCR reviewed the final report, and spoke with the assigned investigator and supervisor, who confirmed to OCR that the appropriate procedures were followed related to the McKinney Vento Act after consultation with the US Department of Education’s appropriate office. The GA DOE’s investigation determined that the Student was not eligible to enroll at Drew Charter School based on homelessness status.

### Analysis/Conclusion

As noted above, to determine whether retaliation has occurred, OCR first examines whether there is a prima facie case of retaliation, and if any element of a prima facie case is not established, it is not necessary to address the remaining elements.

#### *Adverse Action*

As noted above, the Section 504 and Title II anti-retaliation regulations provide that no recipient or other person shall “intimidate, threaten, coerce, or discriminate against” any individual for certain purposes. An act of intimidation, threat, coercion, or discrimination constitutes adverse action if it 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 by Section 504 and Title II. Whether an action is adverse is judged from the perspective of a reasonable person in the Complainant’s position.

OCR’s investigation revealed that the Student was not admitted to Drew Charter School, and OCR finds this to be an adverse action. Accordingly, OCR moves to the next step in the analysis.

#### *Protected activity and knowledge*

The Section 504 and Title II regulations define protected activity as either participation or interference, which protect distinct behavior. The participation applies when an individual has “made a complaint, testified, assisted, or participated in any manner” in an investigation, proceeding, or hearing under OCR’s regulations, while the interference clause – prohibiting actions for the purpose of interfering “with any right or privilege secured by” the statutes enforced by Section 504 and Title II and their implementing regulations – protects any actions taken in furtherance of a substantive or procedural right guaranteed by the statutes and regulations enforced by OCR.

Where the recipient is alleged to have retaliated due to previous or ongoing protected activity, the recipient must have had knowledge of the protected activity at the time that it took the adverse action. The recipient’s knowledge of the protected activity can be based on written,

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<sup>1</sup> Specifically, the Complainant alleged in the GA DOE complaint that the Student should have been eligible to enroll at Drew Charter School due to rights under the McKinney Vento Education for Homeless Children and Youth Act.

verbal, formal, or informal notice, but the notice must convey that an individual has engaged in a protected activity.

Here, the record clearly shows that the Complainant has previously advocated on behalf of disabled Student with the School District. As the District, notes in their response, “The “Complainant is a chronic and habitual filer of complaints against the District”, including the filing of a due process request on October 25, 2016, against the District. OCR has generally held that filing a due process hearing request is exercising a right provided by Section 504 and Title II and, therefore, is a protected activity. Accordingly, OCR found that the Complainant did meet the threshold for protected activity and the District had knowledge of such.

### *Causal Connection*

Next, OCR must determine whether the recipient took adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity. For purposes of the *prima facie* case, OCR looks at the facts as a whole and broadly construes whether there is some evidence of a causal connection. Causal connection may be established through either direct or circumstantial evidence. Here, the Complainant previously requested a due process hearing in October 25, 2016, which was dismissed on May 4, 2017, while the adverse action occurred in early August 2017. Thus, there was as little more than three months between the protected activity and adverse act, which OCR deems is a sufficiently close in time between knowledge of the protected activities and the adverse actions to infer a causal connection. Accordingly, a *prima facie* case of retaliation is established.

Upon the Complainant’s establishment of a *prima facie* case of retaliation, the District is given an opportunity to provide a legitimate, non-retaliatory reason for the alleged adverse action.

### *Legitimate Non-retaliatory Reason and Pretext*

Once a *prima facie* case of retaliation is established, the recipient must articulate a legitimate, non-retaliatory reason for its action, and if so, the evidence is analyzed to determine whether the proffered reason is merely an excuse or pretext for retaliation. 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.

The District’s legitimate non-retaliatory reason for the Student enrollment denial at Drew Charter School was due to the mother not providing a valid address within the District’s zone, and not related to the homelessness status of the Student, as the Complainant alleged. OCR examined whether the District’s proffered reason was a pretext for retaliation, considering whether the District’s explanation was credible and the actions were logical and consistent with procedures established related to residency and homelessness. OCR found that although, the Complainant believed that the Student was denied enrollment due to an improper determination of the Student’s homelessness status, the evidence indicated that the Student was actually denied

enrollment at Drew Charter School due to three invalid addresses being given to the School during the enrollment process.

Specifically, related to the Student's homelessness status, OCR found that the mother acknowledged that homelessness status was not alleged until after enrollment was denied by Drew Charter School on August 8, 2017, although she stated that she was without a home since July 2017 when she moved. Furthermore, the GA DOE's investigation and staff confirmed to OCR that the appropriate policies and procedures were followed in the application of the McKinney Vento Act at Drew Charter School, and the Student was not eligible to enroll at Drew Charter School due to homelessness.

Next, OCR examined the three invalid addresses provided; first a P.O. box, then a physical address that the mother of the Student acknowledged she no longer lived at because she chose to move due to a break in from a neighbor's son, and finally the Student's father's address. The Drew Charter employee who went to the address stated to OCR that the resident acknowledged being the father of the Student, but denied that the Student resided with him, stating that she lived with her mom on the other side of town. OCR notes that this information is consistent with both the Complainant's and Student's mother's prior statements that the mother was the custodial parent, and not the father.

Accordingly, OCR finds that the District's proffered reason was credible, consistent and logical with established procedures for enrollment, and the Student was not treated differently than similarly situated students. Therefore, based on the preponderance of the evidence, OCR finds that the District's proffered reason withstands the pretext analysis and therefore, there is insufficient evidence to support a finding that the District violated Section 504 and Title II with regard to this allegation.

### **Conclusion**

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on June 6, 2018 which, when fully implemented, will resolve allegation #1 raised in this complaint. The provisions of the Agreement are aligned with allegation #1 and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Lorraine Irier, the OCR attorney assigned to this complaint, at 404-973-9349 or [lorraine.rier@ed.gov](mailto:lorraine.rier@ed.gov).

Sincerely,

Arthur Manigault  
Compliance Team Leader

Enclosure: Resolution Agreement

cc: MaryGrace Bell <[marygrace.bell@nelsonmullins.com](mailto:marygrace.bell@nelsonmullins.com)>