



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

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
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December 20, 2018

Via Regular Mail & Email

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Broward County School District
600 SE 3rd Avenue
Ft. Lauderdale, FL 33062

Re: OCR Complaint # 04-18-1126

Dear XXXXXX:

On December 7, 2017, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint against the Broward County School District (District). In the complaint, the Complainant alleged that the District discriminated against his son, (Student), on the basis of disability. Specifically, he stated that the District failed to provide the Student with transportation as an accommodation from October 9, 2017 until sometime after December, 2017, and the District failed to provide peer assistance in the classroom as required by the Student's 504 Plan.

OCR is responsible for enforcing 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; and 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 prohibits discrimination on the basis of disability by public entities. The District is a public entity and receives federal financial assistance and is subject to these laws.

OCR investigated the following issues:

- (1) Whether the District denied the Student a free and appropriate public education (FAPE) by failing to provide him with in-class peer assistance as outlined in his Accommodation Plan for the 2017-18 school year, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.33, and Title II and its implementing regulation at 28 C.F.R. § 35.130.
- (2) Whether the District discriminated against the Student on the basis of disability by denying him the benefit of transportation services as outlined in his Accommodation Plan for the 2017-18 school year, in noncompliance with Section 504 and its implementing

regulation at 34 C.F.R. §§104.4 and 104.37, and Title II and its implementing regulation at 28 C.F.R. § 35.130.

OCR's investigation of the complaint included an analysis of data provided by the Complainant and the District, as well as interviews with the Complainant and members of the District's staff. OCR reviewed the evidence under the preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion. After a thorough review of all of the evidence, OCR has determined that there is insufficient evidence to support a finding of noncompliance with Section 504 and Title II, as alleged for Issue 1. However, for Issue 2, prior to the completion of the investigation, the District requested to voluntarily resolve the complaint pursuant to 302. The bases for OCR's determinations are set forth below.

I. Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) provides that no qualified student with a disability shall, on the basis of their 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. Section 104.4(b) provides that 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 student with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified student with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) provide a qualified student with a disability an aid, benefit, or service that is not as effective as that provided to others; (iv) provide different or separate aid, benefits, or services to students with disabilities or to any class of student with disability unless such action is necessary to provide the student with a disability with aid, benefits, or services that are as effective as those provided to others; (v) aid or perpetuate discrimination against a qualified student with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity; or (vii) otherwise limit a qualified student with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires that a recipient that operates a public elementary or secondary education program provide FAPE to each qualified person with a disability in the recipient's jurisdiction. The term "appropriate education" is defined under 34 C.F.R. § 104.33(b) to mean the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of persons without disabilities are met and (ii) are based upon adherence to the procedural requirements of the Section 504 regulations. OCR interprets the Title II regulations general prohibition against discrimination (at 28 C.F.R. § 35.130) consistent with the Section 504 regulations.

With respect to non-academic services, the Section 504 implementing at 34 C.F.R. § 104.37 states that a recipient shall provide non-academic and extracurricular services and activities in

such manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

II. BACKGROUND

The Student was eleven years old and attended the fifth grade at the XXXX Middle School when the complained of actions occurred. XXXX Middle School is his zoned school and he lives approximately 1 ½ miles from it.

XXXXXXXXXXXXXXXXXXXX. As a result, he had to wear a cast that prevented him from bending his elbow or straightening his arm making it hard for him to put on a back pack. Prior to breaking his arm, the Student XXXXXXXXXXXXXXX but was unable to do so afterward.

The District convened a 504 Team meeting on October 9, 2017 and found the Student eligible for accommodations related to his impaired mobility and limited use of his dominant arm. These included transportation services among others. However, the District contacted the Complainant on November 3, 2017 and informed him that District would not provide transportation services to the Student due to the “nature” of his injury. The District provided no transportation services to him prior to or after November 3, 2017.

III. Factual Findings, Analysis, and Conclusion

Issue 1: Whether the Student was denied a FAPE for failure to provide classroom accommodations.

Factual Findings

The Complainant alleged that the District did not provide the Student with a writing assistant and possibly other accommodations included in the Student’ s 504 plan.

The Student’s Section 504 Team met on October 9, 2017 and agreed that the District would provide the Student eight accommodations. Under the plan, the District agreed to allow or provide daily transportation; rest periods during exercise and physical activities; a peer buddy to assist him with classroom tasks and carrying his backpack; five minute early dismissal from classes for extra time in transitions; computer use for typing assignments and tests responses, “if available;” oral responses on “classroom work and tests;” extra time to complete assignments and tests; and assistance transporting the Student’s food tray.

The District used a “peer buddy system” to provide the Student assistance with classroom tasks like notetaking, completing assignments, and carrying his backpack. The data also shows that the District provided the Student with rest periods during exercise and physical activities. The

Student's teachers allowed him and his peer buddy to regularly leave class early to allow the Student extra time during transitions. Regarding the Student's computer use accommodation, the evidence shows that he had access to computers for a majority of the time and that when he was unable to use a computer due to practical or technical reasons, his peer buddy helped him take notes and complete written assignments. The Student also confirmed that he was allowed to provide oral responses to classroom work and tests. The Student also received assistance carrying his lunch tray.

Regarding the last remaining accommodation, OCR notes that the Student stated that he had to turn in assignments on the same day as his classmates and did not receive extra time to complete assignments. However, OCR interviewed the 504 Liaison and the Assistant Principal at XXXX Middle School and they each confirmed that the Student and his peer buddy received extra time to complete his class assignments. During this time, the students would often work in the Guidance Department, which is next to the "office." In clarification, the Complainant noted that he saw the Student working on his assignments with a classmate at or near the office. The Student's peer buddy corroborated this account and added that she and the Student would also go to the ESE classroom on Tuesdays and Thursdays for "extra time."

Analysis & Conclusion

Per Section 504, 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 School's services, programs and activities.

Here, the preponderance of the evidence shows that the Student was provided the classroom accommodations outlined in his 504 Plan such as peer assistance with task like notetaking, completing assignments, and carrying his backpack. The preponderance of the evidence also shows that the Student was given extra time to complete assignments. Accordingly, OCR determined that there is insufficient evidence to conclude that the Recipient discriminated against the Student in the manner alleged in non-compliance with Section 504 and Title II.

Issue 2: Whether the District discriminated against the Student on the basis of disability by denying him the benefit of transportation services as outlined in his Accommodation Plan for the 2017-18 school year.

Summary of the Evidence obtained to date

According to the District's *Bus Transportation* policy, the District provides transportation to students who live more than two miles from their respective school. The District will provide transportation services to students living within the two mile radius only in certain circumstances. To receive this service, a student's parent or guardian must first ask the student's IEP or Section 504 teams for the service as an accommodation. The team must then determine

that the student needs transportation services and afterward, must then submit a transportation request to the District's Transportation Department. The Transportation Department then decides whether the student's disability "qualifies" for transportation services after and irrespective of the IEP or Section 504 team's decision. The Special Needs Supervisor added that, "504 is usually not eligible."

The Student's Section 504 team met on October 9, 2017 and identified his primary disability as "orthopedic disorder." The resulting plan notes that the Student's impairment "substantially or extremely substantially limits" his ability to care for himself, perform manual tasks, and lift things. As accommodation, the District agreed to provide "daily" transportation services from October 9, 2017 until June 8, 2018. The Counselor at XXXX Middle completed a *Pupil Transportation Enrollment Data Form* on October 12, 2017 noting the Student's exceptionality as "orthopedic disorder" and requesting transportation services to begin on the same day. The Special Needs Supervisor requested and received the Student's accommodation plan from the Counselor on October 19, 2017 and forwarded it to the Transportation Department. The District's Transportation Department denied the transportation request on or before November 3, 2017.

Prior to the completion of OCR's investigation, the District requested to voluntarily resolve Allegation 2. Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved before the conclusion of an investigation when the recipient or public entity expresses an interest in resolving the complaint and OCR determines that resolution pursuant to Section 302 is appropriate. The attached Resolution Agreement (Agreement) will require the Recipient to take actions to remedy any compliance concerns related to the process of obtaining transportation as an accommodation in the District pursuant to Section 504 and Title II.

On December 19, 2018, OCR received the enclosed signed Agreement that, when fully implemented, will resolve Issue 2. OCR will monitor the Recipient's implementation of this Agreement to ensure that it is fully implemented. If the Recipient fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

With respect to Issue 1, 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.

The Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the

recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the District may not harass, coerce, 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. If OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Clayton Adams. at (404) 974-9464 or by email at Clayton.Adams@ed.gov, or me at (404) 974-9408.

Sincerely,

April England-Albright, Esq.
Supervisory General Attorney

Enclosures