



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

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
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April 5, 2019

Mr. James Tager, Superintendent
Flagler County School District
1769 E Moody Boulevard, #2
Bunnell, Florida 32110

Re: OCR Complaint No. 04-19-1013

Dear Superintendent Tager:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against the Flagler County School District (District), alleging discrimination on the basis of disability.

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.

On October 30, 2018, OCR opened the following legal issues for investigation:

1. Whether the District discriminates against students with disabilities who receive specialized transportation services by releasing them from class earlier than others thereby shortening their school day, in non-compliance with the Section 504 implementing regulation at 34 C.F.R. §§ 104.4 and 104.33 and the Title II implementing regulation at 28 C.F.R. § 34.130; and,
2. Whether the District discriminates against Emotional Behavioral Disorder (EBD) students in a self-contained class at Wadsworth Elementary School (WES) by treating them differently than their peers. Specifically, the School prohibits students in the self-contained EBD class from bringing backpacks to school, while other students are permitted to do so, 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. § 34.130.

Summary of Investigation

OCR reviews evidence under the preponderance of the evidence standard. Under this 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.

In this matter, OCR reviewed documents and information produced by the Complainant and Recipient and interviewed witnesses identified by both parties. OCR interviewed parent witnesses and District staff, including the XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, general education and special education teachers across the District's nine (9) schools, and bus drivers assigned to the District's ESE routes (i.e. drivers exclusively assigned to bus routes that serve students with specialized transportation needs because of disability) across the District's nine (9) schools.

Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4 states that no 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. 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 persons with disabilities 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 person with a disability with 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 persons with disabilities or to any class of disabled persons unless such action is necessary to provide qualified persons with a disability with aid, benefits, or services that are as effective as those provided to others; . . . (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) 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. A public entity, 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 individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified individual 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 individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; . . . or, (vii) otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

To determine whether a recipient has subjected a student to different treatment on the basis of disability, OCR considers whether there is evidence of intentional discrimination on the basis of disability. Evidence of discriminatory intent may be direct or circumstantial. OCR initially examines whether there is direct evidence of discriminatory bias by a recipient based on a student's disability. Direct evidence includes conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude. Any direct evidence of discrimination must show that discrimination motivated the denial of an educational benefit or other adverse action. OCR also looks at whether there is evidence of different treatment as compared to students without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of education, services, benefits, or opportunities.

If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination based on disability. To find noncompliance, the preponderance of evidence must establish that the recipient's actions were based on disability.

The Section 504 implementing regulation at 34 C.F.R. § 104.33 states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. For the purpose of this subpart, the 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.

Allegation One: Whether the District discriminates against students with disabilities who receive specialized transportation services by releasing them from class earlier than others thereby shortening their school day.

Documentation produced to OCR by the District included a 2018-2019 Transportation Handbook of Operations (Handbook). Section 14 of the Handbook, relevant to Exceptional Student Education (ESE), states that it is common practice, but not a requirement, that ESE students are brought out to the school bus early. They cannot leave their class more than 10 minutes early. According to the Handbook, the middle school bell times are between 7:25am and 1:40pm. The high school and alternative school bell times are between 8:00am and 2:15pm. The elementary school bell times are as follows: the WES bell times are at 8:55am and 3:25pm; the Bunnell Elementary School (BES) and Belle Terre Elementary School (BTES) bell times are 9:00am and 3:30pm; and, the Old Kings Elementary School (OKES) and Rymfire Elementary School (RES) bell times are 9:10am and 3:40pm.

An additional bell schedule produced by the District designated the times the District's paraprofessionals were expected to be on the bus pad with their ESE students to be loaded and unloaded from the ESE buses. For each of the District's nine (9) schools, these times were ten

(10) minutes prior to the end of the school day for middle school students and fifteen (15) minutes prior to the end of the school day for the District’s elementary school, alternative school, and high school students.

In an email communication produced to OCR by the District, XXXX provided an additional ESE transportation schedule that shows when ESE students assigned to the District’s elementary, middle, and high schools arrive to the bus pads. A comparison of the XXXX’s schedule to the end of the day bell times, showed that for PCHS and Matanzas High School (MHS), where the school day ends at 2:15 pm, ESE students who require specialized transportation arrive on the bus pad at 1:50 pm, twenty-five (25) minutes before class dismissal.

For the District’s middle schools, Buddy Taylor Middle School (BTMS) and ITMS, where dismissal is at 1: 40 pm, the ESE Router’s schedule shows that ESE students who require specialized transportation arrive to the bus pad at 1:30 pm, ten (10) minutes before the end of the school day.

With respect to the District’s elementary schools, the XXXX’s schedule showed that for BTES, where the school day ends at 3:30 pm, the XXXX’s schedule shows that ESE students who require specialized transportation arrive on the bus pad between 3:00 and 3:15, 15-30 minutes before the end of the school day. For BES, where the school day ends at 3:30 pm, the XXXX’s schedule shows that ESE students who require specialized transportation arrive to the bus pad between 3:15 pm and 3:20 pm. The OKES school day ends at 3:40 pm. According to the XXXX’s schedule, ESE students who require specialized transportation arrive on the bus pad between 3:10 pm and 3:20 pm.

At RES, where the school day ends at 3:40 pm, ESE students who require specialized transportation arrive on the bus pad between 3:05 pm and 3:20 pm. For some of these students, this amounts to 35 minutes prior to the end of the school day. With respect to WES, the XXXX’s schedule shows that ESE students who require specialized transportation arrive to the bus pad between 2:50 pm and 3:00 pm. The school day ends at 3:25 pm.

These times do not account for the period of time it takes for students to travel from their classes to the bus pad.

During interviews, the XXXX and XXXX, who is XXXX, acknowledged that the District maintained a practice of releasing ESE students who require specialized transportation from school before general education students; however, the XXXX explained that the practice was not widespread and did not impact all of the District’s schools. Further, the XXXX told OCR that the matter had been addressed. He was, however, unable to identify impacted schools, students, or how much earlier the impacted ESE students were released from school in comparison to their general education peers. On the other hand, the XXXX told OCR staff that all ESE students who require specialized transportation should be getting picked up ten (10) minutes early and that the District’s practice in this respect was ongoing and had not been modified.

The District provided OCR with a memorandum dated December 17, 2018 from the XXXX addressed to “ALL ESE Drivers and Aides,” which states:

Effective January 7, 2019, all ESE student will be released from class when the bell rings. These students will utilize the same bell schedule as gen ed students. You are not to accept any students to your bus until bell time. This goes for all schools. Please begin telling your parents immediately that their student will be getting home later in the day once we return from winter break . . . be mindful of gen ed buses and students when exiting bus loops.

The District was unable to produce the route schedules that were attached to the Transportation Director’s memorandum.

OCR interviewed nine (9) District bus drivers assigned to transport students requiring specialized transportation services. One driver, assigned to XXXX, told OCR that she could not recall any specific scheduling information about her routes despite having run her assigned routes in the days immediately preceding her February 6, 2019 interview.

The eight (8) remaining bus drivers confirmed, to one degree or another, that prior to January 7, 2019, they picked-up their ESE students earlier than general education students and in most cases did so prior to the ending bell for the day. Statements of two drivers suggested that, in some cases, although drivers have now been informed that they may not leave school site prior to the ending bell, their ESE students now get on the bus before the end of the school day, but thereafter wait on the bus for the end of day bell before the bus is dismissed to leave school grounds.

Despite the modifications detailed in the XXXX’s January 7, 2019 memorandum, based on the statements of many of the District’s drivers, their current routes still result in many ESE students requiring specialized transportation services receiving less instructional time than their general education peers by up to ten (10) minutes, depending on the school.

Most of the District’s instructional staff who were interviewed by OCR (special education teachers, general education teachers, and paraprofessionals) across the District’s nine (9) schools confirmed, to one degree or another, that prior to the XXXX’s December 17, 2018 memorandum, they dismissed ESE students assigned to self-contained classes who required specialized transportation earlier than general education students, before the end of the instructional day.

The XXXX told OCR that ESE students at PCHS are assigned to a “flex schedule,” in which students with disabilities who need specialized transportation may arrive to school early. Although the Principal was aware that these students arrived earlier than their regular education students, he could not confirm how much earlier. He stated only that instruction for these students begins as soon as they exit the bus. Further, he asserted that all ESE students requiring specialized transportation services at PCHS had Individualized Education Programs (IEP) that required instruction in self-care and grooming, which is taught at the beginning of the school day.

A self-contained ESE teacher at PCHS, who OCR interviewed, confirmed that not all of her ESE students have self-care and grooming instruction as a part of their IEPs. Further, she acknowledged that not all of her ESE students ride these same buses. Thus, they do not all arrive at the same time. The ESE teacher confirmed that prior to January 2019, her students ended their instructional day at 1:50 pm. She told OCR that she was informed by PCHS administrators, through the direction of the Transportation Department, that as of January 2019, her ESE students could not be released before 2:12 pm.

The District provided a number of defenses to this complaint allegation. Initially, through Counsel, the District acknowledged that ESE students were being released from class early; however, the District explained that it released these students early for their safety and comfortability. The District’s position in this respect relied upon generalizations and stereotypes about ESE students (i.e. they can become anxious in the hallway with other students, because of mobility impairments, they require extra time to get to the bus loops etc.).

Second, through Counsel, the District asserted that the impacted students were not missing core instruction because ESE students District-wide are scheduled such that their elective courses (Physical Education (P.E.), Art, and Music etc.) are at the end of the school day. Therefore, the impacted students were missing elective instruction rather than instruction in core subject areas. In an interview with OCR staff, the District’s XXXX categorically denied that the District set schedules where ESE students have elective courses at the end of the school day.

Third, through Counsel, the District contended that the parents of ESE students consented to the early release of their students because they were informed during IEP meetings that in order for their students to receive specialized transportation services, they would need to be picked up earlier than general education students. This practice would not obviate a need for a group of knowledgeable persons under Section 504 or the Individuals with Disabilities Education Act (IDEA) to make an individualized assessment of student need – as distinct from parents conceding to a shortened school day in consideration of the District’s provision of specialized transportation services.

Fourth, through Counsel, the District contended that the District is a School-Choice District, implying that because all students may choose their desired school, the District was not required to provide transportation services to students, including students who, because of their disabilities, require specialized transportation services. When asked to provide documentation supporting this contention, the documentation provided to OCR did not support the District’s position.

Lastly, through Counsel, the District contended that an earlier bus schedule does not confirm that ESE students are being subjected to a shortened school day, implying that although ESE bus schedules reflect earlier pick-up times, the pick-up times themselves were after the school day concluded. As above, this position was not supported by documentary evidence or witness statements.

Analysis and Conclusion

OCR finds that the preponderance of the evidence supports a conclusion that the District discriminated against students with disabilities by releasing students with disabilities requiring specialized transportation services from class earlier than others thereby shortening their school day. Initially, Counsel for the District admitted to this practice, and cited to generalized concerns relevant to ESE students. Further, the District's Transportation Handbook makes specific reference to the District's policy of picking-up students subject to specialized transportation services ten (10) minutes earlier than their regular education peers.

Additionally, the XXXX's schedule showed that generally, paraprofessionals were expected to bring ESE students requiring specialized transportation services within the District out to the bus loop between ten (10) and fifteen (15) minutes before the end of the school day. For the District's middle schools and WES, paraprofessionals were expected to be at the bus loop with their students ten (10) minutes prior to the end of the school day. For high schools, alternative schools, and the remaining elementary schools (BES, BTES, OKES, and RES), paraprofessionals were expected to bring their ESE students to the bus loop fifteen (15) minutes prior to the end of the school day.

In addition, District staff with whom OCR spoke, confirmed that ESE students requiring specialized transportation services who were served in self-contained settings were dismissed from class before the end of the school day to begin their transition to the ESE bus loop, at a minimum, as of the beginning of the 2018-2019 school year. In response to the instant OCR complaint, the District made modifications to its ESE transportation schedule, which pushed back pick-up times for students requiring specialized transportation services a varying number of minutes. The modifications became effective January 7, 2019. The evidence did not show that the modifications impacted the instructional start times identified by the District.

The modifications detailed in the XXXX's January 7, 2019 memorandum still resulted in many ESE students requiring specialized transportation services receiving less instructional time than their general education peers by up to ten (10) minutes, depending on the school. In other cases, based on witness statements provided, it appears that students may still be leaving class up to fifteen (15) minutes early, but remain on campus (on their buses) until general education students are dismissed. Thus, OCR finds that the District's January 7, 2019 modifications did not remedy OCR's concern regarding the early dismissal of ESE students requiring specialized transportation services.

In addition, the XXXX's January 7, 2019 memorandum did not retract or impact the District's Handbook's policy, which explicitly references earlier release times for ESE students. Further, the evidence did not establish whether, and if so, to what extent any notices or directives submitted by administrators to school staff have the effect of District-wide policy.

For PCHS, the District contended that its ESE students were on a "flex schedule" which allowed them to begin and end their day earlier than general education students, resulting in no loss of instructional time as compared to their general education counterparts. However, the XXXX and one ESE self-contained teacher with whom OCR spoke could not provide a specific start time for instruction for these students, such that OCR could compare whether these students were receiving more or less instruction than their regular education peers.

The XXXX and ESE Teacher generally contended that because some or all of these self-contained ESE students required social skills or grooming instruction, their instructional day began as soon as they exited their buses. According to the PCHS Teacher, instructional start time varied based on the students' bus routes and arrival times. For PCHS in particular, where all self-contained ESE students were reportedly on a "flex schedule," the District's January 7, 2019 routing modifications did not impact morning arrival times. According to PCHS staff, however, the afternoon dismissal times were pushed back to bring them into conformity with the dismissal times for general education students at PCHS.

As noted, the District cited safety and comfortability concerns as a rationale for the District's practice of releasing ESE students prior to the end of the school day. This rationale was based on generalizations about the needs of ESE students requiring specialized transportation services and did not account for, in any way, the individual needs of the impacted ESE students. OCR, thus, finds that the District's explanation was discriminatory in nature. Further, because the District could have engaged in alternative practices to ensure ESE student safety without shortening their school day, as evidence by its January 7, 2019 bus route modifications, OCR also finds that the District's explanation for its practices is not legitimate.

The District, thus, has failed to meet its burden of producing a legitimate non-discriminatory reason for its actions. Therefore, the evidence is sufficient to establish that the District subjected students with disabilities who require specialized transportation services to different treatment by effectively shortening their school day, which resulted in the denial or limitation of education, services, benefits, or opportunities and thus, is in violation of the applicable Section 504 and Title II regulations.

Free Appropriate Public Education (FAPE) Implications

Pursuant to the Section 504 implementing regulation at 34 C.F.R. § 104.33, a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. For the purpose of this subpart, the 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.

Because, as above, OCR finds that the District discriminated against ESE students requiring specialized transportation services by shortening their school day, without evidence that the District conducted individualized assessments of student needs in this respect, OCR is concerned that the impacted students may have been denied FAPE.

Allegation Two: Whether the District discriminates against EBD students in a self-contained class at WES by treating them differently than their peers. Specifically, the School prohibits students in the self-contained EBD class from bringing backpacks to school, while other students are permitted to do so.

On November 28, 2018, the District sought to resolve allegation 2 pursuant to Section 302 of OCR's Case Processing Manual (CPM). OCR determined that it is appropriate to resolve allegation 2 because OCR's investigation identified issues that can be addressed through a resolution agreement.

The evidence available to OCR established that WES maintained a practice of treating student assigned to self-contained EBD classes differently than their peers by prohibiting their use of back packs. Specifically, the District produced correspondence from the School's XXXX stating that in the School ". . . EBD students are not allowed to bring back packs until they are ready to start mainstreaming back into the general education setting." The provisions of the resolution agreement are tied to the evidence obtained during this investigation, and will be consistent with applicable regulations.

Overall Conclusion

On April 5, 2019, OCR received the enclosed signed Resolution Agreement (Agreement) that, when fully implemented, will resolve the issues raised in this complaint. OCR will monitor the District's implementation of this 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. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

This concludes OCR's investigation of the 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.

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 about this letter, please contact Cerrone Lockett, at (404) 974-9318.

Sincerely,

Melanie Velez
Regional Director

Enclosure