



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

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ATLANTA, GA 30303 -8927

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December 18, 2019

Via E-mail & U.S. Mail

Dr. Curtis Jones, Superintendent
Bibb County School District
c/o Randy Howard, Chief Legal Counsel
484 Mulberry Street
Macon, GA 31201
randy.howard@bcsdk12.net

Re: OCR Complaint No. 04-19-1475

Dear Dr. Jones:

On July 2, 2019, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint filed by Complainant against the Bibb County School District (District), alleging disability discrimination. Specifically, Complainant alleged that the District discriminated against the Student on the basis of his disability in the following ways:

1. During the 2018-2019 academic year, the District failed to provide the Student a free appropriate public education (FAPE) by failing to implement his Section 504 Accommodation Plan;
2. During the 2018-2019 academic year, the District subjected the Student to different treatment based on his disability when it denied him the opportunity to participate in or benefit from physical education, art, music, and media services;
3. During the 2018-2019 academic year, the District retaliated against the Parent and Student because the Complainant advocated on their behalf when it failed to timely respond to the Parent's requests for a meeting to discuss the Student's educational plan, treated the parent in a hostile manner during Section 504 meetings, failed to provide the Parent or Student with a copy of his report card or communicate with them regarding the lack thereof, subjected the Student to mistreatment while in class, and caused him to fail classes; and
4. The District failed to respond to repeated incidents of peer related bullying between November 2018 until the end of the school year, which occurred because of the Student's disability.

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. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The Section

504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the prohibition against retaliation provided for in the Title VI regulation at 34 C.F.R. § 100.7(e). OCR also enforces 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 by public entities. As a recipient of Federal financial assistance and public entity, the District is subject to these laws.

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

1. Whether during the 2018-2019 academic year the District failed to provide the Student a FAPE by failing to implement the Student's Section 504 Accommodation Plan with respect to accommodations for Instructional Setting, Assignments, and Testing, 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 during the 2018-2019 academic year the District subjected the Student to different treatment based on his disability when it denied the Student the opportunity to participate in or benefit from physical education, art, music, and media services, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4(b) and Title II and its implementing regulation at 28 C.F.R § 35.130;
3. Whether during the 2018-2019 academic year the District retaliated against the Student and Parent in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.61 and Title II and its implementing regulation at 28 C.F.R § 35.134; and
4. Whether the District discriminated against the Student by failing to respond appropriately to incidents of disability harassment by a student in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4 and Title II and its implementing regulation at 28 C.F.R. § 35.130.

During the investigation, OCR reviewed documents provided by the District and Complainant, including but not limited to the Student's 504 Accommodation Plan, Individualized Education Programs (IEP), the District's Section 504 Policies and Procedures Manual, disciplinary records, email communications, audio recordings of meetings, statements and meeting notes.

However, prior to completing the investigation of Issue Nos. 1-3, the District requested to voluntarily resolve the complaints pursuant to OCR's case process manual section 302. With respect to Issue No. 4, after carefully considering all the information obtained during the investigation, OCR has found insufficient evidence of a violation of Section 504 and Title II as alleged. Set forth below is a summary of OCR's investigation thus far in relation to Issue Nos. 1-3 and the basis for OCR's determination on Issue No. 4.

Legal Standards

FAPE

The Section 504 implementing 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 free appropriate public education to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Section 504 at 34 C.F.R. §104.33 (b)(1) states that 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 disabled persons as adequately as the needs of nondisabled persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

Different Treatment & Harassment

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.

The Section 504 implementing regulation at 34 C.F.R. § 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 implementing regulation of Title II at 28 C.F.R § 35.130 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.

Retaliation

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation 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 a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an

investigation, proceeding or hearing under Section 504. The Title II implementing regulation at 28 C.F.R. § 35.134, similarly prohibits retaliation by public entities.

Issues 1-3: Whether the Student was denied a FAPE, subjected to different treatment, or subjected to retaliation, in non-compliance with Section 504 and Title II, as alleged.

Summary of Evidence Gathered Thus Far and Resolution

The Student is a qualified student with disabilities (Asperger's Disorder and ADHD). The Student's Parent contracted Complainant to advocate for her son's educational rights during the 2018-2019 academic year when he was a fourth-grade student at Sonny Carter Elementary School within the District. The Student's 504 Plan, implemented on August 21, 2018, required the District to provide accommodations with respect to instructional setting, assignments and testing. Specifically, his teachers were required to secure attention and repeat directions, check for understanding, place him in close proximity, provide a reading checklist to assist with completing assignments, provide frequent redirection to task, and provide small group testing. On or about October 21, 2019, the Parent withdrew the Student from Sonny Carter Elementary School and enrolled him in a different school within the District where, according to Complainant, the Student has not experienced any of the issues alleged in the Complaint and his IEP is currently addressing his needs.

Examination of an audio recording of a March 4, 2019, meeting between District staff, Complainant and the Parent, revealed that some of the accommodations required by the Student's Section 504 Plan, with the exception of small group testing, may not have been provided. The audio recording also indicated that teachers may not have understood what some of the accommodations required. For example, the Teachers explained that small group testing was provided at a back table in all classrooms while the other students were testing at their desks instead of being provided outside the classroom. At this stage of the investigation, OCR has not received any documents which showed that the Student's 504 Plan was implemented.

The recording further revealed that at least one teacher acknowledged a practice of pulling the Student out of Physical Education and other special classes to provide additional instruction. However, the District maintains that once the Parent voiced her concerns about the matter during the IEP meeting, it agreed to stop this practice. The March 4, 2019 recording shows that the parties agreed the Student could be pulled from activity classes under the following conditions: never physical education; never two days in a row; never multiple days in a week; not for punishment; and the parent must be notified. This agreement was not memorialized in either of the Student's IEP or 504 Plans and the District did not produce any records that show when it provided the Student's IEP or 504 Plan accommodations.

While recordings occasionally showed that voices of parties were slightly raised during the meetings to get their respective points across, there was no apparent hostility directed at neither the Parent nor Complainant. Email records showing communications between the District and the Parent and Complainant likewise fail to show the District engaging with the Parent and/or the Complainant in a hostile manner. Documents produced by the Complainant show that the Parent made three separate written requests for a meeting by letters dated January 15, 2019, February 4,

2019, and February 13, 2019. The District granted the Parent's request and scheduled an initial meeting for March 4, 2019. The recording shows that when Complainant brought up the District's failure to timely respond to the Parent's previous requests for a meeting, the District did not offer an explanation.

As indicated above, prior to OCR's completion of the investigation of Issue Nos. 1-3 the District expressed an interest in resolving the complaint pursuant to Section 302 of the CPM. OCR determined that it would be appropriate to resolve this complaint under Section 302 because OCR's investigation had identified issues that could be addressed through a Resolution Agreement.

The District signed the enclosed Resolution Agreement which, when fully implemented, will resolve the complaint allegations. To address the complaint allegations regarding disability discrimination, the Agreement requires that the District convene a meeting to determine whether the Student's current IEP and/or Section 504 Plan are designed to provide the Student a free appropriate public education (FAPE) and revise the plan(s) as necessary to ensure that the Student is able to attend physical education and special or elective classes while also receiving remediation services per his Section 504 Plan or IEP. In addition, the Agreement requires that a group of knowledgeable persons determine whether the Student needs compensatory and/or remedial services for the 2018-2019 school year as a result of not receiving the related aids and services outlined in the Student's 504 Plan for that year and that the group develop a plan for providing such services in a timely manner. The Agreement requires the District to provide the Student's parent(s) notice of the procedural safeguards including the right to challenge the group's determinations through an impartial due process hearing.

Lastly, the Agreement requires that the District provide training for the Student's 2018-2019 and 2019-2020 teachers and Section 504 Counselors at the Student's Schools regarding the requirements of Section 504 and Title II to 1) provide the Student's parent(s) or legal guardian a notice of procedural safeguards; 2) to develop and implement a student's Section 504 Plan as written; 3) to communicate with students, parent(s), and legal guardians regarding progress of the Section 504 Plan goals; 4) to permit parent(s) and legal guardians to have meaningful input in the development of a student's Section 504 Plan or IEP; and 4) to avoid retaliation or harassment of individuals seeking redress under Section 504 and Title II. The training will also include an overview of the Student's current related aids and services listed in the Student's Section 504 Plan.

Issue No. 4: Whether the District discriminated against the Student by failing to respond appropriately to incidents of disability harassment by another student.

Factual Findings

The School's Principal stated that "with the exception of a discipline incident involving another student and [the Student], [she is] not aware of any reporting of bullying or harassment incidents involving [the Student]." Notably, the audio recordings examined by OCR show that neither the Parent nor the Complainant raised the issues of disability harassment by peers or the mistreatment of the Student by District staff during the IEP meetings.

The District provided a Behavior Detail Report regarding disciplinary measures imposed on fourth-grade student [Student A] on November 16, 2018, for student incivility. The report details the following: [Student A] started rough-housing with that student and became increasingly rough by choking the Student. During the Boosterthon Fundraising Event, a student [Student B] told his teacher that Student A choked the Student in his class. Student A said that the Student called him a rabbit, and he was annoyed that the Student kept calling him a rabbit. Upon further investigation, the Student admitted to saying rabbit and Student A admitted to choking the Student. The District responded by issuing Student A 1 day of in-school suspension.

The Student's teacher who was present during the event provided a statement to the District memorializing what occurred. Specifically, she described that during an activity called the Fun Run, Student B mentioned to her that Student A choked the Student while they were watching the girls run. The teacher stated that she notified the school Principal who immediately went searching for Student A. Once back in the classroom, the teacher discussed the situation with both students and inspected the Student for obvious marks on his body but did not observe any. The Student and Student A were subsequently sent to the office.

Complainant was unable to produce any evidence showing that the November 16, 2018, occurrence was related to the Student's disability or that the District had notice of any incident of bullying or harassment involving the Student after November 16, 2018.

Analysis & Conclusion

Here, the investigation failed to disclose any evidence showing that the Student was subjected to unwelcome comments or conduct by another student based on his disability or that the District had notice of an alleged incident involving disability-based harassment and failed to take immediate corrective action. The one reported incident involving an act of aggression from another student, did not include any comments, reference, or behavior which indicated that it was related to the Student's disability.

Accordingly, OCR has determined that there is insufficient evidence to establish that the District subjected the Student to disability harassment by failing to respond appropriately to incidents of peer-based disability harassment in non-compliance with Section 504 and Title II.

With respect to Issues 1, 2, and 3, on December 13, 2019, OCR received the enclosed signed Resolution Agreement that, when fully implemented, will resolve these in this complaint pursuant to CPM Section 302, as discussed above. OCR will monitor the District's implementation of this Resolution 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.

With respect to Issue 4, this concludes OCR's consideration of this complaint. 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

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approved by a duly authorized OCR official and made available to the public. The Complainant may file a private suit in Federal court whether OCR finds a violation.

Regarding Issue 4, 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 incorrect, 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 District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

The Complainant may file a private suit in federal court whether or not OCR finds a violation. 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.

Please be advised that the District may 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 occurs, the individual may file a retaliation complaint with OCR. Also, 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 Sairalina Montesino, General Attorney at sairalina.montesino@ed.gov or at (404) 974-9448.

Sincerely,

April England-Albright, Esq.
Supervisory General Attorney

Enclosure: As stated