



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

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ATLANTA, GA 30303-8927

REGION IV

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January 23, 2020

Via EMAIL and US MAIL (superintendent@flaglerschools.com)

Superintendent
Mr. James Tager
Flagler County Schools
1769 E Moody Blvd #2,
Bunnell, FL 32110

RE: OCR Complaint No. 04-19-1508
Resolution Letter

Dear Mr. Tager:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on August 5, 2019, against Flagler County School District (the District). The Complainants filed the complaint on behalf of a student (the Student) at Belle Terre Elementary School (the School). The Complainants alleged that the District discriminated against the Student on the basis of disability on May 24, 2019, when the Student was excluded from the kindergarten graduation ceremony at the School due to his disability.

Specifically, the Complainants alleged that the Student did not attend the graduation ceremony because the parent was not invited or notified that a ceremony would take place. The Complainants alleged that once the parent became aware of the kindergarten graduation after the fact, the parent asked the Principal about it who admitted that there had been one. The Complainants stated that when the parent asked the Principal why the Student had not been invited, he responded that the Student could not attend because “he’s special”; “they’ make noise” and “they’re’ not comfortable in settings like that.” The Complainants stated that the next day when the Teacher called the parent the Teacher said that she had simply forgotten to invite the parent or send [the Student] to the ceremony on the day.”

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.

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Accordingly, OCR investigated the following legal issue:

- Whether the District discriminated against the Student based on disability when he was excluded from the kindergarten graduation ceremony on May 24, 2019, in noncompliance with the Section 504 implementing regulations at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

During the investigation to date, OCR reviewed information provided by the Complainant and the District; and interviewed the Principal and Teacher. Before OCR completed its investigation, the District expressed a willingness to resolve the allegation pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination if the District expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

Background

During the 2018-19 School year the Student was in kindergarten at Belle Terre Elementary School (School). The Student is diagnosed with autism and has an Individualized Education Program (IEP) with the primary exceptionality of Autism Spectrum Disorder and secondary exceptionalities of Language Impairment and Occupational Therapy.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or *prima facie*, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

The Section 504 regulation, at 34 C.F.R. § 104.37, requires school districts to afford students with disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities. Furthermore, school districts must ensure that students with disabilities participate in nonacademic and extracurricular services and activities with students without disabilities to the maximum extent appropriate to the needs of each student with a disability. OCR interprets the Title II regulation to provide the same protections as Section 504.

When a school district has sufficient information that a student with a disability requires reasonable modifications to participate in a nonacademic or extracurricular activity, the district must take steps to determine whether it could provide a reasonable modification that would allow the student the opportunity to participate without fundamentally altering the nature of the nonacademic or extracurricular activity. One way of meeting this obligation is to hold a meeting with a group of persons knowledgeable about the student to decide whether there are any reasonable modifications or aids and services that could be provided to the student in the activity.

Facts

The Teacher stated that the parent was notified of the kindergarten graduation via her monthly newsletter in May, which included the date and time, a school phone broadcast, and a message on the school website. The Teacher also stated that she personally called the parent, along with the other kindergartener's parents in her class, a few days before the kindergarten graduation, although, the parent did not answer and the Teacher did not leave a message. The parent did not attend the kindergarten graduation.

The Teacher stated that she decided not to send the Student on the day of the kindergarten graduation due to the way he was acting that morning. The Student arrived at 9:00 am and she had to depart the classroom by 9:20 am to be at the graduation. The Teacher said that the Student was having a "hard morning" and was taking off his socks and shoes and was adamant about having them off. She stated he can also have meltdowns, and attack, with biting and scratching. She said she did not think he would do very well with the stimulation of the crowd in the cafeteria and deviation from his routine since he had a hard time with stimulation and transitions, which could trigger his behaviors and she did not want to put him on display.

The Teacher stated that after the Principal raised the parent's concern about the Student being excluded from the kindergarten graduation to her, she called the parent and apologized. She denied telling the parent that she "had simply forgotten" to send the Student or invite the parent. The Principal likewise denied that he said that the Student could not attend because "he's special"; "they' make noise" or "they're' not comfortable in settings like that." The Principal stated that he also later apologized to the parent after speaking with the Teacher to determine that the Student did not attend and that he offered to take a picture with the Student and the School mascot similar to the opportunity that other students had at the kindergarten graduation.

Prior to the completion of OCR's investigation, the District requested to voluntarily resolve this complaint and OCR agreed, pursuant to Section 302 of OCR's Case Processing Manual (CPM).

Conclusion

On January 16, 2020, the District signed the enclosed Resolution Agreement which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the District to (1) provide the parent of the Student a written offer to take a picture with the Principal; and (2) provide training to School staff on (a) the Section 504/Title II requirements that all school districts ensure that

students with disabilities are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District’s programs or activities on the basis of disability; and (b) the 504/Title II requirements that all school districts provide students with disabilities an equal opportunity to participate in non-academic or extracurricular services and activities. Please review the enclosed Agreement for further details. OCR will monitor the District’s implementation of the Agreement until the District has fulfilled the terms of the Agreement.

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, please contact Lorraine Irier, the OCR attorney assigned to this complaint, at 404-974-9349.

Sincerely,

/s/

Arthur Manigault
Compliance Team Leader