



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV

ALABAMA
FLORIDA
GEORGIA
TENNESSEE

September 8, 2021

VIA EMAIL ONLY TO: tmcabee@lewisk12.org

Dr. Tracy McAbee
Director of Schools
Lewis County Schools
206 S. Court St.
Hohenwald, Tennessee 38462

RE: OCR Complaints #04-22-1338

Dear Dr. McAbee:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint we received on March 16, 2022, the Complainant filed against the Lewis County School District in Tennessee alleging discrimination against XXX who was a XXXX at XXXX School. In this letter, we will refer to the XXXXXX as the Student. The complaint alleged discrimination against the Student based on disability and retaliation.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. Section 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department of Education. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Sections 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 from the Department of Education and a public entity, the District is subject to these laws and OCR's jurisdiction.

Specifically, the Complainant alleged that the Student had to be placed on homebound placement in January 2022 due to severe neurological complications XXX that made her unable to walk. During this time period, the Complainant provided the District with the Student's neurology medical records and asked for an Individualized Education Program or Section 504 Plan for the Student; however, the District official responsible for special education responded that was not appropriate for students on homebound, only for students attending classes in-person. The Complainant also alleged that while on homebound, the Student was not receiving an education because the District failed to provide the Student with working access to virtual learning, and you raised several complaints internally about this. Finally, the Complainant alleged that the Former Principal prohibited the Student from participating in the school's talent show due to her

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

www.ed.gov

homebound status but the Complainant believes this was retaliation for her complaints regarding the lack of accommodation for the Student's medical disability.

Based on the allegations, OCR investigated the following issues:

- 1) whether the District failed to evaluate the Student for a neurological medical condition, in violation of Section 504 and its implementing regulations at 34 CFR § 104.35;
- 2) whether the District failed to provide the Student with a free appropriate public education by failing to provide adequate access to virtual learning on homebound status, in violation of Section 504 and its implementing regulations at 34 C.F.R. §104.33,¹ and the Title II implementing regulation at 28 CF.R. §35.130; and,
- 3) whether the District retaliated against the Student by banning her from participating in the school talent show because of the Complainant's disability advocacy on the Student's behalf, in violation of Section 504 and its implementing regulations at 34 CFR § 104.61 and the Title II implementing regulation at 28 CF.R. §35.134.

Summary of Investigation

During the investigation, OCR reviewed information from the Complainant and District, texts and voicemails between the Complainant and school staff/administrators, District policies for disability eligibility determinations, the Homebound Policy, the Extracurricular Activities Policy, the Student's homebound medical documentation, virtual learning logs for the Student and statements from the Section 504 Coordinator. OCR interviewed the Complainant, the Section 504 Coordinator and the Former Principal of the school.

Before OCR completed its investigation, the District agreed to voluntarily resolve the allegations in this complaint. Pursuant to Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved before the conclusion of an investigation, when the recipient expresses an interest in resolving the complaint and OCR determines that it is appropriate to resolve the investigation because OCR has identified issues that can be addressed through a resolution agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation.

Legal Standards

The Section 504 regulatory provision at 34 C.F.R. § 104.35(a) requires school systems that operate public elementary education programs or activities to conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of their disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. The Section 504 regulatory provision at 34 C.F.R. § 104.35 (c)(3) requires school systems to ensure that the determination that a student is eligible for special education and/or related aids and services be made by a group of persons, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options. If a parent disagrees with the determination, he or she may request a due process hearing. The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires school districts to establish

¹ The letter of notification had an incorrect citation and has been corrected.

procedures for periodic reevaluation of students who have been provided special education related services.

The Section 504 regulation at 34 C.F.R. § 104.33 requires school districts to provide a free appropriate public education 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. Title II is interpreted consistently with Section 504.

The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. §100.7, and 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. To establish a *prima facie* claim of retaliation, OCR must find the complainant engaged in a protected activity, the recipient subjected the complainant to an adverse action, and there was a causal connection between the alleged protected activity and the alleged adverse action. A claim of retaliation will fail if any of these elements are not met, or if they are met but a recipient can provide a legitimate non-retaliatory reason for an alleged adverse action and OCR finds no evidence that the reason is pretextual.

Factual Findings

On January 18, 2022, the Student XXXXXXXXXXXX needed hospitalization, and the Complainant notified the Former Principal and from that point forward continued to keep the Former Principal apprised of the Student's condition and needs regarding her education. Although the Student had a Section 504 Plan the previous year for another condition, that Plan had expired because the Student no longer suffered from that condition, and therefore, the Student had no Section 504 Plan at this time. On or around January 25, 2022, while still in the hospital, the Student began her homebound placement due to the onset of XXXX, a neurological condition XXXXXXXXX. All parties agree the District's virtual homebound did not function during this time period.

On or about February 2, 2022, the Student returned to the school, but her XXXX was causing her significant leg pain and a lot of difficulties walking, for which she had a walker. Around February 2, 2022, is also when the Complainant stated that she first asked the Former Principal about obtaining a Section 504 Plan for the Student, because the Student's medical team thought the nerve pain would persist for at least six months and the Former Principal responded that she would have someone get in touch with the Complainant about that. The Former Principal told OCR that she does not recall having any conversation with the Complainant about Section 504, but stated if there was such a conversation, she always tells parents to speak to the District's Section 504 Coordinator. The District provided OCR with a copy of its evaluation and placement procedures but acknowledged those are not posted on the website or in Student Handbooks.

On February 3, 2022, the Executive Assistant to the Director of Schools, who also serves Homebound Coordinator, switched the Student to the special needs bus because she could no

longer ride the regular bus with her walker. The Complainant also asked the Former Principal if someone could carry the Student's books for her between classes and the Former Principal had someone help her with that.

Over the next 20 days or so, the Student tried to attend the school but was having great difficulties. The Student had so much pain in her legs that frequently she either did not go to school or she called the Complainant to pick her up early from school. She was also having problems navigating the school which has stairs, using her walker, and she nearly fell down several times. Because of her problems walking, the Student was also frequently late for classes, and the Complainant reported to OCR that the Student's Language teacher told the Student she needed to be on time for class and may have given the Student a tardy slip or threatened to give one. Sitting in class, the hard chairs caused the Student's legs to go completely numb, so there were discussions about the Complainant bringing a padded chair for the Student to use but the problem was how to move the chair from class to class. The Complainant had been continually reporting these extensive problems to the Former Principal and after discussions about the chair, the Complainant believed the Student needed to go on homebound so she asked the Former Principal. The Former Principal referred the Complainant to the Homebound Coordinator to get paperwork for starting the homebound approval process. The Complainant found that once she was in contact with the Homebound Coordinator, which was on or around February 17, 2022, the Homebound Coordinator was very helpful and acted quickly; she explained to the Complainant that the District needed medical documentation sent directly from the Student's neurologist. Around February 22, 2022, was the Student's last day attending school, according to the Complainant.

On February 23, 2022, the Student's neurology team faxed to the District's central office, a completed Physician Referral for Homebound Instruction which was signed by the neurologist. For the expected return-to-school date and duration of treatment, the neurologist wrote that was unclear at this time while the Student's treatments were underway. The neurologist checked the boxes for strength and gross motor skills: physical function/ambulation were areas of functioning that were adversely affected by the Student's medical condition which she commented was causing the Student bilateral lower extremity pain and difficulty ambulating.

The District's Homebound Instruction Policy explains that the homebound instruction program is for students who because of a medical condition are unable to attend the regular instructional program, and homebound instruction shall consist of three (3) hours of instruction per week while school is in session for a period of time determined, on a case-by-case basis, by the District.

On February 23, 2022, the Student began her homebound placement, never returning back to school except for a test at the end of the year. However, the homebound logs provided by the District do not start until March 15, 2022. Between March 15 and 23, 2022, District logs state that the Student failed to log onto Google Classroom and therefore missed P.E. and/or Health instruction on four days. Throughout this time period, instead of receiving the three hours of instruction required by the Homebound Instruction Policy, the Student was limited to receiving homebound services virtually because the Former Principal reportedly could not find a volunteer. The Former Principal stated she was daily emailing teachers to obtain a volunteer to provide in-person homebound instruction to the Student but was having trouble getting anyone to volunteer.

Both the Complainant and the Former Principal acknowledge there were a lot of problems during this time period with the Student not receiving access to her virtual classes.

On March 17, 2022, the Former Principal officially approved in-person visits to the Student's residence by a teacher to provide homebound services, and the Student's math teacher began providing those in-person visits on March 22, 2022.

On March 21, 2022, the Complainant stated that she spoke to the Former Principal and requested a Section 504 Plan, but the Former Principal denied to OCR that any such conversation ever took place between her and the Complainant about Section 504.

On an unknown date, the Former Principal advised the Complainant that due to her homebound status, the Student could not participate in the upcoming April 14th talent show. There is nothing in the Homebound Instruction Policy posted on the District's website which states that students on homebound may not participate in extracurricular activities. The District's Extracurricular Activities Policy states that activities which restrict participation because of race, color, religion, sex, disabilities, or national origin are forbidden. This policy fails to mention anything about homebound students. The Former Principal told OCR that there was a Board Homebound Policy that she believed prohibited homebound students from participating in extracurricular activities. No such policy was provided to OCR in response to our request for all policies pertaining to participation in extracurricular activities for students on homebound status.

On April 7 and 14, 2022, the Former Principal called and left messages for the Complainant to let her know the schools' internet was out. The Complainant provided OCR with voicemail transcriptions wherein the Former Principal stated that due to problems with the District's internet which was being worked on, Google Classroom was not available those weeks and she was not sure when it would be fixed. The Former Principal also stated in her message that this would not affect the three hours per week of teacher visits on homebound which was required, and that the Google Classroom was just offered as supplementary. The Complainant alleged to OCR that no one at the school ever told her or the Student that the Student should be logging onto Google Classroom for Physical Education or PE. On April 4-8, 2022, the logs provided by the District state that the Student failed to log onto Google Classroom for Health/PE.

Prior to April 4, 2022, the Section 504 Coordinator had no knowledge of any problems or concerns the Complainant had regarding accommodating the Student, or any request for a Section 504 Plan. The Section 504 Coordinator knew the Complainant from the Student having a prior Section 504 Plan, and did not understand why neither the Complainant nor anyone at the school contacted her sooner. On or around April 4, 2022, the Section 504 Coordinator heard from the Director of Student Support Services that the Complainant was asking for a Section 504 Plan, so on April 5, 2022, the Section 504 Coordinator called the Complainant and took notes about their conversation. The Complainant explained that she had turned in paperwork from the Student's neurology team to the District's Homebound Coordinator and that the Student should have automatically been given a Section 504 Plan at that time, according to advice from an attorney with the State. The Complainant indicated that she wanted a Section 504 Plan to ensure the Student would receive instruction on Google Classroom and three hours of homebound services for the remainder of the school year. The Section 504 Coordinator responded that the purpose of a Section 504 Plan was

to provide modifications or accommodations to students with medical conditions or disabilities in order to provide equal access to curriculum. The Section 504 Coordinator stated that she did not feel a Section 504 Plan was warranted for the provision of homebound services and once the Student returned to school, they would put a Section 504 Plan in place to accommodate her physical limitations. The Section 504 Coordinator acknowledged to OCR that if she was wrong, she takes full responsibility and would like some Section 504 training to prevent this from happening again. She explained to OCR that her intention had been to discuss the Section 504 evaluation process at the meeting she scheduled with the Complainant and Former Principal on April 12, 2022, to which the Complainant had agreed to attend.

For the scheduled April 12, 2022 meeting, there is a conflict in the evidence presented to OCR about why it never took place. According to the Section 504 Coordinator and the Former Principal, the Complainant failed to show up for this meeting and did not request to reschedule this meeting. According to the Complainant, a woman in charge of Section 504 for the District called either the day before, or the day of, the scheduled meeting and told the Complainant that Section 504 was for students in the classroom, not homebound and that she was not sure why the Complainant had been told the Student needed a Section 504 Plan. It was the Complainant's understanding that based on the feedback provided, this phone call was to cancel the meeting about Section 504. The Complainant stated that no one from the school or District ever reached out to her about not showing up for a meeting; this was corroborated by the Former Principal and Section 504 Coordinator. After being told Section 504 was not appropriate, the Complainant knew of nothing else to do other than file with OCR. The Complainant was never provided any due process rights. The Section 504 Coordinator stated that she only called and spoke to the Complainant once. She also intended to provide the Complainant her due process rights and explain the Section 504 process at the April 12th meeting.

On April 14, 2022, the talent show was held at school and the Student was not permitted to participate.

On April 27, when the Student returned to school which was required to take her Tennessee Comprehensive Assessment Program, or TCAPS, in person, she almost fell down the stairs and was very upset, calling the Complainant. The Complainant alleged that when she called the school and asked for someone to assist the Student, the receptionist told her that no one can help, everyone is in TCAPS and no one would be available to help her the second day of testing; therefore, the Complainant opted to keep the Student home the second day of testing. Both the Former Principal and the Section 504 Coordinator stated to OCR they were unaware, as this was never reported to them.

After the school year ended in May, the Student transferred out of the District.

Analysis

Regarding, Issue #1, OCR first reviewed the evidence to determine if the District was on notice that the Student may be eligible for a Section 504 Plan due to her neurological condition, and therefore, should have evaluated her for such. It is undisputed that school administrators knew the Student XXXXXX requiring hospitalization in late January 2022, when homebound placement was approved. However, is not clear whether the District knew about the neurological condition

prior to the Homebound Physician Referral for Homebound Instruction signed by the neurologist on February 23, 2022. The record has no medical documentation dated earlier. While the Complainant alleged and the Principal confirmed that the Student was experiencing problems due to her XXXX trying to attend school throughout February 2022, it is not clear the exact dates of each of those problems, and when there was sufficient information to alert the school that the Student may need a Section 504 Plan. The Principal denied that the Complainant ever requested a Section 504 Plan or she would have referred the Complainant to the Section 504 Coordinator; it is also unclear why the Complainant would have continued to ask the Principal rather than contacting the Section 504 Coordinator whom she had dealt with previously.

Once contacted, the Section 504 Coordinator incorrectly advised the Complainant about whether Section 504 services were warranted while the Student was on homebound due a physical impairment, suggesting possible misconceptions about eligibility based on the Student's type of disability. This also raises concerns about making, or appearing to make, unilateral placement decisions which only a properly constituted Section 504 team is authorized to make. Without further interviews and evidence gathering, an exact timeline cannot be established to show exactly how much information the District had and when, that would have triggered an earlier obligation to evaluate the Student.

Regarding Issue #2, while on homebound, there were significant problems that the District has acknowledged regarding providing virtual learning during spring 2022 semester. These problems with the District's virtual platform persisted from late January until late March when in-person homebound instruction was finally approved. After that, there was still miscommunication from the District to the Complainant about how the Student was to keep up in all her classes and she continued to fall behind. There also appears to be a problem with the school providing homebound teachers in a prompt manner when virtual was not working. The evidence thus far suggests that the Student may have been denied a free appropriate public education, but without interviewing teachers and the Homebound Coordinator, and comparing course materials provided, OCR cannot make such a determination.

Regarding Issue #3, OCR found that the Complainant engaged in a protected activity in her advocacy to accommodate the Student for her neurological condition during January-March 2022; and in late March 2022, the Student experienced an adverse action when the Former Principal notified the Complainant that the Student, due to her homebound status, could not participate in the talent show, despite having been permitted to attend several practices. OCR infers that a causal connection exists due to the temporal proximity between the protected activity and the Former Principal's decision to not allow the Student to participate in the talent show. Therefore, a *prima facie* case of retaliation has been established. OCR next examined whether the District had a legitimate reason for taking the action, and the District's proffered reason was that the Student was on homebound placement. In analyzing whether the District's reason was a pretext for retaliation, OCR reviewed the District's policies and did not find any to support the exclusion of homebound students from extracurricular activities. OCR would need to interview additional staff and other witnesses in order to determine if the District's alleged practice of excluding homebound students from extracurricular activities was a pretext for retaliation.

Prior to conducting OCR interviews with additional staff and other witnesses to complete the investigation of Issues #1 - #3, the District requested to voluntarily resolve this complaint pursuant to Section 302 of OCR's *Case Processing Manual*. Once implemented, the enclosed Resolution Agreement, will resolve the compliance concerns identified during this investigation. When fully implemented, the resolution agreement will address the evidence obtained and all of the allegations investigated. OCR will monitor the implementation of the agreement until the recipient is in compliance with the terms of the agreement and the statute(s) and regulations(s) at issue in the case. Upon determining the recipient's compliance, OCR will close the case.

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.

OCR would also like to make you aware that the complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

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 reasonably be expected to constitute an unwarranted invasion of personal privacy.

This concludes OCR's consideration of your complaint. If you have any questions concerning this letter, please contact Angela Collins, Senior Attorney, angela.collins@ed.gov at 404-987-1884 or me, at 202-987-0007.

Sincerely,

/s/

Scott R. Sausser
Supervisory General Attorney

cc: Allen Trull,
Director of Student and Support Services
atrull@lewisk12.org