



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

1999 BRYAN STREET, SUITE 1620
DALLAS, TX 75201-6831

REGION VI
LOUISIANA
MISSISSIPPI
TEXAS

July 7, 2020

OCR Ref. No. 06-17-1458

Mr. Glen Fenter, Superintendent
Marion School District
gfenter@msd3.org

Via email only

Dear Superintendent Fenter:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has resolved the above-referenced complaint filed against the Marion School District (MSD, District, or recipient), in Marion, Arkansas. This complaint was received by OCR on [XXXX XXXX XXXX]. The complaint alleged that the District discriminated against the Student on the bases of disability and race. The complaint also alleged retaliation.

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to this Department, are in compliance with Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulations at 34 C.F.R. Part 100; and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 *et seq.*, and its implementing regulations, at 34 C.F.R. Part 104. Title VI prohibits discrimination on the bases of race, color, and national origin; Section 504 prohibits discrimination on the basis of disability. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132 *et seq.*, and its implementing regulations, at 28 C.F.R. Part 35, which prohibit public entities from discriminating on the basis of disability. Section 504, Title II, and Title VI also prohibit retaliation. Because the District is a recipient of Federal financial assistance from the Department and is a public entity, OCR has jurisdiction to process this complaint for resolution.

In this case, OCR investigated the following issues:

1. Whether the District discriminated against the Student on the basis of disability by failing to provide regular or special education and related aids and services deemed necessary to meet the Student's individual educational needs (e.g., [XXXX to parenthesis]), and thereby denied the Student a free appropriate public education (FAPE) during the [XXXX-XXXX] school year, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130, respectively;

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

2. Whether the District discriminated against the Student on the basis of disability by failing to provide the Student with a FAPE when the District failed to reevaluate the Student's educational placement after the District knew, or should have known, that the effects of bullying/harassment may have affected the Student's receipt of FAPE, in violation of Section 504 and Title II, at 34 C.F.R. § 104.35, and 28 C.F.R. § 35.130, respectively;
3. Whether the District retaliated against the Student when [XXXX to end of clause], because [XXXX to end of clause], in violation of Section 504 and Title II, at 34 C.F.R. § 104.61, and 28 C.F.R. § 35.134, respectively; and
4. Whether the District treated the Student differently on the basis of race, color, or national origin, in the context of an educational program or activity without a legitimate, nondiscriminatory reason, and thereby interfered with or limited the ability of the Student to participate in or benefit from the services, activities, or privileges provided by the recipient during the [XXXX–XXXX] school year, in violation of Title VI, at 34 C.F.R. § 100.3.

In its investigation of this complaint, OCR carefully reviewed written and electronic documentation provided by both the complainant and the recipient. As explained in this letter, OCR resolved the allegations and issues of this investigation pursuant to Section 302 of OCR's *Case Processing Manual*. The basis for OCR's resolution regarding each issue of the investigation is discussed in further detail below.

I. Issue 1 – Alleged Failure to Implement Accommodations:

A. Investigative Summary:

[XXXX to end of subsection]

B. Legal Standard:

Under the Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.33(a) and 28 C.F.R. § 35.130, respectively, a public school district that receives Federal financial assistance from the Department (recipient) must provide a FAPE to each qualified student with a disability in the district's jurisdiction. The Section 504 regulations, at 34 C.F.R. § 104.33(b), define an "appropriate education" as 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 nondisabled persons are met, and (ii) are based upon adherence to procedures that satisfy Section 504 requirements. Compliance with this provision is generally determined by assessing whether a district has implemented a student's Section 504 plan, also known as an "individualized education program," or "IEP." When evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: (1) whether the district evaluated the student in accordance with Section 504 requirements and determined that the student was a qualified individual with a disability as defined by Section 504; (2) whether the student's needs were determined on an individualized basis by a group of persons knowledgeable about the student and the information considered; and (3) whether the placements, aids, and services identified by the district through this process as necessary to

meet the student’s individual needs were or are being provided. If they have not been provided, OCR will determine the district’s reason for failing to do so and the impact of the failure.

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

C. Preliminary Analysis:

[XXXX to end of paragraph]

[XXXX to end of paragraph]

Section 302 of OCR’s *Case Processing Manual* states that allegations under investigation may be resolved at any time when, prior to the point when the Regional Office issues a final determination, the recipient 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. After the investigation of this complaint began, but before OCR reached an investigative compliance determination as to Issue 1, the District expressed a desire to voluntarily resolve this issue, and OCR determined that resolution of this issue and the related allegation was appropriate.

II. Issue 2 – Alleged Failure to Reevaluate the Student:

A. Investigative Summary:

[XXXX to end of subsection]

B. Legal Standard:

Under the Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.33(a) and 28 C.F.R. § 35.130, respectively, a public school district that receives Federal financial assistance from the Department (recipient) must provide a FAPE to each qualified student with a disability in the district’s jurisdiction. The Section 504 regulations’ evaluation procedures, at 34 C.F.R. § 104.35(a) and (b), state that a recipient must evaluate any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the student’s initial educational placement and any subsequent significant change in that placement. The Section 504 regulations do not specify how quickly an evaluation must be completed after a recipient obtains notice that a student needs or is believed to need special education or related services. As a result, OCR applies a “reasonableness” standard to determinations regarding the timeliness of evaluations. Under Section 504 and Title II, at 34 C.F.R. § 104.3(j) and 28 C.F.R. § 35.104, respectively, a student is “disabled,” and therefore entitled to individually prescribed special education or related aids and services, if the student has a physical or mental impairment that substantially limits a major life activity. Finally, the Section 504 regulations, at 34 C.F.R. § 104.35(c), provide that:

In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options

OCR interprets the general prohibition against discrimination in the Title II implementing regulations to require the provision of a FAPE to the same extent that the Section 504 implementing regulations specifically require the provision of a FAPE.

At the elementary and secondary school level, bullying or harassment of a student with a disability on any basis can result in the denial of FAPE that must be remedied under Section 504. School districts must assess the effect of bullying and harassment on a student with a disability even if it was not disability-based harassment and even if it did not create a hostile environment.

C. Preliminary Analysis:

[XXXX to end of paragraph]

Section 302 of OCR's *Case Processing Manual* states that allegations under investigation may be resolved at any time when, prior to the point when the Regional Office issues a final determination, the recipient 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. After the investigation of this complaint began, but before OCR reached an investigative compliance determination as to Issue 2, the District expressed a desire to voluntarily resolve this issue, and OCR determined that resolution of this issue and the related allegation was appropriate.

III. Issue 3 – Alleged Retaliation:

A. Investigative Summary:

[XXXX to end of subsection]

B. Legal Standard:

OCR interprets the regulations it enforces, consistent with case law regarding analogous provisions, to require satisfaction of the following three elements to find a *prima facie* case of retaliation:

1. An individual experienced an adverse action caused by the recipient; and
2. The recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and

3. There is some evidence of a causal connection between the adverse action and the protected activity.

Although all three elements must exist to establish a *prima facie* case, OCR need not address all three elements if it determines one is missing. If OCR does not find that a *prima facie* case exists, OCR will conclude that there is insufficient evidence to support a finding of retaliation. If, however, the evidence demonstrates a *prima facie* case of retaliation, an inference of unlawful retaliation is raised and OCR proceeds to the next stage of the analysis. To ascertain whether this inference might be rebutted, OCR will then determine whether the recipient can identify a non-retaliatory reason for its actions. If such a reason is identified, OCR's investigation proceeds to the third stage. At the third stage, OCR examines the evidence to resolve what the reason was (or reasons were) for the intimidation, threat, coercion, or discrimination.

C. Preliminary Analysis:

[XXXX to end of paragraph]

After the investigation of this complaint began, but before OCR reached an investigative compliance determination as to Issue 3, the District expressed a desire to voluntarily resolve this issue. While OCR has not yet analyzed any legitimate, nondiscriminatory reasons the District may offer for [XXXX XXXX XXXX XXXX XXXX XXXX XXXX] or reached a determination regarding the issue investigated at this time, given the information collected thus far and OCR's concerns regarding other issues of this investigation, OCR has determined that it is appropriate to resolve Issue 3 of the investigation via voluntary resolution agreement. Section 302 of OCR's *Case Processing Manual* states that allegations under investigation may be resolved at any time when, prior to the point when the Regional Office issues a final determination, the recipient 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. Based on the information received in the investigation OCR determined that resolution of this issue and the related allegation was appropriate.

IV. Issue 4 – Alleged Different Treatment on the Basis of Race, Color, or National Origin:

A. Investigative Summary:

[XXXX to end of subsection]

B. Legal Standard:

The Title VI implementing regulations, at 34 C.F.R. § 100.3(b)(1), prohibit recipients from excluding an individual from participation in, denying an individual the benefits of, or otherwise subjecting an individual to discrimination with respect to the services, activities, or privileges provided by the recipient because of the individual's race, color, or national origin. In considering allegations that a recipient has discriminated on the basis of race, OCR looks for evidence of discriminatory intent. Discriminatory intent can be established either through direct evidence (i.e., statements, documents, or actions that clearly evidence a discriminatory intent), or through indirect (also known as circumstantial) evidence (i.e., a set of facts from which one may infer a

discriminatory intent). Absent direct evidence that a recipient discriminated on the basis of race, color, or national origin, OCR applies a disparate treatment analysis under which OCR must determine whether the facts support a *prima facie* case of racial discrimination. A *prima facie* case exists if a preponderance of the evidence indicates that a recipient treated one person differently than one or more similarly situated persons of another race, color, or national origin. If a *prima facie* case of different treatment is established, OCR must then determine whether the recipient had a legitimate, non-discriminatory reason for its action(s) that would rebut the *prima facie* case against it. If one or more legitimate, non-discriminatory reasons for the different treatment are identified, OCR must then determine whether the recipient's asserted reasons for its actions are pretext for discrimination. Ultimately, however, the weight of the evidence must support a finding that actual discrimination occurred.

C. Preliminary Analysis:

[XXXX to end of paragraph]

Section 302 of OCR's *Case Processing Manual* states that allegations under investigation may be resolved at any time when, prior to the point when the Regional Office issues a final determination, the recipient 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. After the investigation of this complaint began, but before OCR reached an investigative compliance determination as to Issue 4, the District expressed a desire to voluntarily resolve this issue, and, as indicated above, OCR determined that resolution of this issue and the related allegation was appropriate.

V. **Conclusion:**

As explained above, OCR determined that voluntary resolution of this complaint under Section 302 of OCR's *Case Processing Manual* was appropriate. The District submitted the enclosed Resolution Agreement (Agreement) to memorialize the steps that it will take to resolve the compliance issues raised by the complaint. OCR has determined that the Agreement, when fully implemented, will satisfactorily resolve the compliance issues raised by this complaint. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding this complaint; however, OCR will actively monitor the District's efforts to implement the Agreement. Please be advised that if the District fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts. This letter concludes OCR's investigation of this 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. The complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Further, please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a 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. In the event that OCR receives such a request, we will seek to protect to the extent provided by law personally identifiable information, which if released could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR appreciates the District's cooperation during the investigation and resolution of this complaint. If you have any questions regarding this letter, please contact Cristin Hedman, the attorney assigned to this matter, at (214)-661-9647 or cristin.hedman@ed.gov. You may also contact me at (214)-661-9638 or lori.bringas@ed.gov.

Sincerely,

Lori Howard Bringas
Supervisory Attorney/Team Leader
Office for Civil Rights
Dallas Office

Enclosure: Executed Voluntary Resolution Agreement

CC: [XXXX to end of CC line]