



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 5, 2019

Dr. Mike Waldrip, Superintendent of Schools
Frisco Independent School District
5515 Ohio Drive
Frisco, TX 75035

Ref: 06-18-1818

Dear Dr. Waldrip:

This letter is to notify you of the determination made by the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, regarding the above-referenced complaint filed against the Frisco Independent School District (FISD), Frisco, Texas, which was received in our office on August 8, 2018. The complaint was filed on behalf of XXXX XXXX (the Student), a former student at the FISD's XXXX XXXX XXXX. The complainant alleged that the FISD discriminated against the Student on the basis of disability (XXXX XXXX XXXXX).

This agency 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 the Department are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities, including public elementary and secondary educational institutions.

The FISD is a recipient of Federal financial assistance from the Department and is a public elementary and secondary educational institution. Therefore, OCR has jurisdiction to process this complaint to resolution pursuant to Section 504 and Title II.

Issues Investigated

Based on the complaint allegations and OCR's jurisdictional authority, OCR investigated the following legal issues:

1. Whether the FISD discriminated against the Student on the basis of disability when, on or around XXXX XXXX XXXX, the FISD denied the Student the opportunity to participate

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

in a XXXX XXXX class field trip, in violation of Section 504, at 34 C.F.R. § 104.37, and Title II, at 28 C.F.R. § 35.130.

2. Whether the FISD treated the Student differently on the basis of disability in the context of an educational program or activity and thereby interfered with or limited the ability of the Student to participate in or benefit from the services, activities or privileges offered by the FISD during the XXXX XXXX school year when the FISD failed to plan for the Student's participation in a graduation ceremony held on XXXX XXXX, in violation of Section 504, at 34 C.F.R. § 104.4, and Title II, at 28 C.F.R. § 35.130.
3. Whether the FISD 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, and thereby denied the Student a free appropriate public education (FAPE), in violation of Section 504, at 34 C.F.R. § 104.33, and Title II, at 28 C.F.R. § 35.130, when:
 - a. XX – to end of sentence redacted – XX;
 - b. XX – to end of sentence redacted – XX; and
 - c. XX – to end of sentence redacted – XX.

As a preliminary matter, a finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence that it is more likely than not that unlawful discrimination occurred). Where there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

In its investigation of this complaint, OCR reviewed information provided by the complainant and recipient. OCR also interviewed the complainant and FISD staff. Finally, OCR contacted the complainant and provided her with the opportunity to respond to information provided by the FISD during OCR's investigation. Based on a careful review of the available evidence, OCR has determined that the evidence is sufficient to support a finding that the FISD discriminated against the Student in violation of Section 504 and Title II with respect to Issue 1. OCR has also determined that Issue 3(a) has been resolved in part, and no further investigation is necessary. Regarding Issue 2 and the remainder of Issue 3, OCR determined that the evidence is insufficient to support a finding that the FISD violated Section 504 or Title II. OCR's investigative findings, the legal standards applied, and the bases for OCR's determinations are detailed below.

Issue One

OCR Findings

XX – sentence redacted – XX. Documentation reviewed by OCR reveals that the FISD evaluated the Student and determined that she is eligible to receive special education services, with her eligible conditions recognized as the following: XXX XXXX XXXX. The FISD's

documentation reveals that an “annual” Admission, Review, and Dismissal (ARD) committee convened to evaluate the Student’s needs and develop an Individualized Education Program (IEP) for the Student in XXXX XXXX XXXX. XX – sentence redacted – XX. The FISD did not make any specific determination that the Student could not participate in any non-academic services or extracurricular activities. Rather, OCR’s review of all versions of the Student’s IEP in effect during the XXXX XXXX school year indicates that the FISD determined that the Student’s ability to participate in nonacademic services and extracurricular activities would “vary.”

XX – to end of *OCR Findings* redacted – XX

Legal Standard

The Section 504 regulations, at 34 C.F.R. §§ 104.4(a), and the Title II regulations, at 28 C.F.R. § 35.130(a), 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 disability status. The regulation implementing Section 504, at 34 C.F.R. § 104.37, also specifically prohibits recipients from denying students with disabilities an equal opportunity to participate in a recipient’s nonacademic services.

In considering allegations that a recipient or public entity has discriminated on the basis of disability, 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 or public entity discriminated on the basis of disability, OCR applies a disparate treatment analysis under which OCR must determine whether the facts support a *prima facie* case of disability discrimination. A *prima facie* case exists if a preponderance of the evidence indicates that a recipient treated a disabled student differently than one or more similarly situated students without disabilities. 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 disability discrimination. Ultimately, however, the weight of the evidence must support a finding that actual discrimination occurred.

Analysis and Conclusion

The evidence is sufficient to support a finding that the FISD denied the Student the opportunity to participate in the XXXX XXXX field trip because of her disability. First, OCR determined that the Student was treated differently than her nondisabled peers, as OCR’s investigation corroborated that the Student was unable to attend the field trip because of her disabilities. The FISD did not offer a legitimate, non-discriminatory reason to OCR for its actions. Rather, FISD

staff reported to OCR that the complainant elected for the Student not to attend the field trip. The evidence received by OCR reveals, however, that the complainant elected for the Student not to participate because XX – to end of sentence redacted – XX. XXXX XXXX conceded to OCR that the school was aware of the Student’s XXXX, although XXXX stated that XXXX was not sure whether the individuals responsible for planning the trip and selecting the site location were aware of the Student’s XXXX.

The regulations implementing Section 504 and Title II require that recipient public school districts ensure that students with disabilities are afforded the same opportunities to participate in nonacademic services as their nondisabled peers. Here, the FISD failed to ensure that appropriate plans were made for the XXXX XXXX which would have enabled the Student to participate in spite of her XXXX XXXX had she elected to do so. The FISD asserts to OCR that the complainant elected to not have the Student participate; however, in failing to make appropriate arrangements which considered the Student’s individualized needs, the FISD failed to provide the Student an equal *opportunity* to participate in the field trip.¹ Accordingly, OCR has determined that the FISD discriminated against the Student on the basis of her disability in violation of Section 504 and Title II.

Issue Two

OCR Findings

The complainant further alleged that the FISD failed to plan for the Student’s participation in her XXXX XXXX graduation ceremony, which was held on XXXX XXXX XXXX. In her interview with OCR, the complainant stated that, during an ARD committee meeting, the FISD had discussed putting a “plan” in place to accommodate the Student at the graduation. According to the complainant, however, she did not hear anything from the FISD after the Student’s XXXX ARD meeting. XX – to end of paragraph redacted – XX.

The complainant further alleged to OCR during this interview that she met with XXXX and XXXX “two days before graduation.” XX – sentences redacted – XX. The complainant asserted to OCR that the FISD was “scrambling” to put something together, and, because the FISD was not prepared, she elected to not have the Student participate in the graduation ceremony.

¹ OCR notes that the regulations implementing both Section 504 and Title II recognize that, in providing services to students with disabilities, some modifications may be necessary in order to ensure that the individual educational needs of students with disabilities are met as adequately as the needs of students without disabilities are met. Accordingly, recipient public entities are not required to provide *identical* benefits to disabled and nondisabled students alike, so long as students with disabilities are afforded the opportunity to gain the same benefit as nondisabled students, and the benefits provided are based on an assessment of the student’s individual needs, are not based on stereotypes or generalizations about students with disabilities, and do not disguise a discriminatory purpose.

As noted above, OCR received documentation from the FISD evidencing communications between FISD staff and the complainant regarding “end of year” events. XX – to end of paragraph redacted – XX.

XX – remainder of *OCR Findings* redacted – XX

Legal Standard

As stated above, when considering allegations that a recipient or public entity has discriminated on the basis of disability, OCR looks for evidence of discriminatory intent, which can be established through direct or indirect evidence. Absent direct evidence of disability discrimination, OCR applies a disparate treatment analysis under which OCR must determine whether the facts support a *prima facie* case of disability discrimination, and if so, 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 disability discrimination.

Analysis and Conclusion

OCR has determined that the evidence is insufficient to support a finding that the FISD denied the Student the opportunity to participate in the XXXX XXXX because of her disability. Although OCR’s investigation confirmed that the Student did not participate in the ceremony, OCR’s investigation did not reveal any direct or indirect evidence of discriminatory intent to deny the Student the opportunity to participate because of her disability. Further, OCR’s investigation did not reveal any evidence that the Student was treated differently than nondisabled students in the manner in which the date(s) of the event and rehearsals for the event were communicated to the complainant and Student. While the complainant asserted to OCR that the FISD failed to communicate to her that the school had a XX – phrase redacted – XX, FISD staff reported to OCR that the complainant was informed of the XXX XXXX prior to this date. Additionally, FISD staff and the complainant reported to OCR that the complainant, XXXX, and XXXX XXXX discussed the XXXX XXXX and options for the Student’s inclusion in the ceremony on XXXX XXXX, a full week prior to the date of the XXXX XXXX. The complainant conceded to OCR that she communicated to the FISD during this meeting that she did not wish to have the Student participate in the XXXX XXXX. Based on a review of all of the available evidence, OCR cannot conclude that the FISD denied the Student the opportunity to participate in the ceremony because of her disability in violation of Section 504 or Title II.

Issue Three

OCR Findings

Finally, the complainant alleged that the FISD denied the Student a FAPE by failing to provide the Student with related aids and services identified as necessary to meet her individual educational needs, as specified in the Student’s IEP.

XX – remainder of *OCR Findings* redacted – XX.

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.

Analysis and Conclusion

OCR could not determine by a preponderance of the evidence that the FISD denied the Student a FAPE as alleged. With regard to the provision of XXX XXXX, OCR's investigation revealed that the FISD evaluated the Student and determined the educational services necessary to be provided to the Student XX – to end of sentence redacted – XX. The FISD conceded that, for the first 9 weeks of the XXXX XXXX school year, the Student's XXXX XXXX teacher failed to include instruction in the areas of XXXX and XXXX Science and Social Studies. The information provided by the FISD further revealed, however, that the FISD later re-evaluated the Student's needs, determined that compensatory services for the Student were necessary, and also provided compensatory XXXX and XXXX instruction for the Student during the XXXX XXXX. The complainant conceded that these services were provided. OCR's *Case Processing Manual* (CPM), at Section 108(j), provides that OCR will dismiss a complaint allegation when OCR receives credible information indicating that the allegation is currently resolved and therefore no longer appropriate for investigation. To the extent the complainant alleges that XXXX XXXX were not provided for the Student during the XXXX XXXX school year, OCR has determined

that this allegation has been resolved by the Fisd, and, therefore, further investigation is not appropriate. OCR is dismissing this allegation in part.

To the extent the complainant alleged that the Student's XXXX teacher continued to XX – phrase redacted – XX during the XXXX XXXX school year, OCR received insufficient evidence to support this allegation. Rather, both the Student's XXXX teacher and XXXX teacher reported to OCR that there were no additional concerns regarding the provision of XXXX after the XXXX XXXX semester. XX – sentence redacted – XX. Accordingly, OCR has determined that the evidence is insufficient to support a finding that the Fisd denied the Student a FAPE during the XXXX XXXX school year with regard to Issue 3(a).

OCR also determined there is insufficient evidence to support a finding that the Fisd denied the Student a FAPE with regard to Issues 3(b) and (c). As noted above, when considering allegations that a recipient has denied a student with a disability a FAPE, OCR considers whether services identified as necessary to meet the student's needs were provided by the recipient. Here, although the evidence indicates that the Fisd evaluated the Student and determined that, because of disability, the Student is eligible for special education and related aids and services, the evidence does not indicate that the Fisd agreed that the Student's XX – phrase redacted – XX was necessary for the Student until XXXX XXXX. After that date, XX – sentences redacted – XX. The preponderance of the evidence does not indicate that, after the services were identified as necessary for the Student and documented in her IEP, they were not provided. Accordingly, OCR cannot establish by a preponderance of the evidence that the Fisd denied the Student a FAPE with respect to Issue 3(b).

Moreover, OCR cannot establish by a preponderance of the evidence that the Fisd denied the Student a FAPE with respect to Issue 3(b). As noted above, although the Student's IEP as of XXXX XXXX provided that the Student would XX – phrase redacted – XX, the IEP did not indicate that the Student would XX – to end of sentence redacted – XX. Further, the evidence received by OCR from both the complainant and the Student's XXXX teacher reveals that the Student XX – to end of sentence redacted – XX. Moreover, the evidence indicates that the Student XX – to end of sentence redacted – XX. Accordingly, OCR has determined that the evidence is insufficient to support a finding that the Fisd denied the Student the opportunity to participate in XXXX XXXX, and thereby denied the Student a FAPE.

Conclusion

As discussed in further detail above, OCR has determined that the Fisd discriminated against the Student in violation of Section 504 and Title II with respect to Issue 1. OCR has determined that dismissal of part of allegation 3(a) [regarding the XXXX XXXX school year] without further investigation is appropriate, and has determined that the evidence is insufficient to support a finding of discrimination in violation of Section 504 or Title II with respect to the remainder of the issues investigated.

This letter concludes OCR's consideration of Issues 2 and 3. OCR will take no further action regarding these issues as of the date of this letter. This letter should not be interpreted to address

the FISD'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 file a private suit in federal court whether or not OCR finds a violation.

The complainant has a right to appeal OCR's findings of insufficient evidence with respect to issues 2 and 3 within 60 calendar days of the date indicated on this letter.² 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 FISD. The FISD has the option to submit to OCR a response to the appeal. The FISD must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the FISD.

Regarding Issue 1, the FISD submitted a signed Resolution Agreement (Agreement) to OCR on April 1, 2019. Enclosed is a courtesy copy of the Agreement. The provisions of the Agreement are aligned with the complaint allegation and the compliance concerns identified by OCR during its investigation of this complaint. OCR has determined that, upon full implementation, the Agreement resolves the complaint allegation.

Based on the commitments the FISD has made in the Agreement, OCR has determined that it is appropriate to close the investigation of this complaint. The FISD has agreed to provide data and other information demonstrating implementation of the Agreement in a timely manner in accordance with the reporting requirements of the Agreement. OCR will not close the monitoring of the Agreement until it has determined that the FISD has complied with the terms of the Agreement and is in compliance with Section 504 and Title II. Should the FISD fail to fully implement the Agreement, OCR will take appropriate action to ensure the FISD's compliance with Section 504 and Title II, including possibly initiating administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the FISD written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Please be advised that the FISD 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 another complaint alleging such treatment.

² The complainant does not have the right to appeal OCR's dismissal without further investigation the portions of Issue 3(a) relating to the XXXX XXXX school year.

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, it 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 would like to thank you and your staff for your cooperation throughout OCR's investigation of this complaint. If you have any questions or concerns regarding this letter, please contact Rachel E. Caum, Attorney, at (214) 661-9632, or at rachel.caum@ed.gov. You may also contact Ms. Lori Howard Bringas, Supervisory Attorney/Team Leader, at (214) 661-9638, or at lori.bringas@ed.gov.

Sincerely,

/s/

Taylor D. August, Director
Office for Civil Rights
Dallas Office

Enclosure: Resolution Agreement

cc: XXXX XXXX (*via email only*)