



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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November 6, 2015

IN RESPONSE, PLEASE REFER TO: 03141211

Howard County Public School System
Dr. Renee A. Foose, Superintendent
10910 Clarksville Pike
Ellicott City, MD 21042

Dear Dr. Foose:

This is to advise you that we have completed our investigation and reached a determination in the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Howard County Public School System (the District). XX XXX XXX XXXXXXXXXXX XXX XXXXX XXXXXXXX (the Complainants) allege that the District discriminated against XXXXX XXXXXXXXXXX XXXXX XXXXXXXXXXX XXXXXXXX (the Student), on the basis of disability. Specifically, they allege that the District discriminated against the Student on the basis of disability by:

1. Failing to implement the provision of the Student's 504 Plan that requires XXXXXXXX XXXXX XXXXXXXX and extended time during the 2013-2014 school year;
2. Informing the Student that she would not be permitted any absences for XXX XXXXX XXXXXX XX XXX XXXX XXXX and thereby treated her differently as compared to her non-disabled peers;
3. Subjecting the Student to a hostile environment by failing to address disability harassment from the Student's peers, teachers and guidance counselor XXXXXXX XXX XXXX XXXX XXXXXXX XXXX.

The Complainants also allege that the District retaliated against the Student for raising disability-related complaints during XXX XXXX XXXX school year by:

4. Removing the Student from the XXXX XXXXX XXXXXXXXXXXXXXXX XX XXX XX XXXX; and
5. The Student's XXXXXXXX XXXXXXXX refusing to accept assignments after the Student was told that the assignments would be accepted.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973, 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. Section 504 also prohibits retaliation.

- Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. Title II also prohibits retaliation.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

During our investigation, we interviewed the Student, the Student's mother, and District administrators and staff, and reviewed documents submitted by the Complainants and the District. OCR finds sufficient evidence to support the allegation that the District failed to comply with the requirements of Section 504 and Title II with respect to the implementation of the Student's Section 504 plan (Allegation #1), as well as compliance concerns regarding the District's policies and procedures for addressing complaints of disability harassment (Allegation #3). On October 19, 2015, the District signed a Resolution Agreement to address these compliance concerns. Regarding Allegations 2, 4 and 5, OCR finds that there is insufficient evidence to find that the District discriminated against the Student.

Legal standards

The Section 504 regulation, at 34 C.F.R. § 104.4(a), states that no qualified individual shall, on the basis of 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. Title II prohibits the same form of discrimination by public entities. Therefore, OCR applies the Section 504 standards when analyzing the same claims under Title II.

Free Appropriate Public Education (FAPE)

The Section 504 implementing regulation, at 34 C.F.R. § 104.33, requires that a recipient of Federal financial assistance that operates a public elementary or secondary education program or activity provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34–104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education plan (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

Different Treatment

In determining whether a recipient has subjected an individual to discrimination on the basis of disability, OCR looks at whether there were any apparent differences in the treatment of similarly situated individuals on the basis of disability. If different treatment is established, OCR then considers whether the recipient has a legitimate, nondiscriminatory reason for the apparent difference in treatment and whether the reason provided by the recipient is a pretext for discrimination based on disability. When examining pretext, OCR examines whether the recipient treated the individual in a manner that was consistent with established policies and procedures, and whether there is any other evidence of disability discrimination.

Disability Based Harassment

Disability harassment that is severe, pervasive or persistent can result in the denial or limitation of a student's ability to participate in or receive benefits, services or opportunities from the school's program. If a recipient receives information indicating that a student may have been harassed on the basis of disability, the recipient is responsible for investigating the allegations and, if a hostile environment is found, to take immediate effective action to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

To establish a violation under the hostile environment approach, OCR must determine whether the conduct constitutes a hostile environment from the totality of the circumstances, including a consideration of whether the disability harassment is severe, pervasive, or persistent. In making this determination, OCR examines the context, nature, scope, frequency, duration, and location of harassing incidents, as well as the identity, number, and relationships of the persons involved. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. In addition, as with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim. For example, the age and maturity of the students involved must be considered. Under OCR policy, the harassment must, in most cases, consist of more than casual or isolated incidents to constitute a hostile environment on the basis of disability. In addition, where a recipient has notice of the conduct, we determine whether it took prompt and effective action to eliminate the hostile environment and prevent its recurrence.

The Section 504 implementing regulations, at 34 C.F.R. Section 104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. OCR examines a number of factors in evaluating whether a recipient/public entity's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to parents of elementary and secondary school students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Retaliation

When investigating a retaliation claim, OCR must determine whether: (1) the individual engaged in a protected activity; (2) the recipient had notice of the individual's protected activity; (3) the

individual was subjected to an adverse action contemporaneous with or subsequent to the protected activity; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. While OCR would need to address all of the elements in order to find a violation, OCR need not address all of these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established. If all of these elements establish a prima facie case, OCR then considers whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action, and whether the reason asserted is a pretext for retaliation.

In order for an activity to be considered to be protected, the individual must have either opposed conduct prohibited by one of the laws that OCR enforces or participated in an investigation conducted under the laws that OCR enforces. Notice of the protected activity to the recipient, and not necessarily to the alleged individual retaliator(s), is sufficient to establish the notice requirement. In determining whether an action taken by the recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse. Generally, the more time in between the protected activity and the adverse action, the weaker the presumption of a causal connection. Additional evidence that would demonstrate a causal connection includes: a change in treatment of the individual before and after engaging in the protected activity; treatment of the individual that is different from treatment of other similarly situated individuals; and deviation from established practice or procedure.

FACTUAL SUMMARY

XX—Paragraph Redacted--XX

Allegation #1- Failure to implement Section 504 plan re: XXXXXXXX XXXXX XXX XXXXXXXX XXXX.

It is undisputed that the Student's Section 504 plan for the XXXX XXXX XXXXXXX year provided, among other things, XX—Paragraph Redacted--XX.

Our investigation found that the District did not consistently implement the provision of the Student's Section 504 plan that called for XXXXXXXX XXXXX. XX—Paragraph Redacted--XX.

Our investigation also found that the District consistently implemented the provision of the Student's Section 504 plan that called for extended time for assessments and assignments. XX—Paragraph Redacted--XX.

Allegation #2- Informing the Student she would not be permitted XXX XXXXXXXX XX XXX XXXX XXXX XXXXX XXXX.

XX—Paragraph Redacted--XX.

Allegation #3- Hostile environment.

The Complainants assert that students made comments to the Student XXX regarding XXX thereby creating a hostile environment XXX —Paragraphs Redacted--XX. Notwithstanding, however, the evidence reflects that the District did not provide a prompt and equitable response to the Complainants’ allegations of disability harassment.

XXX —Paragraph Redacted--XX.

Our investigation established that the District did not provide an adequate, reliable, and impartial investigation, including the opportunity to present witnesses and other evidence. XXX — Paragraph Redacted--XX.

In addition, our investigation established that the Complainants were never advised of the outcome of the complaint. XXX —Paragraph Redacted--XX.

Accordingly, OCR concludes that the evidence is sufficient to establish that the District failed to provide a prompt and equitable response to the Complainants’ complaint of disability-based harassment pursuant to the requirements of Section 504.

Allegation #4- Retaliated by XXXXXXXXXXX XXX XXXXXXXXXXX XXXX XXX XXX XXXX XXXXX XXXXXXXXXXXXXXX.

XX—Paragraphs Redacted—XX.

Allegation #5- Retaliated by XXX XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX XX XXXXXXX XXXXXXXXXXXXXXX.

XX—Paragraph Redacted--XX

CONCLUSION

OCR concludes, by a preponderance of evidence, that the District failed to implement the Student’s Section 504 plan and failed to provide a prompt and equitable resolution to the Complainants’ complaint of disability based harassment. Thus, OCR concludes that the District did not comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. On October 19, 2015, the District provided OCR with the enclosed signed Resolution Agreement (the Agreement). When fully implemented, the Agreement will address all of OCR’s compliance concerns. OCR will monitor the implementation of the Agreement until the recipient is in compliance with the statute(s) and regulations at issue in the case.

This concludes OCR’s investigation and should not be interpreted to address the Recipient’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

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 Complainant may file another 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 is committed to a high-quality resolution of every case. If you have questions or concerns about OCR's findings, you may contact Amy Niedzalkoski at (215) 656-8571 or amy.niedzalkoski@ed.gov.

Thank you for your cooperation with this matter.

Very truly yours,

/s/

Beth Gellman-Beer
Team Leader

Enclosure

cc: Rochelle Eisenberg, Esq.