

Applicable Legal Standards

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

Discrimination generally

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

In analyzing an allegation of different treatment based on disability, OCR ascertains whether there were any apparent differences in the treatment of similarly situated individuals who are not disabled. If such differences are found, then OCR considers whether the recipient had a legitimate, non-discriminatory reason for the differences in treatment and whether the reason provided by the recipient was a pretext for unlawful discrimination based on disability. Additionally, OCR examines whether the recipient treated the student in a manner that was inconsistent with its established policies and procedures and whether there was any other evidence of discrimination on the basis of disability.

Retaliation

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964 at 34 C.F.R. § 100.7(e), which prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation. Similar protections against acts of retaliation are prohibited by the Title II implementing regulation at 28 C.F.R. § 35.134(a).

A *prima facie* case of retaliation is established when it is determined that (1) an individual engaged in a protected activity (opposed a discriminatory policy, asserted protected rights, or participated in an OCR complaint or proceeding); (2) the recipient knew of this activity; (3) the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and (4) there is an inferable causal connection between the protected activity and the

adverse action. To be considered adverse, an action must significantly disadvantage an individual or reasonably deter an individual from engaging in future protected activities.

If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the elements of a *prima facie* case of retaliation are met, OCR then considers whether the recipient presented a legitimate, non-retaliatory justification for taking the adverse action, and whether the reason is a pretext for retaliation. Pretext may be shown by evidence demonstrating that the explanation for the adverse action is not credible or believable or that treatment of the person was inconsistent with the treatment of similarly situated individuals or established policy or practice.

Factual Background

During the 2014-15 school year, Student A was a xxxxx xxxxx student with a disability (xxxxxxxxxxxxxxxx) at xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx (School B), a District school where xxx xxxxxxxxxxxxxx xxx xxxxxxxxx. Student A's individualized education plan (IEP) placed Student A in the general education classroom, with direct services provided in the special education classroom for approximately 30% of each school week. In addition, the IEP contained a behavior intervention plan (BIP).

The Principal told OCR that in the fall of 2014, the Complainant approached her both to discuss her xxxxxxxxxxxxxx at School B and to seek advice regarding Student A. The Principal explained that xxx xxx xxxxx xxx xxxxxxxxxxxxxxxxxxxxxxxxxxx xx xxxxxxxxxxxxxx prior to becoming the Principal at School A and that Complainant xxxxxx xxxxxxxx xxx xxxxxxxx xxxxxx xxxxxx x. The Principal stated that in her capacity as xxxxxxxxxxxxxxxxxxxxxxxxxxx xx xxxxxxx xx, xxx xxx xxxxxx xx xxxxxxxxxxxxxx. Since becoming the Principal at School A, the Complainant would frequently approach her as she arrived or left the building.

The Principal explained that throughout the fall of 2014 the Complainant sought advice about Student A's experience at School B. The Principal stated that she (1) encouraged the Complainant to talk to School B's counselor if Student A were having difficulty or if the Complainant believed that School B was not implementing Student A's IEP, (2) asked School A's counselor to call the District's law department to determine how to provide a parent advocate to work with the Complainant and School B to resolve any issues, and (3) provided the Complainant with the contact information of a District Specialized Services Administrator (SSA) with oversight of School B. However, the Principal stated that Complainant A did not act on her advice or referrals. The Complainant denies that the Principal provided this information in the fall of 2014.¹

¹ The Complainant told OCR that the Principal provided her this information only after she complained to the Network office that the Principal had denied the request to transfer Student A to School A.

In March 2015, the Complainant asked the Principal about transferring Student A from School B to School A. In response, the Principal contacted the Parent Support Administrator for School A (PSA-A) to discuss the Complainant's request to transfer Student A. According to the Principal, she had a lengthy discussion with PSA-A about the Complainant's transfer request and that he told her, among other things, that School A's "numbers are high in special education" and that PSA-A directed her to deny the transfer.² As a result of her call with PSA-A, the Principal informed the Complainant via voicemail that PSA-A did not "okay" this transfer. In the voicemail, the Principal also told the Complainant that the transfer was "not fair to [School A]."

The Principal explained to OCR that when she told the Complainant that the transfer request was "not fair" she meant that it was not fair (1) to Student A in that she would be uprooted from the environment she was accustomed to, (2) to the Principal herself in that she had provided advice and resources to the Complainant who had not acted on that advice; and (3) to School A in that implementing Student A's IEP at School A might strain the school's resources. In addition, the Principal told OCR that School A could not accommodate Student A in its self-contained classroom.

In April 2015, the Complainant filed a complaint with the District that the decision to deny her request to transfer Student A to School A subjected Student A to discrimination based on her disability. PSA-B reviewed the complaint and obtained more information from the Principal, who denied that she rejected the Complainant's transfer request because of Student A's disability and instead asserted that PSA-A had directed her to reject the transfer request because it occurred during the middle of the school year. PSA-B determined that no discrimination had occurred, and closed the complaint, based on the Principal's response. In an email to the Principal, PSA-B stated that she called the Complainant to encourage the Complainant to contact School B's case manager and that the Complainant stated she no longer wished to transfer Student A to School A. The Complainant acknowledges that PSA-B called her but states that PSA-B told her only that she was "sorry" but did not take any other action.

The District's transfer policy states that "students attending schools outside their attendance area who wish to transfer to their attendance area school *shall be* enrolled as provided in section I.A. of this policy" (emphasis added). Section I.A.4 provides that "where a student

² PSA-A denied providing this advice to the Principal, but OCR does not find his denial credible. On June 4, 2015, PSA-A wrote to School A's Network Chief disputing the Principal's description of their conversation. However, PSA-A was first aware that the Principal had informed the Complainant that PSA-A had directed her to deny the Complainant's transfer request on April 7, 2015, when the Principal copied PSA-A on an email she wrote to PSA-B in response to an internal complaint filed by the Complainant and again on May 5, 2015, when the Complainant played the Principal's voicemail for PSA-A. The Complainant stated that PSA-A did not deny the statements attributed to him by the Principal in the voicemail and instead said only that the "Principal should know there are no mid-year transfers."

with disabilities seeks to enroll in his or her attendance area school, the attendance area school *must immediately* enroll that child” (emphasis added). Section I.A.4 further provides that if the school believes it cannot implement the student’s IEP or 504 plan, it must contact the Office of Specialized Services³ for appropriate review and placement and provide interim services until a placement is made.

School A is Student A’s attendance area School. Student A attended School B during the 2014-15 school year; she did not reside in School B’s attendance area. Neither the Principal nor PSA-A identified (either to OCR or to the Complainant) the applicable transfer rule on which she or he relied when denying the Complainant’s request to transfer Student A to School A mid-year. Further, neither the Principal nor PSA-A contacted the District’s ODLSS to inform it that School A would not be able to implement Student A’s IEP if she transferred to School A or to request additional staff to enable School A to implement Student A’s IEP.

The Complainant also asserts that the xxxxxxxxxxx xxxxxxxxxxx xx xxxxxx xxx xx xxxx xx xx xxxxxx xxxxx,xxxxx xxxxxx xx xxxxxxxx xxxxxxxxxxx xxxxxxxxxxx, xxx xxxxxxxxxxxxxx xxx. Four School A Nightincluding a xxxxxxxx xxxxxxxx, x xxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx, xxxxxxxx xxxxxxxxxxx, and xx xxxxxxxxxxx xxxxxxxxxxx told OCR that they heard or witnessed the incident between the Principal and xxxxxxxx x. All four provided consistent accounts of the argument and each of the four told OCR that they did not hear the Principal raise her voice or xxxxxxxx xx xxxxxx xxx xxxxxxxxxxxxxx xx xxxx.

The Complainant provided OCR copies of undated texts exchanged between xxx xxxxxxxxxxx xxx xxxxxxxx x xx xxxxx xxx xxxxxxxxxxx xxxxxxx xxx xx x xxxxx xxx xxxxxxxxxxx xxxxxxx, x xx xxxxxxx xxx.” The Complainant also provided OCR with an undated voicemail from the Principal to xxxxxxxx x in which the Principal informed xxxxxxxx x that the Complainant’s voicemail was full and that if the Complainant did not return her call she would report the Complainant to the Network Chief. The Principal acknowledged sending the text and voicemail and explained that she informed xxxxxxxx x that she would report the Complainant because the Complainant had begun leaving multiple voicemails for the Principal on School A’s voicemail and on the Principal’s personal cell phone after she informed the Complainant that School A would not accept Student A as a transfer student mid-year. The Principal explained that she intended to call the District’s law department to report the Complainant’s repeated calls, which she viewed as harassing. xxx xxxxxxxxxxx xxxxxx xxxxxxxxxxxxxx xx xxxxxx xxxxxxxxxxxxxxxxxxxxxx xx xxxx.

Analysis

Discrimination

³ This Office has since been renamed the Office of Diverse Learner Supports and Services (ODLSS).

Prior to the conclusion of OCR’s investigation, the District requested to resolve the allegation that it discriminated against Student A, based on her disability by denying the Complainant’s request to transfer Student A to School A. The provisions of the resolution agreement are aligned with the complaint allegation and the issues investigated, and they are consistent with applicable law and regulations.

OCR will monitor the District’s implementation of the Resolution Agreement (Enclosed) until the District has fulfilled the terms of the Agreement. OCR looks forward to receiving the District’s first monitoring report, which is due by November 15, 2015.

Retaliation

OCR finds insufficient evidence to establish that the District retaliated against the Complainant as alleged. The Complainant asserts that the Principal xxxxxxxxxxx xx xxxxxx xxx xx xxxx xxxxxx xxxxx x, xxxx xxxxxxxxxxx xxx xxxxxxxxx x,xxx xxxxxxxxxxxxxxxxxxx.

For purposes of this analysis, OCR assumes that the Complainant engaged in protected activity when she complained that the Principal’s decision to deny her request to transfer Student A was discriminatory.

However, OCR found insufficient evidence to conclude that the Complainant was subjected to an adverse action. Although the Complainant and Principal dispute xxxxxxx xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx xxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxx, four witnesses told OCR that they did not hear the Principal threaten xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx as alleged. Further, although the Principal notified xxxxxxx x xxxxxxx xxxxxxx xxx xxx xxxxxx “xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx” xxx xxxxxxxxxxx, the text exchange lacks sufficient context, and the Complainant did not provide any additional information, from which OCR can infer that the Principal intended to xxxxxx xxxxxxxxxxxxxxxxxxx xxx xxxxx xxxxx xx xxxxxxx. Rather, the text exchange between xxxxxxx x and the Principal indicates that the xxxxxxx x and the Principal were texting about the Complainant’s request to transfer Student A to School A. Further, the Principal explained that she intended to call the District’s law department to determine whether there were any steps to take to curb the Complainant’s repeated calls to School A and to the Principal’s personal cell phone to complain about the denial of her request to transfer Student A, which the Principal considered harassing and threatening.

Finally, the evidence shows the Principal made repeated efforts, throughout the fall 2014, to provide the Complainant with advice and referrals regarding Student A’s education, which is inconsistent with a retaliatory motive on her part.

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. In this case, the preponderance of the evidence does not support the allegation that the Principal threatened to report the Complainant to DCFS. For all of these reasons, OCR

finds insufficient evidence of retaliation as alleged and has closed this allegation effective the date of this letter.

This concludes OCR’s investigation of the 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.

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. The Complainant may also 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. 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.

We wish to thank you for the cooperation extended to OCR during our investigation. If you have any questions, please do not hesitate to contact Patrick Alexander by phone at 312-730-1716, or by e-mail at Patrick.Alexander@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

Enclosure

cc: XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXXXXXXXXXX
 XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXXXXXXXXXX
 XX XXXXXX, XXXXXXXXXXXXXXXXXXXXXXXX