

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS



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Ms. Donna Hamilton Cornell, Vice Chancellor for Legal Affairs, UH System
University of Houston Charter School
311 E. Cullen Building
Houston, TX 77204-2028

RE: OCR Case No. 06142014
University of Houston Charter School (UHCS)

Dear Ms. Cornell:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, which was received in this office on November 6, 2013. The complainants alleged that the University of Houston Charter School (UHCS or the School), Houston, Texas, discriminated against XXXX XXXX on the basis of his disabilities (XXXX XXXX XXXX (XXX), XXXX XXXX (XX), and XXXX XXXX (XX)). Specifically, the complainants alleged that:

1. On or about XXXX, XXXX, the UHCS used “physical force to manage XXXX XXXX behavior, which the behavior (XXXX XXXX XXXX XXXX) did not include harm to himself or others”;
2. The UHCS “has no formal or written grievance procedures accessible to the public or to people who believe their rights have been violated on the basis of disability”; and
3. The UHCS retaliated against the complainants because they attempted to protect XXXX XXXX rights as a student with a disability, when the UHCS “prevented them from communication with XXXX XXXX teachers, UHCS staff and therapists.”

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance from the Department, or from an agency that has delegated investigative authority to this Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, (amended 1992), and its implementing regulation, at 34 C.F.R. Part 104, which prohibit 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, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Under Title II, OCR has jurisdiction over complaints alleging disability discrimination against public entities, such as public preschools, elementary and secondary education systems and institutions, public institutions of

higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and public libraries.

Further, OCR has jurisdictional authority to pursue allegations of retaliation under Section 504 and Title II. The Section 504 implementing regulations, at 34 C.F.R. § 104.61 incorporate by reference the non-retaliation provision of the implementing regulations of Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which states that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The Title II implementing regulations, at 28 C.F.R. § 35.134, incorporate a prohibition against retaliation that is comparable to the provision incorporated by reference in the Section 504 implementing regulations. The UHCS is a recipient of Federal financial assistance from the Department and is a public elementary education system. Therefore, OCR has jurisdictional authority to process this complaint for resolution under both Section 504 and Title II.

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 to prove that a particular proposition is more likely than not). When 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.

During the course of this investigation, OCR interviewed the complainants and UHCS staff members. Additionally, OCR considered documentation and information provided by the complainants and the UHCS. Based on our review and analysis of the information obtained during this investigation, OCR has determined there is insufficient evidence to support findings of noncompliance with respect to Issues 1 and 3. However, OCR determined that the UHCS is not in compliance with Section 504 and Title II, with respect to its grievance procedures. The basis for this determination is outlined below.

- 1. Whether the UHCS denied the XXXX XXXX a Free Appropriate Public Education (FAPE) when, on or about XXXX, XXXX, UHCS employees used physical force to manage his behavior, despite being aware of the XXXX XXXX disabilities, in violation of Section 504, at 34 C.F.R §104.33(a) and § 104.35(a), and Title II, at 28 C.F.R. § 35.130.**

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. §104.33 requires recipient school districts to provide a FAPE to each qualified individual with a disability who is in the District'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 §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. § 35.130 to require recipients to provide a FAPE at least to the same extent required under the Section 504 regulations.

Facts and Analysis

The complainants alleged that on XXXX, XXXX, XXXX XXXX teacher improperly used physical force to manage his behavior while attempting to get him to X---phrase redacted---X amounted to a denial of a FAPE to the XXXX XXXX. Specifically, one of the complainants alleged that on XXXX, XXXX, she was approached by a parent who stated that she (the parent) witnessed an incident on XXXX, XXXX involving the XXXX XXXX and his teacher. The complainant alleged that the parent indicated that X---phrase redacted---X. However, according to the findings of an investigation conducted by UHCS and a review conducted by Child Protective Services (CPS) in XXXX XXXX, the teacher did not X---phrase redacted---X.

OCR looked for evidence that management of the Student's behavior was considered a necessary element in the provision of a FAPE to the Student. OCR reviewed documentation provided by the UHCS and the complainants and found that at the time of the incident, the Student, XXXX, was receiving services as a student with a disability through an Individual Education Plan (IEP), which was developed in accordance with procedures consistent with the procedural requirements of Section 504 and Title II. The IEP that was in effect at the time of the alleged incident was developed on XXXX, XXXX effective through XXXX, XXXX. Although the IEP identified XXXX XXXX XXXX as an educational goal, the IEP did not identify the Student as having a need for aids or services to manage his behavior. OCR found that the IEP was silent regarding management of the Student's behavior, and there was no separate plan (i.e., a Behavior Intervention Plan) to govern the management of the Student's behavior. Accordingly, OCR determined that management of the Student's behavior was not a part of the Student's individualized plan.

Therefore, OCR determined that there is insufficient evidence to support a finding of noncompliance with the regulations implementing Section 504 and Title II with respect to this issue.

- 2. Whether the UHCS failed to adopt grievance procedures providing for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability, in violation of Section 504, at 34 C.F.R. § 104.7, and Title II, at 28 C.F.R. § 35.107.**

Legal Standards

The Section 504 regulation requires that schools employing 15 or more persons implement appropriate, continuing steps to notify students and others that the school does not discriminate on the basis of disability in violation of the regulation. The notification must state, where

appropriate, that the school does not discriminate in admission, treatment, employment or access to its programs and/or activities. Also, the employee designated to coordinate compliance with Section 504 and Title II must be identified in the notification, as stated in 34 C.F.R. Section 104.7(a) and 28 C.F.R. Section 35.107(a). Under 34 C.F.R. Section 104.8(a), the school is required to take appropriate and continuing steps to notify students, employees, and other interested parties of the identity of its Section 504/Title II Coordinator. Title II further obligates public entities to make the identity and contact information of its designated coordinator readily available to interested parties pursuant to 28 C.F.R. Section 35.107(a).

Section 504, at 34 C.F.R. Section 104.7(b) and Title II, at 28 C.F.R. Section 35.107(b), both require schools to adopt, implement and publish grievance procedures that provide for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability in the schools' programs and/or activities. Additionally, Section 504 requires that schools provide sufficient notice to students, parents, teachers, employees, and/or other interested parties of its grievance procedures and where complaints may be filed. In addition, Title II requires that schools publish such grievance procedures to make them available to interested parties.

To evaluate whether the School's grievance procedure(s) comply with the requirements of Section 504 and Title II, OCR considered a number of factors, including whether the procedures: (a) provided clear notice to students, employees, parents, and other interested parties of how, when and where to file a complaint; (b) applied to the full range of potential discriminatory actions covered by Section 504 and Title II; (c) provided for an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (d) contained designated and reasonably prompt timeframes for major stages of the complaint process; (e) provided that the parties are provided notice of the outcome of the complaint; and (f) provided for an assurance that the recipient will take steps to prevent recurrence of the discrimination and remedy its discriminatory effects on the complainant and others, if appropriate.

Facts and Analysis

The complainants alleged that the "UHCS has no formal or written grievance procedures accessible to the public or to people who believe their rights have been violated on the basis of disability." The UHCS provided OCR a document titled "Interim Grievance Process" (Grievance Procedure). According to the UHCS, the Interim Grievance Policy was adopted on November 26, 2013, and provided to the complainants XXXX XXXX XXXX XXXX. Further, the UHCS stated that the policy was disseminated to the parent community on December 3, 2013, with its "Tuesday Newsletter."

OCR reviewed the UHCS's "Interim Grievance Process" and determined that the Grievance Procedure does not comply with the requirements of Section 504 and Title II. Specifically, it did not address complaints regarding discrimination on a number of different bases, including those alleging discrimination on the basis of disability. It also did not include the non-discriminatory notice (i.e., a statement of non-discrimination that specifies the basis for non-discrimination; identification by name or title, address, and telephone number of the employee or employees

responsible for coordinating the compliance concerns/issues). Also, the procedures did not include the opportunity to present witnesses and other evidence. Further, the grievance procedure did not contain any assurance that the UHCS will take steps to prevent recurrence and to correct any discriminatory effects on the person who is filing the complaint, if appropriate. Finally, the Grievance Procedure required complainants to present their concerns to the “Campus principal,” without providing an alternative designee for a potential grievance alleging discriminatory actions by the principal. Based on this information, OCR determined that the UHCS did not adopt and implement grievance procedures that comply with the requirements of Section 504/Title II.

3. Whether the UHCS retaliated against the complainants by denying them the opportunity to communicate directly with XXXX XXXX teachers, UHCS staff, and therapists regarding XXXX XXXX education during the 2013-2014 school year, in violation of Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. § 35.134.

Legal Standards

In accordance with OCR policy and relevant case law, when analyzing an allegation of retaliation, OCR must first determine whether a *prima facie* case of retaliation has been established. A *prima facie* case of retaliation consists of the following four elements:

1. The complainant or other alleged injured party engaged in a protected activity;
2. The recipient had knowledge that the complainant engaged in a protected activity;
3. The recipient took an adverse action against the complainant or other alleged injured party contemporaneously with or subsequent to the protected activity; and
4. There exists a causal connection between the protected activity and the adverse action.

If any one of these elements cannot be established, then OCR will find insufficient evidence of a violation. If, however, all of the above elements are established and a *prima facie* case has been established, OCR next considers whether the recipient can articulate one or more legitimate, non-discriminatory reasons for having taken the adverse action. If so, OCR then considers whether the reason asserted is merely a pretext for retaliation.

While OCR would need to address all of the elements in order to find a violation, OCR need not address all of the above-listed elements in order to find insufficient evidence of a violation where the evidence otherwise demonstrates that retaliation cannot be established.

With respect to the factors to establish a *prima facie* case, to determine whether an individual participated in protected activity, OCR examines whether that individual: (1) opposed what he or she believed to be an act or policy that is unlawful under one of the laws that OCR enforces, or (2) made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing conducted under the laws enforced by OCR. Further, for purposes of establishing a *prima facie* case of retaliation, notice to the recipient, and not the individual retaliator, is sufficient to establish that the recipient had knowledge of the complainant’s protected activity.

OCR has defined an adverse action as an action by the recipient that significantly disadvantages the complainant as to his or her ability to gain the benefits of the program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims. To make this determination, 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.

A causal connection can be established when there is a change in a recipient's actions and, in most cases, is inferred when the adverse action occurs in close proximity in time with the protected activity. Additionally, evidence of a change in treatment of the individual before and after engaging in the protected activity, treatment of the complaining individual that is different from treatment of other similarly situated individuals, or deviation from established practice or procedure could all demonstrate a causal connection.

Facts and Analysis

Using the legal framework above, OCR's investigation showed that a *prima facie* case of retaliation cannot be established. Regarding the element of protected activity, OCR found that the complainant filed a complaint with the Texas Education Agency (TEA) (Complaint #XXXX) against the School concerning different disability issues on XXXX, XXXX. OCR determined that the filing of a TEA complaint is sufficient to demonstrate that the complainant participated in a protected activity by opposing what she believed to be an act that is prohibited under one of the laws that OCR enforces. The UHCS demonstrated knowledge of the protected activity when it responded to the complaint in a letter to the TEA dated XXXX, XXXX.

OCR next examined whether the complainants were subjected to an adverse action contemporaneous with or subsequent to the complainant's protected activity. In light of the standard described above, OCR must consider each case on a case-by-case basis and exercise judgment in light of all the facts and circumstances of the case. While some actions may be adverse actions in almost any context, *e.g.*, dismissing a student or firing an employee, other actions need to be considered in light of all the facts in the case to assess the harm and the deterrent effect that an action causes. Based on the information discussed below, OCR determined that the UHCS did not subject the complainants to an adverse action during the 2013-2014 school year, as alleged.

The complainants informed OCR that they were denied the opportunity to communicate directly with XXXX XXXX teachers, UHCS staff, and therapists regarding XXXX XXXX education during the 2013-2014 school year. Further, the complainants alleged that when they communicated with the UHCS staff, they were told X---phrase redacted---X. According to the UHCS's officials, there is a policy in effect to prevent disruption in the education system. Specifically, parents are encouraged to speak with their child's teacher or designated administrator. Also, parents of students with disabilities are encouraged to speak with the special

education teacher. OCR's review of the aforementioned policy revealed that it contained the following statement: "[P]lease share all parental questions and concerns with your child's teacher as they arise..." According to XXXX XXXX, in addition to this written policy/guidance, parents are verbally informed at the beginning of the school year that communications regarding their child's education should be directed to their child's teacher or principal. OCR found that the written policy, which was published in the 2013-2014 Parent/Student Handbook, was applicable to all parents.

Additionally, OCR interviewed seven (7) UHCS staff members, and they all indicated that they were not "instructed" to deny communication directly with the complainants and they were not required to report the context of their communications to XXXX XXXX. In fact, most of the teachers acknowledged that they greeted the complainants and communicated with them on a regular basis. Further, the staff members all concurred that they were instructed by XXXX XXXX during a faculty meeting at the beginning of the school year, that all educational questions were to be addressed with either the student's teacher or an administrator, and that this policy was applied to all parents.

Further, OCR reviewed a letter dated XXXX, XXXX from the complainants to the XXXX XXXX XXXX XXXX XXXX, which addressed the complainants' retaliation concerns. By letter on XXXX, XXXX, the XXXX XXXX XXXX XXXX responded to the complainants' concerns by assuring the complainants that X---remainder of paragraph redacted--X.

OCR contacted the complainants to provide them an opportunity to rebut the information provided by the UHCS. According to the complainants, they were not actually prevented from speaking with XXXX XXXX teachers, UHCS staff, and therapists regarding XXXX XXXX education; instead, the complainants indicated that XXXX XXXX was merely X---phrase redacted---X when they spoke with the UHCS staff (*i.e.*, teachers or therapists), but that XXXX XXXX did not prevent them from communicating with UHCS staff.

Based on the information obtained during the course of OCR's investigation, OCR was unable to establish that the alleged adverse act occurred, because, the evidence was insufficient to substantiate that the UHCS denied the complainants the opportunity to communicate directly with XXXX XXXX teachers, UHCS staff, and therapist regarding XXXX XXXX education. Accordingly, it was unnecessary for OCR to proceed further with the retaliation analysis for this allegation. As such, OCR determined that the evidence is insufficient to support a conclusion that the complainants were subjected to retaliation by the UHCS with respect to this issue.

Conclusion

For the reasons stated above, OCR determined that there was insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to Issues #1 and #3. Therefore, OCR is closing these complaint allegations as of the date of this letter.

However, OCR determined that there was sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to Issue #2 regarding UHCS's

grievance procedures. On March 12, 2014, the Director of the Dallas Office approved the request from the UHCS to resolve Issue #2. The UHCS voluntarily submitted to OCR a Resolution Agreement (Agreement) to resolve this issue, which was signed by the UHCS on May 16, 2014. A copy of the Agreement is enclosed. OCR determined that the provisions of the Agreement are aligned with this issue and appropriately will resolve them. Further, OCR accepts the Agreement as an assurance that the UHCS will fulfill its obligations under Section 504 and Title II with respect to this issue. The dates for implementation and specific actions are detailed in the Agreement, and OCR will monitor the implementation of the Agreement.

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 complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

This concludes OCR's investigation of the complaint and is not intended nor should it be construed to cover any other matters that may exist regarding compliance with Section 504 and Title II, and are not specifically discussed herein.

Under OCR procedures, we are obligated to advise the institution against which a complaint is filed that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because an individual has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

Under the Freedom of Information Act, it may be necessary to release this document and other related correspondence and records upon request. In the event we receive 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 privacy.

If you have any questions, please feel free to contact Patricia I. Sinanan, investigator, by telephone at (214) 661-9649, or me at (214) 661-9600.

Sincerely,

/s/

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