



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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March 22, 2016

Dr. Abelardo Saavedra, Superintendent of Schools
South San Antonio Independent School District
5622 Ray Ellison
San Antonio, TX 78242

Ref: 06-16-1054

Dear Dr. Saavedra:

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 against the South San Antonio Independent School District (SSAISD), San Antonio, Texas, which was received by OCR on November 2, 2015. The complaint was filed on behalf of a XXXX-grade student at Price Elementary School (the Student), and alleged discrimination on the basis of disability (XXXX XXXX, XXXX XXXX). The complaint also alleged retaliation. Specifically, the complaint alleged the following:

1. During the 2014-15 and 2015-16 school years, the SSAISD has discriminated against the Student on the basis of his disability by failing to evaluate him to determine whether, because of his disabilities, he was in need of regular or special education and related aids and services;
2. On or around October 30, 2015, the SSAISD discriminated against the Student on the basis of his disability by denying him the opportunity to participate in a school Halloween dance, because he had missed absences due to his disability; and
3. After the complainant requested that the Student be removed from his homeroom classroom during the 2014-15 school year because his teacher was forcing him to read aloud in front of other students, the SSAISD has retaliated against the complainant and the Student by (a) not permitting the Student to participate in the Halloween dance on or around October 30, 2015; and (b) issuing the complainant XXXX truancy warning letters during the fall 2015 semester.

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

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to the 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 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). Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. Moreover, the regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference at 34 C.F.R. § 100.7(e) the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which states:

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 section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this part.

The SSAISD is a recipient of Federal financial assistance from the U.S. Department of Education and is a public elementary and secondary educational institution. Therefore, OCR has jurisdiction to process complaints of discrimination and retaliation on the basis of disability filed against the SSAISD 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 SSAISD discriminated against the Student on the basis of disability by failing to evaluate the Student's need for regular or special education and related aids and services despite having notice that, because of the Student's alleged disabilities, the Student needed or was believed to need such aids and services, and thereby denied the Student a free appropriate public education during the 2014-15 and 2015-16 school years, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. §§ 104.33 and 104.35, and 28 C.F.R. § 35.130, respectively;
2. Whether the SSAISD denied the Student a free appropriate public education by denying him the opportunity to participate in a Halloween dance held on or around October 30, 2015, due to disability-related absences, in violation of Section 504 and Title II, at 34 C.F.R. §§ 104.33 and 28 C.F.R. § 35.130, respectively; and
3. Whether the SSAISD retaliated against the complainant and Student by (a) denying the Student the opportunity to participate in a Halloween dance on or around October 30, 2015, and (b) issuing truancy warning letters to the complainant during the 2015-16 school year, because the complainant had requested that the Student be removed from his homeroom classroom as a result of alleged disability discrimination (specifically, the Student, who has X---phrase redacted---X, was being forced to read aloud in front of his

classmates) during the 2014-15 school year, in violation of Section 504 and Title II at 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134, respectively.

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 carefully reviewed written documentation provided by both the complainant and recipient and conducted interviews with the complainant and appropriate SSAISD employees. Based on a careful review of the information obtained, OCR has determined that the evidence is sufficient to support a finding of noncompliance with Section 504 and Title II with respect to Issue 1. OCR has determined that the evidence is insufficient to support a finding of noncompliance with Section 504 and Title II with respect to Issues 2 and 3. The bases for OCR's determinations with regard to each issue investigated are outlined in further detail below.

Issue 1

Whether the SSAISD discriminated against the Student on the basis of disability by failing to evaluate the Student's need for regular or special education and related aids and services despite having notice that, because of the Student's alleged disabilities, the Student needed or was believed to need such aids and services, and thereby denied the Student a free appropriate public education during the 2014-15 and 2015-16 school years, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. §§ 104.33 and 104.35, and 28 C.F.R. § 35.130, respectively.

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 free appropriate public education (FAPE) to each qualified student with a disability in the recipient'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.

OCR Findings

The Student is currently in the XXXX grade at the SSAISD's Price Elementary School (Price). The Student first enrolled at Price X---phrase redacted---X the XXXX-XXXX school year, when the Student was in XXXX grade. In an interview with OCR, the X---phrase redacted---X Section 504 Coordinator, reported that she met with both the complainant and the Student's XXXX when they enrolled the Student at Price. During this meeting, according to XXXX XXXX, the complainant and the Student's XXXX informed the XXXX XXXX that the Student had been diagnosed with XXXX XXXX and spoke to the XXXX XXXX regarding the Student's "medical issues." The XXXX XXXX reported that the complainant and XXXX were interested in seeing whether the Student qualified for any services, but she informed the two of the them that, before she could recommend any services for the Student, she would need to receive documentation from the Student's doctor stating his diagnosis, what medications he was taking, and so forth, so that she could also share this information with the school XXXX. The XXXX XXXX stated that she informed the complainant that before she could initiate any evaluation for services of the Student, she would need to receive medical documentation evidencing the Student's medical condition. The XXXX XXXX further stated to OCR that, although she followed up with the Student's XXXX on at least two or three more occasions over the next several months regarding her request for this information, she never received the requested medical documentation regarding the Student. The XXXX XXXX stated that she thought maybe they had "changed their minds."

The XXXX XXXX further reported to OCR that, at this time, the Student X---phrase redacted---X. According to the XXXX XXXX, she was informed by the Student's classroom teacher that, when the Student needed to communicate to the teacher, he would X---phrase redacted---X in his class who would help him. The XXXX XXXX stated that X---phrase redacted---X for the Student to the teacher. The XXXX XXXX asserted to OCR that she did not feel that this limited the Student's participation in the classroom, because "there are other ways to participate other than XXXX XXXX." Further, the XXXX XXXX stated to OCR that she did not initiate an evaluation of the Student to determine his eligibility for related aids and services under Section

504 because “at no time did [the Student] qualify for 504 in [her] opinion.” According to the XXXX XXXX, the Student was doing well academically, and “unless he had a mental or physical disability that could be proven to them that affected his learning, [she] wasn’t going to put him in 504.”

OCR also interviewed the Student’s XXXX grade teacher. The XXXX grade teacher reported that she believes that the Student came in to her classroom around XXXX XXXX of the year during his XXXX grade year, which was the XXXX-XXXX school year. The teacher reported that, although the Student’s XXXX told her that she was going to have the Student “tested,” she never followed up after that, and she never received any medical documentation from either the complainant or XXXX. The teacher reported that the Student talked well with other kids, but was “very limited” with her. The teacher informed OCR that the Student’s X---phrase redacted--X. According to the teacher, there was one specific X---phrase redacted---X.

The XXXX grade teacher further reported to OCR that she did believe the Student was performing below grade level, in particular with regard to reading, and that she tried to encourage the complainant to have the Student repeat the XXXX grade. According to the teacher, the complainant did not want the Student to repeat the XXXX grade. The XXXX grade teacher also reported that, although the Student began receiving interventions such as one-on-one assistance and after-school tutoring through the District’s Response to Intervention (RtI) procedures, she did not ever initiate a referral for a Section 504 evaluation of the Student because she never received any documentation from the complainant to evidence that the Student had been tested by a doctor.

OCR also interviewed the Price XXXX and the Price XXXX. Both witnesses reported that they were aware through the complainant and Student’s XXXX that the Student had been diagnosed with certain medical conditions. In her interview with OCR, the XXXX reported that she recalls meeting with the complainant and XXXX when they enrolled the Student at Price, along with the XXXX XXXX. In this meeting, according to the XXXX, the complainant and Student’s XXXX informed the XXXX and XXXX XXXX that the Student had XXXX XXXX. The XXXX informed OCR that it is their practice to request “proof” by way of a doctor’s note. In this case, the XXXX stated, the District never received medical documentation evidencing the Student’s diagnosis. When OCR inquired as to whether the Student exhibited signs of XXXX XXXX, the XXXX responded that she knew the Student was “quiet,” and would X---phrase redacted---X in his class. The XXXX reported that she did inform his teacher, and that this is documented in the Student’s RtI paperwork. The XXXX also explained to OCR that, at Price, all students are considered “Tier 1” RtI because these are small group interventions. If a Student is struggling, they will place them in Tier 2. According to the XXXX, the Student was receiving Tier 2 interventions, but has been progressing since his XXXX grade year. When OCR asked the XXXX when a Student would be referred for an evaluation to determine eligibility for Section 504 services, the XXXX responded that a referral would be initiated if “something is hindering their learning.” The XXXX further stated that the District “has to have medical documentation.”

In her interview with OCR, the XXXX XXXX reported that a “medical emergency card” that she receives each school year regarding each student at Price was not filled out for the Student for

the current school year. The XXXX recalled that she spoke with the complainant around October of 2015, in order to complete this information, and the complainant informed her that the Student had XXXX and XXXX XXXX. The XXXX XXXX also reported that she did have an “XXXX action plan” on file for the Student, which is a physician’s order for when the XXXX needs X---phrase redacted---X. The XXXX XXXX reported that she keeps the Student’s XXXX locked in her office. When OCR inquired as to whether the Student had an XXXX action plan in previous school years, the XXXX XXXX reported that she could not recall specifically, but that she believes that he did. The XXXX XXXX stated to OCR that she did not recall receiving any medical documentation regarding other medical conditions of the Student.

In an interview with OCR, the Price XXXX also reported to OCR that the complainant approached her during the Student’s first year at Price to request “help” for the Student. According to the XXXX, she told the complainant that she should speak to the XXXX XXXX, as it was “not her decision.” OCR also interviewed the District’s XXXX of XXXX XXXX (XXXX). In her interview, the XXXX stated that, after the District received a formal written request from the parent during the current school year, the District initiated a referral of the Student for an evaluation for special education services. The XXXX reported that, because of the Student’s XXXX XXXX, there are times when he will not speak with the evaluator. The XXXX stated that the evaluation of the Student is still pending.

OCR also received written documentation from the District which evidences that, on XXXX XXXX, the complainant wrote a letter to the Price XXXX requesting that the Student be evaluated for special education services. Documentation received by OCR also evidences that, on XXXX XXXX, the complainant signed consent for the District to initiate the testing of the Student. According to the District, the evaluation of the Student remains ongoing, and OCR has not received documentation to evidence whether the District has made an eligibility determination for the Student.

Legal Analysis

Based on the above findings of fact, OCR has determined that the District received verbal notice when the Student was first enrolled in the District in the XXXX-XXXX school year that the Student may suffer from a disabling condition, XXXX XXXX. Further, evidence obtained by OCR through witness interviews revealed that the Student exhibited signs of the diagnosis that had been reported in that he was not X---phrase redacted---X. Moreover, the Student’s XXXX teacher reported that the Student was performing below grade level. Based on this information, the District had reason to believe that, because of disability, the Student may have been in need of regular or special education or other related aids and services. The District failed to conduct an evaluation of the Student, however, because, according to the District, they were awaiting medical “proof” from the complainant, and the Student’s condition did not affect his “learning.”

The District has had an extended period of time to observe the Student during the XXXX, XXXX, and XXXX grades. During this period, District employees have witnessed behavior that would cause a reasonable person to believe the Student needs special education or related services. This is especially true when combined with the information provided by the Student’s

XXXX and XXXX, even though not supported by medical documentation. Medical documentation could have been requested from the parent/guardian as part of the evaluation of the Student. The information obtained from the District through witness interviews reflects a misunderstanding of the District's legal obligations pursuant to Section 504. In part, the District's stated reason for not more appropriately pursuing an evaluation of the Student was because the behavior witnessed did not prevent him from doing well academically. This is contradicted by the provision of the RtI process as part of the Student's education plan and by the consideration of retaining the Student in the XXXX grade. Nevertheless, "learning" is not the only major life activity which need be substantially limited in order to potentially qualify a student for services pursuant to Section 504.¹ Here, recipient witnesses reported that the Student exhibited signs of being X---phrase redacted---X. Moreover, while nothing in Section 504 prohibits a recipient from requesting medical documentation from XXXX who reports a medical diagnosis, an evaluation of a student to determine eligibility for individually prescribed services as a result of a suspected disability may not be unnecessarily delayed when XXXX fails to provide this documentation where, as here, the recipient otherwise has reason to believe that the student suffers from an impairment which substantially limits the student in one or more major life activities.

Further, in addition to receiving verbal notice that the Student had been diagnosed with XXXX XXXX, OCR's investigation revealed that the Price XXXX was aware that the Student suffered from XXXX, and had in place an "XXXX action plan" for the Student, which included a physician's order regarding X---phrase redacted---X. Despite having knowledge of this additional impairment, the District never initiated an evaluation of the Student which would satisfy the procedural requirements of Section 504's implementing regulation.² In this case, it was not until the complainant wrote a letter requesting a special education evaluation nearly two years after she first put the District on notice that the Student may have a disabling condition as defined by Section 504 that the District initiated a formal evaluation process for the Student. Under the facts presented here, the District's failure to initiate an evaluation of the Student prior to receiving the formal parent request resulted in a denial of a FAPE to the Student.

¹ See 34 C.F.R. § 104.3(j)(2)(ii) (providing the following examples of major life activities: caring for one's self, performing manual tasks, walking, seeing, hearing, *speaking*, breathing, learning, and working) (emphasis added); see also Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (U.S. Department of Education Office for Civil Rights Jan. 19, 2012), at Question 7 ("Nothing in the ADA or Section 504 limits coverage or protection to those whose impairments concern learning." . . . "Therefore, rather than considering only how an impairment affects a student's ability to learn, a recipient or public entity must consider how an impairment affects any major life activity of the student and, if necessary, must assess what is needed to ensure that student's equal opportunity to participate in the recipient's or public entity's program.").

² See *id.* at Question 8 ("A school district's obligation to provide FAPE extends to students with disabilities who do not need special education but require a related service. For example, if a student with a disability is unable to self-administer a needed medication, a school district may be required to administer the medication if that service is necessary to meet the student's educational needs as adequately as the needs of nondisabled students are met. In order to satisfy the FAPE requirements described in the Section 504 regulation, the educational institution must comply with several evaluation and placement requirements, afford procedural safeguards, and inform students' parents or guardians of those safeguards.").

Conclusion

For the reasons outlined above, OCR has determined that the evidence is sufficient to support a finding of noncompliance with Section 504 and Title II with regard to Issue 1.

Issue 2

Whether the SSAISD denied the Student a free appropriate public education by denying him the opportunity to participate in a Halloween dance held on or around October 30, 2015, due to disability-related absences, in violation of Section 504 and Title II, at 34 C.F.R. §§ 104.33 and 28 C.F.R § 35.130, respectively.

Legal Standard

The regulations implementing Section 504, at 34 C.F.R. § 104.37, provide that a recipient shall provide nonacademic and extracurricular activities to individuals with disabilities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in such services and activities. “Nonacademic and extracurricular services and activities” are defined by the regulations to include recreational activities offered by a recipient to students. 34 C.F.R. § 104.34(b) provides that, in providing for or arranging for the provision of nonacademic and extracurricular services and activities, a recipient shall ensure that students with disabilities participate with nondisabled students in such activities and services to the maximum extent appropriate to the needs of the student with a disability in question.

In assessing the a recipient’s compliance with Section 504 with regard to this issue, OCR first considers whether the recipient treated a disabled student differently than students without disabilities with regard to the opportunity to participate in an extracurricular activity. If different treatment is established, OCR considers whether the recipient can provide a legitimate, non-discriminatory reason for the difference in treatment. Finally, OCR assesses the explanation offered by the recipient to determine whether the reason proffered is a pretext for discrimination (in other words, is not credible or believable).

In the alternative, even if no different treatment based on his disability status is established, a recipient’s failure to appropriately accommodate a student’s disability, if such failure results in the denial of a disabled student’s opportunity to participate in an extracurricular opportunity offered by the recipient to nondisabled students, could also result in the denial of a FAPE to a student with a disability. In determining whether a recipient has denied a FAPE to a student with a disability with regard to the provision of extracurricular services, OCR considers whether the recipient’s failure to evaluate a student for special education or other related aids and services, despite having notice of the student’s disability status, resulted in the student being denied the opportunity to participate in an extracurricular activity offered by the recipient. If OCR determines that a student’s inability to participate in an extracurricular opportunity was the direct result of a recipient’s failure to evaluate the student, OCR may determine that the recipient denied the student a FAPE.

OCR Findings

OCR's investigation revealed that Price held a "Halloween dance" on or around October 30, 2015, which was open to students of all grade levels. As reported by the XXXX in her interview with OCR, the "Halloween dance" consisted of students reporting to P.E. and exercising to music. The XXXX explained to OCR that the dance took place during regularly-scheduled "specials," which consist of P.E., music, or computer time. During "specials," which occur every day, students are split up and attend P.E., music, or computer time. The XXXX reported that the Price attendance committee, which consists of a teacher representative from every grade level as well as counselors, determined that this dance would be an effort to increase attendance. Specifically, the attendance committee determined that, in order to be able to attend the dance, students would need to achieve perfect attendance during the two-week period prior to the dance. According to the XXXX, any absence, even if medically excused, would disqualify a student from participation in this attendance incentive.

OCR received a copy of a flyer advertising the dance from the SSAID. OCR's review of the flyer revealed that the flyer included the following text: *"You must have PERFECT ATTENDANCE from October 16th to October 29th in order to go to the dance."* OCR also received documentation from the SSAID which evidences that, on XXXX, 2015, the Student reported to the XXXX's office accompanied by his XXXX exhibiting signs of pink eye. According to this documentation, the XXXX XXXX sent the Student home on this day. Additional documentation provided by the SSAID evidences that the Student visited the doctor on XXXX, 2015, and received a doctor's note indicating that he would be ready to return to school on XXXX, 2015. Further documentation submitted by the SSAID shows, however, that when the Student reported to school on XXXX, 2015, the XXXX XXXX again sent him home because his eyes continued to be "very red with yellow drain."

OCR also interviewed the Student's XXXX XXXX teacher. The Student's teacher reported that, prior to the date of the dance, teachers were provided a list of all of their students. The teacher reported that, if a student was absent, they would highlight their name, and this is how they kept track of who was absent during the designated timeframe. According to the teacher, the Student was absent for the week leading up to the dance, and thus was not able to attend the dance. The teacher also reported that she had several students who were also not able to attend the dance because of absences. The teacher reported that those students who were unable because of absences to attend the Halloween dance were taken to the music room, and they watched a movie.

Legal Analysis

OCR's investigation did not reveal that the Student was treated differently than nondisabled students when he was not permitted to attend the Halloween dance. OCR found that the Price attendance committee established attendance guidelines for participation in the Halloween dance which were applicable to all students equally. Because the Student was absent the week of the dance, he, like other students who were also absent during the two-week period preceding the dance, was not eligible to participate.

OCR also considered whether the denial of the opportunity to participate in the Halloween dance denied the Student a FAPE. Although OCR's investigation revealed that the District did fail to conduct a timely evaluation of the Student to determine whether, because of disability, the Student was in need of regular or special education or related aids and services, OCR's investigation did not reveal that the Student was denied participation in the Halloween dance because of a disability. Rather, the evidence indicates that the Student was absent for several days prior to the date of the dance because of pink eye.

Conclusion

OCR contacted the complainant and provided her the opportunity to provide any additional evidence to rebut the factual findings outlined above. The complainant has not provided any additional information to OCR. Therefore, for the reasons set forth above, OCR has determined that the evidence insufficient to support a finding of discrimination against the Student in violation of Section 504 or Title II with respect to Issue 2.

Issue 3

Whether the SSAISD retaliated against the complainant and Student by (a) denying the Student the opportunity to participate in a Halloween dance on or around October 30, 2015, and (b) issuing truancy warning letters to the complainant during the 2015-16 school year, because the complainant had requested that the Student be removed from his homeroom classroom as a result of alleged disability discrimination (specifically, the Student, who has X---phrase redacted---X, was being forced to read aloud in front of his classmates) during the 2014-15 school year, in violation of Section 504 and Title II at 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134.

Legal Standard

In order for an allegation of retaliation to be sustained, OCR must determine whether (1) the complainant or other alleged injured party engaged in a protected activity, (2) the recipient had notice of the 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 was a causal connection between the protected activity and the adverse action.

If any one of these elements cannot be established, then OCR finds insufficient evidence of a violation. If, however, all of the aforementioned elements are established, OCR inquires as to whether the recipient can identify a legitimate, non-retaliatory reason for taking the adverse action. If the recipient provides a non-retaliatory reason for taking the adverse action, OCR considers whether the reason proffered is merely a pretext for retaliation (i.e., whether the reason is not credible or believable).

OCR Findings

As discussed in further detail above, OCR's investigation found that the Student was prohibited from participating in the Halloween dance, as alleged by the complainant. According to the District, however, the Student was denied participation because the dance served as an attendance incentive and, therefore, any absence during the designated timeframe would mean that a student would be unable to attend the dance. OCR's investigation revealed that the Student was absent from school the four days prior to the dance because of pink eye.

In her interview with OCR, the XXXX stated that she did remember that the complainant requested that the Student change classrooms during the first week of school of the 2014-15 school year. According to the XXXX, the Student was moved the following week. The XXXX informed OCR, however, that she did not recall the specific reason that the complainant requested the move, but recalled the complainant stating that the Student wasn't comfortable in the classroom. OCR also interviewed the Student's other XXXX grade teacher, who reported to OCR that the Student was placed in her classroom approximately two weeks into the school year of his XXXX grade year.

With regard to the complainant's allegation that the District issued truancy warning letters to her during the current school year in retaliation for her having requested the teacher move referenced above, the District reported in its written response to OCR that it has no record of having issued any truancy warning letters to the complainant during the current school year. OCR also interviewed the Price XXXX XXXX. The XXXX XXXX also reported to OCR that she had no record of having issued any truancy warning letters to the complainant during the current school year. OCR attempted to obtain a copy of the truancy warning letters from the complainant, but she was unable to provide them.

Legal Analysis

The first two steps in analyzing allegations of retaliation require OCR to consider whether the complainant or other alleged injured party engaged in a protected activity of which the recipient had notice. A "protected activity" is one in which a person either opposes an act or policy that is unlawful under any of the laws that OCR enforces; files a complaint, testifies, assists or participates in an investigation, proceeding or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR.

Here, the specific protected activity alleged by the complainant in support of her retaliation allegation is that, at the beginning of the 2014-15 school year, the complainant requested that the Student move teachers because the Student's previous teacher made him read aloud. Although OCR's investigation corroborated that the complainant made this request, OCR's investigation could not establish by a preponderance of the evidence (i.e., more likely than not) that, at the time the complainant made this request, the complainant was alleging disability discrimination. However, as noted above, OCR's investigation did reveal evidence that, at the time the complainant enrolled the Student at Price during the XXXX-XXXX school year, she was seeking to see whether the Student qualified for any additional services as a result of his disabilities.

Accordingly, for purposes of establishing a *prima facie* case of retaliation, OCR has determined that the complainant engaged in a protected activity of which the recipient had notice.

The third step in OCR's analysis involves determining whether the complainant or other alleged injured party was subjected to an adverse action. To be an "adverse action," the recipient's action must significantly disadvantage the complainant or other alleged injured party as a student or employee, or 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 claim(s). To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) 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.

Here, the complainant has alleged two separate adverse actions: first, that the Student was not permitted to participate in a Halloween dance at his school and, second, that she was issued truancy warning letters. OCR's investigation confirmed that the Student was not permitted the opportunity to participate in a Halloween dance held at school on or around October 30, 2015. Because other students were permitted the opportunity to participate in this activity, OCR has determined that the denial of the Student of the opportunity to participate did significantly disadvantage his status as a student. Accordingly, OCR has determined that the denial to the Student of the opportunity to participate in the dance was an adverse action.

With regard to the issuance of truancy warning letters to the complainant, OCR's investigation could not corroborate the complainant's allegation that any such letters were issued. According to the SSAISD, there are no records of the complainant having received any truancy warning letters during the 2015-16 school year. Accordingly, OCR has determined that the complainant was not subjected to this adverse action, thus precluding a finding of a *prima facie* case of retaliation with respect to this allegation.

OCR proceeded with its analysis to determine whether there is a causal connection between the complainant's protected activity and the denial to the Student of the opportunity to participate in the Halloween dance. An adverse action can be considered retaliatory only if it was motivated by a protected activity. Absent direct evidence of a retaliatory motive, a causal connection is inferred in cases where the adverse action occurs in close proximity in time to the protected activity. Other indicia of a causal connection can include, but are not limited to, inconsistent treatment of the alleged victim of retaliation before and after the protected activity, inconsistent or harsher treatment of the alleged victim as compared to individuals who did not engage in protected activity, and evidence that the recipient's actions would not have been the same absent the protected activity. Here, OCR's investigation revealed that the complainant put the District on notice of the Student's disability and requested services for the Student during the XXXX-XXXX school year. The Halloween dance occurred on October 30, 2015, nearly two years later. Thus, for purposes of a *prima facie* case of retaliation, there is insufficient proximity in time

between the protected activity and the alleged adverse action for OCR to infer a causal connection.

A causal connection can also be supported by evidence of a change in treatment of the complainant or student, treatment of either person that is different from other similarly situated persons, or deviation of district policy or practice regarding either person. In this case there is no evidence of any of these possibilities. Nevertheless, even if OCR were to assume a causal connection, however, the SSAISD provided a legitimate, non-retaliatory reason for the adverse action: the Student was not eligible to participate in the dance because he was absent for several days prior to the dance. OCR's investigation did not reveal that this treatment of the Student was inconsistent or harsher than the treatment of other students who were also absent during the two-week period prior to the dance, nor did OCR find any direct evidence that supports a determination of pretext. Thus, OCR does not have reason to believe that the District's proffered reason for the adverse action is a pretext for retaliation.

Conclusion

OCR contacted the complainant and provided her the opportunity to provide any additional evidence to rebut the factual findings outlined above. The complainant has not provided any additional information to OCR. Therefore, for the reasons set forth above, OCR has determined that the evidence is insufficient to support a finding of retaliation in violation of Section 504 or Title II as alleged by the complainant.

Final Conclusion

Based on the above factual findings, OCR has determined that the evidence is insufficient to support a finding of noncompliance with Section 504 or Title II with regard to Issues 2 and 3. As discussed in further detail above, however, OCR found sufficient evidence to support a finding of discrimination in violation of Section 504 and Title II with respect to Issue 1.

On March 21, 2016, the SSAISD voluntarily submitted to OCR a Resolution Agreement to resolve this issue, which was signed by the SSAISD on March 11, 2016. A copy of the Resolution Agreement is enclosed with this letter. OCR has determined that the provisions of the Resolution Agreement are aligned with the concerns identified by OCR during its investigation and appropriately resolve them. Further, OCR accepts the Resolution Agreement as an assurance that the SSAISD will fulfill its obligations under Section 504 and Title II with respect to the evaluation and placement of students with disabilities in the District. The dates for implementation and specific actions are detailed in the Resolution Agreement. OCR will monitor the implementation of the Resolution Agreement.

There are no further complaint allegations appropriate for resolution; therefore, OCR is closing the investigation of the above-referenced complaint as of the date of this letter. The complainant has been notified of this action. This letter is not intended, nor should it be construed to cover, any other matters regarding compliance with Section 504 or Title II that may exist and are not specifically discussed herein.

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.

Please be advised that a recipient 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, 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 Caum, Attorney, at (214) 661-9632, or rachel.caum@ed.gov, or Lori Bringas, Team Leader designee, at (214) 661-9638, or lori.bringas@ed.gov. You may also contact me at (214) 661-9674, or gregory.mcghee@ed.gov.

Sincerely,

Gregory McGhee
Program Manager
Office for Civil Rights
Dallas Office

cc:

XXXX XXXX (*email only*)
Schulman, Lopez, Hoffer & Adelstein LLP