

January 15, 2015

Timothy J. Mullins, Esq.
Giarmarco, Mullins & Horton, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280

Re: OCR Docket #15-14-1148

Dear Mr. Mullins:

This is to notify you of the disposition of the above-referenced complaint against Oxford Community Schools (the District), which was filed on March 19, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR) alleging discrimination based on race and disability and retaliation. Specifically, the complaint alleged that:

1. the District did not allow a student (Student A) to participate on the Oxford Elementary school's Academic Games team in XXXXXXXX XXXX based on her race (African American) and disability (XXXXXXXXX); and,
2. the District would not assignXXXXXXXX XXX XXXXXXXX (Student B) a hotel room with other students for the Academic Games state tournament in XXXXXXXX XXXX because XXXXXXXX X XXX XXXXXXXX XXX XXXXXXXX complained to the District that it had discriminated against Student A based on race and disability.

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, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Further, OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color, or national origin

by recipients of Federal financial assistance from the Department. Persons who seek to enforce their rights under these laws are also protected from retaliation. As a recipient of such financial assistance and as a public entity, the District is subject to these laws.

Based on the complaint allegations, OCR investigated the following legal issues:

- whether the District subjected a student to different treatment based on her race in violation of the Title VI implementing regulation at 34 C.F.R. § 100.3(b)(1)(v);
- whether the District subjected a student to different treatment based on her disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.4; and
- whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured under Section 504, Title II or Title VI, or because the individual made a complaint or participated in any manner in a proceeding or hearing under Section 504, Title II, or Title VI, in violation of 34 C.F.R. § 104.61, 28 C.F.R. § 35.134, or 34 C.F.R. § 100.7(e).

During its investigation, OCR interviewed the Students' parent and District staff. OCR also reviewed documents, District policies and other information provided by the parent and the District. Based on this investigation, OCR determined that the Academic Games offered at Oxford Elementary School is a District program. OCR also determined that the evidence is insufficient to support that the District discriminated against Student A based on race or disability. However, the evidence is sufficient to find that the District retaliated against Student B, by denying her the opportunity to stay in hotel room with other program participants, after XXX XXXXXX complained that the District was discriminating against Student A. The District submitted the enclosed resolution agreement, described below, to resolve these issues. The bases for the foregoing determinations, and the resolution agreement, are discussed below.

Background

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The Academic Games is a program listed on the District's website as a School club or group, along with other afterschool programs offered at the School. It has been at the District for five years. The program is described on the website as being based around several math, logic, language arts, and social studies games. Students compete both individually and as a team. Students have the opportunity to compete in six tournaments held on one Saturday each month at various locations throughout southeast Michigan and at a state tournament in March. The web page indicates the School supports the state tournament through fundraising efforts. The web page states that there are no

qualification requirements for enrolling in the Academic Games, except that students attend the third, fourth, or fifth grade and have acceptable classroom behavior. Practices are held at the School.

There is no formal agreement between the Michigan League of Academic Games and the District. The Academic Games are run by coaches who serve as unpaid volunteers. However, the District's Parent-Teacher Organization (PTO) assists the Academic Games by providing funding for the program and paying for the head coach's hotel room and registration for the state tournament. The PTO has also provided funds for the purchase of 10-20 games used by the club and has contributed to the purchase of t-shirts for participants. According to the head coach of the Academic Games, she sends her request for support to the principal of the School, who forwards it to the PTO. The District provided direct support to the Academic Games by agreeing to pay for transportation to and from the state tournament and startup expenses during the first two years the program was in place. Additionally, the School principal served as a coach of the Academic Games for the first two years.

The District allows the Academic Games coaches to visit student classrooms and the lunch room at the School to share information about the program with interested students. The District has recognized Academic Games teams at school board meetings and at School assemblies. The School offers other programs that have arrangements similar to the Academic Games and does not charge these groups, including the Academic Games, building use fees for using its school buildings.

Summary of OCR's investigation

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In response to these allegations, the District stated that during the XXXXXXXXX school year there were three coaches who had younger children in grades K-2 attending the Academic Games' practices, all of whom are white. The younger children participate in practices with their parents/caregivers and participate in one or two of the six Saturday tournaments in a limited way.

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The head coach explained that at the state tournament students can either stay in a hotel where the games are being held with their teammates and coaches or students and parents can stay together in a different hotel. Several parents elect this option, and several students elect to stay in the hotel where the games are held.

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Applicable Legal Standards and Analysis

The Title VI implementing regulation, at 34 C.F.R. § 100.3, prohibits recipients of Federal financial assistance from, on the ground of race, color, or national origin, excluding a person from participation in, denying the person the benefits of, or otherwise subjecting the person to discrimination under its programs. The regulation specifically prohibits discriminatory actions. For instance, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin. 34 C.F.R. § 100.3(b)(2). Further, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance. 34 C.F.R. § 100.3(b)(4).

When investigating an allegation of different treatment on the basis of race or disability, OCR generally first determines whether the individual in question was treated differently than similarly situated individuals of other races or individuals without disabilities. If so, OCR then looks to see if the recipient has given a legitimate, nondiscriminatory reason for the individual's treatment. When the recipient gives a legitimate, nondiscriminatory reason for its actions, OCR then must determine whether the reason is merely a pretext or excuse to hide unlawful discrimination.

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), prohibits recipients from, on the basis of disability, excluding a qualified person with a disability from participation in, denying the person the benefits of, or otherwise subjecting the person to

discrimination under any of its programs or activities. The regulation further prohibits recipients from aiding or perpetuating discrimination against a qualified person with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity. 34 C.F.R. § 104.4(b)(1)(v). The Title II regulation contains similar provisions at 28 C.F.R. § 35.130(a) and (b)(1)(v). If OCR finds that a recipient is providing significant assistance to an agency or organization that discriminates on the basis of disability, the recipient must either obtain compliance by the other entity or terminate the assistance.

The Title VI implementing regulation, at 34 C.F.R. § 100.7(e), also prohibits recipients from retaliating against any individual for exercising any right or privilege secured by Title VI or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VI. This Title VI regulation provision is incorporated by reference into the Section 504 implementing regulation at 34 C.F.R. § 104.61. The Title II implementing regulation at 28 C.F.R. § 35.134 contains a similar prohibition against retaliation.

To establish a *prima facie* case of retaliation under the laws enforced by OCR, *i.e.*, one that supports an inference of retaliation, OCR determines: (1) whether the individual engaged in an activity protected by that law, such as asserting rights or opposing prohibited disability discrimination; (2) whether the recipient had notice of the individual's protected activity; (3) whether the recipient took a materially adverse action at the same time as or after the protected activity; and (4) whether there was a causal connection between the protected activity and the adverse action. To determine whether a "materially adverse action" has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination. Whether an action is materially adverse is judged from the perspective of a reasonable person in the individual's position.

If all of these elements establish a *prima facie* case of retaliation, OCR next considers whether the recipient has articulated what could constitute a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for prohibited retaliation.

a. The Status of the Academic Games

OCR first analyzed whether the Academic Games program is a District program or, alternatively, whether the District offers significant assistance to the Academic Games. The District asserted that the Academic Games is not a District program and is not affiliated with the District.

Appendix A to the Section 504 regulation explains that among the criteria to be considered when determining whether a recipient is providing significant assistance to another entity are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's

activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

Significant assistance is tested by a number of factors indicating whether a substantial relationship exists between a recipient of federal funding and a private entity such that the activity can be fairly considered the recipient's activity, or that the private entity's activities relate so closely to the recipient's program or activity that they should be considered activities of the recipient.

The factors evaluated in determining this issue include:

- 1) direct financial support provided by the recipient;
- 2) indirect financial support provided by the recipient;
- 3) provision of tangible resources such as staff, facilities, and/or materials at no cost or reduced cost;
- 4) intangible benefits such as the lending of recognition and approval;
- 5) selectively providing privileges and resources to the private entity;
- 6) whether the relationship is occasional and temporary or permanent and long-term.

Not all factors must be present to support a finding of significant assistance.

Several factors support a finding that the Academic Games is a District program, including the fact that it is advertised on the District's website as a School club or group; District students are encouraged to participate through direct classroom solicitation by the coaches; Academic Games does not pay any type of rent or usage fee to the District; the building principal participated as a coach of the Academic Games for two of the five years that the program has been at the District; the building principal responds to parent concerns regarding the program and volunteers District materials (e.g., the third-grade math assessment) to determine if students have the academic skills to participate; the District PTO supports the program financially and pays the hotel cost and registration fee for the head coach; and the District directly supported the program by donating transportation services.

Based on the evidence obtained, OCR finds that the Academic Games is a District program.

b. Alleged Race and Disability Discrimination against Student A

OCR found no evidence to support that Student A was discriminated against based on race or disability with regard to the Academic Games as alleged. Although there is evidence that the District treated Student A differently than white students who also did not meet the grade-level requirements to participate in the Academic Games, the District had a legitimate, nondiscriminatory reason for the different treatment. The District stated

that Student A was excluded from the Academic Games during the XXXXXXXXXX school year because she was in the XXXXXX grade and did not have the requisite XXXX skills required to perform XXXX-grade XXXX. The evidence shows that the other younger students who participated were the children or grandchildren of the coaches and were present at the practices for childcare purposes. While these children participated in practices, they practiced together, not with the other students, and under the supervision of their parents or grandparent. The younger children only participated in one actual tournament held at the School, if they participated at all, and were not eligible to participate and did not participate in the state tournament. Finally, the evidence supports the District's assertion that, had the parent permitted Student A to take the proposed XXXX assessment to continue participating in the Academic Games, the District would have similarly assessed the other younger students as well.

Further supporting that race was not a factor in the District's actions regarding Student A is the fact that two other African American students participated in the Academic Games, including XXXXXXXX X. XXXXXXXX X continued to participate even though she was no longer XX XXXXXXX XXX, and, even after XXXXXXXXXXXX was asked to XXXXX the program.

Thus, there is no evidence that the District did not allow Student A to participate in the Academic Games because of her race, or that the District's legitimate, nondiscriminatory reason was a pretext.

Likewise, there is no evidence to support that Student A was discriminated against because of a disability. XXX---paragraph deleted---XXX

Accordingly, OCR finds that the evidence is insufficient to support a conclusion that Student A was discriminated against based on race or disability as alleged.

c. Alleged Retaliation

XXX---paragraph deleted---XXX

Accordingly, OCR finds that the District retaliated against Student B for the parent's protected activity in violation of the regulations implementing Title VI at 34 C.F.R. § 100.7(e), Section 504 at 34 C.F.R. § 104.61, and Title II at 28 C.F.R. § 35.134.

Conclusion

XXX---paragraph deleted---XXX

This is in violation of Title VI implementing regulation, at 34 C.F.R. § 100.7(e), and Section 504 implementing regulation at 34 C.F.R. § 104.61. To resolve these compliance concerns, the District submitted the enclosed agreement on December 9, 2014.

Under terms of the enclosed Agreement, the District will issue a notice to all coaches and volunteers who work with all afterschool programs and clubs offered at the District's elementary schools that specifically states that Title VI, Section 504 and Title II prohibit retaliation against any individual who makes a complaint or participates in an investigation alleging discrimination based on race, color, national origin, or disability, and that the District will provide notice of this prohibition to the coaches and volunteers annually. Further, the District will provide training to all coaches and volunteers who work with afterschool programs and clubs offered at the District's elementary schools on the requirements of Title VI, Section 504 and Title II and their implementing regulations as they pertain to nondiscrimination, including their prohibitions against retaliation.

In light of the signed Agreement, OCR finds that this complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will reopen the complaint and resume its investigation of the complaint allegation.

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 another complaint alleging such treatment.

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.

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.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

We appreciate the cooperation of the District during the investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, you may contact XXXXXXXX XXXXXXXX at (216) 522-XXXX or at XXXXXXXXXXXXXXXXXXXX.

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We look forward to receiving the District's monitoring report by February 17, 2015. The report should be directed to XXXXXXXX XXXXXXXXXXXX attention.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure