



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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November 14, 2014

Mr. Jon Gutierrez
Executive Director
St. Croix Preparatory Academy
4260 Stagecoach Trail North
Stillwater, Minnesota 55082

Re: 05-12-1320

Dear Superintendent Gutierrez:

This is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed processing the above referenced complaint, which was filed with OCR on May 22, 2012, against the St. Croix Preparatory Academy District (District). The complaint alleges that St. Croix Preparatory Academy (SCPA) engaged in discriminatory and retaliatory conduct, as follows:

1. The SCPA failed to conduct timely evaluations or re-evaluations of disabled students when the students' academic performance or other factors suggested either that they needed special education or related services or that the special education or related services being provided were not adequately meeting the students' needs.
2. The SCPA failed to consistently implement the provisions of the individualized education programs (IEPs) and 504 Plans that were in place for nine disabled students.
3. In spring 2012, the SCPA disciplined a student with a disability (Student C) more harshly than a similarly situated non-disabled student who engaged in the same conduct.
4. Because Parent A and Parent B advocated for the rights of students with disabilities, the SCPA retaliated against Parent A and Parent B by not selecting them for the SCPA's parent advisory council.
5. Because Parent A advocated for the rights of students with disabilities, the SCPA retaliated against Parent A when it failed to communicate with Parent A regarding summer 2012 ESY programming and fall 2012 admission.
6. Because Parent A advocated for the rights of students with disabilities, Student A's teacher retaliated against Parent A when she refused to communicate with Parent A in spring 2012.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability and retaliation by recipients of Federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

1990, 42 U.S.C. § 12132, and its implementing regulation, 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability and retaliation by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to Section 504 and Title II. Therefore, OCR has jurisdiction over this complaint.

In accordance with Section 302 of OCR's *Case Processing Manual*, a complaint allegation may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. Prior to the conclusion of OCR's investigation, the District expressed an interest in resolving Allegations #1 and #2. On October 31, 2014, the District signed the enclosed Resolution Agreement (Agreement) which, when fully implemented, will address the issue raised in Allegations #1 and #2. The provisions of the Agreement are consistent with applicable regulations and are aligned with the issues raised by Allegations #1 and #2 and the information obtained during OCR's investigation. OCR will monitor the District's implementation of the Agreement. We look forward to receiving the District's first report on its implementation of the Agreement, which is due by December 12, 2014.

During OCR's investigation of Allegations #3-6, OCR reviewed documents provided by the District and by the Complainant. OCR interviewed the Complainant's witnesses, i.e., parents of Students A-I, as well as SCPA administrators, teachers, and staff. OCR carefully considered the relevant evidence in this case and has determined that there is insufficient evidence to conclude that the District discriminated against Students C or D and/or retaliated against Parent A and Parent B as alleged. The bases for OCR's determinations are set forth below.

Background Information

The SCPA first opened as a charter school in 2004 with 200 students, covering grades K-7. For the 2011-12 school year, the SCPA had a total enrollment of 1,010 students, comprised of a lower school (grades K-4), a middle school (grades 5-8), and a high school¹ (grades 9-12). Based on information from the National Center for Educational Statistics, for the 2010-11 school year SCPA had a total enrollment of 953 students (434 in the lower school, 336 in the middle school, and 186 in the high school). Of those 953 students, 93 (10%) were students with Individual Educational Plans (IEP's).

Allegation 3 – Different Treatment in Discipline

The Complainant alleged that in spring 2012, the SCPA disciplined Student C more harshly than a similarly situated non-disabled student who engaged in the same conduct. Specifically, on January 31, 2012, a bus driver completed separate Bus Conduct Reports for Student C, a

¹ None of the students named in this case attend SCPA's high school.

student with an IEP, and his nondisabled brother for general misbehavior. Behavior cited in Student C's report included "jumping around" and a failure to "quiet down." The brother had also failed to "quiet down" and "keep his hands to himself." The bus driver reassigned Student C's brother to the front of the bus. According to the reports, the bus driver asked the two students to settle down on other occasions. Eight days later, Principal A sent Parent B an email about the bus incident on February 8, 2012, that indicated she would visit with the brothers and give them a "friendly reminder about bus guidelines" later that day. Principal A then escorted the brothers to her office and said she gave them "verbal warning", which, according to the SCPA's Family Handbook², can be construed as the lowest level of discipline. In response, Parent B contacted the bus company to express concern that her children had claimed that there was general horseplay on the bus and that at least one other student (Companion Rider) had also engaged in misbehavior during the same bus ride and requested to know whether Companion Rider was reported as Student C and his brother. According to SCPA records, the bus driver did not file a behavior report with the SCPA regarding the Companion Rider.

OCR reviewed the disciplinary records for the three students. Companion Rider had no prior discipline incidents in school or on the bus. OCR noted that SCPA disciplined Student C for disrespectful behavior on the bus two months prior to the January 31, 2012 incident, and the prior year, SCPA suspended Student C and his nondisabled brother from the bus for misbehavior. According to the Principal, based on the disciplinary history of the three students, and the lack of a formal report from the bus company, SCPA issued no formal discipline to Companion Rider.

Legal Standard and Analysis

The Section 504 regulation at 34 C.F.R. § 104.4(a) provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance from the Department.

In analyzing allegations of different treatment based on disability, OCR ascertains whether there were any apparent differences in the treatment of similarly situated individuals on the basis of disability. If true, then OCR assesses the recipient's explanation for any differences in treatment to determine if the reasons offered are legitimate and non-discriminatory or whether they are a pretext for discrimination. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with its established policies and procedures and whether there is any other evidence of disability discrimination.

For purposes of being subject to discipline, OCR determined that the Companion Rider was not similarly situated to Student C. Unlike Student C and Student C's brother, Companion

² <http://www.stcroixprep.org/files/stcroixprep/files/Admin/2012-2013%20Family%20Handbook%20.pdf>

Rider had no disciplinary history at SCPA or on the bus. Additionally, the evidence showed that the bus driver did not report Companion Rider for discipline, as he did Student C and Student C's brother. According to Parent B, she made a report to the bus company several days after the incident based on reports she received from her children. However, no charge was filed by the bus driver.

OCR determined that Student C and his brother (a nondisabled student) were similarly situated, as the two students had a similar behavioral history on the bus. The two students' disciplinary records reflected that they received similar discipline for similar behavior on the bus after reported to SCPA by the bus driver on January 31, 2012 and previous occasions. Finally, the evidence showed that for the January 31, 2012 incident, both Student C and his brother received a verbal warning, an identical penalty consistent with SCPA disciplinary policy. OCR found no other evidence of disability discrimination.

Therefore, based on the foregoing, the evidence is insufficient for OCR to conclude that that SCPA subjected Student C to different treatment in discipline on the basis of disability.

Allegations 4 – 5 Retaliation (Committee Selection) and (Fall 2012 Admission)

Committee Selection

According to Parent A and Parent B, on March 7, 2012, the SCPA rejected their request to join its Special Education Advisory Council (SEAC)³. Parent A told OCR she sent the Superintendent an email in January 2012 to advise him that Parent A and other parents would attend the meeting and contribute items to the meeting's agenda. Parent A and Parent B believed that the purpose of the meeting was to select members of the committee. Parent A and Parent B said they attended the March meeting, requested to become committee members of the SEAC, but were told membership had already been established. Parent A and Parent B asserted to OCR that the March 7, 2012 denial was in retaliation for their advocacy on behalf of their disabled children at IEP meetings.

The Superintendent of the SCPA (Superintendent) and the SCPA Special Education Director (Special Education Director) asserted to OCR that the purpose of the March 7, 2012 meeting was not to select members, but an initial meeting of interested parents who could meet with special education staff and discuss the purpose of the SEAC. SCPA submitted to OCR an email announcement connected with the March 7, 2012 meeting. The email did not state that

³ According to Minnesota State law, in order to increase the involvement of parents of children with disabilities in district policy making and decision making, school districts must have a SEAC that is incorporated into the district's special education system plan. At least half of the designated council members must be parents of students with a disability. When a nonpublic school is located in the district, the council must include at least one member who is a parent of a nonpublic school student with a disability, or an employee of a nonpublic school if no parent of a nonpublic school student with a disability is available to serve. Each local council must meet no less than once each year. The number of members, frequency of meetings, and operational procedures are to be locally determined.

the purpose of the meeting was to select new committee members. According to the Superintendent and the Special Education Director, the SEAC committee had already been selected the prior year, and that the new committee member selection process was to begin the following month.

According to the Superintendent and the Special Education Director, on April 12, 2012, the SEAC announced its need for committee members. The announcement and application form were made available on the SCPA website. The SCPA also provided OCR with a copy of an email sent to all parents on April 12, 2012, advising them of the need for SEAC committee members and a link to the application form. The announcement and the email stated that the deadline for SEAC committee member application was April 27, 2012. Parent A and Parent B informed OCR that they knew about the selection process and the deadline, but neither submitted an application.

Fall 2012 Admission

Parent A asserted that the SCPA, in retaliation for her advocacy on behalf of Student A at IEP meetings and for filing previous complaints about Student A's summer programming, failed to communicate information about fall 2012 admission for Student A's brother. Parent A explained to OCR that prior to 2011, the SCPA used emails to advise her of her wait list status, but for the fall of 2011, the SCPA changed the mode of communication by sending copies of written letters via email regarding fall 2012 admission. The Complainant asserted that because of this change, she was forced to place a deposit at another school because of what she viewed as an unnecessary delay. Although offered a space on August 16, 2012, Parent A did not enroll the student at SCPA.

According to the Parent A's enrollment records, the student's application for the 2012-13 school year was received by SCPA on October 12, 2011, more than one month after the two-month open enrollment period began. SCPA made offers of admission beginning in May of 2012 based on the earlier applications (first filed had priority). Per SCPA's rolling application policy, on July 19, 2012 SCPA had tentatively filled the fourth grade including pending offers of enrollment⁴. Pursuant to its policies, the SCPA placed the remaining applicants, including Parent A's child, into a rank order of preference based on a lottery conducted that same day. According to a July 20, 2012 letter send via email, Parent A was informed that the student was in position number 3 for the fourth grade. Information provided by SCPA indicates that Parent A was in contact with the SCPA lower school office manager via email on August 7-9, 2012 regarding the enrollment process and the possibility that the student would attend SCPA.

⁴ According to letters provided by the SCPA four students were accepted into the fourth grade on July 19, 2012, these students had until July 23, 2012 to inform the school whether they accepted. These students also had until July 27, 2012 to complete the paperwork if they accepted. The acceptance would not be complete until the paperwork was completed.

On August 16, 2012, the SCPA lower school office manager emailed Parent A and informed her that SCPA had a space available for the student. Attached to this email was a letter on SCPA letterhead informing Parent A that the student was accepted into the fourth grade class. The letter advised the Parent that she had until August 17, 2012 to accept the offer and August 23, 2012 to complete all required paperwork. OCR noted that at least five other households received acceptance letters after Parent A received hers.

Legal Standard and Analysis

Retaliation is prohibited by the regulation implementing Section 504 at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI) at 34 C.F.R. § 100.7(e). The regulation implementing Section 504 prohibits a recipient from retaliating against an individual for the purpose of interfering with any right or privilege secured by Section 504 or because the individual has made a complaint, testified, assisted or participated in any manner in an investigation, hearing or proceeding under this part. The regulation implementing Title II contains similar prohibitions against retaliation at 28 C.F.R. § 35.134(a) and (b).

A *prima facie* case of retaliation exists when each of the following is established: 1) a person engaged in an activity protected by the laws or regulations enforced by OCR; 2) the recipient had notice of the protected activity; 3) the recipient took an adverse action against the person contemporaneous with or subsequent to the protected activity; and 4) there is an inferable causal connection between the person's participation in the protected activity and the adverse action. In assessing whether an individual has been subjected to an adverse action, OCR considers whether the recipient's action significantly disadvantaged the individual and whether the challenged action reasonably might have deterred or precluded the individual from engaging in further protected activity. Merely unpleasant or transient incidents are not considered adverse.

If a *prima facie* case is established, then OCR considers whether the recipient has a legitimate non-retaliatory reason for its 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 that the recipient's treatment of the person was inconsistent with its treatment of similarly situated individuals or established policy or practice.

The evidence showed that Parent A engaged in protected activities by filing complaints about the reevaluation and summer program components of Student A's IEP on February 12, 2012 and March 26, 2012, and Parent B engaged in ongoing advocacy efforts of Student C. The SCPA had notice of the protected activities. OCR assumed for purposes of argument that Parents A and B were subjected to adverse actions when they were not permitted to join the SCPA SEAC as committee members, and OCR assumed for purposes of analysis that the communication change regarding fall 2012 admission for Student A's brother was also an adverse action. Based on the timing of the events, a causal connection can be inferred

between the protected activities and the alleged adverse acts. Therefore, a prima facie case of retaliation was established.

OCR determined that SCPA provided legitimate, non-retaliatory, non-pretextual reasons for the both the denial of Parent A and Parent B's SCPA SEAC committee request, and the time for processing Student A's brother's admission application.

Regarding the SCPA SEAC committee request, the evidence indicated SEAC committee was established the year prior to when the request was made. The March 7, 2012 meeting was a meeting of interested parents who could discuss the purpose of the SEAC with special education staff; the purpose of the meeting was not to select committee members. The evidence also confirmed that when the SCPA made requests for new committee members a month later, Parent A and Parent B were aware of the process but did not apply for committee positions. Finally, there is no evidence to show that a SEAC committee member was ever selected outside of the selection process.

Regarding the admission communications, the evidence established that SCPA changed the process of notifying families of their waitlist status for the 2012-13 school year. Prior to 2012-13, families were notified by email of their status; beginning with the 2012-13 school year, SCPA notified families of their waitlist status by mail. The evidence showed that Parent A submitted the 2012-13 application after the open enrollment period began and was subsequently placed on a waitlist consistent with SCPA policies and procedures. The evidence showed that there were pending application offers that needed to be accepted prior processing Student A's brother's application. On August 16, 2012, SCPA notified Parent A that the student was accepted into the fourth grade class, but did not enroll the student. OCR's review of SCPA's rolling admissions process verified that the process had proceeded according to then existing SCPA admissions policy and Parent A was treated similarly to other parents placed on the waitlist. OCR found no evidence to suggest that timing of the communications or the admission process was a pretext for retaliation.

Based on the forgoing, the evidence is insufficient to established that SCPA retaliated against Parents A and B as alleged.

Allegations 5 and 6 – Retaliation (Summer 2012 ESY Programming) and (Teacher Communication)

Summer 2012 ESY Programming

Parent A asserted that the SCPA failed to communicate information about summer 2012 ESY programming to her in retaliation for advocating on behalf of her disabled child. According to information provided by the District, on March 26, 2012, Parent A filed a complaint with the Minnesota Department of Education (MDE) against the SCPA for, among other things,

failing to provide adequate information necessary in a timely fashion (failure to communicate) regarding the student's 2012 ESY program.

OCR received a copy of an August 16, 2012 investigative report with legal conclusions prepared by MDE. The relevant issue raised by Parent A with MDE focused on whether the SCPA failed "to have an [Asperger's Spectrum Disorder] specialist involved with educational planning for [ESY] services violated 34 C.F.R. §300.9 and 300.300(b) by obstructing [Parent A] from providing informed consent to the ESY services."

The IEP in effect during the 2011-12 academic year, dated May 12, 2011, stated that Student A was eligible for ESY. The MDE report noted that an "ASD specialist was a member of the evaluation team whose assessments form the basis of the IEP and has been available to meet with [Parent A]" and that "in late May or early June 2012, an IEP was drafted, but [Parent A] ultimately did not agree to the proposed IEP, and that document remains unapproved." In addition, the MDE report noted that "sufficient information was provided to [Parent A], including specific ESY goals." Thus, while Parent A may not have received as much communication as she would have preferred, MDE's investigation concluded that the SCPA provided sufficient information, "which would allow for informed consent." MDE's attorney, who serves as the Director of the Division of Compliance and Assistance, concluded that her investigation found "no violations." Parent A did not appeal the decision.

Teacher Communication

Student A had an approved IEP in place during the 2011-12 academic year, and his three-year reevaluation was set to occur in spring 2012. In preparation for the re-evaluation, Parent A started asking questions in January 2012 about assessments and the qualifications of the assessors. On January 31, Parent A advised the SCPA that she was "in the process of consulting with an attorney who specializes in disability advocacy." The SCPA sent Parent A a document entitled "Prior Written Notice" on February 15, 2012, concerning the reevaluation and the need for additional testing. One day later, Parent A agreed to some portions of the proposed evaluation and testing procedures and objected to others. An impasse ensued, and the parties scheduled a conciliation conference. Parent A was represented by an attorney at that meeting.

On February 23, 2012, Parent A sent Student A's regular education teacher (Teacher A) an email that touched upon various subjects such as writing, science, and social studies. Teacher A replied several hours later with references to the earth, volcanoes, and flashcards, and she ended with, "Just so you know since there is a lawyer involved with helping put together [Student A's] IEP I am no longer able to communicate any IEP issues with you."

Parent A told OCR that Teacher A, both prior to and after February 23, 2012 consistently failed to answer questions Parent A posed in relation to Student A's IEP such as modifications, visuals, and other issues. Teacher A asserted to OCR that she spoke to Parent

A approximately two times per week in the morning after Parent A dropped off Student A. Teacher A asserted that she would speak to Parent A about numerous subjects. Teacher A did not recall any discussions about Student A's current IEP and/or the reevaluation.

Regarding actual communications, the SCPA advanced to OCR approximately 100 pages of emails Teacher A and other SCPA personnel had with Parent A after February 23. The information contained therein pertained to routine matters as well as IEP implementation issues. The documentation includes multiple responses from Teacher A and SCPA administrators to Parent A specifically about issues surrounding Student A's IEP. OCR noted that the communications between the parties showed no significant delays or lack of information in responding to emails from Parent A. OCR also noted numerous occasions where Teacher A would email Parent A regarding IEP implementation for issues such as behavior. Although the SCPA and Parent A continued their dispute about Student A's reevaluation into May 2012, the documentation reveals Parent A and Teacher A communicated on a regular basis with both persons initiating emails to one another.

Analysis

The evidence showed that for each of these allegations, Parent A engaged in protected activity when she advocated on behalf of Student A her by filing a complaint about the reevaluation of Student A's IEP's on February 15, 2012. The SCPA knew of the protected activity on the date it occurred. However, the evidence is insufficient to show that adverse actions occurred as alleged.

Regarding communication about Student A's proposed 2012 summer ESY programming, the evidence obtained by OCR reflects that SCPA did communicate with Parent A and that the MDE investigation determined that Parent A received the necessary amount of information from SCPA in order to make an informed decision about the student's summer programming. Although the parent may not have received her preferred amount of communication, the evidence is insufficient to show that SCPA failed to communicate with her regarding the proposed ESY programming as alleged.

Regarding the alleged refusal of Teacher A to communicate with Parent A about Student A's IEP, the evidence obtained by OCR reflected that Teacher A and SCPA administration responded to inquiries about Student A's behavioral and academic performance at SCPA, as well as the implementation of Student A's current IEP before and after Parent A hired a lawyer. Even though Teacher A stated she could no longer communicate with Parent A, the evidence reflects that she continued to do so. Therefore, the evidence is insufficient to show that SCPA subjected Parent A to the alleged adverse action.

Therefore, in both instances, the evidence is insufficient to establish a *prima facie* case of retaliation.

This concludes OCR's investigation of the complaint. This letter 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.

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 release, 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 wish to thank SCPS for the courtesy and cooperation extended by its staff during this investigation. In particular, we wish to thank Mr. Tim R. Palmatier, Attorney. If you have any questions regarding this letter, please contact Mark Erickson, Senior Equal Opportunity Specialist, at 312-730-1574 or via email at mark.erickson@ed.gov. You can also contact Miguel Figueras, Attorney, 312-730-1578 or via email at miguel.figueras@ed.gov.

Sincerely,

Karen E. Mines
Supervisory Attorney

Enclosure

cc: Tim R. Palmatier, Esq.