



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION V
ILLINOIS
INDIANA
IOWA
MINNESOTA
NORTH DAKOTA
WISCONSIN

October 16, 2015

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
Chicago Public Schools
42 West Madison
Chicago, IL 60602

Re: OCR Docket #05-15-1222

Dear XXXXXXXXXXXXXXXX:

This is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR) on April 20, 2015, against the Chicago Public Schools District 299 (District) alleging discrimination on the basis of disability (XXXXXXXXXX) and retaliation. Specifically, the complaint alleges that:

1. From XXXXXXXXXXXX, 2014 to XXXXXXXXXXXX, 2014, the District failed to provide Student A, a student at the XXXXXXXXXXXX (School), a Free and Appropriate Education (FAPE) in that School staff failed to implement multiple provisions of her Individualized Education Plan (IEP), including but not limited to XXXXXXXXXXXXXXXX;¹ and
2. In XXXXXXXX 2014, the School retaliated against the Complainant, his wife, and Student A because they advocated for the implementation of Student A’s IEP by treating them in a hostile manner and threatening to XXXXXXXXXXXXXXXX after he reported to the School that XXXXXXXX Student A in class on or about XXXXXXXX, 2014.

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. Both laws prohibit retaliation. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

¹ The Complainant confirmed that the only services he alleges the School failed to implement in Student A’s IEP were XXXXXXXXXXXXXXXX XXXXXXXXXXXX services.

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

As a part of its investigation, OCR conducted interviews with the Complainant and District staff. OCR also reviewed documentation provided by the Complainant and the District. Prior to the conclusion of OCR's investigation, the District requested to resolve the allegation that it discriminated against Student A and similarly situated students, based on disability by denying them a FAPE to the extent they failed to provide XXXXXXXXXX services during the 2014-15 school year. The provisions of the resolution agreement are aligned with this allegation and consistent with the applicable regulations. OCR, however, completed its investigation into the retaliation allegation and based on a review of the evidence, determined that there is insufficient evidence to conclude that the District retaliated against the Complainant, his wife, and Student A as alleged. The reasons for this determination are set forth below.

Legal Standards

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

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

FAPE

The Section 504 regulation at 34 C.F.R. § 104.33 requires that a recipient shall provide a free appropriate public education (FAPE) to all qualified students with disabilities in its jurisdiction, regardless of the nature or severity of the person's disability. FAPE is defined at 34 C.F.R. § 104.33(b) (1) as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The development and implementation of an IEP is one means by which a FAPE may be provided.

The Section 504 regulation at 34 C.F.R. 104.36 provides that recipients are required to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an

impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.²

Retaliation

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

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

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

Facts

During the 2014-15 school year, Student A was in XXXXXXXXXX in the District and received special education services XXXXXXXXXX pursuant to an IEP. Student A's IEP dated XXXXXXXX, 2014 included XXXXXXXXXXXXXXXXXXXXXXXX.
XX.

Denial of FAPE

The Complainant asserts that Student A did not receive XXXXXXXXXX therapy for twelve weeks, from XXXXXXXX, 2014 to XXXXXXXX, 2014. Based on an investigation OCR conducted in a complaint filed by another parent of a XXXXX student with a disability at the School, it is undisputed that the District did not provide XXXXXXXXXX therapy to certain XXXXXXXXXX students at the School for a period of several weeks during the

² The District's Procedural Safeguards for Parents of Students with Disabilities can be found at <http://cps.edu/Pages/SafeguardsAndParentSupports.aspx>.

XXXXXX 2014 because the School's XXXXXXXX XXXXXXXXXXXXXXXX therapist was on XXXXXXXX leave. The Complainant asserts that on numerous occasions, he spoke with the XXXXXXXX and other School staff about the need to hire a substitute XXXXX XXXXXXXXXXXXXXXX therapist during this time period. The District acknowledges that there was a disruption in XXXXXXXXXXXXXXXX XXXXXXXX services; however, it asserts that students receiving XXXXXXXX XXXXXXXXXXXXXXXX therapy missed services for only five weeks, from XXXXXXXX, 2014 to XXXXXXXX, 2014. According to the District, the School's XXXXXXXX contacted the District's XXXXXXXXXXXXXXXX and XXXXXXXX on XXXXXXXX, 2014 about obtaining a substitute XXXXXXXX XXXXXXXXXXXXXXXX therapist, and the Coordinator responded the same day that the District was in the process of hiring a new bilingual XXXXXXXXXXXXXXXX therapist and hoped that she would be able to start within the "coming weeks." A substitute bilingual XXXXXXXXXXXXXXXX therapist was eventually hired and started at the School on XXXXXXXX, 2014. The substitute therapist worked at the school two full days per week until the regular XXXXXXXXXXXXXXXX therapist returned on XXXXXXXXXXXXXXXX, 2014.

Retaliation

The Complainant alleged, in part, that the School's XXXXXXXX retaliated against him, his wife and Student A when he threatened to XXXXXXXXXXXXXXXX after the Complainant had repeatedly advocated for the hiring of a substitute XXXXXXXXXXXXXXXX therapist to ensure that Student A and other students did not suffer a disruption in services. Specifically, the Complainant asserts that following an unrelated incident that occurred on XXXXXXXX, 2014 involving XXXXXXXXXXXXXXXX, in which the Complainant asserts that XXXXXXXXXXXXXXXX, he and his wife asked to meet in person with the School XXXXXXXX. When they met with the XXXXXXXXXXXXXXXX on XXXXXXXX, 2014 and talked to him about the incident involving Teacher A, the Complainant asserts that he and his wife informed the XXXXXXXXXXXXXXXX that they had filed XXXXXXXXXXXXXXXX. According to the Complainant, during the meeting he and his wife asked the XXXXXXXXXXXXXXXX to explain why Teacher A XXXXXXXX and to move their daughter to another classroom. The Complainant asserts that the XXXXXXXXXXXXXXXX, however, responded in a hostile manner and instead of listening to them in a respectful and professional manner, threatened to report the Complainant and his wife XXXXXXXX. The XXXXXXXXXXXXXXXX ended the meeting by telling the Complainant and his wife that he had reported the incident involving Teacher A to the District's central office for an investigation. The Complainant acknowledges that the District investigated the incident involving Teacher A, but explained that neither he nor his wife was contacted by XXXXXXXX regarding the XXXXXXXXXXXXXXXX's alleged report. The Complainant acknowledged that this was the first time the XXXXXXXXXXXXXXXX brought up a XXXXXXXX referral and that he never made such a statement in the context of any of the conversations that the Complainant had with him about the need to hire a substitute XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX therapist.

Retaliation

OCR finds there is insufficient evidence to establish that the XXXXXXXXXXXXX retaliated against the Complainant, his wife and Student A by threatening to XXXXXXXX. OCR determined that the Complainant engaged in protected conduct of which the School and the XXXXXXXXXXXXX were aware when he advocated for the hiring of a substitute XXXXXXXX XXXXXXXXXXXXXXXX therapist to ensure that students at the School continued to receive services during the regular XXXXXX XXXXXXXXXXXXXXXX therapist's XXXXXXXX leave. Next OCR considered whether the XXXXXXXXXXXXXXXX subjected the Complainant and his wife to an adverse action by threatening to XXXXXXXX. Here, OCR was unable to substantiate the Complainant's assertion that the XXXXXXXXXXXXXXXX made the threat as the XXXXXXXXXXXXXXXX is no longer a District employee XXXXXXXXXXXXXXXX. The District generally denied that the XXXXXXXXXXXXXXXX threatened XXXXXXXX the Complainant and his wife XXXXXXXX. Additionally, the School's former XXXXXXXX XXXXXXXXXXXXXXXX, although unable to confirm what the XXXXXXXXXXXXXXXX may have said during the XXXXXXXX meeting, indicated that it was inconsistent with her understanding of the situation and the XXXXXXXXXXXXXXXX's past behavior that he would make such a threat. Rather, the Assistant XXXXXXXXXXXXXXXX surmised that because a different School employee, Teacher A, had raised concerns of XXXXXXXX prior to the XXXXXXXX, 2014 meeting, the XXXXXXXXXXXXXXXX may have communicated this information to the Complainant and his wife at that meeting.³ Because the Assistant XXXXXXXXXXXXXXXX was not present in the meeting, however, she was unable to confirm what occurred. The Complainant did not provide, and OCR did not obtain any other information to support the allegation that the XXXXXXXXXXXXXXXX threatened to report the Complainant and his wife to DCFS. Absent additional information to corroborate the account of the Complainant and his wife, OCR finds insufficient evidence that the XXXXXXXXXXXXXXXX subjected the Complainant to an adverse action as alleged. Accordingly, OCR finds insufficient evidence to establish a *prima facie* case of retaliation, and has closed this allegation effective the date of this letter.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may file a private suit in federal court whether or not OCR found a violation.

³ Even assuming the XXXXXXXXXXXXXXXX had mentioned during the XXXXXXXX meeting Teacher A's concerns that Student A XXXXXXXX, and in the context of that conversation indicated that Teacher A might XXXXXXXX, this information would not suggest a causal connection between the Complainant's protected conduct – advocacy for a substitute XXXXXXXX XXXXXXXXXXXXXXXX therapist – and a XXXXXXXX by a different School staff member based upon a suspicion XXXXXXXX. In any event, because OCR cannot confirm through testimony of the XXXXXXXXXXXXXXXX what, if any, comments were made during the XXXXXXXX meeting regarding a possible XXXXXXXXXXXXXXXX, OCR is unable to conclude that retaliation occurred as alleged.

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, you may file another complaint alleging such treatment.

Additionally, 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.

If you have any questions regarding this letter, please contact Mr. Alonzo Rivas, Attorney at (312) 730-1684 or Alonzo.Rivas@ed.gov

Sincerely,

Aleeza Strubel
Supervisor Attorney

Enclosure

cc: XXXXXXXXXXX, XXXXXXXX XXXXXXXX
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