



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VI
ARKANSAS
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TEXAS

Dr. Terry B. Grier, Superintendent
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092

OCR Ref.: 06-14-1208

Dear Dr. Grier:

This letter is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed the investigation of the complaint of discrimination filed against the Houston Independent School District (HISD), Houston, Texas, on February 12, 2012. The complaint alleged that the HISD discriminated against, the Student, based on his disability, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104 (2013); and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation at 28 C.F.R. Part 35 (2013).

Based on a review of the complaint and information received from the complainant during evaluation, OCR processed the following issues for investigation to determine:

1. Whether during the 2013-2014 school year, the HISD [Mandarin Chinese Language Immersion Magnet School (MCLIM)] denied the Student an appropriate education (i.e., FAPE) when it failed to implement the related aids and services deemed necessary by a group of knowledgeable people, in order for the Student to participate in and benefit from the program, in violation of 34 C.F.R. §35.104.33 and 28 C.F.R. §35.130;
2. Whether during the 2013-2014 school year, the HISD discriminated against the Student when it disciplined him for behavior associated with his disability, in violation of 34 C.F.R. §104.4 (b), and 28 C.F.R. §35.104; and
3. Whether during the 2013-2014 school year, the HISD retaliated against the complainant and the Student after she attempted to assert rights for the Student as a student with a disability, in violation of 34 C.F.R. §104.61 and 28 C.F.R. § 35.134.

OCR is responsible for determining whether organizations that receive or benefit from Federal financial assistance from the Department, or an agency that has delegated investigative authority to this Department, are in compliance with Section 504 and Title

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

II. Section 504 prohibits discrimination on the basis of disability and under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities. The HISD is a recipient of Federal financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to process allegations of disability discrimination and retaliation filed against the HISD under Section 504 and Title II.

Additionally, Section 504 and Title II, incorporate by reference, the anti-retaliation provision of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation at 34 C.F.R. Part 100, which prohibits retaliation based on a person's exercise of a protected right or because they participated in an investigation into discrimination. OCR has authority to investigate complaints under the aforementioned statute.

During OCR's investigation, we reviewed information provided by the complainant and the HISD, which included the Student's educational records, email correspondence, discipline records and HISD policies and procedures. OCR also conducted interviews with HISD faculty and staff, including the MCLIMS principal and assistant principal, the Student's teachers and HISD assistant general counsels. Based on a review of this information, OCR determined that there is insufficient evidence to support a conclusion of non-compliance regarding Issue 1 and Issue 3 raised in this complaint. However, during the course of the investigation and prior to its completion, the HISD requested to voluntarily resolve Issue 2. The bases for these determinations are set forth below.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

Issue 1:

Whether during the 2013-2014 school year, the HISD [Mandarin Chinese Language Immersion Magnet School (MCLIMS)] denied the Student an appropriate education (i.e., FAPE) when it failed to implement the related aids and services deemed necessary by a group of knowledgeable people, in order for the Student to participate in and benefit from the program, in violation of 34 C.F.R. §35.104.33 and 28 C.F.R. §35.130;

Under OCR Case Processing Manual (CPM), Section 110(a), OCR will administratively close a complaint when the same complaint allegations have been filed by the complainant against the same recipient with another Federal, state or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings and OCR anticipates that there will be a comparable resolution process under comparable standards; i.e. all allegations will be investigated, appropriate legal standards will be applied and any remedies secured will meet OCR's standards.

In response to OCR's data request, the HISD provided OCR with documentation that showed that the complainant filed this same complaint allegation with the Texas Education Agency (TEA) for a due process hearing (i.e., TEA Docket No. 146-SE-0214). OCR's review of the complainant's request for due process dated March 14, 2014, revealed that the complainant alleged that, "Respondent did not provide Student with a free appropriate public education from the start of the 2013-2014 school year until the time of his withdrawal from special education services. Petitioner alleges that Respondent failed to provide Student with an appropriate IEP for Reading, failed to properly implement his IEP, and failed to provide a program that could not be expected to result or which did result in reasonable progress in Reading."

Inasmuch as OCR has confirmed with the complainant and the HISD that this same complaint allegation is currently being addressed via the school district's internal process, and in accordance with OCR's CPM, we are administratively closing Issue 1, effective the date of this letter. Please be advised that the complainant may re-file this complaint with OCR within 60 calendar days of the disposition of the due process hearing.

Issue 2:

Whether during the 2013-2014 school year, the HISD discriminated against the Student when it disciplined him for behavior associated with his disability, in violation of 34 C.F.R. §104.4 (b), and 28 C.F.R. §35.104; and

Legal Standard

The regulations implementing Section 504, at 34 C.F.R. § 104.35(a), specifically require a recipient that operates a public elementary or secondary education program to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related aids and services before taking any action with respect to the initial placement of the person in a regular or special education program or any subsequent significant change in placement. When the proposed exclusion of a child with a disability is permanent (expulsion), for an indefinite period, or for more than ten consecutive school days, the exclusion constitutes a "significant change in placement." In addition, a series of suspensions that are each ten or fewer days in duration but exceed ten days in the aggregate may create a pattern of exclusions that would constitute a "significant change in placement." Among the factors that should be considered in determining whether a series of suspension has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is *excluded* from school.

To implement an exclusion that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student under 34 C.F.R. § 104.35. The first step of the reevaluation is to determine, using appropriate evaluation procedures that conform to the requirements of the Section 504 regulations, whether the misconduct is caused by the student's disability. That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the

placement options. If the group determines that the student's misconduct is a manifestation of the student's disabling condition, the group must continue the evaluation, following the requirements of 34 C.F.R. § 104.35 regarding evaluation and placement, to determine whether the student's educational placement is appropriate and what, if any, modifications to that placement are necessary. If, on the other hand, the group determines that the conduct is not a manifestation of the student's disability, the student may be excluded from school in the same manner that similarly situated students without disabilities are excluded. The manifestation determination should be made as soon as possible after the disciplinary action is administered. Use of procedures consistent with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the requirements of the Section 504 regulations.

Findings of Facts & Analysis

The complainant alleged that during the 2013-2014 school year the Student, a second grader enrolled in MCLIMS, was disciplined and punished for behavior associated with his disability. Specifically, the complainant informed OCR that the HISD suspended the Student repeatedly for manifestations of his disabilities (i.e., ADD, learning disability and dyslexia).

OCR reviewed the HISD's code of conduct and policies and procedures regarding discipline and determined that they were non-discriminatory on their face. OCR's investigation determined that until November 7, 2013, when the complainant revoked consent for the HISD to provide the Student services pursuant to IDEA, the HISD provided the Student with special education services. The MCLIMS administrators and staff knew the Student was one with a disability, which substantially limited one or more major life activities. After the complainant revoked consent, the HISD informed OCR that it applied the discipline code of conduct as it would any other student, "without a disability." As such, a review of the Student's discipline file revealed that from November 18, 2014, through March 12, 2014, the HISD suspended the Student out of school sixteen (16) times. Although these out of school suspensions were not consecutive, the HISD did not consider whether the Student's misbehavior was associated to his documented disabilities. Additionally, at the time the complainant revoked consent pursuant to IDEA, the HISD did not offer her an opportunity to request Section 504 services.

After the investigation began, but before OCR reached an investigative compliance determination, the HISD expressed a desire to voluntarily resolve Issue 2. Regarding the above issue, consistent with Section 302 of OCR's Complaint Processing Manual, the HISD submitted the enclosed Voluntary Resolution Agreement (Agreement) on August 28, 2014, which OCR has determined addresses the compliance issues raised in the complaint and which when fully implemented, will resolve this complaint. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding Issue 2; however, OCR will actively monitor the implementation of the Agreement by the HISD to determine whether the commitments made by the HISD have been implemented consistently with the terms of the Agreement. If the HISD fails to

implement the Agreement, as specified, OCR will resume its investigation of the above issues. If the HISD determines a need to modify any portion of the Agreement, the HISD may submit, for consideration, proposed revisions to OCR.

Issue 3

Whether during the 2013-2014 school year, the HISD retaliated against the complainant and the Student after the complainant attempted to assert rights for the Student as a student with a disability, in violation of 34 C.F.R. §104.61 and 28 C.F.R. § 35.134.

Legal Standard for Retaliation

In order to establish whether retaliation occurred in this case, it is necessary for OCR to determine whether: (1) the complainant was involved in a protected activity (that is, exercised a right or took some action that is protected under the Federal laws that OCR enforces); (2) the recipient was aware of the complainant's involvement in a protected activity; (3) the complainant was subjected to an adverse action contemporaneously with or subsequent to the protected activity; (4) there was a causal connection between the protected activity and adverse action(s). If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all these elements establish a prima facie case, OCR next considers whether the recipient has identified a legitimate, nondiscriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for discrimination. While OCR would need to address all of the elements in order to find a violation, OCR need not address all these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established.

To be adverse, the recipient's action must significantly disadvantage an individual as to his or her ability to gain the benefits of the recipient's program in a lasting and tangible manner or act as a deterrent to further protected activity. Merely unpleasant or transient incidents usually are not considered adverse.

Findings of Facts & Analysis:

In the letter of complaint, the complainant alleged several adverse acts of retaliation committed against her by the HISD, which included but were not limited to the following: 1) Repeatedly made false allegations to CPS; 2) Threats to fail the Student; Student's recess taken away and his grades lowered because the parent requested to have paper copies of the Student's homework; 3) School meetings held to harass, bully and threaten the parent or to document the parent under the guise of helping the Student; 4) Inundating the complainant with trivial emails that accuse the parent of doing the child's homework; 5) Spread rumors or gossip intended to discredit parent and hurt the Student; 6) Not correcting numerous errors on report card regarding grades and attendance record; 7) Threatened to remove the Student's siblings from gifted and talented programs or not allowed to participate in afterschool programs; 8) Not allowing the Student to participate in school wide activities or field trips; 9) Harassing phone calls from the school to the

complainant demanding to medicate the Student or take him to the doctor; and 10) Harassing the Student and the complainant to persuade them to leave MCLIMS and enroll in his home school.

However, during the investigation OCR requested that the complainant provide specific information regarding whom allegedly took these actions against the complainant and/or the Student and when the alleged incidences occurred. The complainant provided OCR limited information as to the CPS allegation only.

Specifically, the complainant alleged that she believes that the HISD filed false charges against her with CPS because two HISD attorneys attended a hearing for a court case she filed against CPS in an effort to compel CPS to open their records to her. The complainant did not provide the date of the hearing. The complainant stated to OCR, “why all the interest in the case if they are so innocent?” As such, OCR solely investigated this allegation that the HISD repeatedly made false allegations to CPS against the complainant.

Protected Activity & Notice

OCR’s investigation determined that during the 2013-2014 school year the HISD identified the Student as one with a disability who received services pursuant to IDEA. The complainant and the HISD had an acrimonious relationship as it related to the Student’s special education services. The complainant had previously exercised her right and requested a due process hearing for the Student regarding this issue (i.e., TEA Docket No. 131-SE-0213). As such, OCR determined that elements one and two of the retaliation analysis have been established. The complainant was involved in a protected activity because she attempted to assert her son’s rights as an individual with a disability and the HISD was aware of this protected activity, as it defended itself in the due process hearing referenced above.

Adverse Action

As stated above, to be adverse, the recipient’s action must significantly disadvantage an individual as to his or her ability to gain the benefits of the recipient’s program in a lasting and tangible manner or act as a deterrent to further protected activity. Merely unpleasant or transient incidents usually are not considered adverse.

The complainant was provided an opportunity to respond to and rebut OCR’s findings relative to this issue of retaliation and the alleged adverse act committed by the HISD. The complainant’s responses did not yield sufficient information to overturn these findings, as described below.

No Adverse Action Established

“Repeated false allegations made to Child Protective Services.”

As stated previously, upon OCR's request for any specific information relative to this allegation, the complainant informed OCR that two HISD attorneys attended a hearing for a court case she filed against CPS in an effort to compel CPS to open their records to her. The complainant stated to OCR, "why all the interest in the case if they are so innocent?" This was the only information the complainant provided to OCR.

The HISD informed OCR that it had no knowledge of any employee whom had reported the complainant to CPS (i.e., OCR interviews and/or statements with HISD administrators, teachers and personnel) and that referrals and reports to CPS are confidential (e.g., reporters identities are undisclosed and may be reported anonymously). However, in an interview with OCR a HISD Assistant General Counsel stated that she and another HISD attorney did attend a court hearing regarding the disclosure of CPS documents. The Assistant General Counsel informed OCR that four HISD employees are currently being prosecuted for their failure to report to CPS. The Assistant General Counsel informed OCR that she and her colleague attended the court hearing involving the complainant and as well as other CPS hearings, as a response to other personnel issues involving CPS.

OCR reviewed the state law and HISD policies and procedures as it relates to mandatory referrals to the Texas Department of Family Services (i.e., CPS) by teachers. The state statute and HISD policies describe the responsibility and obligation that teachers have to report to CPS. Based on this information, OCR's investigation did not yield any information to substantiate the allegation that the HISD repeatedly reported the complainant to CPS in retaliation for her advocacy for the Student. As such, OCR did not continue on with the retaliation analysis and has closed this issue as of the date of this letter.

In conclusion, the HISD has agreed to voluntarily resolve Issue 2 of this complaint. OCR will monitor the implementation of the attached resolution agreement. According to OCR's processing manual, OCR has administratively closed Issue 1 and OCR's investigation determined that there was insufficient evidence to substantiate a violation of Issue 3. As such, OCR is closing this complaint as of the date of this letter and will take no further action relative to this complaint.

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

Under OCR procedures we are obligated to advise the institution against which the complaint is filed that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state that no recipient or other person shall intimidate, threaten,

coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceedings or hearing held in connection with a complaint.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this document and other related correspondence and records upon request. In the event we receive such a request, we will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your assistance in this matter. If you have any questions, please feel free to contact Melissa Malonson, Senior Attorney, at 214.661.9637 or Melissa.malonson@ed.gov. or John Stephens, Compliance Team Leader, at 214.661.9600.

Sincerely,

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

Enclosure