



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
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TEXAS

July ____, 2014

Ref: 06141617

Bret A. Champion, Ed.D.
Superintendent
Leander Independent School District
204 W. South Street
P.O. Box 218
Leander, TX 78646-0218

Via first class mail and email (XXXXXXXXXXXXXX)

Dear Dr. Champion:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, which was received in our office on September 10, 2014 and filed against the Leander Independent School District (LISD), in Cedar Park, Texas. The complainant alleged that the LISD discriminated and retaliated against his son (Student) based on disability (XXXXXXXXXX), when the Student was removed from the Cedar Park High School (CPHS) XXXXXXXXX in XXXXXXXXXX.

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 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 also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §12132, and its implementing regulation at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities.

With respect to allegations of retaliation, the Section 504 regulation at 34 C.F.R. §104.61 incorporates by reference the Title VI regulation at 34 C.F.R. §100.7(e), which prohibits recipients of federal financial assistance from engaging in intimidating or retaliatory acts against any person for the purpose of interfering with any right or privilege secured under the regulation or because the person has made a complaint or participated in any manner in an investigation or proceeding brought pursuant to the regulation. The Title II regulation, at 28 C.F.R. §35.134, has a similar provision.

The LISD is a recipient of Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

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 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 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, 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 reaching a determination in this case, OCR conducted interviews with the complainant, the Student, and LISD employees, as well as reviewed documentation provided by the complainant and the LISD. Based on a review of this information, OCR determined that there is insufficient evidence to support a conclusion of noncompliance with regard to the issues investigated.

However, during the course of the investigation, OCR learned that the complainant had complained to the LISD that he believed the Student was discriminated against when he was removed from the XXXXXX XXXXX XXXX. OCR's preliminary analysis of information received from the complainant and the LISD revealed compliance concerns with regard to how his complaint was addressed by the LISD. OCR discussed its concerns regarding grievance procedures with the LISD. Subsequently, prior to further investigation of this compliance concern, the LISD requested to enter into a voluntary resolution agreement regarding its grievance procedures. On July 16, 2015, the LISD voluntarily entered into the enclosed agreement, which, when fully implemented, resolves the identified compliance concern. OCR will actively monitor the LISD's implementation of the resolution agreement to ensure compliance with Section 504/Title II with regard to the identified compliance concern.

The bases for OCR's determination with regard to the issues opened for investigation are provided below.

Issue #1: Whether the LISD discriminated against the Student on the basis of disability by denying the Student an equal opportunity to participate in XXXXXXXXX (i.e. XXXXXXXXXXXXXXXX), in violation of Section 504 and Title II and their implementing regulations at 34 C.F.R. §104.37 and 28 C.F.R. §35.130.

Legal Standard

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) states 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 Federal financial assistance. The Title II 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.

For purposes of Section 504, a person with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. With respect to public elementary and secondary educational services, "qualified" means a person (i) of an age during which

persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

A school district that offers extracurricular XXXXXX must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. Schools may require a level of skill or ability for participation in a competitive program or activity; equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on XXXXXXX for which other students must try out. A school district must, however, afford qualified students with disabilities an equal opportunity for participation in extracurricular XXXXXX in an integrated manner to the maximum extent appropriate to the needs of the student.

Simply because a student is a “qualified” student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.

In assessing whether the LISD discriminated against the Student on the basis of disability, OCR applied a different treatment analysis. In applying a different treatment analysis, OCR first examines whether a *prima facie* case of discrimination exists. To establish a *prima facie* case of discrimination, OCR must determine whether the recipient treated the Student differently than other similarly-situated non-disabled students with regard to a service, financial aid, or other benefit provided by the recipient. If OCR finds that a *prima facie* case of discrimination exists, it then determines whether the recipient has articulated a legitimate, non-discriminatory reason for treating the Student differently. If the recipient articulates a legitimate, non-discriminatory reason for its action, OCR determines whether the reason is merely a pretext for unlawful discrimination. Ultimately, the weight of the evidence must convince OCR that actual discrimination occurred.

Findings of Fact and Analysis

In the complaint and in subsequent communication with OCR, the complainant alleged that the Student was discriminated against in XXXXXXXX when he was XXXX from the XXXXXXXX. Although the complainant initially described the Student as being XXX from XXX XXXX, during the course of the investigation it was clarified that the Student tried out for the XXXXXXX XXXX, but was not selected to participate.

The complainant reported that the Student, XXXXXXXX, is diagnosed with a XXXXXXX XXXXXXX disability, XXXXXXX, and XXXXX. The complainant stated that the Student was told by the XXXX XXXXXXX that he was not one of the XXXXX XXXX selected for the XXXXX XXXX and that the Student had missed a lot of time during the XXXXXXXXXXXX. The complainant believes XXXXXXX decision is discriminatory because the Student is a skilled XXXXXXXXXXXX, but XXXXXXX is aware of the Student’s XXXXXXXXXXXX disability and did not

want to deal with the Student or the Student's disability. The complainant believes that the Student is more skilled and experienced than the XXXXXXXX and XXXXXXXX students who were selected for the XXXXXXXXXXXX. In addition, when the Student was not selected for XXXXXXXXXXXX, the complainant reported the XXXXXXXX made discriminatory comments such as: XXXXXXXX the Student "XXXXXXX" the Student "XXXXXXXXXX" and the "XXXXXXX." The complainant further reported that XXXXXXXX would routinely ask the following types of questions to the Student: "XXXXXXXXXX" "XXXXXXX" "XXXXXXXXXX" and "XXXXXXX"

The Student reported participating in the XXXXXXXXXXXX at the beginning of the 2014-2015 school year and not being XXXXXXXX for the XXXX. The Student believes he was XXXXXXXX for XXXX because of his disability. When the XXXX told the Student he did not make the XXXXXXXX, the Student reported that the XXXXXXXX told him he showed skill in some areas but still did not make the XXX. The Student reported that at the end of XXXXXXXX told him he needed to work on the way he thinks and the way he XXXXXXXX. The Student felt singled out when XXXX would make comments such as: "XXXXXXXXXX" "XXXXXXX" "XXXXXXX" and "XXXXXXXXXX". The Student reported that XXXXXXXX would not make such comments to XXXXXXXX, but only to the Student. The Student reported that the XXXX never told him he did a good job even when he got something right, although XXXXXXXX told others they did a good job. The Student felt he performed well XXXXXXXX and was shocked when he did not XXXXXXXX.

OCR interviewed the following LISD employees: Assistant Principal, Special Education XXXX, XXXXXXXX Teacher, XXXXXXXX, XXXXXXXX, and XXXXXXXXXXXX.

The LISD recognizes the Student as a student with a disability and determined he is eligible for special education services under the Individuals with Disabilities Education Act (IDEA). The Student has an Individualized Education Program (IEP) in place for the 2014-2015 school year, reflecting that the Student meets criteria for a XXXXXXXXXXXX in the areas of XXXXXXXX, XXXXXXXX and XXXX. There are no provisions in the IEP for accommodations or modifications in XXXXXXXX, XXXXXXXX, or XXXXXXXX.

The LISD reported and the XXXXXXXX confirmed that the CPHS XXXX is a highly competitive and XXXX which XXXXXXXX. The LISD reported that the Student was given an equal opportunity to XXXXXXXXXXXX; however, the Student was not one of the XXXXXXXXXXXX for the XXXX. XXXXXXXX reported that this was a particularly competitive year.

The LISD provided and OCR reviewed the CPHS XXXXXXXXXXXX. The handout indicates that XXXXXXXX is made up of the XXXXXXXX in the program regardless of age, and provides: "XXXXXXXXXXXXXXXXXXXX" The handout further provides that XXXXXXXX will be evaluated on the following criteria: XXXXXXXXXXXXXXXX. The XXXXXXXX similarly reported to OCR that the criteria considered in team XXXXXXXXXXXXXXXXXXXX.

The XXXXXXXX and XXXX evaluated XXXX for the 2014-2015 XXXXXXXX. The XXXX reported that the Student's disability was not a factor in the XXXX and agreed that the Student was not XXXXXXXX in the program. Specifically, XXXXXXXX reported that the XXXX for the XXXX demonstrated greater skill than the Student with regard to XXXXXXXX, XXXXXXXX and XXXXXXXX.

XXXX reported XXXXXX exhibited better XXXXXX skill development than the Student and that the Student struggled XXXXX and with XXXXXX in XXXXXXXX. Although not involved in the XXXXXXXXX, the Student's XXX observed the Student's XXXXXX the 2013-2014 XXXXXX and reported to OCR that the skills XXXXXXXXXX of the Student during the prior year. The XXXXX reported that the Student was not XXXXX and that other XXXXXXXX than the Student.

The LISD further reported and OCR reviewed attendance records reflecting that the Student had XXXXXXXX during the 2013-2014 school year. The LISD also reported and OCR reviewed grade records XXXXXXXXX end of the school year. The 3rd 6-weeks ended December 20, 2013, and XXXX from XXXXXXXX. XXXXXXXX reported that the primary criterion XXXXXXX, and the Student lacked the requisite skill. However, he noted that there is a lack of development and cumulative effect on skills and abilities when XXXXXXXX. XXXXX similarly reported that XXXXX is based on skill level, but also noted that such factors have a domino effect on XXXXX in that the less a XXXX, the less they develop.

With regard to the comments/questions the complainant alleged the XXXXXXX made to the Student, XXXXX did not deny making such statements. However, XXXXX stated that these comments/questions were not related to the Student's disability, were not specifically targeted at the Student, and most represent typical questions he asks XXXXXXX, not just the Student. With regard to the statement "XXXXX" the XXXXXXX stated that he may have said this, but he was not referring to the Student's disability. He meant XXXXXXX is not about XXXXXXX, do-overs or second chances. With regard to stating that the Student could not blame everything on his XXXXXXX, XXXXX reported that he may have said this and meant that he did not believe that the Student's disability was a big factor because in any event the Student lacked the requisite skill to XXXX.

None of the LISD witnesses interviewed by OCR believed that the Student's disability was a factor in his not XXXXXXX. The LISD reported that XXXXXXX and XXXX, including the Student, did not qualify for XXXXX. The Student was XXXXXXXX who did not qualify XXXXXXX. The LISD further reported and the special education XXXXXXX confirmed that the CPHS XXXXX and XXXXXXX have consistently included students with disabilities. Specifically, XXXXXXX receive special education or Section 504 services for XXXXX, XXX, and XXXX, respectively.

OCR spoke with the complainant and the Student following its interviews of the LISD employees and its review of the data provided by the LISD, and provided the complainant the opportunity to identify any additional information or evidence. The Student reported that he believed he was skilled enough to qualify for XXXX and that he performed well XXXX. The Student additionally stated that he made sure he passed his classes during his XXXXX, and that the absences during XXXX were during XXXX when he would go to the library to get work done. The complainant reported that the Student is a XXXX, that other XXX were surprised that he did not XXXX and that he had XXXXXXX. The complainant reported that the Student was eligible to play XXXXXXX, and although the complainant was not sure about the number of his absences, they occurred XXXXXXXX when the Student was working on getting his grades up.

In order to establish a violation of any of the regulations enforced by OCR under the preponderance of the evidence standard used by this office, the information obtained by OCR must indicate that it is more likely than not that a violation has occurred. As provided above, in applying a different treatment analysis, OCR must first determine whether the LISD treated the Student differently than other similarly-situated non-disabled students with regard to a service, financial aid, or other benefit provided by the recipient (i.e., participation on the varsity basketball team). As a preliminary matter, OCR found that the Student was considered to be a “qualified” student with a disability, based upon the LISD’s determination that the Student was eligible for special education services under the Individuals with Disabilities Education Act. OCR’s investigation also revealed conflicting testimony between the complainant and the Student and the LISD XXXXX with regard to the Student’s skills and qualifications for participation XXXXXXXX. Further, OCR found that the LISD offered extracurricular XXXXX in a manner as is necessary to afford qualified students with disabilities an equal opportunity for participation, based upon the LISD’s production of evidence that establishes that there are currently XXXXXXXXX receiving special education or Section 504 services. School districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory.

Based on the information above, OCR was unable to determine that the Student was treated differently based on disability. OCR determined that there is insufficient evidence to support a conclusion that the LISD discriminated against the Student because of disability by treating the Student differently than similarly-situated students. Therefore, there is insufficient evidence to demonstrate a finding of non-compliance with Section 504 and Title II regarding this issue.

Issue #2: Whether the LISD retaliated against the Student in XXXXXX, when he was XXXXX, after the complainant advocated on the Student’s behalf during the previous XXXXX, in violation of Section 504 and Title II and their implementing regulations at 34 C.F.R. §104.61 and 28 C.F.R. §35.134.

Legal Standard

Recipients of federal financial assistance are prohibited from retaliating against, or interfering with the rights and privileges of, an individual protected by the statutes that OCR enforces. The regulatory provisions implementing Title VI, at 34 C.F.R. §100.7(e), prohibit retaliation, and provide 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 the laws OCR enforces, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

In order for an allegation of retaliation to be sustained, OCR must determine whether: 1) the complainant engaged in a protected activity; 2) the recipient had knowledge of the complainant’s protected activity; 3) the recipient took an adverse action contemporaneously with or subsequent to the protected activity; and 4) there is 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 above elements are established, OCR

then inquires as to whether the recipient can identify a legitimate, nondiscriminatory reason for taking the adverse action. If so, OCR considers whether the reason given is merely a pretext for retaliation.

Regarding element 4, 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.

While OCR would need to address all of the elements in order to find a violation, it need not address each of the above-listed retaliation elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established. Rather, if insufficient evidence is found with regard to one of the elements, OCR can find insufficient evidence of a violation without engaging in unnecessary further investigation and analysis.

Findings of Fact and Analysis

In the complaint and in subsequent communications with OCR, the complainant alleged that the Student was XXXXXXXXXX in retaliation for the complainant advocating for the Student during the previous XXXXXX. The Student was removed from XXXXXXXX. The complainant reported that he spoke with the XXX and advocated for the Student to XXXXX, noting the Student's disability and the complainant's belief that XXXXXXXX. Following the complainant's discussion with the XXX, the Student was XXXX. However, as described above, the Student was not selected to participate on XXXXXXXX.

The XXXXX reported that the Student was XXXXXXXX. He reported that the complainant contacted him and asked him to reconsider and he decided to give the Student a second chance. He did not recall the specifics of the conversation, but reported that the complainant may have stated to him that he believed the Student had XXXXXX due to his disability and that he believed some of XXXXXX were discriminatory and he could be sued. The XXXXXXXX denied his actions were based on the Student's disability.

OCR determined that the complainant engaged in a protected activity in XXX when he advocated for the Student to be XXXXX because he believed he had been XXXX due to his disability and told the XXXXX he could be sued for making discriminatory XXXX. OCR further determined that the recipient had knowledge of the complainant's protected activity, in that his conversation took place with XXX. OCR also determined that the recipient took an adverse action subsequent to the complainant's protected activity when the Student was not selected to participate on XXXXXX. However, OCR was unable to determine by a preponderance of the evidence that the adverse action was taken because of the protected activity. Proof of a causal connection may be established through either direct or circumstantial evidence. Examples

of direct evidence include a recipient's written declaration, verbal statement, or action demonstrating that the recipient took the adverse action because the complainant engaged in a protected activity. OCR found no direct evidence of a retaliatory motive. Circumstantial evidence is evidence that allows OCR to infer a retaliatory motive based on the facts and circumstances of the investigation. OCR follows the general principle that as the time period between the protected activity and the adverse action increases, the likelihood that there is a causal link between these two activities decreases. OCR notes that the Student was XXXXX following the protected activity. It was not until the following school year that the Student again competed for the XXXXXXXX. As determined above, OCR was also unable to establish by the preponderance of the evidence that the Student was treated differently than similarly situated students when he XXXXXXX. OCR found no other indicia of a causal connection.

In order to establish a violation of any of the regulations enforced by OCR under the preponderance of the evidence standard used by this office, the information obtained by OCR must indicate that it is more likely than not that a violation has occurred. As provided above, OCR was unable to determine by a preponderance of the evidence that a causal connection exists between the complainant's advocacy on behalf of the Student XXX and the Student not being XXXXX. OCR determined that there is insufficient evidence to support a conclusion that the LISD retaliated against the Student in XXX, when he was not selected for the XXXX. Therefore, there is insufficient evidence to demonstrate a finding of non-compliance with Section 504 and Title II regarding this issue.

This concludes OCR's investigation of the complaint and should not be interpreted to address the recipient'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. The complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the 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.

If you have any questions or concerns regarding this matter, you may contact Natasha Gonzalez Rojas, the attorney assigned to investigate this matter, at 214-661-9680 or natasha.rojas@ed.gov, or Adriane P. Martin, Supervisory Attorney/Team Leader at 214-661-9678 or adriane.martin@ed.gov.

Sincerely,

/S/

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

Enclosure

cc: XXXXXX, Esquire, counsel for LISD (via email XXXXXXXXXXXXX, with enclosure)