



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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December 27, 2013

Tooele County School District
Dr. Scott A. Rogers – Superintendent
92 Lodestone Way
Tooele, UT 84074

Re: Tooele County School District
OCR Case Number: 08-13-1189

Dear Superintendent Rogers:

In a letter dated xxxx, we notified the Tooele County School District (the District) that we were opening for investigation the above-referenced complaint filed against the District. In our notification letter, we stated that the Complainant alleged the District discriminated when an employee made improper, excessive, and repeated physical contact with his xxxx (the Student), including in an incident on xxxx. We noted, however, that because the Complainant had already raised this discrimination allegation to the District, rather than looking at the underlying discrimination alleged, we would instead investigate 1) whether the District provided a prompt and equitable response after being informed of this alleged discrimination. In addition, we notified the District that we were investigating the Complainant's allegations that the District: 2) retaliated in response to his and his wife's protected activities when an employee encouraged other students to bully the Student and his younger brother; 3) retaliated by telling District staff not to communicate with him or his wife; and 4) discriminated through unequal treatment of the Student in disciplinary matters.¹ We have completed our investigation and are notifying you of our decisions.

We investigated these allegations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a public entity that receives Federal financial assistance from the Department and is subject to the requirements of these laws and regulations.

In the investigation, we considered information provided by the Complainant, documents submitted by the District, and the District's response to the complaint. We also interviewed the

¹ In our notification letter, we listed the allegation regarding disciplinary issues as a form of retaliation. During the course of our investigation, we learned that the Complainant's intended the disciplinary issues as a form of discrimination rather than retaliation. Further, the discipline at issue could not have been retaliation because it occurred prior to the Complainant's protected activities. As a result, our investigation into the Student's discipline was focused on whether he was disciplined in a discriminatory manner.

Complainant and numerous District witnesses with information relevant to the allegations. Our investigation found insufficient evidence that the District violated Section 504 or Title II with respect to the allegations. This letter explains our findings.

Our investigation did, however, reveal a potential compliance concern with respect to a related allegation that was not explicitly identified in our notification letter. After this potential compliance concern became apparent, the District indicated its desire to voluntarily enter into an agreement to resolve it pursuant to Section 302 of our *Case Processing Manual* (CPM). We reviewed this request and determined that it justified entering into an agreement. We received the District's signed Resolution Agreement (enclosed). When the Agreement is fully implemented, the potential compliance concern we identified will have been resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. We will monitor implementation of the Agreement through periodic reports demonstrating the terms of the Agreement have been fulfilled. We will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, which may include enforcement actions, as described in the Agreement.

Background

During the xxxx school year, the Student was in the xxx grade at Stansbury High School (the School) in the District. In xxxx, the District developed an Individualized Education Program (IEP) for the Student, who is xxxxx, and the IEP contained a Behavior Intervention Plan (BIP). The October 2012 IEP was in effect during most of the time period relevant to the Complainant's allegations. The Student's parents (the Parents) and the District had numerous disagreements during the school year, which resulted in multiple complaints to the Utah State Office of Education, internal complaints to the District, and this complaint to OCR.

Discussion

I. Alleged Failure to Provide a Prompt and Equitable Response to the Complainant

Legal Standard

The regulations implementing Section 504 at 34 C.F.R. § 104.7(b) and Title II at 28 C.F.R. § 35.107(b) require a covered entity, such as the District, to respond in a prompt and equitable manner whenever it has notice of possible discrimination based on disability. When investigating allegations of a failure to respond to possible disability discrimination, OCR first examines whether the District knew or should have known that disability discrimination may have occurred. Once OCR determines that the District is on notice of possible disability-based discrimination, it then examines whether the District responded in a prompt and equitable fashion. In evaluating whether a response is prompt and equitable, we consider whether: (1) the district provided an adequate, reliable, and impartial investigation of the complaint allegations, including the opportunity to present witnesses and other evidence; (2) there were reasonably prompt timeframes for the major stages of the complaint process; (3) parties were notified of the outcome of the complaint; and (4) the district took steps to prevent further discrimination and correct its effects, if applicable. The specific steps in a district's investigation will vary

depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the District, and other factors.

Relevant Facts

On xxxx, the Student was involved in an incident in a classroom during xxxx with a paraprofessional (the Paraprofessional). At the same time as the incident, the Parents were in a different room at the School for the Student's IEP meeting. The Parents were in the hall after the IEP meeting when some other students came up to a special education teacher (the SET) and told her about the incident. In response, the SET told the Parents she would investigate the incident and get back to them. The SET was not a witness to the incident but it occurred in her classroom, which is why she investigated it. The SET investigated the issue by interviewing the witnesses who were in the room during the incident. The SET then informed the Parents by email of what she believed happened in the room that same day, stating: " X – [paragraph, sentence, provision, etc.] redacted - X."

Although they initially believed the SET's summary of the incident, the Parents became concerned because the Student continued to talk about the incident. As a result, on March 13, the Parents contacted the School Resource Officer (the SRO) seeking additional information about the incident. After finding the video footage, the Parents were asked to come to the School on xxx where they viewed the video of the incident with a number of School administrators and others from the District. The video, which only shows what happened in the hall and does not show what happened in the classroom, shows the X – [paragraph, sentence, provision, etc.] redacted - X. The video then shows the Student later returning to the room and being promptly escorted out again and down the hall by the Paraprofessional, who maintained his grip on the Student's arm while the Student appeared to be trying to get free.

Upon seeing this video, the Parents were outraged about how the Student was treated, demanded that the District take appropriate steps, and asked to file criminal charges against the Paraprofessional. Next, on xxxx, the District placed the Paraprofessional on administrative leave pending an investigation. The District then conducted a risk assessment for the Paraprofessional to determine whether he posed a risk to others. The District also took statements from the witnesses in the room on xxxx.² With respect to the incident on xxxx, the witness statements indicated that the Student entered a room that contained a few District staff members along with some students with disabilities, some of whom had significant medical needs and were being fed by staff. After entering the room, witnesses state that the Student began running around the room, yelling, and being disruptive. As a result, a staff member asked him to leave the room. The Student did not leave the room and his disruptive behavior continued. The Paraprofessional then asked the Student to leave the room. The Student refused and after repeated requests by the Paraprofessional that the Student leave, the Paraprofessional grabbed the Student firmly by the arm and physically removed him from the room.³ As the Student passed through the door into

² The District was not investigating whether the Paraprofessional discriminated against the Student on the basis of his disability, nor did the Parents make such allegations. Instead, the District investigated what happened in the room on xxxx and whether the Paraprofessional posed a risk.

³ the X – [paragraph, sentence, provision, etc.] redacted - X

the hall, the Paraprofessional released his grip on the Student's arm, and the Student then fell into the lockers across the hall. The witnesses stated that the Paraprofessional did not push the Student out of the room but instead the Student tripped himself into the lockers. It is unclear from the video whether the Student intentionally tripped himself or lost his balance when the Paraprofessional released his grip. After the Student was removed from the room, he walked down the hall and then eventually returned to the same room. Soon after reentering the room, the Paraprofessional again grabbed the Student by his arm and removed him from the room. This time, the Paraprofessional maintained his grip, in part because he did not want the Student to stumble again, and escorted the Student down the hall and into another room while the Student struggled to get free. With respect to the risk assessment of the Paraprofessional, which was completed by an evaluator for the District on xxxx, the evaluator found that the Paraprofessional was found to be low in every category of the risk assessment. As a result, the Paraprofessional's administrative leave ended, and he was able to return to work.

The Parents were not informed of the specifics of the District's investigation or the risk assessment of the Paraprofessional, nor is it clear that it would have been appropriate for the District to provide such personnel information to the Parents. The Parents were informed, however, the District's view of what happened in the room on xxxx. The Parents were also informed that the Paraprofessional was placed on administrative leave pending a risk assessment and were promptly informed that he had returned from his administrative leave.

Next, on xxxx, the Parents alleged in an email to a special education teacher: the X – [paragraph, sentence, provision, etc.] redacted - X.” The email was forwarded on to the District's Special Education Director (the SED), who forwarded the email on to the School's Principal and asked him to investigate the allegation and get back to the Parents. The Principal then investigated the allegation by interviewing the Paraprofessional and the SET who supervises the Paraprofessional and was in the class with the Paraprofessional and the Student for part of the school day. The Paraprofessional denied physically touching the Student other than during the incident on xxxx and stated that he has never forced a student into a chair. The SET stated that she has never seen the Paraprofessional physically direct the Student into a seat and that the Paraprofessional was not with the Student often because the Paraprofessional was not assigned to the Student and typically works with another student. Based on these two interviews, the Principal concluded he did not have sufficient information to support the allegations in the Parents' email xxxx. At a subsequent meeting with the Parents, while the Principal provided very little detail about his investigation, it appears likely he did inform the Parents that he concluded that the Paraprofessional did not physically direct the Student other than in the incident on xxxx.

Then, on xxxx, the Parents informed the Principal that another student witnessed the Paraprofessional being physical with the Student and was willing to speak with him about it. The Principal then promptly interviewed that student witness, who stated that the Paraprofessional had grabbed a hold of the Student and shook him at an assembly and, on another occasion, had told him that the Student was a bad kid. When asked whether there were

We need not definitively resolve either of these factual disputes because neither is critical to the question of whether the Student was discriminated against. In other words, even if the staff were incorrect in their beliefs that the Student was not permitted in that class or that he posed a risk to himself or others, those views were reasonable and a mistake as to those facts would not constitute disability discrimination.

any other witnesses who could support these assertions, however, the student was unable to identify any other witnesses. The Principal then contacted the student witness's father, who stated that his son had never told him any of that; he had only mentioned the incident on xxxx. The Principal also interviewed the Paraprofessional, who denied ever saying anything like that about the Student, denied ever touching him at an assembly, and stated that there were no instances when he touched the Student other than the incident on xxxx, aside from congratulatory high fives or handshakes. The Principal then stated that because he had a student giving one side of the story and a staff member giving a contradictory version of events and no additional information about the incident, he did not have sufficient information to find that the Paraprofessional engaged in the behavior alleged by the Parents, and he notified the Parents of his findings that same day. The Parents also alleged that the Paraprofessional had physically bullied the Student in a physical education class.⁴ The Parents did not provide additional detail about the incident that would have allowed the Principal to effectively look into the allegation. The Principal asked the Paraprofessional about the allegation, and the Paraprofessional denied the allegation.

Analysis

a. The District's response to the allegations regarding the February 26 incident

Analyzing the District's response to the incident on February 26 involves considering two separate investigations by the District. First, before any specific allegations of discrimination were made, the SET conducted an investigation, which included interviewing the witnesses in the room, and the SET notified the Parents of her findings on the same day of the incident.⁵ Next, after the Parents complained about the incident on March 14, the District promptly investigated. The District's investigation was not focused on disability discrimination.⁶ Nonetheless, it was focused on and responsive to the allegations made by the Parents. Specifically, the District investigated whether the Paraprofessional acted improperly in removing the Student from the room and whether he was a risk to others.

For the following reasons, we find that the District provided a prompt and equitable response to the Parents allegations regarding the incident on February 26. First, the District provided an adequate, reliable, and impartial investigation of the potential discrimination. It did so by interviewing the relevant witnesses, speaking with the Parents, reviewing the video, and

⁴ The Parents claim to have told the Principal about these other allegations earlier than xxxx, though they acknowledge that they did not tell the Principal about the student witness until xxxx because they were not aware of his statement until the summer. The Principal, however, does not have any record or memory of learning of these additional allegations until xxxx.

⁵ The SET stated, however, that because she had been at the School for less than two months, she did not know there was video footage of the hall. As a result, she did not view the video of the incident in her investigation.

⁶ The Parents have alleged the Paraprofessional improperly restrained the Student on xxxx. The U.S. Department of Education's "Restrain and Seclusion: Resource Document" states that the Department's Civil Rights Data Collection (CRDC) defines a "physical restraint" as "A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a student who is acting out to walk to a safe location." Although it is not part of the Section 504 or Title II regulations or enforced by OCR, it would appear that the Paraprofessional's actions on February 26 would be classified as a physical escort and not a physical restraint under the CRDC's definition.

assessing whether the Paraprofessional posed a threat. Based on the information from these sources, the District reasonably concluded that the Paraprofessional did not violate District policy and did not pose a threat. Second, both of these investigations were promptly completed. The SET's teacher initial investigation was completed the same day as the incident, and the District's risk assessment was completed within six days of the Parents contacting the SRO. Finally, the Parents were notified of the outcome of the District's investigation; the SET notified the Parents of her findings the day of the incident, and the Superintendent and SED notified the Parents that the Paraprofessional was placed on administrative leave pending the threat assessment and then notified them that the Paraprofessional was then returning to work. Although we might ordinarily want more information provided to a complaining party, the District is limited in what information it is able to convey about specific personnel matters, and the information provided was sufficient for the Parents to infer that the District found that the Paraprofessional was not a threat.

- b. The District's response to the Parents' allegations that the Paraprofessional physically redirected the Student through the school year

The Parents alleged a number of different ways in which the Paraprofessional was bullying the Student during the school year. First, the Parents alleged in an email that “[the Paraprofessional] has been physically pushing [the Student] into his seat and grabbing him to move him around the room.” Next, the Parents alleged to the Principal that the Paraprofessional had physically bullied the Student in physical education and at an assembly, and they identified a student who was a witness and was willing to speak with the Principal.

We find that the District provided a prompt and equitable response to these allegations. First, in response to the Parents' email alleging that the Paraprofessional was pushing the Student into his seat, the Principal interviewed the Paraprofessional and the SET who supervises the Paraprofessional and was in the class with the Paraprofessional and the Student for part of the school day. Although the Principal could have been more thorough in his investigation, possibly by speaking with other teachers who interact with the Student while the Paraprofessional is present,⁷ we find that the Principal's investigation was adequate for the specific allegation made. Specifically, the Parents alleged that Paraprofessional had been physically pushing the Student into his seat and grabbing him to move him around the room, and the Principal interviewed the two staff members most likely to have information about whether that was true. Further, the Principal's investigation was prompt; the Parents' email was sent to the SED on xxxx, the SED asked the Principal to investigate it on xxxx, and the Principal completed his interviews by xxxx. Finally, we find that the Principal likely informed the Parents that he looked into their allegation and found that the Paraprofessional did not physically force the Student into his seat as the Parents had alleged.⁸

⁷ X – [paragraph, sentence, provision, etc.] redacted - X. Nonetheless, OCR interviewed the xxxx teacher, who stated that he had never seen the Paraprofessional physically bully the Student and that they interacted very little in his class. Further, OCR interviewed others at the School who similarly denied seeing the Paraprofessional physically bully the Student.

⁸ We say it appears likely because there is no record of the conversation. The Principal stated that he believes he told the Parents at a subsequent meeting with the Parents that spring but does not have written documentation of that conversation. The Parents do not specifically recall being told of the Principal's findings regarding the allegations

Second, the Principal took appropriate steps to investigate the Parents' additional allegations about bullying at an assembly and in physical education and their statement about a witness who could support their allegations. Specifically, the Principal interviewed the student witness, the student witness's father, and the Paraprofessional at issue. Here, the Principal stated that he was faced with conflicting statements between the student witness and Paraprofessional, and without further support for the student witness's statement, he did not have sufficient evidence to find that the Paraprofessional had physically bullied the Student as alleged by the Parents. The Principal then promptly notified the Parents of his conclusion the same day he was notified of the student witness.

For these reasons, we find there is insufficient evidence that the District failed to provide a prompt and equitable response to the Complainant's various allegations regarding the Paraprofessional.⁹

II. Alleged Retaliation

Legal Standard

Under the implementing regulation, recipients are prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504 and Title II. In analyzing a retaliation claim, we determine whether: the individual engaged in an activity protected by Section 504 or Title II of which the recipient had knowledge; the recipient took adverse action against the individual; a causal connection existed between the protected activity and the adverse action; and, the recipient has a legitimate, non-retaliatory, non-pretextual reason for its action. An adverse action is an action that adversely affects a person's work, education, or well-being in a serious, lasting, and usually tangible manner – something that is more than a transient, unpleasant incident, or that had a deterrent effect.

The District was aware that the Parents engaged in numerous protected activities. The first protected activity the District was aware of came when the Parents filed a complaint with the USOE on February 16, 2013, making a variety of different disability discrimination allegations. After that, the Parents engaged in numerous other protected activities, including their allegations on March 14 that the Paraprofessional abused the Student on February 26, and other related allegations at subsequent team meetings. These protected activities are sufficient to satisfy the first element of retaliation for both of the Parents' retaliation allegations.

A. Alleged retaliation by encouraging students to bully the Student and his brother

Relevant Facts

in their xxxx email, but they do acknowledge that he told them that he did not believe the Paraprofessional would do anything like that. Given the length of time since the investigation occurred and the number of issues that were raised by the Parents, and numerous subsequent conversations that occurred regarding the Paraprofessional, the uncertainty on this detail is understandable. Nonetheless, the District might consider ensuring that it documents all phases of its internal investigations in the future.

⁹ Because the District found that no discrimination occurred, no steps were necessary to prevent future discrimination or correct its effects.

As background, after getting a copy of the video of the incident with the Paraprofessional on X – [paragraph, sentence, provision, etc.] redacted - X. Following the posting of that video, there were numerous comments on xxxx, significant discussion among the students on xxxx about the incident, and even local news coverage about the incident. The Parents believe that the Paraprofessional, who is the xxxx at the School, retaliated by violating the Student’s privacy rights and encouraging his xxxx to bully the Student and his younger brother. In support of this belief, the Parents state that the son of a family friend told them he saw a text on a friend’s phone that was from the Paraprofessional stating that the Student was pulling oxygen tubes out of another student’s nose. In addition, there was a comment on xxxx from someone claiming to be a relative of the Paraprofessional stating that the Student did not have permission to be in the classroom and is a troublemaker. Further, the Parents claim that the xxxx told his daughter that the Student was pulling oxygen tubes out of another student’s nose, which she then posted on xxxx.

On xxxx, the Parents wrote an email to the SED and the Principal stating “[the Paraprofessional] and probably others have violated FERPA and have caused, and are causing problems for [the Student] with rumors among the students in the school – started by [the Paraprofessional].” In response to this email, the SED investigated the allegation regarding the Paraprofessional and the Principal investigated the allegation regarding the football coach. In his investigation, the SED:

- Spoke with the Parents about the allegation, who stated that a xxxx received a text from the Paraprofessional (xxxx) claiming that he had to remove the Student from the classroom xxxx because the Student was pulling breathing tubes out of another Student’s nose who was on life support, and that the football coach had told his children a similar story;
- Interviewed the Paraprofessional, who denied texting or telling anyone that the Student was pulling breathing tubes out of another students nose or anything like that. The Paraprofessional also stated that because there was a lot of talk about the issue between the students on xxxx, he texted some of his xxxx to stay out of it and not get involved. He also stated that he did not have a copy of the texts anymore;
- Interviewed members of the wrestling team to determine whether they had received any texts similar to the one described by the Parents. In response, one student – the same one who the Parents were aware of and told the SED about – told the SED that he had received a text from the Paraprofessional containing the information described by the Parents. That student, however, said he did not have a copy of the text anymore. The other xxxx denied receiving any similar texts. Instead, they consistently stated that the only text they received from the Paraprofessional about this issue told them to stay out of the drama going on online, as described by the Paraprofessional;
- Based on the conflicting information he had, the SED concluded that the Paraprofessional did not send the text claimed by the Parents or disclose private information about the Student. Generally, he did not believe the student identified by the Parents because it was inconsistent with the information provided by the Paraprofessional and the other wrestlers and the student did not have a copy of the text, and the SED felt that because there was so much conversation going on about the incident, there was no way for him to accurately track where the information was coming from, such as xxxx, gossip among students, the Parents, or someone else; and

- Finally, the SED notified the Parents that he had completed his investigation and of his findings.

The Principal interviewed the xxxx, who stated that he could not recall telling his daughter anything about this and that she was the one who told him that the Student was pulling breathing tubes out of another student's nose. As a result, the Principal found that the xxxx did not disclose any information about the Student to his daughter. Even though they did not find that the Paraprofessional or xxxx disclosed any private information about the Student, the Principal and Paraprofessional held a meeting about the issue with the xxxx team and told them to stay out of it and not get involved on xxxx or elsewhere. Similarly, the Principal addressed the importance of privacy issues with his faculty.

OCR also interviewed the Paraprofessional and xxxx, and both of their statements were entirely consistent with the statements they provided previously in their interviews with the SED and the Principal.

Analysis

Because the District investigated the Parents' allegation, we can rely in part on the District's investigation in making our findings.¹⁰ Specifically, the District investigated whether the Paraprofessional or xxxx inappropriately disclosed information about the Student and interviewed both the Paraprofessional and the xxxx. The District also interviewed the students who were allegedly told this information, and based on these interviews, the District concluded that neither the Paraprofessional nor the xxxx inappropriately disclosed information about the Student.

In addition, OCR conducted its own interviews of the xxxx and the Paraprofessional. Their statements to OCR were consistent with their statements in the District's internal investigation, and OCR found them credible. There is no question that after the Parents posted the video of the xxxx incident on xxxx that some individuals commented online and xxxx with their views of the incident. There is also no question that some commenters took sides about who was to blame for the incident, and some of them blamed the Student. Nonetheless, there is insufficient evidence that any of these individuals received this information from either the Paraprofessional or the xxxx or that either of them encouraged others to post this information online.¹¹

Thus, based on the information in OCR's investigation and the investigation completed by the District, we find insufficient evidence of the alleged adverse action that the Paraprofessional or xxxx disclosed private information about the Student or encouraged students to bully the Student

¹⁰ The Parents did not allege to the District that this was a form of disability discrimination or retaliation. As a result, no response or investigation by the District was required under Section 504 or Title II. Nonetheless, because the District did investigate the allegation, its investigation is relevant to our analysis here.

¹¹ There were other related allegations, including an allegation that some wrestlers bullied the Student's younger brother – who is not a student with a disability – over the summer and on the bus about the incident with the Paraprofessional. Because we find insufficient evidence that the Paraprofessional encouraged students to bully the Student or his brother or violated the Student's privacy rights, even if the Student's younger brother was bullied, we would not have jurisdiction because it was not a retaliatory action by the District or disability related.

or his brother.¹² Because we find insufficient evidence of an adverse action, we find insufficient evidence of retaliation as alleged.

B. Alleged retaliation by telling District staff not to communicate with the Parents

Relevant Facts

The Parents alleged the District retaliated against them by telling staff members not to communicate with the Parents. In response, the District denies ever telling staff members not to communicate with the Parents. More specifically, a teacher asked the SED if he could restrict the ability of the Parents to communicate with teachers outside the presence of an administrator. The teacher made this request after the Student's mother – whom she is friendly with – visited her at her home in the evening and had a lengthy discussion on a range of topics, including the incident on xxxx, and also because of the advice of the teacher's husband based on the perceived threat of a potential lawsuit involving the xxxx incident. In response to the teacher's request, the SED told that teacher while she could make it clear to the Parents that any school related discussions occur at School during regular hours, she must continue to communicate with the Parents as you would any other parents. Further, that teacher stated to OCR that she continued to communicate with the Parents, and there is no meaningful evidence that District staff refused to or stopped communicating with the Parents. The SED also met with other teachers and explained to them that they must continue to communicate with the Parents about the Student.

Analysis

We find insufficient evidence that the District encouraged staff not to communicate with the Parents. More specifically, documents and the District's witnesses credibly and consistently confirm: a teacher was uncomfortable communicating with the Parents because of concern about a potential lawsuit between the Parents and the District and because the Student's mother visited her at her home; when this teacher asked for some form of communications restrictions, she was told that she needed to continue to communicate with the Parents about the Student at School; the District met with other special education teachers and informed them of the same information regarding communicating with the Parents; and the Parents continued to communicate with staff at the School.

Because we find insufficient evidence that the District took the adverse action of restricting the Parents' ability to communicate with staff, we find insufficient evidence of retaliation as alleged.

III. Alleged Discrimination in Discipline

Legal Standard

¹² OCR does not have jurisdiction over or enforce the Family Educational Rights and Privacy Act. It is possible, however, that a privacy violation taken in response to a protected activity could be sufficiently adverse to constitute retaliation in violation of Section 504 and Title II. Because we find insufficient evidence of the alleged disclosures by the Paraprofessional or xxxx here, we need not decide whether the disclosure allegedly made by the Paraprofessional and xxxx about the Student would have been sufficient to constitute an adverse action if we had found that such a disclosure occurred.

In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged injured party, whether it followed its policies and procedures for taking such action and whether similarly situated non-disabled individuals were treated differently. If the alleged injured party was treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Relevant Facts

The Parents alleged the Student was unfairly disciplined. As examples, the Parents stated: the Student was often disciplined for behaviors that were common in his special education class and that were a manifestation of his disability but the other students in that class, who were also students with disabilities, were not disciplined for similar behaviors; the Student was almost suspended for an incident in which he was punched in the face and was essentially blamed for it even though he did not physically provoke the other student; and the Student was suspended after he threatened to stab another student with a pencil in response to harassment from the other student.

Analysis

Having reviewed the Student's disciplinary record, we find insufficient evidence of discrimination. First, there is no evidence that the Student was disciplined differently than his non-disabled peers. In fact, the comparisons used by the Parents in arguing the Student was disciplined unfairly are to other students with disabilities. Although different discipline of students within a class of students with disabilities may be unfair, it does not constitute discrimination.

Second, although the Parents allege the Student was disciplined for behaviors that are caused by his disability, the Student's discipline was not sufficient to constitute a significant change in placement. Typically, a school district cannot discipline a student with a disability for behavior that is a manifestation of his disability if the discipline constitutes a significant change in placement, and OCR typically interprets discipline to be a significant change in placement when a student is suspended for more than ten consecutive days or ten non-consecutive days when the discipline creates a pattern of exclusion. Here, the Student's cumulative suspensions do not come close to ten days. Thus, even if the Student's discipline resulted from behaviors that are a manifestation of his disability, it would not be discrimination.

Third, the Student was not disciplined for one of the primary incidents that upset the Parents – the incident when the Student was punched in the face by another student and the Parents felt like the School was blaming the Student. Because the Student was not disciplined for that incident, it cannot give rise to a finding of discriminatory discipline.¹³

¹³ Further, the teacher interviews indicate that they believed the Student was verbally annoying and provoking the other student, who is also a student with a disability, which resulted in him getting punched. Although the teachers may have felt the Student was partially at fault in the incident, the Student was not disciplined and the student who punched the Student was disciplined for his behavior.

Fourth, regarding the incident in which the Student threatened to stab another student with a pencil, even if the Student was being harassed by another student, the District can legitimately impose discipline on the Student for his behavior.¹⁴ Further, the other student involved – also a student with a disability – was also disciplined for his behavior.¹⁵

For these reasons, we find insufficient evidence that the Student’s discipline was discriminatory.

IV. Failure to Provide a free appropriate public education

The Section 504 regulation at 34 C.F.R § 104.33(b) states that the provision of a free appropriate public education (FAPE) includes the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. OCR interprets the Title II implementing regulation at 28 C.F.R. § 35.130 to require public education entities to provide a FAPE to the same extent as is required under the Section 504 regulation. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this regulatory requirement. Further, one of the ways in which a district can deny a student a FAPE is by failing to properly implement a student’s IEP or Section 504 plan.

Our notification letter did not explicitly identify FAPE issues as part of our investigation. During the course of investigating the other allegations, however, it became apparent that there were potential FAPE-related compliance concerns regarding the District’s implementation of the Student’s BIP. More specifically, OCR had concerns that the District was regularly using and threatening to use the School’s SRO as a means of managing the Student behavior in a manner that was inconsistent with the Student’s BIP. In other words, the Student’s BIP from xxxx listed reinforcement strategies and negative consequences for the Student, and utilizing the SRO was not one of them.¹⁶ Once the District was notified of OCR’s concerns, the District agreed to resolve that concern in the attached Resolution Agreement. Thus, no further discussion of that allegation is necessary.

Conclusion

As explained previously, we find that there is insufficient evidence that the District violated Section 504 or Title II with respect to allegations identified in our notification letter. With respect to the FAPE issue that arose during the course of our investigation, we are pleased that the District voluntarily entered into the enclosed Resolution Agreement to address this compliance issue. This concludes our investigation of this complaint.

¹⁴ In addition, the School reduced the length of the Student’s suspension xxxx based on the Case Management Team’s recommendation.

¹⁵ The Parents alleged that the other student’s actions amounted to disability harassment. OCR did not investigate that issue because it was part of a complaint made to the USOE and the USOE pursued that allegation with the District.

¹⁶ OCR recognizes that there are situations when an SRO can be legitimately used – for example, when a student appears to be a threat to others or himself – even when the use of the SRO is not provided for in a student’s BIP. Here, however, the SET indicated that the SRO was contacted at least weekly to address issues with the Student, and the Parents stated that the SET stated she told them she threatened to call the SRO to get the Student to behave.

This letter addresses only the issues raised in this complaint and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504, Title II, or other Federal civil rights laws in any other regard. Please note that the Complainant may have the right to file a private suit in federal court regardless of whether OCR finds a violation.

OCR routinely advises recipients of Federal funds and public educational entities that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will protect personal information to the extent provided by law.

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.

Thank you for the courtesy and cooperation your staff extended to OCR during the investigation of this case. If you have any questions regarding your complaint, please contact XXXX. You may also contact me at (303) 844-6083.

Sincerely,

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Resolution Agreement

cc (w/o enclosure): XXXX
Martell Menlove – Superintendent of Public Instruction