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OFFICE FOR CIVIL RIGHTS

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March 4, 2014

Dr. David Schauer
Superintendent
Kyrene School District
8700 South Kyrene Road
Tempe, Arizona 85284

Re: Kyrene School District
OCR Case Number: 08-13-1263

Dear Superintendent Schauer:

On May 20, 2013, we received a complaint of discrimination filed against Kyrene School District (District). The complainant alleged that the District discriminated on the basis of disability. Specifically, she alleged that due to bias on behalf of the investigator the District failed to provide an appropriate resolution to her complaints of discrimination and retaliation relating to her performance evaluation for school year 2012-13. The complainant also alleges that the District retaliated when it did not renew her employment for the upcoming 2013-14 school year.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134. As a recipient of Federal financial assistance from the Department, the District is subject to these laws and regulations.

During our investigation, we considered information provided by the complainant, the District, and other sources. Regarding the complainant's allegation that the District retaliated when it did not rehire her for the 2013-14 school year, we found insufficient evidence to establish the District discriminated as alleged. Below is a discussion of our review of the complainant's allegations, and the relevant facts and legal requirements. Specific to the complainant's allegation that the District failed to provide an appropriate resolution of her complaint, the District requested to resolve this allegation through the enclosed Voluntary Resolution Agreement (Agreement). Prior to the conclusion of our investigation, the District informed us of its desire to enter voluntarily into an agreement to resolve the remainder of the complainant's concerns. Pursuant to Section 302 of our *Case Processing Manual*, we reviewed this request and determined that it justified entering into an agreement without our completing a full investigation of the remaining issue.

On March 4, 2014, we received the District's signed Agreement. We will monitor implementation of the Agreement (copy enclosed) through periodic reports from the District demonstrating the terms of the Agreement have been fulfilled. We will promptly provide written notice to the District of any

deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies.

Background:

The complainant began working for the District as a xxxxxxxxxxxx teacher at xxxxxx Elementary (xxxxxx) pursuant to a Retired Teacher Contract beginning in school year 2010-2011. A retired teacher working for the District is employed for an individual school year only and must reapply annually to seek ongoing employment. By its terms, a Retired Teacher Contract for employment self-terminates at the end of the school year for which the contract is executed. At the end of the 2010-11 and 2011-12 school years, the complainant applied and was hired by the District to continue at xxxxxx via a Retired Teacher Contract. The complainant's final contract with the District was for school year 2012-13. Again, each contract was for the specific school year and terminated at the end of that school year. According to the complainant, in the fall of 2011, her second year with the District, she reported concerns to her supervisor of non-compliance with the Individual with Disabilities Education Act's (IDEA) documentation requirements. Subsequent to her initial complaint regarding the IDEA, the District took actions to address the complainant's concerns during school year 2011-12. The complainant (and her spouse on her behalf) also submitted a series of complaints to the District relating to allegations of retaliation for her earlier complaint of IDEA violations. Many of the alleged incidents dated back to the 2011 school year. The complainant's various letters of complaint are dated: November 4, 2012; November 12, 2012; December 3, 2012; December 6, 2012; December 16, 2012, January 16, 2013; and February 27, 2013. The complaints that the complainant's husband submitted on her behalf are dated March 31, 2013 and April 25, 2013.

The District responded to the complainant's initial complaints regarding the IDEA concerns and took action to address the problems she identified. The District also responded to her various allegations of retaliation many of which were duplications of earlier complaints submitted to various District administrators. The District issued its initial written response in January 2013. The District was in the process of responding to the complainant's subsequent February 2013 complaint when she and her husband alleged bias on the part of the District's identified investigator. In response to her allegations of bias, the District made arrangements for a local attorney to complete the investigation of the complainant's complaint, including the various issues she raised throughout the 2012-13 school year. In her complaint to us, the complainant alleged that the investigating attorney was *also* biased in favor of the District, because the District has previously used the attorney's law firm for other District legal matters. Finally, the complainant alleged that the District did not renew her annual Retired Teacher Contract for the 2013-14 school year in ongoing retaliation for her complaints, primarily the IDEA complaint of 2011-12 school year. We will address the complainant's retaliation allegation first, followed by resolution of the complainant's allegation of bias on behalf of the attorney investigator.

Retaliation:

The complainant alleged that the District retaliated when it did not renew her employment for the 2013-14 school year in her original teaching position or others for which she applied. The District is prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504 or 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; and a causal connection existed between the protected activity and the adverse action. If one of these elements cannot be established, then OCR ends its analysis finding insufficient evidence of retaliation. If, however, each of these elements is established, we then consider whether the recipient has a legitimate, non-retaliatory, reason for its action that is not a pre-text for prohibited discrimination.

The complainant advised us that the District's alleged retaliation resulted from her status as a "whistle blower" relating to her earlier complaints of IDEA non-compliance and her earlier retaliation complaints. For purposes of analysis, we will consider the complainant's various complaints to be protected activities under Section 504 and Title II of which the District was aware.

At the end of the 2012-13 school year, the District advised the complainant that due to an internal employee transfer, the position she held would not be available to her as a contract employee. The complainant and the District agree that as a retired teacher her employment contract is for a set term and her employment terminates at the expiration of the contractual term. The complainant does not, based on the terms of the contract, have a continued expectation of employment despite having held the same position for three consecutive school years. Thus, at the end of the 2012-13 school year in order to continue her employment with the District, she had to reapply and be selected for a position. It is undisputed that her prior position within the District was filled by a regular District teacher and that the District did not continue her employment for the 2013-14 SY. An adverse action causes lasting and tangible harm, or has a deterrent effect on further protected activities. Unpleasant or transient incidents are not considered adverse. Generally, something that you are not entitled to receive, if withheld, is not sufficient to constitute an adverse action. The complainant, however, asserts that the failure to renew her position is an adverse action based on her expectation of continued employment resulting from her prior employment history with the District and oral assurances she was provided regarding ongoing employment. Consequently, we will continue with our analysis without definitely concluding that the failure to renew the complainant's employment constitutes an adverse action in this case.

We next considered whether there is a causal connection between the complainant's protected activities and her non-renewal for the 2013-14 for her original position and for additional positions for which she applied. In order to establish a causal connection between the protected activity and the adverse action, OCR must find evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. A causal connection may also be inferred from the proximity in time between the protected activity and the adverse action. The closer the period between the protected activity and the adverse action the more likely it is that the adverse action resulted from the protected activity. Here, the District did not rehire the complainant for the position she previously held because it was no longer available on a Retired Teacher Contract to any interested retired teacher applicant. The complainant also was not interviewed or selected for any other positions for which she applied. The complainant, however, did not have any assurance from the District that she would be selected for an alternate teaching job, and she was in the same position as other applicants for the available jobs. During the complainant's employment with the District (2010-2013), we noted that she continuously made complaints, of which the District was aware, and the District rehired her throughout that same time period. The District's renewal of the complainant's contract on more than one occasion after her initial complaint and contemporaneous to her other complaints negates an inference of a causal connection. Consequently, we do not find that the complainant's protected activities (beginning in school year 2011) resulted in the District's failure to renew her employment at xxxxxx for 2013-14.

Although not necessary to the analysis absent a causal connection between the complainant's protected activities and the alleged failure to rehire her, we also evaluated the District stated reason for not rehiring the complainant at xxxxxx to determine whether it is a pretext for discriminatory action. Evidence that discredits or undermines the legitimacy of the District's stated reasons for its actions may tend to demonstrate that the District's stated reason is a mere pretext. The complainant reported to us that the District advised her that it was going to reassign a currently employed District teacher (not retired) to her teaching position pursuant to District personnel policy. According to the District, the teacher who replaced the complainant was a regular District teacher, who – due to her status as a regular District employee (not an annual contract employee) - had priority for the position. We reviewed relevant District

policies and found that, as stated, the teacher who replaced the complainant had priority over a retired teacher interested in the same position.

We asked whether the complainant had any reason to believe this teacher is not qualified for the position the complainant previously held. The complainant indicated that she had no reason to believe the teacher who replaced her is unqualified. The District provided us information about this teacher that affirmed her qualifications as a xxxxxxxxxxxx teacher. We asked the District to explain its decision to place this teacher at xxxxxxxx, which resulted in the complainant's former position being unavailable to her or other retired applicants. The District explained the transferred teacher was placed in the position to maintain her full-time employment status. The teacher previously worked two half-time positions at two different schools. One of the half-time positions was eliminated. Thus, to maintain her fulltime status, the teacher was voluntarily transferred to xxxxxxxx. Under applicable District policies the teacher has priority in site selection to available positions not already filled by tenured staff. Thus, she was entitled to move to xxxx causing the position the complainant previously held to become unavailable to the complainant and other retired teacher applicants.

Regarding the various other positions for which the complainant applied, according to information the District provided, the jobs were open to applicants on or about May 1, 2013. The District provided OCR an email message from the Superintendent to all teachers that notified the complainant and other contract teachers that if they wished to apply for available positions they needed to do so. The District confirmed that it received the complainant's earliest application on or after May 26, 2013, which is consistent with what the complainant reported to us. The complainant explained that positions are often posted generally, and do not indicate the specific school where the positions will be available. The complainant also explained that posted positions are available to all interested applicants, including retired teachers, when posted. There is not a specific application period when positions are solely available to retired teachers. Consequently, retired teachers, continuing teachers, and non-district applicants all compete for available positions. The complainant indicated that oftentimes a position, despite being posted, is filled by the same person that held the position the prior year, and interviews are not always conducted. This depends on the particular school principal. Also, applicants often do not know when applying whether a position has already been filled. Based on this information, the complainant did not have a reasonable expectation of an interview or selection for the additional positions for which she applied. Consequently, we do not find that the District retaliated as alleged when it did not grant her an interview or rehire her in any capacity for school year 2013-14.

Grievance Process:

The complainant alleged that the District failed to provide an equitable response to her complaints of retaliation due to investigator bias. Recipients of Department funds that employ fifteen or more persons are required to designate at least one person to coordinate its efforts to comply with Section 504's requirements and adopt grievance procedures (that incorporate appropriate due process standards) that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 (34 C.F.R. § 104.7). The implementing regulation for Title II has similar requirements at 28 C.F.R. § 35.107. Additionally, both Section 504 and Title II prohibit retaliation against individuals who have filed a complaint, participated in an investigation, or asserted a right under Section 504 or Title II. As part our investigation, we verified that the District has the required disability discrimination complaint procedures for the prompt and equitable resolution of complaints. The District also provides appropriate notice of its Compliance Officer. The complainant's various complaints were appropriately directed to the Human Resources Office, which coordinated an investigative response to her concerns.

We reviewed the complainant's letters of complaint to the District and noted that the letters refer to her initial complaints regarding non-compliance with the IDEA and allege that various District staff were retaliating against her for the IDEA complaints. The District responded to the complainant's IDEA

complaints at the time that she made them. The District confirms that it received the complainant's letters of complaint, which include allegations of retaliation. The District was in the midst of responding to some of the complainant's additional allegations when she expressed concern about the District's identified investigator, a retired District administrator, who according to the District was used to conduct independent investigations. The complainant indicated that she believed the retired administrator would not be fair due to her association with the District. Due to the repeated concerns the complainant and her husband raised throughout February and March 2013 regarding the former District administrator conducting an investigation of the complaints, the District ultimately agreed to use a different investigator. In mid-April 2013, the District contacted an attorney to complete the investigation of the complainant's complaints, and advised the complainant that the attorney would complete the investigation. The attorney issued her written findings to the District on June 17, 2013.

In her complaint to us, the complainant expressed concern that the investigating attorney was biased because the District hired and paid her and because the firm the attorney is associated with routinely represents school districts, including the District. The complainant indicated that an attorney she contacted advised her that she should not participate in the District's investigation of the complaints. The complainant confirmed that although the attorney reached out to her on more than one occasion, she did not cooperate in the investigation the attorney conducted. The attorney also advised the complainant that she would proceed with her investigation, even if the complainant chose not to participate.

Section 504 and Title II's regulations contemplate an internal investigative process for allegations of disability discrimination that afford elements of due process, including notice to the recipient or district of the allegations, investigation of all allegations, information gathering from relevant witnesses identified by both the complainant and the recipient, and the application of appropriate legal standards to the relevant facts. Consequently, it is appropriate that the District arrange and pay for the completion of an investigation. Absent an action demonstrating actual bias, the fact that the investigator has an employment relationship with the District is not sufficient to demonstrate a lack of neutrality in the investigative process.

We reviewed the attorney's investigation to determine whether it afforded the appropriate elements of due process. We reviewed the investigating attorney's letter of findings and the investigative file compiled throughout her investigation, which is approximately 600 pages in length. The investigative file included copies of all the complainant's complaints, which had been reviewed. The investigator's hand written notes were on many of the documents indicating her specific attention to the complainant's various allegations of retaliation. The investigative file also included initial interviews and follow-up interviews, where necessary, with relevant witnesses, including those the complainant identified in her complaints. We also noted that the investigator gathered and reviewed pertinent documentation relevant to the investigation. Additionally, the investigative file includes correspondence between the complainant and the investigator demonstrating she made reasonable efforts to review the complainant's information and interview the complainant as part of the investigation. The complainant, however, declined to participate in the interview process.

We also considered whether the investigating attorney applied an appropriate legal standard and made an individualized determination based on the information available to her. The investigator found that the complainant had engaged in a protected activity when she made complaints relating to IDEA non-compliance, and that some of the concerns she raised were valid. The investigating attorney also considered whether the complainant was entitled to "whistle blower" protection under a state statute as she asserted. The investigator further considered whether the District was aware of the complainant's protected activity (reporting IDEA violations) and whether the complainant was subjected to adverse actions. She found that, while the District was aware of the complainant's earlier protected activity, the complainant was not subjected to adverse action(s). Specifically she determined that the alleged actions

did not rise to the level of adverse actions and were not causally related to the complainant's 2011 protected activity. She also specifically noted the fifteen month delay between the complainant's protected activity and the asserted adverse actions. Because adverse action and causal connection were not established, the investigator concluded that retaliation did not occur as the complainant alleged.

Based on our review, we conclude that the District arranged for an appropriate investigation of the complainant's complaint using a local attorney. The attorney initiated her investigation in mid-April 2013 and by June 2013 completed a prompt and thorough investigation applying appropriate legal standards and collecting relevant information from identified witnesses. The complainant indicated to us she was aware that the investigation had been completed in June 2013 without her participation. During our investigation, however, we learned that the complainant was not formally notified of the outcome of the investigation until recently. The District voluntarily agreed to address this concern by implementing the attached agreement, which when fully implemented resolves this concern.

Conclusion:

We find insufficient evidence to establish the District retaliated in violation of Section 504 or Title II when it did not renew the complainant's employment for SY 2013-14. Additionally, the District voluntarily agreed to resolve concerns regarding its investigation of the complainant's complaints by entering into the attached Agreement. In light of this Agreement, OCR finds that the complainant's allegation that the District failed to properly address her complaints of discrimination is resolved. OCR will monitor the District's implementation of the attached Agreement.

This concludes OCR's investigation of this complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter is, in part, a letter of findings and sets forth OCR's determination in an individual 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 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.

As noted previously, the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens the individual may file another complaint alleging this treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Should you have any questions regarding this letter, please contact me at 303-844-2557. You may also contact Sandra Sanchez, Civil Rights Attorney, at 303- 844-6096.

Sincerely,

/S/

Stephen Chen
Supervisory General Attorney

Enc.

Superintendent Schauer – page 7

cc: XXXXXXXXX
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Honorable John Huppenthal
Superintendent of Public Instruction