

Robert G. Huber, Esq.
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Re: OCR Docket #15-15-1044

Dear Mr. Huber:

This letter is to notify you of the disposition of the complaint filed on October 30, 2014, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the White Cloud Public Schools (District), alleging discrimination against a student (Student) on the basis of disability. Specifically, the complaint alleged that the District discriminated against the Student when it:

1. failed to evaluate the Student prior to the adoption of xxxxx Section 504 plan on xxxxx;
2. failed to implement xxxxx Section 504 plan by: xxxxx
3. failed to ensure equal access to education when it xxxxx
4. failed to provide the Student's parent with procedural safeguards in connection with the adoption of xxxxx Section 504 plan; and
5. retaliated against the Student's parent in xxxxx by xxxxx.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a

recipient of Federal financial assistance from the Department and as a public institution, the District is subject to these laws. Therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the legal issues of:

- whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied the benefits of, or otherwise subjected to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130;
- whether the District denied a qualified student with a disability a free and appropriate public education (FAPE) in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33;
- whether the District failed to conduct an evaluation of a student who, because of disability, needs or is believed to need special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35;
- whether the District has failed to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of a disability, need or are believed to need special instruction or related services, a system of procedural safeguards, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.36; and
- whether the District intimidated, threatened, coerced, or discriminated against individuals for the purpose of interfering with any right or privilege secured by Section 504 and Title II, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134.

Because the Title II implementing regulation provided no greater protection than the Section 504 implementing regulation with respect to the issues raised in these complaints, OCR applied Section 504 standards in analyzing the complaint allegations.

During its investigation of this complaint, OCR interviewed the Complainant, the District's xxxxx. OCR also reviewed data submitted by the Complainant and the District.

After a careful review of the evidence obtained, OCR has determined that the evidence is sufficient to support a finding that the District failed to appropriately evaluate the Student and provide an appropriate education plan based on the student's individual needs in violation of Section 504. It further found that the evidence is sufficient to support a finding that the District's policies and procedures failed to comply with the standards set forth in Section 504. However, OCR found insufficient evidence of a violation on the Complainant's retaliation allegation. The bases for our determinations are explained below.

I. OCR's Investigation

The Student, who has been enrolled in the District for xxxxx, began attending the District's xxxxx in xxxxx. According to the Complainant, the Student has xxxxx. Due to these impairments, xxxxx, the Student xxxxx. The Complainant alleged to OCR that although the District adopted a Section 504 plan for the Student on xxxxx, it did so xxxxx and without providing the parent with procedural safeguards.

X—paragraph omitted –X

The Complainant also said that following the 504 meeting at which the Student's plan was adopted, staff xxxxx, failed to implement certain requirements of the plan such as providing the Student: xxxxx. Finally, the Complainant said that there had been xxxxx. As an example, she described a xxxxx.

X—paragraph omitted –X

Subsequently, the Student suffered from disability-related illness xxxxx, during which time xxxxx. The Complainant said the District xxxxx during this period of time, despite xxxxx requests that they do so in compliance with the Section 504 plan. For example, she said xxxxx.

X—paragraph omitted –X

OCR obtained a response to these allegations from the District. According to the District, upon obtaining xxxxx from the Complainant, the District's xxxxx prior to the Section 504 meeting on xxxxx. Xxxxx provided by the Complainant was also considered. The District developed the Section 504 plan on xxxxx.

X—paragraph omitted –X

Information provided by the District indicated that the Complainant was given procedural safeguards in connection with the Section 504 meeting. The Complainant signed the Section 504 plan, and checked the box indicating that she had received them.

Staff disputed that there had been problems implementing the Section 504 plan, or any intent to not implement the plan. However, they noted that since the Student xxxxx, they may not xxxxx. The xxxxx said that the District did xxxxx to the Student xxxxx.

With respect to the retaliation allegation, staff told OCR that on xxxxx, xxxxx, the Complainant xxxxx. Specifically, staff told OCR that the Complainant was xxxxx. Staff said they spoke with the Complainant and reviewed the information she provided, including xxxxx. They also xxxxx. Staff followed up by speaking with xxxxx, who stated the Complainant's xxxxx. In the meantime, staff said the Complainant xxxxx. The xxxxx said he then xxxxx. The xxxxx said that because the Complainant had a xxxxx.

X—paragraph omitted --X

X—paragraph omitted –X

X—paragraph omitted –X

OCR also reviewed the District’s visitor policy (Bylaw 9150), which is publicly available through its website. It states in relevant part that:

X—paragraph omitted--X

OCR tried several times to reach the Complainant via telephone and email to allow her to respond to the information provided by the District, however her phone was not accepting calls, and she has not replied to OCR’s emails.

During the course of the investigation, OCR reviewed the District’s policies and procedures with respect to disability and found various concerns, including an incorrect definition of “disability.” Additionally, the policies state that an individual is disabled within the definition of Section 504 if he or she “has a mental or physical impairment which substantially limits one or more major life activities; the impairment must impact that individual’s education.” Several major life activities are described, but the list is incomplete (for example, failing to mention major bodily functions) and although Section 504 does not require an exhaustive listing of major life activities, the District’s policies, as written, fail to note that its list is not exhaustive, which could give the impression to the reader that major life activities consist only of what the District has identified. Finally, the policy describes the entitlements under Section 504 as “accommodations” and indicates that special education is not permitted under Section 504.

II. Relevant Law and Policy

A. Retaliation

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the Title VI of the Civil Rights Act of 1964 implementing regulation at 34 C.F.R. § 100.7(e), which prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose or interfering with any right or privilege secured by the regulation or because s/he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation. Title II’s implementing regulation contains a similar prohibition against retaliation at 28 C.F.R. § 35.134.

To find a prima facie case of retaliation, OCR must find: (1) the individual engaged in protected activity; (2) the individual experienced a materially adverse action by the recipient; and (3) there is a causal connection between the protected activity and the materially adverse action. To determine whether a “materially adverse action” has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual’s position from making or supporting a charge of discrimination. Normally, petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. The significance of any given

act of retaliation will often depend upon the particular circumstances. Depending on context, an act that would be immaterial in some situations may be material in other situations. Whether an action is materially adverse is judged from the perspective of a reasonable person in the individual's position.

If any of the elements of a prima facie case cannot be established, OCR will find insufficient evidence of a violation. If the evidence demonstrates a prima facie case of retaliation, a presumption or inference of unlawful retaliation is raised. OCR must then determine whether the recipient had a facially legitimate reason for the materially adverse action. If OCR finds that the recipient did have a facially legitimate reason for the materially adverse action, OCR must conduct a "pretext" inquiry to determine whether the recipient's reason is a cover-up for retaliation. Evidence of pretext may involve factual scenarios in which the individual was treated differently from how he or she was treated prior to the protected activity or was treated differently from similarly situated individuals. Evidence of pretext may also include situations in which the individual was treated in a manner that deviated from the recipient's established policies or practices.

B. Disability, FAPE and Exclusion

Section 504 and the ADA define disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such impairment; or (3) being regarded as having such an impairment. The definition of disability is construed broadly and the determination of whether an individual has a disability should not demand extensive analysis. An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting. Additionally, mitigating measures such as medications used to eliminate or reduce the effects of an impairment cannot be considered when determining whether a person has a substantially limiting impairment.

The ADA also provides a non-exhaustive list of major life activities, which include, but are not limited to: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, or communicating; or the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

A student will be deemed to have a disability under Section 504 and to be entitled to a FAPE if the student has a mental or physical impairment that substantially limits one or more major life activities.

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), prohibits recipient school districts from, on the basis of disability, excluding a qualified person with a disability from participation in, denying the person the benefits of, or otherwise subjecting the person to discrimination under any program or activity. The Title II implementing regulation contains a similar provision at 28 C.F.R. § 35.130(a).

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a) and (b) provides that recipients must provide a free appropriate public education (FAPE) to each qualified student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the disability. For purposes of FAPE, the provision of an appropriate education is 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 and that are based upon adherence to procedures that satisfy the specific procedural requirements set forth in the Section 504 regulation at 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a recipient school district to evaluate any student who, because of disability, needs or is believed to need special education or related services. The Section 504 regulation does not set out specific circumstances that trigger the obligation to conduct an evaluation; the decision to conduct an evaluation is governed by the individual circumstances in each case. School districts should not assume that a student's academic success necessarily means that the student is not substantially limited in a major life activity and therefore is not a person with a disability. Grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades. A student may have a disability even if his or her impairment does not substantially limit learning, as long as the impairment substantially limits another major life activity (such as focus or attention, among many others). Appendix A to the regulation notes that it is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the recipient complies with the "process" requirements of Section 504, Subpart D (concerning identification and location, evaluation, and due process procedures).

In addition, the Section 504 implementing regulation at 34 C.F.R. § 104.21, states that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which Section 504 applies. The Title II regulation at 28 C.F.R. § 35.149, contains a similar provision for public entities

The Section 504 and Title II regulations contain standards for determining whether a school's programs, activities, and services are readily accessible to and usable by individuals with disabilities, depending on whether the facilities are determined to be existing facilities, new construction, or altered construction. The applicable standard depends on the date of construction or alteration of the facility and the nature of any alternation.

III. Analysis and Conclusion

A. Retaliation

With respect to the retaliation allegation, OCR finds that the Complainant satisfied the prima facie case for retaliation in that she engaged in a protected activity on xxxxx, when she advocated for the Student. Additionally, the District took an adverse action against the Complainant when it xxxxx, and there was a facially causal connection between the two, as the xxxxx on the same day that the Complainant engaged in her protected activity, i.e., making her verbal complaint to the District about the Student. However the District then provided evidence regarding its actual reason for this action: that the Complainant xxxxx. The Complainant did not provide further information to rebut the District's assertions or to show that they were a pretext for discrimination.

Additionally, OCR's review of the District's visitor's policy demonstrates that xxxxx.

Based on this information, OCR concludes that the District had a legitimate non-discriminatory reason for xxxxx. The District was motivated by a desire to ensure xxxxx. According to the information that was provided by the District, against which the Complainant has provided no rebuttal, the Complainant was xxxxx. While the evidence suggests that in addition to xxxxx the Complainant also began to xxxxx, not an effort to stifle the concerns themselves being raised – nor was it in response to the Complainant's advocacy on behalf of the Student. The evidence further shows that the District acted in a manner consistent with its own publicly available visitor's policy.

Earlier during the course of OCR's investigation, the Complainant disputed the District's account of the events of xxxxx, simply disagreeing that the events occurred as the District described. After the District provided additional information and detail about the events of the day in question, the Complainant did not proffer any additional information to rebut the District's assertions. The Complainant's disagreement with the District's account, without more, fails to support a finding that the District's proffered reasons for its actions were a pretext for discrimination. Accordingly, OCR finds insufficient evidence that the District retaliated against the Complainant.

OCR encourages the District to make the Complainant aware in writing, of its process for xxxxx.

B. Remaining Allegations

As noted above, except under extraordinary circumstances, OCR does not review, the individual evaluation and placement decisions of a District, so long as the recipient complies with the procedural requirements of Section 504. However, in the instant case, the evidence is sufficient to demonstrate that the District failed to comply with the procedural requirements of Section 504 when the District failed to appropriately evaluate the Student and assess her in all areas of suspected need, including xxxxx. The evidence also supports that the District failed to provide the Student an appropriate education that 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; specifically, the Student's 504 plan xxxxx, rather than following the required procedures for determining the appropriate related aids and services necessary to meet the Student's needs.

Because the evidence is sufficient to demonstrate that the District did not appropriately evaluate the Student, or provide an appropriate education plan based on the student's individual needs, it is unnecessary to make further findings as to whether or not other specific plan items (such as xxxxx) were implemented in this case, as the Student xxxxx. OCR's proposed agreement, described below, will address and remedy any areas of the Student's education program that may not have been implemented during the xxxxx time period in which the plan was in effect.

With respect to the District's Section 504 policies and procedures, OCR found that they failed to include an appropriate definition of disability and FAPE. Specifically, contrary to Section 504, the policies state that a student may only be considered disabled under Section 504 to the extent that her impairment impacts her education. As noted above, a student may have a disability even if his or her impairment does not substantially limit learning, as long as the impairment substantially limits another major life activity (such as focus or attention, among many others).

Additionally, the policies and procedures did not provide an appropriate description of regular and special education and related aids and services to which a student is entitled under Section 504. The provision of FAPE may require special education, a one-on-one aide, and any number of other measures depending on the student's unique needs, to be determined by an appropriate evaluation of the Student, which did not occur in this case.

The District has submitted the enclosed signed Agreement to OCR, which, once fully implemented, will resolve the complaint violations regarding the deficiencies in its 504 policies and procedures and the failure to evaluate the Student fully and appropriately, and will ensure the District's compliance with Section 504 and Title II.

IV. Conclusion

Based on the information above, OCR is closing this complaint effective the date of this letter. This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerced, 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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The complainant may have the right to file a private suit in federal court, whether or not OCR

finds a violation.

OCR appreciates the District's cooperation during the investigation of this complaint. If you have any questions, please contact me at (216) xxx-xxxx, or Kelly.M.Johnson@ed.gov. For questions about implementation of the Agreement, please contact Ms. Gayle Horwitz at (216) xxx-xxxx, or by email at Gayle.Horwitz@ed.gov, who will be monitoring the District's implementation of the Agreement. We look forward to receiving the District's first monitoring report by xxxx. Should you choose to submit your monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

/s/

Kelly M. Johnson
Supervisory Attorney/Team Leader