



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I  
5 POST OFFICE SQUARE, 8<sup>th</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

March 22, 2018

Lyle Holiday  
Superintendent  
Windham Southeast Supervisory Union  
[lholiday@wsesu.org](mailto:lholiday@wsesu.org)

Re: Complaint No. 01-13-1155  
Windham Southeast Supervisory Union

Dear Superintendent Holiday:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint received on April 11, 2013 against Windham Southeast Supervisory Union (the District). In the complaint, the Complainant alleged that the District discriminated against her in retaliation for her advocacy on behalf of students with disabilities.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces 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 against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department.

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In reaching a determination, OCR reviewed documents provided by the District; interviewed the Complainant and District faculty/staff; interviewed staff for the XXXXXXXXXXXXXXXX tutoring contractor; and conducted a site visit at the District on September 26, 2013.

After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II, which the District agreed to resolve through the enclosed resolution agreement. OCR's findings and conclusions are discussed below.

## **Background**

During the time period relevant to this investigation, the Complainant was a tutor employed by an independent contractor, XXX, under a statewide Supplemental Educational Services (SES) program in Vermont, which offers additional academic instruction outside the school day or during the summer. The Complainant was not an employee of the District. Under the SES program, parents may select tutors from a list through several licensed contractors in the state (XXX is one such contractor). The tutors then provide tutorial services at various locations which may include public libraries, a student's home, or a local school. While the tutors may collaborate with teachers, they are not employees of any school district, and they are therefore not under the supervision of any school district.

During the 2012-2013 school year, Complainant was providing tutoring services to several students with disabilities at the District's XXXXXXXXXXXXXXXX (School). She alleged that she informed the District of disability-based harassment and that, after she informed the District of this harassment, the District retaliated when it: a) developed a specific communication protocol that required that she communicate through her work supervisor, XXXXXXXXXXXX (Supervisor); b) no longer allowed her to tutor students at the School; c) no longer allowed her to tutor any of her students at any school within the District; and d) threatened to complain to the Vermont Agency of Education (Agency), the agency that licenses XXX, if the Complainant continued to communicate directly with District staff.

## **Legal Standards**

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In analyzing an individual's claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future<sup>1</sup>; (2) the individual experienced an adverse action caused by the recipient<sup>2</sup>; and, (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR next examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

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<sup>1</sup> A "protected activity" is the exercise of a right that is protected under OCR's non-discrimination laws.

<sup>2</sup> An adverse action is something that could deter a reasonable person from engaging in further protected activity

## **Analysis**

### ***Prong One: Protected Activity***

OCR determined that the Complainant sent three emails to the District in March and April 2013, in which she engaged in protected activity by advocating on behalf of students with disabilities at the District. An individual engages in a protected activity if he/she asserts a right or privilege or opposes an act or policy that he/she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under one of the laws OCR enforces.

In the first email, sent on March 6, 2013, to a District teacher (Teacher), the Complainant expressed her concerns that a math teacher was harassing a student based on his disability, and that his educational placement was not meeting his needs. In the second email, sent by the Complainant on March 7, 2013, to the School's principal (Principal) and the Teacher, the Complainant expressed her concern that a student was being harassed by peers based on his disability. In the third email, sent on April 8, 2013, by the Complainant to her Supervisor, who then forwarded the message to the Principal and the Teacher, the Complainant reported concerns that another student was harassing a peer based on disability.

OCR determined that these emails constituted protected activity because the Complainant alerted the District to incidents of disability-based harassment involving School personnel and students, and also raised concerns about a Student's educational placement.<sup>3</sup> Further, the evidence indicated that the District believed the Complainant would continue to raise disability-based allegations with the District (as described *infra*), which is also sufficient to satisfy the first prong of the retaliation analysis.

### ***Prong Two: Adverse Action***

OCR determined that in response to the Complainant's advocacy, the District took a series of adverse actions (i.e., actions that could deter a reasonable person from engaging in further protected activity). Based on email correspondence involving District personnel and the Supervisor, OCR found that during the month following the Complainant's email of March 6, 2013, the District took the following five adverse actions against the Complainant.

First, the District repeatedly contacted the Supervisor to raise concerns about the Complainant's conduct, including her disability-based advocacy on behalf of students. After the Complainant's email on March 6, 2013, through April 10, 2013, the District had no fewer than ten contacts with the Supervisor, including emails expressing their concerns about the Complainant and in-person meetings. The Complainant's Supervisor indicated in an email dated April 9, 2013, that she "promise[d] to make this problem disappear if we can only get through to the end of the year," indicating that she did not intend to continue employing the Complainant after the District's repeated complaints. Accordingly, OCR determined that the District's correspondence with the Supervisor constituted an adverse action.

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<sup>3</sup> The Complainant also sent a series of other emails that OCR determined did not constitute protected activity.

Second, the District created a communication protocol specifically for the Complainant. As described by the District, the protocol required that the Complainant’s “communications with [School] staff and classroom teachers would be limited to providing information about the academics of students who were being tutored.” All other communications, including but not limited to harassment allegations, were to be reported to her Supervisor, who would then report them to the District. OCR determined that this constituted an adverse action because no other tutor had such a protocol, and it placed the Complainant at risk for violating the law because, as a mandatory reporter, she had an obligation to report harassment to the District.<sup>4</sup>

Third, the District threatened the Complainant’s Supervisor with a complaint to the Vermont Agency of Education (Agency), based on the Complainant’s conduct (including her disability-based advocacy), and the District eventually did contact the Agency with concerns about XXX. OCR determined that emails involving District personnel and the Supervisor in March and early April 2013 indicated that District personnel may have believed the Complainant was not permitted to file complaints with the District as an XXX tutor (despite that she was a mandatory reporter) and that it was necessary to take action against her, including by contacting the Agency. In subsequent email communications to the Supervisor in April 2013, the Director XXXXX, XXXXXXXXXXXXXXXXXXXX (Director) cc-ed personnel from the Agency when “formally requesting” the Complainant no longer tutor any students in the District.<sup>5</sup> Because the Agency is responsible for licensing, the evidence indicates that the District’s actions in contacting the Agency regarding the Complainant were threatening and potentially punitive.<sup>6</sup> Based on the above, OCR determined that the District engaged in an adverse action when contacting the Agency.

Fourth, the District prohibited the Complainant from tutoring at least one student at the School, instead suggesting she tutor them at the public library. In an email to the Supervisor on March 8, 2013, the Principal wrote: “At this point, with this student I’m requesting that tutoring take place off campus, at a mutually agreeable location. (Public library comes to mind.)” The evidence indicates that the Director and Principal appeared to believe the Complainant would not be tutoring any students at the School, while the Supervisor understood the ban to be limited to the Complainant’s tutoring of one student. OCR determined that the Principal advised the Supervisor in an email on April 2, 2013, that tutoring on campus was a “courtesy extended to [XXX] and to the families of those enrolled in the SES program”; accordingly, OCR determined that the removal thereof constituted an adverse action, regardless of whether the Complainant was banned entirely, or prohibited from tutoring one student on campus.

Finally, the District prohibited the Complainant from tutoring any students at the School and, eventually, any students in the District. On April 10, 2013, the Director sent an email to the Supervisor stating that the District was “formally requesting she be removed from tutoring

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<sup>4</sup> The Director acknowledged in her interview that as a mandatory reporter, a tutor who believed a student was being harassed would need to tell the principal or counselor.

<sup>5</sup> The emails between District personnel during this timeframe also substantiated that the District was aware of the possible consequences for the Complainant and for XXX. On March 7, 2013, the Principal stated in an email to District personnel on March 7, 2013: “I think we need to ask [Complainant] to “cease and desist” if you know what I mean . . . This could well jeopardize Options relationship with not only WSESU, but the DOE as well. I suspect [Complainant’s the Supervisor] should be motivated to take care of this.”

<sup>6</sup> The anti-retaliation regulation specifically prohibits “threaten[ing].” 34 C.F.R. 100.7(e).

[District] students” before April 22, 2013, or the District would insist that all tutoring delivered by XXX tutors takes place outside the school.” The Director also stated that the District “did not want [the Complainant] to be working in the [School],” and that “all communications other than academic be filtered through you,” but that this issue “has not been resolved to our satisfaction.” OCR determined that this conduct was adverse in nature, since it prohibited the Complainant from tutoring District students, when other XXX tutors were not similarly restricted. OCR further determined that the District’s actions also had the effect of curtailing the Complainant’s employment.

Based on the above, OCR determined that the actions taken by the District described above could deter a reasonable person from engaging in further protected activity, and therefore constituted adverse actions against the Complainant.

***Prong Three: Causal Connection***

In determining whether there is an inferable causal connection between the protected activity and the adverse action, a key factor is the proximity in time between the protected activity and the adverse action. The investigation showed that the Complainant sent her initial email on March 6, 2013, after which the first adverse action took place on March 7, 2013, when the Complainant’s Supervisor met with District personnel. Further, the protocol was first communicated to the Complainant on March 8, 2013 and, later that same day, the Principal prohibited the Complainant from tutoring at least one student on campus. Accordingly, OCR determined that the protected activity and adverse action were closely proximate in time and supported that a causal connection existed.

Further, emails from the period indicated that the District personnel took the above-referenced adverse actions in response to the Complainant’s advocacy. OCR determined that emails by District administrators in March 2013 stated that the Complainant was “inserting herself into school related issues” when “she absolutely should not be”; in addition, the Principal wrote in his emails that the District had matters “under control,” that the advocacy “feels way off base,” and that he was “[o]ut of patience with this.” Finally, when the District ultimately prohibited the Complainant from tutoring any students on April 10, 2013, the Director explained that the District had to “insist” the Complainant be removed “[i]n light of a recent email exchange involving [a student] and non-academic issues,” referring to the Complainant’s emails in which she expressed concern that a student was being subjected to harassment by a peer, based on his disability.

Based on the above, OCR determined that the evidence substantiated that a causal connection existed between the protected activity and the adverse actions.

***Prong Four: Legitimate, Non-Retaliatory Reason for Taking the Actions***

The District contended that it had several legitimate, non-retaliatory reasons for taking these adverse actions. However, OCR determined that the District failed to proffer legitimate and/or non-retaliatory reasons, as explained below.

Proffered Reason: Complainant’s Emails Were Burdensome for Teachers

The District contends the communication protocol implemented for the Complainant was designed to ensure that the District would review and investigate any complaints, and that the teachers and other staff “would be able to focus on instruction in the classroom and not feel responsible for responding directly to [the Complainant’s] on-going concerns.” However, the Director stated in her interview with OCR that, as a mandatory reporter, a tutor who believed a student was being harassed would need to inform the principal or counselor, and the evidence indicates that with different tutors with whom the District contracted, the Director recognized this was the appropriate procedure.<sup>7</sup> In contrast, OCR determined that the Complainant was not directed to report any harassment allegations to the appropriate administrator at the School, but was required to relay the allegations to her Supervisor, who would then contact the administrator.

While the evidence suggests while the District may have initially had a legitimate, non-retaliatory reason for creating a protocol (i.e., concerns about teachers diverting attention away from the classroom), OCR determined that the protocol was not developed or implemented in a manner consistent with its stated purpose and forced the Complainant to choose between following the protocol and complying with her mandatory reporter requirements. Accordingly, OCR determined that the evidence indicated the District did not provide legitimate, non-retaliatory reasons with respect to use of the protocol.

Proffered Reason: Complainant’s Failure to Follow Protocol

The District also asserts that the Complainant failed to follow the protocol, which resulted in restrictions on her on campus tutoring, and the prohibition on her tutoring at the District. As stated above, OCR determined that the protocol itself was an adverse action. Moreover, the evidence indicates that when the Complainant attempted to use the protocol, District personnel did not follow the protocol in responding. Specifically, the Supervisor emailed the Principal on April 2, 2013, asking to confirm which District personnel were designated to receive information reported by the Complainant concerning bullying and harassment. Rather than emphasizing the protocol (i.e., by stating that the Complainant should communicate through her Supervisor), the Principal instead informed the Supervisor that if the Complainant was aware of harassment, she was to tell the *student* to contact the school. This effectively prohibited the Complainant from notifying the District of incidents of harassment, and potentially could have required students to advocate for themselves after attempting to reach out to the Complainant regarding harassment they experienced.

Additionally, OCR determined that the timeline of events does not support the District’s position that it took the adverse actions in response to the Complainant’s failure to follow the protocol. As stated above, the Complainant sent her first two emails constituting protected activity on March 6, and 7, 2013; the Supervisor confirmed the protocol with the Complainant the morning of March 8, 2013, and emailed the Principal later the same morning to confirm the protocol was in place. On the same day, in the late afternoon, the Principal sent the above-referenced email to

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<sup>7</sup> In an email dated March 15, 2013, the Director wrote that a different tutoring organization “also contacted me this week saying, as they are mandatory reporters, they have had to report a situation communicated to them by one of our students.”

the Supervisor requesting that the Complainant conduct tutoring of a student off-campus. OCR found no evidence of any communication between the Complainant and the District during the day on March 8, 2013, concerning any alleged breach of protocol or other matters. Therefore, OCR determined that the adverse action taken by the District, in requiring the Complainant to tutor a student off-campus, cannot be inferred to be the result of any breach of the protocol by the Complainant.

Proffered Reason: Complainant’s Allegations Lacked Merit

The District further informed OCR that the adverse actions were taken because the Complainant was raising allegations that lacked merit. OCR determined that this does not constitute a legitimate, non-retaliatory reason. Specifically, the Complainant engaged in protected activity in advocating for students, whether or not harassment violating Section 504 or Title II (or other federal regulations) in fact occurred.<sup>8</sup> By extension, a District cannot retaliate simply because it found the allegations to lack merit.

The District also suggested in its August 2013 communications to OCR that the Complainant may have been acting in bad faith when bringing the allegations (and therefore had not engaged in a protected activity). However, when interviewed earlier in the investigation, District administrators informed OCR that the District was not contending there was no merit to investigating the complaints, and provided a “qualified yes” when asked if the Complainant was sincere in her concerns. OCR also determined that the evidence indicated that there appeared to be at least some merit to the allegations. District personnel conceded that there was a history of conflict between one student, whom the Complainant had reported as being harassed based on disability, and the student who allegedly harassed him, and the alleged harasser was disciplined for this conduct. While OCR did not find any evidence to indicate that the District failed to respond appropriately to incidents raised by the Complainant, OCR determined that the District did not proffer a legitimate, non-retaliatory reason by citing a potential lack of merit with respect to the Complainant’s allegations.

Further, the evidence does not indicate that District adequately investigated the Complainant’s allegations before responding adversely. As discussed above, the Complainant’s initial email was sent on March 6, at 6:45 p.m.; the next morning, at 6:55 a.m., the Principal emailed the Director stating “[w]e’ve got an issue with one of the SES tutors.” The evidence did not substantiate that the District undertook a complete investigation of the allegations in roughly twelve hours, none of which were normal school hours, particularly when the evidence did not indicate the District contacted the Complainant about her allegations, at this time or any other.

Proffered Reason: Complainant Raised “Non-Academic” Matters

The District also suggests the adverse actions were motivated by the Complainant’s observations and conclusions about non-academic matters, not her harassment allegations. The District characterized her emails as containing “her personal analysis of the issues” and “why certain

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<sup>8</sup> Cf. *Bakhtiari v. Lutz*, 507 F.3d 1132, 1137 (8th Cir. 2007) (“[A] plaintiff employee need not establish that the conduct he opposed was in fact prohibited under Title VII; rather he need only demonstrate that he had a ‘good faith, reasonable belief that the underlying challenged conduct violated [Title VII].’”).

individuals may be having the emotional/social or medical problems she believed they were having.” In addition, on March 8, 2013, the Principal emailed the Teacher stating that the Complainant “is not a mental health professional and for her to be making such allegations is, at best, a large stretch for a tutor.”

OCR determined that the evidence indicated that the District objected to the Complainant stating her personal beliefs in the concerns she was reporting, including potential harm to a student’s long-term mental health, and physical symptoms she believed were related to a student’s emotional state. However, OCR determined that the District’s actions, in requiring a complainant to include only the detail the District believes they are qualified to provide, could result in a failure to respond appropriately to allegations of harassment and other discriminatory conduct, and would have the effect of deterring or discouraging future reporting. OCR determined that this therefore does not constitute a legitimate, non-retaliatory reason.<sup>9</sup>

### **Conclusion**

Based on the above, OCR determined that the District did not proffer legitimate, non-retaliatory reasons for the adverse actions described above, and OCR concluded that the reasons proffered were pretextual. OCR found that statements made by District personnel in emails at the time and during interviews with OCR substantiated that the adverse actions were the direct result of the protected activity, and not any other cause. Therefore, OCR concludes the adverse actions were retaliation for the Complainant’s protected activity. Therefore, OCR determined that the District was not in compliance with Section 504 and Title II.

On March 15, 2018, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR’s *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant if the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the District’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into the by the District on March 15, 2018, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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<sup>9</sup> The District also suggested that it was the Complainant’s other communications, not her harassment allegations, which warranted the adverse actions, and cited an email from the Complainant expressing concern for the health of a woman she saw on campus. However, this email was sent on March 12, 2013, after the protocol was created and after the Complainant was prohibited from tutoring a student on campus.

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

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, you may contact Civil Rights Attorney Catherine Deneke at (617) 289-0080 or by e-mail at [Catherine.Deneke@ed.gov](mailto:Catherine.Deneke@ed.gov).

Sincerely,

/s/

Meena Morey Chandra *w/p AMM*  
Acting Regional Director

Enclosure