



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

October 11, 2018

VIA EMAIL: c/o Mary Ann Carroll at macarroll@hcllawri.com

Re: Complaint No. 01-15-1104
Portsmouth School Department

Dear Superintendent Ana C. Riley:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received on March 2, 2015, against the Portsmouth School Department (District). OCR investigated the following legal issues:

1. Whether the District failed to provide the Student a free appropriate public education (FAPE) by failing to implement her 504 plan, in violation of 34 C.F.R. § 104.33(a) and (b) and 28 C.F.R. § 35.130.
2. Whether the District failed to provide the Student a FAPE by failing to design her education program to meet her individual needs to the same extent that the needs of nondisabled students are met, in violation of 34 C.F.R. § 104.33(a) and (b) and 28 C.F.R. § 35.130.
3. Whether the District retaliated against the Complainant by filing a truancy complaint and issuing a no trespass notice after she exercised her rights under Section 504, in violation of 34 C.F.R. § 104.61, which incorporates by reference 34 C.F.R. § 100.7(e).

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 any program or activity receiving 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 laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or their implementing regulations, or who files a complaint, testifies, assists, or participates in a proceeding under these laws.

In reaching a determination, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant and District staff. After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II regarding Allegation 1, which the District agreed to resolve through the

enclosed resolution agreement (Agreement). However, OCR found insufficient evidence to support Allegations 2 and 3. OCR’s findings and conclusions are discussed below.

Background

The District first placed the Student on a Section 504 plan on April 28, 2014. At the time, the Student had been missing a significant amount of school due to health issues. The Complainant submitted a note from the Student’s pediatrician dated April 17, 2014, stating that the Student should not return to school until her fever resolves. She also submitted a note from the Student’s pediatrician dated April 28, 2014, which read, “patient may have missed schooling due to diagnosis of the following: XXXXXXXX [sic], XXXXXXXXXXXXXXXXXXXX, XXX [XXXXXXXXXXXXXXXXXX], possible [X]XXX.” The Student also had surgery in April 2014 to XX.

OCR learned from interviews with four team members that a directive from the administration triggered the initial 504 plan in April 2014. They explained that the Student had been receiving private tutoring, and the administration ordered the Principal to find a way to pay for the tutoring. The 504 plan provided ten hours a week of home tutoring, to be reevaluated in June. The plan also required teachers to “provide academic material” for the tutor and to “consult/communicate with the tutor.” The District did not initiate its own evaluations or otherwise seek out additional evaluative data prior to placing the Student on the initial plan beyond noting in the plan that the parent would provide further diagnosis documentation.

On June 12, 2014, the team reduced the tutoring to six hours a week to end on June 30. The plan continued to require teachers to provide academic material and communicate with the tutor but no longer included the language regarding the parent’s responsibility to provide further diagnosis documentation. The District did not initiate its own evaluations or otherwise seek out additional evaluative data prior to reducing the tutoring hours. The plan also stated that the team would reconvene in August to reevaluate the plan.

According to the District, the Complainant did not want to convene the team until after the school year began in order to have a more accurate sense of how the Student was performing. The Student attended the first two and a half weeks of the 2014-2015 school year without incident but was dismissed from school on September 11, 2014, after experiencing a headache, dizziness, and fast heart rate.¹ The Complainant emailed the school that the emergency room doctors thought that the Student “may have a XX earlier this year.” The Complainant told OCR that she recalled requesting a meeting within a week of the Student’s relapse on September 11, and that the District told her that the school could not reinstate tutoring until the team reconvened. She explained that during this time, the Student was undergoing significant medical testing. The Complainant submitted a note from the Student’s pediatrician dated October 9, 2014, which read, “Out since 10/6 due to medical illness. Please

¹ Attendance records show that the Student returned to school for three consecutive days on September 29, 2014, but then remained out beginning October 1, 2014, until the District approved the Complainant’s request to XXXXXXXXXXXXX on January 29, 2015.

reinstate tutor. No gym when returns. Headache/fevers.” In addition, a September 16, 2014, email from the Guidance Counselor to District staff indicated that the Complainant reported that the Student had an XX.

The team convened on October 14, 2014, and created a plan that provided two hours of tutoring per week “until [a] health care plan is developed.” The Complainant’s copy of the plan included a handwritten note that indicated six hours of tutoring would be provided following a meeting with the Principal on October 16, 2014.² The plan included the same provisions as prior plans regarding teachers providing academic material and communicating with the tutor. Again, the District did not initiate its own evaluations or otherwise seek out additional evaluative data prior to changing the tutoring hours beyond reinserting a statement into the plan that the parents would provide medical updates.

According to the Complainant, the team did not determine the number of tutoring hours based on the Student’s needs. Rather, she believed the number of hours was limited by the District’s finances because when she requested more hours, the District would respond with phrases like, “that’s all we can do for now.”

Team members told OCR that reductions in the number of tutoring hours were a result of either the approaching end of the school year, a recommendation from the tutor, a directive from a new administration,³ or the team’s attempt to get the Student back in school as soon as possible. Team members also told OCR that they did not believe the Student had a qualifying disability based on the documentation provided by the Complainant, and in retrospect, they would have conducted evaluations rather than automatically placing the Student on a 504 plan.

On November 7, 2014, in a letter to the Complainant, the Principal requested a diagnosis that “complies with the 504 statute” and informed the Complainant that the pediatrician’s note submitted by the Complainant “did not identify her diagnosis and is not valid.” On November 19, 2014, the Principal sent a letter notifying the Complainant that the Student had missed 41 days of school and that if the Student did not return to school by November 24, a truancy petition would be filed. The Student’s pediatrician submitted a note dated November 20, 2014, diagnosing the Student with “XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX[sic] XXXXXXXX.”

On December 5, 2014, the team convened to discuss a draft individual health plan, separate from the 504 plan, that allowed the Student to XXXXXXXXXXXXXXXXXXXXXXXX at all times for her migraines and provided a response plan in case of XXXXXXXXXXXXXXXX to address her XXXXXXXXXXXXXXXX diagnosis. The Complainant said that she was not permitted to discuss her Section 504 grievances and other concerns at the meeting (i.e., teachers were not communicating with the tutor or sending home tests/quizzes as required by the 504 plan, the team should have convened earlier following the October meeting, and the District refused to

² The District submitted a log demonstrating that the District consistently paid the tutor for six hours per week beginning October 21, 2014, through the remainder of the calendar year.

³ As of December 9, 2015, the date of OCR’s onsite, District counsel informed OCR that the District had gone through three superintendents over the last four years.

provide a complete response to her repeated request for the Student’s records). She refused to sign the health plan.

On December 11, 2014, the District filed a truancy complaint stating that the Student had been absent XX of 70 days that school year. The District also notified the Complainant via a letter dated December 12, 2014, and email dated December 17, 2014, that tutoring would cease at the end of the calendar year because there was no valid basis for the 504 plan. The District approved the Complainant’s request to home school the Student on January 29, 2015, and the court subsequently dismissed the truancy petition on February 5, 2015.

Also on February 5, 2015, the Complainant received a no trespass order based on “threatening comments” she made to the superintendent that morning. District counsel told OCR that after the court dismissed the truancy petition, the Complainant showed up at the superintendent’s office to meet with the superintendent but was turned away by the superintendent’s assistant. According to District counsel, the Complainant “made a statement something to the effect of ‘tell her I will get her [the superintendent] and will get her schools.’” The Complainant denied making any threatening statement and said that all she did was inform the District she wanted to file a formal complaint.

The District provided OCR with emails and handwritten instructions for the tutor demonstrating that there was communication with the Student’s two academic teachers for science/math and English/social studies on the following dates: October 22, 23, and 28, 2014; November 5, 10, 15, 19, 20, and 21, 2014; December 8, 10, and 16, 2014; and January 7 and 8, 2015. Of those dates, the science/math teacher communicated about tests and/or quizzes on November 5, November 19, December 8, December 10, and January 8, and the English/social studies teacher communicated about a quiz on November 20.

Allegation 1

Legal Standard

Section 504 requires a district to provide a FAPE to each qualified student with a disability in its jurisdiction. 34 C.F.R. § 104.33(a). The provision of FAPE is defined as 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. 34 C.F.R. § 104.33(b). When a team determines services are necessary for a student to receive a FAPE, a district must implement those services. If OCR finds that a district has not implemented a student’s plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

Analysis

The Complainant alleged that the District did not provide any tutoring for six weeks beginning September 11, 2014. She also alleged that the District did not implement the provisions of the

Student’s plan regarding teachers communicating with the tutor and providing the tutor with academic material, i.e., tests and quizzes.

OCR reviewed the Student’s 504 plans. The June 12, 2014, plan provided six hours of tutoring through June 30, 2014. Therefore, when the Student became ill on September 11, 2014, there was no plan in place that provided tutoring. The team then convened on October 14, 2014, to develop a new plan, and tutoring began on October 21, 2014, and continued for the remainder of the calendar year. Thus, OCR found that there was no failure to implement with regard to tutoring hours because there was no plan requiring tutoring in place until October 14, 2014.

The Complainant also alleged that the District did not implement the provisions of the 504 plan requiring teachers to communicate with the tutor and to provide academic work for the tutor. The Complainant shared an email from November 7, 2014, in which she wrote that the Student’s teachers had made “zero effort” since the October 14, 2014, team meeting to reach out to the Student’s tutor. She told OCR that the teachers did not send home tests or quizzes until she raised concerns at the December 5, 2014, team meeting. However, the District provided contemporaneous documentation showing communication between the teachers and tutor on numerous dates, including communication about tests and/or quizzes. Therefore, OCR found insufficient evidence that the District failed to implement the provisions of the Student’s 504 plan requiring teachers to communicate with the tutor and to provide academic work, specifically tests and quizzes.

Allegation 2

Legal Standard

As part of providing a FAPE, a district must evaluate any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education and any subsequent significant change in placement. 34 C.F.R. § 104.34(a). The regulation implementing Section 504, at 34 C.F.R. Section 104.3(j), defines a qualified individual with a disability as any individual who has a physical or mental impairment which substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. If the student’s impairment substantially limits one or more major life activities, the next question for the district is whether the impairment limits the student’s access to the educational benefits, programs, services and activities. If the impairment limits the student’s access, then the district must determine which services, or combination of services, are needed in order to provide that student with a FAPE.

In making placement decisions, Section 504 requires a district to (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement

options, and (4) ensure that the placement decision is made in conformity with 34 C.F.R. § 104.34 regarding educational setting. 34 C.F.R. § 104.35(c).

The evaluation procedures must ensure that students are not misclassified; unnecessarily labeled as having a disability; or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials. The Section 504 regulations further detail that the tests and evaluation materials that are used must be chosen to assess specific areas of a student's needs, and only trained people may administer the tests or evaluation materials. A physician's medical diagnosis of an illness does not automatically mean a student can receive services under Section 504. A medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity.

Analysis

The Complainant alleged that the District reduced the number of tutoring hours for reasons unrelated to the Student's individual needs. OCR found a violation on this matter and determined that the District failed to: follow the correct process to identify whether the Student was a qualified student with a disability, evaluate the Student, determine the amount of information required to evaluate the Student, make individualized determinations about the Student's needs, and ensure that the placement decision was made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. In the Student's situation, the team never engaged in the inquiry of whether the Student had a physical or mental impairment that substantially limited one or more major life activities. The District created three 504 plans in April 2014, June 2014, and October 2014, and one individual health plan in December 2014, with only minimal documentation from the Complainant. Three of the team members that OCR interviewed stated that in retrospect, the team should not have created a 504 plan without further documentation than a doctor's note containing limited information. They acknowledged that the decision was made for reasons unrelated to whether the Student was a qualified student with a disability. A medical note that is mainly limited to a statement of diagnosis does not provide any information regarding an individual student's needs and how the disability affects the student's access to education as is required under Section 504. Although the District repeatedly requested additional documentation from the Complainant during the 2014-2015 school year, the District never initiated its own evaluations or asked the Complainant for consent to conduct its own evaluations, as required by Section 504. Without any evaluative materials that could serve as a basis for eligibility, there was no basis for determining whether the ensuing 504 plan was appropriate and met the Student's individual needs.

Thus, OCR found that the initial determination to put the Student on a 504 plan in April 2014 was based on a directive from the administration at that time, i.e., the Complainant was paying for private tutoring, and the administration wanted the District to find a way to pay for the tutoring instead. Even more concerning was that the decision regarding the tutoring services needed was not determined by the team based on a formal evaluation, or even based on any of the limited information the District could have obtained about the Student (from teachers, the outside tutor, etc.), but based on a directive from the administration.

While the District later developed an individual health plan for the Student in December 2014, the provision and implementation of an individual health plan did not alleviate the District's obligation to conduct an evaluation to determine the need for special education or related services or to follow the procedural requirements of Section 504 when determining the proper educational placement of a qualified student with a disability. An individual health plan may also not provide parents and/or guardians with the procedural safeguards afforded by Section 504.

Therefore, OCR found a violation of Section 504 and Title II with respect to the District's placement decisions regarding the number of tutoring hours appropriate for the Student, and entered into the enclosed Agreement to address the violations

Allegation 3

Legal Standard

The regulation implementing Section 504 at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e), and prohibits retaliation against any individual who has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under 34 C.F.R. Part 104.

In investigating retaliation, OCR first establishes 1) whether an individual experienced an adverse action caused by the district, 2) the district knew that the individual engaged in a protected activity, and 3) there is some evidence of a causal connection between the adverse action and protected activity. If OCR determines that any element is missing, OCR will conclude that there is insufficient evidence for a finding of retaliation. If OCR determines that all three elements are satisfied, OCR will then establish 4) whether there is a facially legitimate non-retaliatory reason for the adverse action and, if so, 5) whether the facially legitimate non-retaliatory reason is a pretext for retaliation or whether the district had multiple motives (i.e., illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action.

Analysis

The Complainant alleged that District retaliated by filing a truancy petition on December 11, 2014, shortly after she raised Section 504 concerns beginning in November and refused to sign the health plan on December 5, 2014.⁴ She also alleged that the District retaliated by issuing a no trespass order dated February 5, 2015, after she informed the District in person that morning that she would be filing a formal complaint.

Assuming for this analysis that 1) the Complainant engaged in a protected activity by advocating repeatedly on behalf of the Student throughout the 2014-2015 school year, 2) the truancy petition and the no trespass order were adverse actions caused by the District, and 3) there is some

⁴ The Complainant also raised concerns that fell outside the scope of Section 504. Two of her main concerns involved the Nurse calling the Student's pediatrician before the October 2014 team meeting without the Complainant's consent and her insistence that the District never provided her with a full response to her requests for every record containing the Student's name.

evidence of a causal connection between the adverse actions because the adverse actions followed much of the Complainant’s advocacy, OCR then considered whether the District had facially legitimate non-retaliatory reasons for both adverse actions and examined the reasons for pretext.

With respect to the truancy petition, the evidence supports that the District was able to articulate a legitimate, non-retaliatory reason for filing it. The Principal explained in his November 19, 2014, letter to the Complainant that the District would file a truancy petition if the Student did not return to school by November 24, 2014, state law required the Student’s attendance, and the Student had XX absences.

OCR considered whether the reason given was pretext. OCR reviewed the District’s truancy policy, which provided that the District may file a truancy petition after unsuccessful attempts to support students with chronic or habitual attendance problems.⁵ OCR also interviewed the truancy officer who told OCR that typically a school will reach out to her to initiate the truancy process after a student has missed about 10% of school days but that the process is tailored to the individual student, i.e. the process is not triggered by a certain number of absences. OCR also reviewed the misdemeanor complaint issued by the family court on December 11, 2014, listing the XX of 70 dates that the Student was absent. OCR also considered the District’s efforts to secure medical documentation to classify the absences as excused and to get the Student back in school prior to filing the petition. Based on a preponderance of the evidence, OCR could not determine that the legitimate non-retaliatory reason offered by the District was pretext. However, while OCR found insufficient evidence that the truancy petition was retaliatory, OCR notes that the Student’s attendance record was one of many indications that should have triggered the District to initiate evaluations. The District’s decision to file a truancy petition rather than initiate evaluations is further indication that the District violated the procedural requirements of Section 504 for the identification, evaluation, and placement of students with disabilities.

With respect to the no trespass order, the evidence also supports that the District had a legitimate, non-discriminatory reason for filing it. District counsel explained to OCR that the District issued a no trespass order after the Complainant came to the superintendent’s office and “made threatening comments about the Superintendent and that the Superintendent should ‘watch out’ and her ‘school should watch out’ as to what could happen.” The Complainant denied that she made threats and told OCR that she believed the District issued a no trespass order after she informed the superintendent’s office that she would file a formal complaint.

OCR considered whether the reason offered by the District was pretext. Correspondence demonstrated that the Complainant regularly filed complaints or warned the District she would file complaints. The District, however, never responded to the Complainant’s complaints by filing a no trespass order until the alleged threats. Therefore, OCR found the District’s explanation plausible that the Complainant’s behavior on February 5, 2015, rose above merely informing the District that she would file a formal complaint.

⁵ District counsel estimated that the District had five or six truancy petitions active at the time of OCR’s onsite on December 9, 2015.

In addition, OCR found that the District may have been legitimately concerned by the Complainant's alleged threats because this was the second time the Complainant exhibited alleged aggressive behavior. After the Complainant raised concerns about the Nurse, the Principal offered to replace the Nurse, a team member, with the high school nurse. However, due to scheduling issues, the Nurse was in attendance at the December 5, 2014, meeting. Regarding the meeting, the Complainant wrote in her December 30, 2014, letter to multiple parties, "As I become visibly upset by the School's further intimidation and bully[ing] during the meeting, before exiting the room, I turned to the School Nurse [name] and said that had she 'minded her own... business from the start, none of this would be happening right now.'" A timeline submitted by the Principal indicated that the Complainant "burst into a tirade using explicative [sic] language at the school nurse." When OCR interviewed the Complainant about the meeting, she said, "It was a very upsetting meeting... one of the lower key meetings... one of the quicker meetings." When OCR interviewed the Principal about the meeting, he said that the Complainant "went ballistic and left." The Nurse told OCR that "[the Complainant] was hostile, she actually jumped across the table... It was scary." While the parties dispute what behavior actually transpired at the meeting, this information may support the District's non-retaliatory explanation and/or does not provide a sufficient basis to demonstrate that it is a pretext for retaliation.

Based on the Complainant's history of filing complaints without the District filing no trespass orders, the description of the Complainant's behavior that triggered the District to file the no trespass order, and the Principal's and Nurse's description of prior interactions with the Complainant, OCR found insufficient evidence that the District retaliated by issuing the order. However, OCR is concerned about the reasonableness of a permanent no trespass order given that the Complainant has not had any other interactions with the District, nor has there been any indication since the order was first issued that it continues to be warranted. The District indicated that it would be willing to reconsider the parameters of the order upon the Complainant's request in order to permit the Complainant to pick up relatives/friends enrolled in the District and to attend events in support of those relatives/friends.

Conclusion

On August 21, 2018, the District agreed to implement the enclosed 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 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. 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 if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings 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.

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 attorney Sandy Lin at (617) 289-0095 or sandy.lin@ed.gov.

Sincerely,

/s/

Ramzi Ajami
Acting Regional Director

Enclosure