



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

December 14, 2017

VIA EMAIL: jaybadams@sau70.org

Re: Complaint Nos. 01-15-1244 & 01-16-1123
School Administrative Unit 70, Dresden School District

Dear Superintendent Badams:

This letter is to advise you of the outcome of the complaints that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against School Administrative Unit 70, Dresden School District (District). In Complaint Number 01-15-1244, the Complainant alleged that the District retaliated against her son (Student) when the Hanover High School (School) required the Complainant and Student to sign a contract to participate in a certain class, and that the School retaliated and discriminated against the Student on the basis of disability when it adopted and published a new policy in its handbook that had the effect of discriminating against the Student and other students with disabilities. In Complaint Number 01-16-1123, the Complainant alleged that the District discriminated against the Student on the basis of disability when it failed to provide him a Free Appropriate Public Education (FAPE) by not delivering him appropriate homebound instruction, and the Student's calculus teacher retaliated against him when she gave him a 60 on a project after accusing him of cheating for using a particular calculator that she did not explicitly prohibit.

OCR consolidated these complaints consistent with Section 102 of OCR's *Case Processing Manual* (CPM),¹ because the Complainant filed both complaints on behalf of the Student against the District and both complaints raise allegations that derive from the same nucleus of operative facts. As explained below, before OCR completed its investigation, the District expressed a willingness to resolve the complaints by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

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

¹ OCR's *Case Processing Manual* is available here: <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

OCR investigated the following legal issues:

- Whether the School denied the Student and other students with disabilities a FAPE by revising its Handbook to include a course requirement modification policy (Individualization Policy) based on absenteeism that was not designed to meet the individual educational needs of students with disabilities following procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36, in violation of 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130;
- Whether the District denied the Student a FAPE by failing to provide homebound instruction designed to meet his individual educational needs from October 2015 to May 2016 following procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36, in violation of 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130; and
- Whether the School retaliated against the Student because of the Complainant’s disability-related advocacy when it asked the Complainant and the Student to sign a contract for the Student to take a math course, revised its Handbook to include the Individualization Policy based on absenteeism, and issued the Student a marginally passing grade on a math project, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. § 35.130, which incorporate by reference 34 C.F.R. § 100.7(e).

Legal Standards

FAPE

The regulation implementing Section 504 at 34 C.F.R. § 104.33(a) requires school districts that operate a public elementary or secondary education program to provide a FAPE to each qualified individual with a disability in the school district’s jurisdiction, regardless of the nature or severity of the person’s disability. The regulation implementing Section 504 at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as regular or special education and related aides and services that: (i) are designed to meet the individual educational needs of people with disabilities as adequately as the needs of nondisabled people are met; and (ii) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. § 104.34 (educational setting), 34 C.F.R. § 104.35 (evaluation and placement), and 34 C.F.R. § 104.36 (procedural safeguards). Although the regulation implementing Title II does not contain specific requirements like those set forth in Subpart D of the regulation implementing Section 504, OCR interprets Title II to generally require no less than is required under Section 504.

The Section 504 regulation at 34 C.F.R. § 104.35(a), requires the District to evaluate students who need, or are believed to need, services before taking any action with respect to the students’ initial placement in a regular or special education program or prior to any subsequent significant changes in placement. The regulation does not define “significant change in placement”; however, Appendix A to the regulation states that “a full reevaluation is not required every time an adjustment in placement is made.” OCR has defined “significant change in placement” as a substantial and fundamental change in a student’s educational program.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that school districts draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

Retaliation

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the procedural provisions of the regulation implementing Title VI at 34 C.F.R. § 100.7(e), which provides that no school district or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing in connection with a complaint. The regulation implementing Title II, 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 examines whether: (1) the recipient knew the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future²; (2) the individual experienced an adverse action caused by the recipient³; and, (3) there is some evidence of a causal connection between the adverse action and the protected activity. If any one of the above elements cannot be established, then OCR will find insufficient evidence of a violation. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation and OCR will determine whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR then 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.

Factual Background

The Student suffers from a neurological disorder, which is characterized by episodic and recurring periods of excessive amounts of sleep and altered behavior. The Complainant contends that, as a consequence of this disorder, the Student cannot attend School when his disorder is in its active state. Correspondence provided by the District indicated that during the 2015-2016 school year, the Student was absent for approximately seven months.

² A "protected activity" is the exercise of a right that is protected under OCR's non-discrimination laws.

³ An adverse action is something that could deter a reasonable person from engaging in further protected activity.

The Complainant and District both confirmed that at the beginning of the 2015-2016 school year, the Complainant became concerned with two actions taken by the District. First, the School added a draft provision to the Individualization⁴ section of its Handbook, notifying the School community that it may modify course expectations if a student misses twenty-five or more classes.⁵ Second, the School's Math Department Coordinator requested that the Student and Complainant sign a contract in acknowledgment of the fact that the Student's prior math teacher did not recommend that he remain in the Honors Calculus course for which he had registered. The Complainant and District both confirmed that neither of these actions had any impact on the Complainant or Student: the Student's course requirements were not modified at any time during his enrollment at the School and the Student remained in the Honors Calculus course even though he and the Complainant did not sign the contract.

The Complainant and District acknowledged that the Student did not attend the School from October 2015 until his graduation from the School due to his neurological disorder. Although the Complainant and District both confirmed that the Student received homebound instruction (tutoring and course assignments) when he was not attending school, they do not agree on the amount of services rendered. The Complainant contended that the District only provided the Student course assignments for some of his classes and developed a tutoring plan that was impractical due to his neurological disorder. The District's data indicated that it offered the Student ten hours of tutoring per week in October 2015 and attempted to evaluate him the following month. Ultimately, the Complainant denied the District consent to evaluate the Student. Correspondence provided by the District further indicated that starting in January 2016, the Complainant refused to make the Student available to participate in the tutoring offered by the District to allow the Student to complete his first semester courses. The District's data did not indicate whether it provided the Student tutoring and course assignments to finish the remainder of the 2015-2016 school year.

The Complainant and District both stated that that the Student received several different grades on a math project that he submitted in December 2015. Although the Student's math teacher initially gave him a 60 on the project, she subsequently changed the grade to a 0, citing the Student's failure to follow instructions. The Complainant claimed that this grade was ultimately increased to an 80 after the Student filed a complaint against the teacher with the Student Council. The Complainant contended that the Student's math teacher told him that the teacher initially believed he cheated on the project. However, the District's data does not indicate whether the Student's teacher accused him of cheating on the math project or otherwise demonstrate her basis for issuing the grades.

⁴ According to the School, "*Individualizations* involve such significant reductions to a course's curriculum, volume, pace, and/or rigor that the student's academic experience and learning are fundamentally different from his/her classmates and, as such, require a relabeling of the course." See Section 6 of the School Handbook, available at <https://sites.google.com/a/hanovernorwichschools.org/hhs-handbook/home/section-6/course-standards>.

⁵ OCR confirmed that the School's prior Handbook, which did not include the draft provision, was still being implemented in March 2016 because the School Board had not held a vote on the draft provision. As of October 2017, the School Handbook indicates that the School Board has still not voted on the absenteeism provision. See Section 6 of the School Handbook, available at <https://sites.google.com/a/hanovernorwichschools.org/hhs-handbook/home/section-6/course-standards>.

Preliminary Concern(s)

Based on this information, the evidence obtained to date indicates that the District may not have provided the Student tutoring and course assignments to finish the remainder of the 2015-2016 school year and may have modified the course requirements of other students with disabilities due to absenteeism during the 2015-2016 school year. The data is incomplete regarding whether the District had a legitimate, nonretaliatory reason for the grade it issued on the Student's math project. To complete the investigation, OCR would need to interview the District Director of Special Education, School Principal, and Student's Honors Calculus teacher; and request data regarding other students with disabilities whose course requirements were modified during the 2015-2016 school year. These District staff members would provide OCR additional information about the Complainant's homebound instruction during the remainder of the 2015-2016 school year, the Student's grade on his math project, and the course requirement modifications of other students with disabilities.

Conclusion

Prior to OCR completing its investigation and making any findings, the District expressed an interest in resolving these complaints pursuant to Section 302 of OCR's *Case Processing Manual*, and agreed to take steps to address the Complainant's allegations by entering into the enclosed Agreement.⁶ Pursuant to the Agreement, the District will revise its Nondiscrimination Policy to prohibit retaliation; revise its Policy for Nondiscrimination on the Basis of Disability: Section 504 to broaden the definition of major life activities and elaborate on what is required for a FAPE; revise the School's Homebound Instruction Policy to require the provision of homebound instruction designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met; and revise the provisions in the School's handbook concerning the Individualization of Classes.

The enclosed Agreement, when fully implemented, will resolve the issues raised in these complaints. The terms of the Agreement are aligned with these complaint allegations and are consistent with the applicable laws and regulations. OCR will monitor the District's implementation of the Agreement and continue to do so until it has determined that the District has complied with the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening the complaint.

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 individual OCR cases. 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law

⁶ The Student has graduated from the District; therefore, no individual remedies were included in the Agreement.

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. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, you may contact Civil Rights Attorney Abra Francois at (617) 289-0142 or by e-mail at Abra.Francois@ed.gov.

/s/ Adrienne Mundy-Shepard
Meena Morey Chandra *w/p AMM*
Acting Regional Director

Attachment

cc: Erin R. Feltes
Drummond Woodson