



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

May 13, 2019

[slubomski@torrington.org](mailto:slubomski@torrington.org)

Re: Complaint No. 01-16-1072  
Torrington Board of Education

Dear Susan M. Lubomski:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Torrington Board of Education (District). The complaint alleged that during the XXXXX school year, the District denied the Student a free appropriate public education (FAPE) by failing to send written reminders of homework assignments home with the Student at the end of the day, pursuant to the Student's Section 504 Plan (Allegation 1). Additionally, the complaint alleged that the District retaliated against the Complainant for her disability-related advocacy on behalf of the Student, by referring the Complainant to the District's Attendance Review Board (ARB) in or around XXXX (Allegation 2). As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (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 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. Because the District receives federal financial assistance from the Department and is a public education system, OCR has jurisdiction pursuant to Section 504 and Title II.

Preliminary Investigation

During the investigation, OCR reviewed and analyzed documents provided by the Complainant and the District including but not limited to: the Student's Section 504 plan; the Student's daily agenda notebook; the Student's attendance records; the District's school attendance and truancy policies; the District's student referrals to the ARB; and other documents, including but not limited to e-mails, correspondence, internal and external memoranda, and meeting minutes and notes, pertaining to the Complainant's reporting her concerns about the alleged lack of implementation of provisions of the Student's Section 504 plan and the referral to the ARB.

**Allegation 1:**

*Background*

The Student has been diagnosed with attention deficit hyperactivity disorder (ADHD) and, according to the Complainant, has had a Section 504 plan since XX grade. At the time of the filing of this complaint, the Student was in XX grade.

The Complainant alleged that the Student's Section 504 plan stated the District was required to send home written reminders of homework assignments with the Student at the end of each day during the XXXXX school year. The District contests that there was any such requirement and provided a copy of the Student's Section 504 plan from the XXXX Section 504 Team Meeting.

The Section 504 plan states that the Student's "Agenda will be signed" every day and the responsible person will be "Parent/Teacher/Student." The Complainant provided OCR with the Student's daily agenda notebook for the XXXXX school year. Many dates are blank, though many appear to record homework assignments and are initialed. OCR did observe a few instances of the initials of the Student's teachers. Often, however, the initials that appear are "XX" or "XX," which, according to the Complainant, are the initials of a fellow student who initialed the agenda at the teacher's request because she was too busy. OCR did not observe the initials of the Complainant on the agenda.

The District stated that all of the Student's XX grade teachers indicated "signing the agenda or attempting to sign the agenda." The District also provided other documentation showing efforts it made to remind the Student of her assignments and keep the Complainant informed. For example, the District provided an email dated XXXX from the Student's XXXXX teacher informing her that the Student was not completing her work. Among other measures the teacher indicated she had taken to ensure that the Student did not fall behind, including an individual conference with the Student and "weekly grade reports" on the missing work, the teacher informed the Complainant that she used an application called "Remind" and suggested that the Complainant could also make use of it in order to keep up to date with the class's assignments and quizzes. OCR also noted an e-mail dated XXXX from the Student's counselor, updating the Complainant on efforts made by the Student's XXXX teacher to provide the Student makeup work and providing a list of the Student's outstanding assignments from science class. Finally, the District provided an e-mail dated XXXX from the Student's XXXXX teacher, informing the Complainant that the Student had not handed in any assignments. The Complainant responded that she was surprised to hear about the missing assignments because "there was never anything written in her agenda, as per her [Section] 504 plan. I therefore thought she didn't have any homework." The XXXXX teacher and the Complainant made arrangements for the Complainant to pick up the missing assignments. The teacher did not address the Complainant's comment regarding the Section 504 plan requirement.

*Legal Standard*

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is

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 developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.130(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

In investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. 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 of Evidence Obtained to Date*

OCR's investigation determined that the Section 504 plan contained a provision requiring that the Student's agenda be signed daily by the Parent, District staff, and/or Student.

OCR's investigation to date revealed conflicting evidence as to whether this provision was being implemented. The District represented that all of the Student's teachers signed or "attempted" to sign the agenda, though OCR's examination of the agenda itself reveals that it appears to have been relatively infrequently initialed by the Student's teachers. OCR also has concerns that the parties may not share an understanding as to what exactly this provision of the Section 504 plan required. For example, it does not appear that the Complainant or the Student was in the practice of signing the agenda.

In addition, there is some evidence indicating that early in the 2015-2016 school year, the District was aware of and took some steps to address the fact that the Student appeared to be falling behind on completing her assignments. However, OCR notes the possibility, depending on such factors as the length of the delay in providing assignment reminders, the quantity of work missed, the scope of the District's efforts to keep the Student from falling behind on her assignments, etc., that a failure to implement this provision could result in a denial of a FAPE. OCR has not continued the investigation to determine whether, in this case, there was a denial of a FAPE.

#### **Allegation 2:**

##### *Background*

In XXXX, the Complainant e-mailed the District about her concerns that the Student's Section 504 plan was not being implemented.

The District contacted the Complainant on XXXX to schedule a Section 504 meeting. The Complainant refused to attend the meeting, e-mailing that she had "wasted enough time trying to

get [the Student's Section] 504 [plan] followed and [she does] not intend to take anymore [sic] time off of work in order to go to the school for no purpose."

By e-mail dated XXXX, the District informed the Complainant that the District also intended to discuss the Student's absences at the Section 504 meeting. The District represented that a certified letter regarding the Student's attendance had earlier been mailed to the Complainant's residence and returned to the District. The e-mail stated that the Student had 22 absences and 29 tardies and District policy required the District to make a referral to the ARB to help resolve the Student's attendance issues. The e-mail informed the Complainant that the ARB meeting would be held on XXXX and that a formal invitation would be sent in the mail.

According to the District, the purpose of the ARB is to reach an agreement with a parent and a student about attendance in the future. The ARB includes representatives from the State of Connecticut Juvenile Court System and the State of Connecticut Department of Children and Families. In situations where an agreement is not reached, the ARB files a Family with Services Needs petition with the Superior Court.

The Complainant responded by e-mail that the meeting would not be necessary because the Student would be moving to Canada. In addition, the Complainant stated that she intended to file a complaint with the State Board of Education, "advising them that the Torrington Middle School does not follow the law when it pertains to [Section] 504 plans." There is further e-mail correspondence between the Complainant and the District regarding correcting errors in the Student's attendance record. The District reviewed the Student's attendance with her teachers, corrected one erroneously marked absence and determined that it could not verify two additional the absences. Ultimately, the District determined that the Student had at least 19 absences for the school year to date.

At the request of the Complainant, the XXXX meeting was rescheduled to XXXX, which Complainant attended. The Complainant withdrew the Student one week later on XXXX and the Student never returned to the District.

The District told OCR that the reason the Student was referred to the District's ARB was that she had more than ten unexcused absences during the XXXXX school year. OCR determined that District policy requires that an ARB meeting be held no later than ten days after a student accumulates 10 unexcused absences. The District told OCR that the referral was made by the Student's XX grade counselor at the District's XXXXXXXX.

During the XXXXX school year, the District's middle school submitted 18 student referrals to the ARB and during the XXXXX school year, it submitted six. OCR does not at this time have information as to the timing of these referrals, that is, if each was made promptly on the student accumulating ten unexcused absences.

### *Legal Standard*

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;<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.

#### *Analysis of Evidence Obtained to Date*

OCR's investigation determined that the Complainant engaged in the protected activity of advocating on behalf of the Student's rights as a student with a disability when the Complainant informed the District during the month of XXXX that the Student's Section 504 plan was not being implemented. Further, although not protected activity itself, the Complainant reminded the District of her protected activity when she informed the District in her XXXX e-mail that, in her view, she had wasted her time trying to ensure the District implemented the Student's Section 504 plan and would not waste her time attending a pointless Section 504 meeting.

OCR also determined that the Complainant experienced an adverse action caused by the District, that is, referring the Complainant to the ARB.

At this point in the investigation, however, OCR has not made any determination on the issue of causation. The District represents that the only reason for the ARB referral was the Student's many unexcused absences. OCR does note that the District responded to the Complainant's XXXX e-mail by informing the Complainant of the ARB referral. However, the District also wrote that a certified letter had earlier been sent to the Complainant. OCR does not have information about whether the certified letter contained information about an ARB referral. Nevertheless, although there is evidence that District policy requires an ARB referral when a student accumulates 10 unexcused absences, OCR notes that here, the District did not make a referral until it believed the Student had accumulated 22 unexcused absences.<sup>3</sup> At this time, OCR does not have information about the reason for the delay.

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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.

<sup>3</sup> As noted above, the District later reviewed its records after the Complainant questioned the number of absences and determined that it could only substantiate that the Student had 19 unexcused absences.

OCR has not continued the investigation to resolve these issues of fact, or made any determination as to whether the District retaliated against the Complainant for her disability-related advocacy.

### Conclusion

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint and OCR determined that a voluntary resolution is appropriate. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations that OCR investigated. OCR will monitor the District's implementation of the Agreement.

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 must 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. 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 Carla Moniz, Civil Rights Attorney at (617) 289-0047 or by e-mail at [Carla.Moniz@ed.gov](mailto:Carla.Moniz@ed.gov).

Sincerely,

/s/ Michelle Kalka

Michelle Kalka  
Compliance Team Leader

Enclosure

cc: AAlfano@goodwin.com