



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

October 3, 2018

Maureen Binienda
Superintendent
c/o Caitlin Leach Mulrooney, esq.
Sent via e-mail to: xxxxxxxxxx

Re: Complaint No. 01-16-1277
Worcester Public Schools

Dear Superintendent Binieda:

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 Worcester Public Schools (the District). The Complainant alleged that during the 2015-2016 school year, the Student was harassed by his teacher (assault) and other students based on his disability, and that the District failed to respond appropriately to the harassment. The Complainant also alleged that the District failed to appropriately evaluate the Student. The Complainant further alleged that the District retaliated for her advocacy on the Student's behalf by: (a) rescinding permission for the Student to attend the XXXXXXXXXXXX School (the School); (b) promoting the Student to first grade rather than retaining him in kindergarten; (c) moving the Student from a "green seat" to a "yellow seat" in class; and (d) releasing the Complainant's name and contact information to another parent in relation to the investigation of the Complainant's complaint with the Department of Children and Families (DCF). 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 evaluated the complaint under Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation found at 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation found at 28 C.F.R. Part 35. Section 504 and Title II both prohibit discrimination on the basis of disability, and also prohibit retaliation against any individual for taking any action guaranteed by those laws. The District is subject to Section 504 because it receives financial assistance from the U.S. Department of Education, and it is subject to Title II because it is a public entity operating an elementary and secondary education system.

Based on the allegations and information presented, OCR opened the following legal issues for investigation:

1. Whether the Student was subjected to disability-based harassment by a teacher and other students, to which District failed to provide a prompt and equitable response, in violation

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

of the regulations implementing Section 504 at 34 C.F.R. Sections 104.4 and 104.7, and Title II at 28 C.F.R. Sections 35.130 and 35.107.

2. Whether the District denied the Student a free appropriate public education (FAPE) by failing to ascertain and address any effects of bullying and/or disability-based harassment on his receipt of a FAPE, in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.33, and Title II at 28 C.F.R. Section 35.130.
3. Whether the District failed to timely and appropriately evaluate the Student in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.35, and Title II at 28 C.F.R. Section 35.130.
4. Whether the District retaliated for the Complainant's advocacy on behalf of the Student by the actions referenced in Allegation 4(a) through (d), in violation of the regulations implementing Section 504 at 34 C.F.R. Section 104.61, and Title II at 28 C.F.R. Section 35.13.

Summary of Preliminary Investigation

Background

The Student transferred into the District in or around February 2016 as a kindergartner. The Complainant said that the District was on notice at the time of enrollment that the Student has autism. He did not have an IEP from his prior school. During the year, the Student experienced some challenges while attending the School and was given some supports through a student support team.

Allegation 1 & 2: Prompt and Equitable Response to Harassment; FAPE

Legal Standard

A district's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A district may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the district had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the district's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context,

nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a district must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Should, as a result of bullying and/or harassment, a student's needs change to the extent they suggest a new disability or change in disability status, the Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

Background/Analysis

The Complainant filed a bullying complaint with the Massachusetts Department of Elementary and Secondary Education (DESE) regarding incidents with one other student. DESE found that the Complainant reported an incident of bullying by a student in June 2016 that the District investigated and found insufficient evidence to support. DESE also noted the District has bullying policies and procedures, and trains staff.

The Complainant also filed with the Massachusetts Department of Children and Families (DCF) over an alleged assault by a teacher. DCF determined the allegations were unfounded.

Prior to OCR determining whether there were any incidents of harassment outside of the alleged peer bullying investigated by DESE and the alleged assault by the teacher investigated by DCF, and whether any such incidents resulted in the need to evaluate the Student under Section 504, the District elected to resolve the complaint through a Section 302 resolution.

Allegation 3: Timely Evaluation

Legal Standard

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying

them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state.

Background/Analysis

The Complainant also brought her evaluation allegation to DESE. DESE found that the District received an evaluation request from the Complainant on May 23, 2016, to which the District promptly and appropriately responded.

However, DESE was unable to confirm whether the Complainant had made a request prior to May 23, 2016, and did not appear to inquire as to whether the District was otherwise on notice earlier than April or May 2016 that the Student needed to be evaluated. The Complainant told OCR that she submitted documentation of the Student's autism diagnosis when she enrolled the Student in the District in or around February 2016. Student support team notes from March 2016 indicated that the Student was experiencing challenges and that the Complainant mentioned the Student had a prior diagnosis of autism. The District shared with OCR that, at the time, the student support team convened in part because the Student was frequently absent from school and having language challenges. The District stated that with the minimal supports provided, the Student was able to make significant progress. Prior to determining whether an evaluation was warranted prior to the May request, the District requested a 302 resolution.

Allegation 4: Retaliation

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 or believed the individual might engage in a protected activity in the future;¹ (2) the individual experienced an adverse action caused by the recipient;² 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

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

² An "adverse action" is something that could deter a reasonable person from engaging in further protected activity

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.

Background/Analysis

The Complainant engaged in a protected activity when she requested an evaluation for the Student in spring 2016, and stated that she suffered an adverse action several months later when she was notified in May 2016 that the Student would no longer be enrolled at the School. The District contends that its decisions were consistent with its enrollment policy and were not motivated by the Complainant's earlier advocacy. Specifically, the District contends that the Student was only allowed to enroll in the School in February 2016 with "special permission" from the school principal because the family was homeless and residing with the complainant's sister who had a child attending the School. According to the District, the Student was transferred to a different school the following school year because the family found permanent residency and, pursuant to published District policy, was required to attend the school for that neighborhood. The District also contends that the Student was promoted to first grade based on his improved academic progress. Prior to OCR reviewing additional information and making any determination, the District requested to resolve this allegation through a Section 302 agreement.

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. 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 raised in the complaint. 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 Civil Rights Investigator Molly O'Halloran at (617) 289-0058 or by e-mail at Molly.OHalloran@ed.gov.

Sincerely,

/s/

Ramzi Ajami
Compliance Team Leader

Enclosure