



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

April 19, 2021

Kenneth Johnson, Superintendent
By email: superintendent@shead.org

Re: Complaint No. 01-19-1162
RSU 85/MSAD 19

Dear Superintendent Johnson:

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 RSU 85/MSAD 19 (District). The Complainant alleges that RSU 85/MSAD 19 (District) retaliated against the Complainant and/or her son (Student) for the Complainant's XXXX 20XX disability-related advocacy (specifically, requesting an XXXXXXXXXXXX (XXXXXX) meeting and inquiring about the XXXXX XXXXX of a XXXXXXX XXXXX teacher (including by contacting the Maine Department of Education) (Maine DOE)) by XXXXXXX a XXXXXXX XXXXX with the XXXX XXXX XX XXXXXXX XXXXXXX (XXXX) in XXXX 2018.

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), 29 U.S.C. § 794, 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), 42 U.S.C. § 12131 *et seq.*, 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 also 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. Because the District receives federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Summary of Preliminary Investigation

The Student was a XXXX-grade student at XXXXXXXXX (School) at the XXXX of the 20XX-20XX school year. The Student was absent beginning on XXXX, XXXXXXX XXXX, 20XX. The Complainant alleges that on the day of the Student's XXXXX consecutive absence, XXXXX, XXXXXXX XX, 20XX, the School XXXXX the Student XXXX to XXXX despite being notified of the excusable reasons for his absences. The Complainant asserts that the

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

XXXX was XXXXX in retaliation for her disability-based advocacy on behalf of the Student. The District maintains that it requested an update on the Student’s absences from the Complainant and notified her that it would need to XXXX XXXX if this information was not provided because it was concerned about the Student’s well-being. It asserts that it ultimately never XXXXXXXX XXXX because the Complainant responded and provided an update.

Alleged Protected Activity

The Complainant alleges that she engaged in protected activities when she requested an XXXXXXX meeting and inquired about the XXXXXXX information of the Student’s XXXX XXXXX teacher (XXXX XXXXX Teacher).

a. IEP Meeting

On XXXXX X, 20XX, the Complainant emailed the Superintendent, XXXX XXXXX Director, and Board of Education Chair to “demand an XXXXXXX meeting immediately to address [the Student’s] urgent needs.” The Complainant wrote, among other things, that the Student “regressed tremendously” during the previous school year, failed to meet any of his XXXXXXX goals, and did not have an XXX XXXX available to him as mandated by his XXXX. The Complainant also expressed concern that the Student’s XXXX XXXXX Teacher was not being XXXXX or XXXXXXX by the District, and that she intended to “[make] a complaint that [their] employee was not XXXXX as directed by law.”

On XXXXXXX XX, 20XX, the XXXX XXXXX Director emailed the Complainant a XXXX XXXX scheduling an XXXXXXX meeting for XXXXX XX, 20XX. Among the District staff members invited to the meeting were the Student’s homeroom teacher (Homeroom Teacher) (who was also his teacher during the XXXX XXXX XXXX), XXXX XXXXX Teacher, XXXX XXXXX Director, and Principal. The Complainant alleges that on XXXXXXX XX, 20XX, she sent the School notice of her intention to XXXXXXX the Student. OCR has not reviewed a copy of this alleged notice. On XXXXX XX, 20XX, the XXXX XXXXX Director emailed the Complainant that she had received a copy of the Complainant’s “intent/request to XXXXXXX” and asked if she wished to proceed with the XXXXX XX XXXX meeting. The Complainant informed OCR that she canceled the XXXX meeting.

b. XXXXXXXXX

The Complainant alleges that on XXXX X, 20XX, she submitted a written request to the Principal for the XXXX XXXXX Teacher’s “XXXXX XXXX” because she was concerned the XXXX XXXXX Teacher lacked the XXXXX and XXXXX to serve students with XXXXXXXX. OCR has not reviewed the alleged written request. The Complainant further alleges that after the XXXX XXXXX Teacher was made aware of the request, she used XXXX XXXX to describe the Complainant to the Student and XXXX the School “XXXXX and XXXX.”

On or around XXXXX X, 20XX, the Superintendent sent the Complainant a letter stating that the XXXX XXXXXXX Teacher was “not currently a XXXXX XXXXX” but a “XXXXX

XXXXX XXXX.” The Superintendent added that the School satisfied its “statutory obligation to support XXXXX XXXXX.”

The Complainant alleges that she also contacted the Maine DOE in XXXXXX 20XX for information on the XXXXX of the XXXX XXXXX Teacher. The Complainant believes the Maine DOE contacted the District about this issue because shortly after this communication, on XXXX XX, 20XX, the Principal sent a letter addressed to “XXXXXXXXXXXX” that there was a “temporary change in the status of our XXXX XXXXX Teacher” and her “XXXXX status is XXXXXX.” The Principal noted that there was a “plan in place to obtain the proper XXXX.”

The District asserts that the Homeroom Teacher, whom the Complainant alleges retaliated against her by threatening to XXX XXXX, “was not aware of [the Complainant’s] concerns about the XXXX XXXXX teacher at the time she left the voicemail, and she had no reason to suspect [the Complainant] was concerned, as both [the Homeroom Teacher] and [XXXX XXXXX Teacher] worked with Student in the XXXXX XXX year without incident.” The Complainant alleges, conversely, that the Homeroom Teacher was aware of her concerns with the XXXX XXXXX Teacher.

Alleged Adverse Action

The Complainant alleges that in retaliation for the above-referenced advocacy, the District XXXXX the Student to XXXX after he missed XXXX days of school (XXXXX XX-XX, XX, and XX, 20XX), despite being notified of the excusable reasons for his absences. The Complainant alleges that on XXXXX XX and XX, 20XX, the Student attended XXXXX XXXXX; on XXXX XX, XX, and XX, 20XX, the Student was ill; and on XXXXX XX, 20XX, the Complainant notified the District that she was XXXXXX the Student and XXXXXX him.

a. XXXX XXX XXX

The Complainant alleges that the Student was absent on XXXX XX and XX, 20XX in order to attend XXXXXXXX. The Complainant alleges that she spoke with the Principal on Friday, XXXXX X, 20XX, and “reminded” her that the Student would be out of school for XXXXX the following Monday and Tuesday. OCR has not addressed this alleged conversation with the District. The Complainant also alleges that she discussed the XXXXX XXXX with the Homeroom Teacher during the XXXXX week of school for the 20XX-20XX school year and that the Homeroom Teacher called her on XXXX XX, 20XX to XXXX the Student “XXXX.” Conversely, the District alleges in its narrative response that the Student’s Homeroom Teacher was concerned about the Student’s absences on XXXXX XX and XX, 20XX and left a voicemail for the Complainant asking her to call.

b. Illness

The Complainant alleges that the Student was then absent from XXXXXX X through XXXXX X, 20XX due to an illness. The District confirmed in its narrative response that the Complainant called the School on or around XXXXX XX, 20XX to report that the Student was ill and would be returning on XXXXX XX, 20XX. The Complainant alleges she subsequently left a voicemail

for the School on XXXXX XX, 20XX stating the Student was still sick and that she planned to submit a letter to XXXXXXXX him on Monday, XXXXX XX, 20XX.

c. XXXXXXXXX

The Complainant alleges she began XXXXXXXXX the Student on XXXX, XXXX XX, 20XX. She alleges she notified the School of her decision through a certified mail letter she sent that morning. OCR does not have a copy of the letter. However, a handwritten note on the School's attendance records states the Student was "XXXXXX XXX XXXXXXX."

d. Adverse action

The Complainant alleges that she received a voicemail from the Homeroom Teacher shortly after classes ended on XXXX XXX, 20XX. The Complainant provided OCR with a voicemail recording in which a caller who self-identifies as the Homeroom Teacher states, "XXXXXX XXXXX. XXXXXXXXXXX XXXXX XXXXXXX XXXXXXX."

The District acknowledged that the Homeroom Teacher left a voicemail for the Complainant "indicating she had not XXX XXX XXXX XXX XXXX XXXX XXXXXXX XXXX, XXX XXX XXX XXXX XXXXXXXXXXX, XXXXX XXXX XXXXX XXXXXXX." The District explained that the Student had been XXX XXXX XXX XXXXX from the Complainant, which was different from the 20XX-20XX school year, when the Complainant contacted the School XXX XXXXX XXXX XXXXXXX. The District noted that the Homeroom Teacher "left this voicemail because XXXX XXXXXXX XXXXXXX."

The Complainant alleges that the following morning (XXXXXX XX, 20XX), she sent an email to the Superintendent and Principal, attaching the Homeroom Teacher's voicemail, proof of XXXXXXX, and the XXXX XXX XXXXXXX XXXXXXX. OCR did not review a copy of this alleged email. The Complainant further alleges she also called the School on XXXXXXX XX, 2018 and received confirmation from a staff member that a XXXX XXXX XXX was made earlier that morning. The Complainant acknowledged that she was never contacted by XXXX and is unsure of the status of the alleged XXXXXXX. She noted, however, that regardless of the outcome, "it created a XXXX XXXXXXX XXX XXXX XXXX XXXX XX XXXX XXX XX."

The District states that the Student's Homeroom Teacher "became aware" that the Complainant contacted the School in response to her voicemail and thus, "no one at [the District] made a XXX XXXXXXX XXXX XXXX 20XX."

The District provided OCR with a list of students who were absent XXX or more consecutive days during the 20**-20** and 20**-20** school years. The District identified XXXXX students (in addition to the Student) who satisfied that criteria. Of these students, XXX were identified for XXXX XXXX XXXXXXX or had a XXXXXXX XXX XXXX. The reason for their absences is noted as "Family Trip" or "Illness." The District also asserts that "[n]o students, aside from the Student at issue in this complaint, missed XXXX or more school days in the 20XX-XX or 20XX-XX school years without expressly being excused. As a result, XXXXX was not XXXX in any of those cases."

Policies

a. Compulsory Attendance Policy

The District’s “Compulsory Attendance” policy defines an “excusable absence” as an absence that is due to one of six reasons, including: (1) personal illness; (2) an appointment with a health professional that must be made during the regular school day; and (3) a planned absence for a personal or educational purpose which has been approved.

b. School Attendance Policy

The School publishes an attendance policy in its annual Student Handbook. The policy states that students should “bring in note” for absences. The policy provides that “if the child is at least 7 and has not completed grade 6 and has the equivalent of 7 full days of unexcused absences during a school year,” on the 7th full day or 5th consecutive day of unexcused absences a meeting will be held with parent, teacher, student, and principal.

c. Reporting Child Abuse and Neglect Policy

The policy identifies abuse or neglect in accordance with Maine law to include a “threat to a child’s health or welfare by . . . failure to ensure compliance with school attendance requirements under Title 20-A’ (specifically when a child who is at least seven years of age and has not completed grade six, has the equivalent of seven full days of unexcused absences or five consecutive school days of unexcused absences during a school year).” As a first step, the reporting employee must immediately notify the principal or designee of the suspected abuse or neglect. That employee may also notify DHHS directly, or if appropriate, the District Attorney.

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 individual engaged in a protected activity;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 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. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the

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.

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

Protected Activity

OCR determined that the Complainant engaged in a protected activity when she advocated on behalf of the Student's disability-related needs by: (1) requesting an XXXX meeting to address his educational regression and failure to meet his XXXX goals, as well as the District's alleged failure to XXXX X XXXX XXXX; and (2) raising concerns about the XXXX XXXXX Teacher's XXXX to provide services to students with XXXXXXXX due to her XXXXXXXX status. This activity is protected because it was taken in furtherance of substantive rights guaranteed by the statutes and regulations enforced by OCR or otherwise protected activities prohibited by those laws – specifically, the right to advocate for a free appropriate public education under 34 C.F.R. §§ 104.33 and 104.35.

Adverse Action

OCR also determined that the Complainant and/or Student experienced an adverse action when the District indicated it might XXXXXXXX XXXXXX about the Student's truancy. An act is an adverse action if it is likely to dissuade a reasonable person from making or supporting a charge of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR. Here, even if the District did not ultimately XXXX the XXXX XXXX with XXXX as alleged, expressing an intent to do so is sufficient to constitute an adverse action because of the concern it raises about the disruptive and stressful nature of XXXXXX XXXX and their XXXXXX implications.

However, OCR has not determined whether there is a causal connection between the adverse action and the protected activity, whether the District has identified a legitimate, non-retaliatory reason for taking the adverse action, and whether any such reason was a pretext for retaliation.

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 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. Complainants 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.

Sincerely,

Abra Francois
Compliance Team Leader

Enclosure

cc: Kathleen Wade, Esq.