



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

April 23, 2020

Superintendent Michael J. Tursi
By email: mtursi@sau80.org

Re: Complaint No. 01-20-1027
Shaker Regional School District

Dear Superintendent Michael J. Tursi:

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 Shaker Regional School District (District). The Complainants alleges that the District discriminated against their son (Student) on the basis of disability and retaliated against him. Specifically, the complaint alleges the following:

1. After XXXXXXXXXXXXXXXXXXXX refused to supervise the Student's XXXXXXXXXX XXXX course (XXX) in XXXXXXXXXXXXXX, the District failed to implement the Student's 504 plan in XXXXXXXX through the end of the 2018-2019 school year by failing to appoint a replacement.
2. XXXXXXXXXXXXXXXXXXXX retaliated against the Student, after the Complainants filed complaints against XXXXXXXXXX XXXXXXXXXX with the District in XXXXXXXXXX and XXXXXXXXXX, and with the New Hampshire Department of Education (NH DOE) in XXXXXXXXXX, by refusing to supervise XXXXXX through the end of the school year, and XXXXXX XXXX one of the Student's XXXXXXXXXXXXXXXXXX XXXXXXXX.
3. XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX.

As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve Allegations 1 and 2 by taking the steps set out in the enclosed Resolution Agreement (Agreement). XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXX.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. Section 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. Section 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which

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

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.

Legal Issues

Because OCR determined that it has jurisdiction and that the complaint was timely filed, OCR opened the following legal issues for investigation:

1. Whether the District failed to implement provisions of the Student's 504 plan, specifically during XXXXXXXX from XXXXXXXXXXXXXXX through the end of the 2018-2019 school year, and whether doing so denied the Student a free appropriate public education (FAPE), in violation of 34 C.F.R. Sections 104.33(a) and (b), and 28 C.F.R. Section 35.130.
2. Whether the District retaliated against the Student, when XXXXXXXXXXXXXXXXXXXXXXX the Student's XXXXXXXXXXXXXXX XXXXXX and refused to supervise the rest of XXXXXXXXXXXXXXX, because the Complainants filed a complaint XXXXXXXXXXXXXXX XXXXXXXXXX with the District and NH DOE, in violation of 34 C.F.R. Section 104.61 (incorporating 34 C.F.R. Section 100.7(e) by reference).
3. XXX
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Summary of Investigation to Date

During the 2018-2019, school year the Student was in the XXXXXXXXX at a XXXXX school (School) in the District. He is an XXXXX student who has participated in XXXXXXXXXXXXXXX XXXXXXXXXXXXXXX; the Complainants asserted he would like to pursue a career XXXXXXXXX XXXXXXXXX. The Student is on a Section 504 Plan XX XXXXX his XXXXXXXXX XXXXXXXXXXXXX XX XXXXXX and XXXXXX XXXXX.

It is not disputed that during the 2018-2019 school year, the Student was enrolled in two classes taught by XXXXXXXXXXXXXXX: (1) XXXXX and (2) XXXXXXXXXXXXXXX, called XXXXXXXXXXXXXXX. The Student remained in the XXXXX class for the entire school year. However, XXXXXXXXXXXXXXX stopped supervising the XXXXXXXXXXXXXXX around XXXXXXXXXXXXXXX.

The Complainants had concerns about XXXXXXXXXXXXXXXXXXXXXXX response to indications that the Student was being “bull[ied]” by peers in XXXXXXXXX class in the 2017-2018 school year.¹ As the 2018-2019 school year progressed, the Complainants believed the bullying was continuing, that the Student was not being included in XXXXXXXXX XXXXXX opportunities, and that he was not being supervised for XXXXXXX.

The Complainants told OCR that they met with the Principal on XXXXXXXXXXXXXXXX, about their concerns regarding bullying, exclusion, and the lack of supervision for XXXXXXX. Correspondence after this meeting show that the Complainants noted concerns about the impact on the Student of these issues, given his disabilities, as well as concerns about implementation of the 504 Plan for XXXXXXX.

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Both parties provided OCR with documentation showing that XXXXXXXXXXXXXXXXXXXXXXX no longer met with the Student after the XXXXXXXXXXXXXXXX meeting; the District asserted that thereafter “the Principal oversaw” XXXXXXX. The District also asserted that reducing the XXXXXXXXX interactions between the Student XXXXXXXXX were partially in response to the Complainants’ concerns. Both parties also provided documentation evidencing that when XXXXXXXXX stopped supervising XXXXXXX, the Student worked from a XXXXX workbook. It is undisputed that at the end of the school year, the Student received honors credit for the course.

It is not clear what supervision or instruction the Student received following the change in XXXXXXX, however, nor whether relevant portions of the Student’s 504 Plan, e.g., ensuring that expectations and XXXXXX XXXXXX were XXXXX and allowing the Student to XXX XXXXXXXXXXXXXXXX about XXXXXXXXX and XXXXXXXXX, were implemented. Both the District and the Complainants provided copies of emails from the Complainants to the Principal asking about the class expectations. Documents from the District show that the workbook was not ordered until XXXXXXXX and the Complainants asserted that “prior to the book arriving, the Student did not have anything to work on,” and that once the workbook arrived, the Student was “not told how much of the workbook to complete [or] how things would be graded,” which XXXX XXXXXXXXX XXXXXXX.

Complaints

As described above, on XXXXXXXXXXXXXXXX, the Complainants raised concerns to the Principal about peer bullying, exclusion from opportunities, the lack of supervision for XXXXXXX and whether the Student’s 504 Plan was being implemented for that class, as well as the impact of these issues on the Student in light of XXX XXXXXXXXXXX. The Complainants raised similar concerns to the District about peer bullying and XXXXXXXXXXX again in XXXXXXXXX. It is undisputed that in XXXXXXXXX, the Complainants also filed a XXXXXXXXXXXXXXX violation against XXXXXXXXX with NH DOE. The NH DOE told OCR that the District informed XXXXXXXXX of the NH DOE complaint.²

¹ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

² XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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It is undisputed that in XXXXXXXXXX, XXXXXXXXXXXX took XXXX the Student's XXXXXXXXXXXX XXXXXXXXXXXX from the XXXXXXXXXXXX XXXX. The Complainants alleged to the District and subsequently to OCR, that XXXXXXXXXXXX XXXX XXX XXXXX down, XXXXX it in the XXXXX, and XXXXXX announced to the classroom that XXXXXX were not to be XXXXX placed on the XXXX. The District told OCR that XXXXXXXXXXXX took XXXX the XXXXX in conformance with XXX policy that XXXXXXXXXXXX XXXXXXXX were not allowed on the classroom XXXX, which XXX had announced to the class before the day on which this incident occurred. The District asserted that upon receiving the Complainants' concerns, it interviewed witnesses who confirmed this; it is unclear whether the Student heard these announcements, however. OCR had not yet interviewed District staff or other witnesses regarding XXXXXXXXXXXX's manner of XXXXX XXX XXX XXXXXXX or XXX XXXXXX XXXXXXXX to the Student, when the District requested to resolve the complaint.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to each qualified student with a disability in its jurisdiction. 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.

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.

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;³ (2) the individual experienced an adverse action caused by the recipient;⁴ and (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are

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³ A "protected activity" is the exercise of a right that is protected under OCR's non-discrimination laws.

⁴ An adverse action is something that could deter a reasonable person from engaging in further protected activity.

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

Allegations 1 and 2

As to Allegation 1, the District disputes that it did not follow the Student's 504 Plan, or that the Student otherwise experienced any disadvantage in XXXXXXXX, citing that the Student earned XXXXXX XXXXXX for it. OCR did not receive enough information to determine whether the Student's Section 504 Plan was being implemented during XXXXXXXX, however, and if not, how he was impacted despite XXXXXXXXX XXXX XXXXXX. OCR is concerned that after XXXXXXXXXXXX stopped supervising the class, the Student may not have received the supports required by his 504 Plan, e.g., XXXXXX XXXXXXXXXXXX and XXXXXX XXXXXXX, and opportunities for the Student to XXX XXXXXXXXX XXXXXXXX XXXXX and XXXXXXXXX. Although the District asserted that the Principal monitored XXXXXX for the remainder of the year, it is not clear when he began supervising the Student, whether he provided any instruction, and if he provided with supports required by the Student's 504 Plan. OCR would need to interview the Principal and XXXXXXXXX to determine if the Student's Section 504 Plan was followed, particularly after XXXXXXXXX stopped supervising XXXXXX.

As to Allegation 2, the District disputes that it retaliated against the Student. OCR determined that Complainants engaged in a protected activity by raising concerns to the District that included their belief that the Student's 504 Plan was not being implemented.⁵ OCR would need

to conduct interviews with relevant District staff to fully determine whether the circumstances of XXXXXXXXXXXX XXXXX XXXX the XXXXXX XXXXXX and withdrawing from supervising XXXXXX were adverse actions under the retaliation analysis. In addition, OCR would need to determine whether there is evidence of a causal connection between the protected activity and any adverse actions, and if so, whether or not the District's proffered legitimate, non-retaliatory reasons for taking these actions were a pretext for retaliation.

Prior to the conclusion of OCR's investigation on these issues, and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving Allegations 1 and 2 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 Allegations 1 and 2 raised in the complaint. OCR will monitor the District's implementation of the Agreement.

Allegation 3

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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,

/s/
Meighan A.F. McCrea
Compliance Team Leader

Enclosure

cc: Stephen Bennett, Esq
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