



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

February 10, 2021

Dr. James Marini  
Interim Superintendent of Schools  
Public Schools of Brookline  
By email: jim\_marini@psbma.org

Re: Complaint No. 01-21-1012  
Public Schools of Brookline

Dear Dr. Marini:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint we received on October 20, 2020 against Public Schools of Brookline (District). The Complainant alleges that the District retaliated against her for her disability-based advocacy, including filing a previous OCR complaint, by: (1) responding in a threatening manner to the Complainant's request for access to e-mails sent to other District parents; (2) flagging the Complainant's e-mails for review and response by the Deputy Superintendent; and (3) denying the Complainant access to e-mails sent to other District parents.

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 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.

In reaching a determination, OCR reviewed documents provided by the Complainant and District and interviewed the Complainant and District staff.

OCR found sufficient evidence of a violation of Section 504 and Title II regarding assertion 1, which the District agreed to resolve through the enclosed resolution agreement. However, OCR found insufficient evidence to support Allegations 2 and 3.

OCR's findings and conclusions are discussed below.

## **Background**

It is undisputed that the Complainant has advocated for her child (Student)'s rights as a student with disabilities in the District<sup>1</sup> by, for example, filing complaints against the District through the Problem Resolution System (PRS) Office of the Massachusetts Department of Elementary and Secondary Education and with OCR. Similarly, it is not disputed that many of these activities occurred prior to the circumstances giving rise to the present complaint.

On XXXXXX, the Complainant sent an e-mail to the District's Director XXXXXX XXXXXX XXXXXX (Director), expressing concern XXXXXX XXXXXX XXXXXX XXXXXX that the District had sent to parents XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX.

Specifically, the Complainant wrote that the District was excluding parents of students with disabilities XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX from e-mails that the District sent to XXXXXX parents. The Complainant requested that XXXXXX XXXXXX parents receive all District-wide e-mails sent to XXXXXX parents, regardless of a student's placement.

OCR reviewed a series of correspondence between the Deputy Superintendent for Student Services (Deputy Superintendent) and the Complainant regarding the Complainant's ongoing concerns related to her access to District e-mails. The correspondence reflected that the Deputy Superintendent assured the Complainant that the reported issue had been corrected, and apologized when the Complainant did not receive multiple XXXXXX emails. The Deputy Superintendent told OCR that the District's data team had to manually modify the XXXXXX parent listserv to add the Complainant to each e-mail sent to XXXXXX parents, and that the failure to do so on some occasions was caused by miscommunication among the data team.

On XXXXXX, however, after she did not receive an e-mail sent to XXXXXX parents, the Complainant e-mailed the Deputy Superintendent that "Any further failure by the district's part to restore my e-mail preferences can only be interpreted as retaliatory and or deliberate withholding."

The Deputy Superintendent responded that day, indicating she would follow up on the issue. She also wrote, "It is your right to interpret how you see fit. Please note again that your tone is not welcomed nor will be tolerated." OCR asked the Deputy Superintendent what she meant by this statement; she responded that she thought the Complainant's tone was "threatening". When pressed by OCR, the Deputy Superintendent clarified, "In the past, [these type of e-mails] have been followed up with 'because I will file a complaint,'" and referenced past and current OCR complaints. She said, "[There is] a history of me having to check [the Complainant's] tone." The Deputy Superintendent characterized her response to the Complainant as "referencing past disrespect" and not wanting any more of it. The Complainant told OCR that she found the Deputy Superintendent's XXXXXX e-mail threatening and retaliatory, and that it hindered her ability to communicate effectively with the District about her concerns.<sup>2</sup>

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<sup>1</sup>XXXXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX

<sup>2</sup> During the course of its investigation, OCR learned that the Complainant attempted to file a complaint with the District regarding the Deputy Superintendent's XXXXXX e-mail. OCR will provide the District with technical assistance regarding the District's obligation to respond to complaints about disability discrimination and retaliation.

Documents reviewed by OCR showed that a XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX XXXXXX e-mailed the Deputy Superintendent stating that she had become aware of the XXXXXX XXXXXX XXXXXX email issue from the Complainant. The Deputy Superintendent replied that she would respond to the Complainant’s concerns, and that the Director “knows to flag e-mails from [the Complainant] with me.”

The Deputy Superintendent told OCR that this “flagging” is not a formal designation, rather it is the process by which the District manages its information-sharing with parents. She said that when parents request e-mails that they wouldn’t typically receive, the data team knows to check in with her about whether it is appropriate to provide the requested information. She stated that the Complainant’s e-mails were “flagged” for this kind of information management. From reviewing correspondence between the Complainant and District, OCR found that the District timely and substantively responded to the Complainant’s e-mails.

### **Legal Standards**

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;<sup>3</sup> (2) the individual experienced an adverse action caused by the recipient;<sup>4</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 there is a legitimate, non-retaliatory reason for the District’s 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 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**

OCR found that the Complainant engaged in a protected activity when, in addition to her past complaints with OCR and PRS alleging concerns relating to a student’s disability, she also sent XXXXXX XXXXXX XXXXXX e-mails asking to be added to the XXXXXX parent e-mail list.

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<sup>3</sup> A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws. An individual engages in a protected activity if he/she asserts a right or privilege or opposes an act or policy that he/she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under one of the laws OCR enforces.

<sup>4</sup> An adverse action is something that could deter a reasonable person from engaging in further protected activity. Petty slights, minor annoyances, and lack of good manners do not normally constitute adverse actions.

Essentially, the Complainant alleged to the District that she was being treated differently and denied access to information due to the XXXXXX XXXXXX XXXXXX.

OCR also found that the Complainant experienced an adverse action when the Deputy Superintendent threatened that the Complainant's "tone" would "not be tolerated" in her response to the Complainant's XXXXXX e-mail. An act of intimidation or threat constitutes an adverse action for purposes of the anti-retaliation regulations if it is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. OCR found that the Deputy Superintendent's response would likely dissuade a reasonable person from filing a complaint or pursuing her legal rights.

OCR next determined that there was evidence of a causal connection between the protected activity and this adverse action. Specifically and explicitly, the Deputy Superintendent told OCR that the Complainant's tone would not be tolerated because she did not want the Complainant to file any more complaints against the District. The evidence of causal connection in this instance is unambiguous and direct.

The District did not raise, and OCR did not otherwise find, a facially legitimate, non-retaliatory reason for the Deputy Superintendent's XXXXXX, e-mail.

Based on all of the evidence gathered during the course of OCR's investigation, OCR found sufficient evidence that the District retaliated against the Complainant by responding in a threatening manner to the Complainant's request for access to e-mails sent to other District parents, in violation of 34 C.F.R. Section 104.61 (incorporating 34 C.F.R. Section 100.7(e) by reference) and 28 C.F.R. Section 35.134.

With respect to flagging the Complainant's e-mails for the Deputy Superintendent's review and response, OCR did not find sufficient evidence that this constitutes an adverse action. While it may be annoying for the Complainant that this mechanism is in place, OCR did not identify information indicating that the Complainant was harmed by the flagging of e-mails: rather, OCR found that the District timely and substantively responded to each e-mail. As such, OCR found insufficient evidence that flagging the Complainant's e-mails was adverse.

Finally, with respect to the Complainant's access to e-mails sent to XXXXXX, OCR determined that the District offered a legitimate non-discriminatory reason for any e-mails that were missed. The District asserted, and OCR did not find evidence to refute, that the District's data team had to manually modify the XXXXXX parent listserv to add the Complainant to each e-mail sent, and that the failure to do so on several occasions was caused by miscommunication among the data team. While OCR found that the issue persisted, despite the District's assurance that the problem would be addressed, OCR noted that the District's asserted reason was supported by contemporaneous e-mails from the Deputy Superintendent apologizing for the oversight and promising that the issue had been fixed. OCR did not find any evidence indicating that the District's stated reason was a pretext for unlawful discrimination. As such, OCR found

insufficient evidence that the District retaliated against the Complainant by denying her access to e-mails sent to other District parents.<sup>5</sup>

### **Conclusion**

On February 9, 2021, the District agreed to implement the enclosed Resolution Agreement (Agreement), which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement entered into by the District on February 9, 2021, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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.

The Complainant has a right to appeal OCR's determination with respect to Allegations 2 and 3 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law

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<sup>5</sup> Although OCR was unable to conclude that the District's denial of access to XXXXXX e-mails was retaliatory, OCR will provide technical assistance to the District regarding the fact that students with disabilities are entitled to the same aids, benefits, and services as students without disabilities, which includes the right of parents of students with disabilities to be informed in an equal manner to all other parents.

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

Sincerely,

/s/

Thomas M. Rodrigues  
Regional Director

Enclosure

cc: Colby Brunt, Esq.