



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

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December 5, 2013

Dennis M. Walcott
Chancellor
New York City Department of Education
Office of the Chancellor
52 Chambers Street
New York, New York 10007

Re: Case No. 02-12-1253
New York City Department of Education

Dear Chancellor Walcott:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against the New York City Department of Education (NYCDOE). The complainant alleged that the NYCDOE discriminated against students at xxxx xxx x xxxxx (the School), on the basis of disability, by failing to provide Special Education Teacher Support Services (SETSS) to students with disabilities as required by their Individualized Education Plans (IEPs) and/or Section 504 Plans, from March 2012 through June 2012 (Allegation 1). The complainant further alleged that the School's xxxxxxxx xxxxxxxxxx retaliated against her for filing a prior complaint with OCR by failing to provide her with a copy of a form with the xxxxxxxxxx xxxxxxxxxx xxxxxxxxxx xxx xxxxxxxx for xxxx xxxx in xxxxxxxx (Allegation 2). Additionally, the complainant alleged that School staff and administrators retaliated against her by failing to notify her about x xxxxxxxx for all xxxxxxxx xxxxxxxxxx that was held on xxxxxxxx xx xxxx (Allegation 3). The complainant also alleged that the School Principal retaliated against her for filing a prior complaint xxxx xxx by xxxxxxxx xxx xxxxxxx xx a xxxxxxxxxx in her School xxxxxxxx on xxxxxxxx xx, xxxx (Allegation 4); and acting in a xxxxxxxxxx xxxxxxxxxx manner toward her in the xxxxxxxxxx room on xxxxx x, xxxx (Allegation 5).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 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 programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The NYCDOE is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d et seq., which provides that:

No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In its investigation, OCR reviewed information and documentation that the complainant and the NYCDOE submitted. OCR also interviewed the complainant and NYCDOE staff and administrators. OCR made the following determinations.

OCR determined that the complainant has worked in various xxxxxxxx positions at the School since xxxxxxxx xxxx. During school year 2011-2012, the complainant was a xxxxxxxx xxxxxxxx xxxxxxxx.

With respect to Allegation 1, the complainant alleged that the School discriminated against students with disabilities by failing to provide SETSS¹ as required by their IEPs and/or Section 504 Plans, from March 2012 through June 2012. Specifically, the complainant alleged that for many disabled students, SETSS was provided on an irregular and inconsistent basis, or for fewer sessions than required by their IEPs or Section 504 Plans.

OCR determined that during school year 2011-2012, there was one SETSS teacher at the School (the SETSS Provider); she was assigned to provide SETSS to 24 students five times per week (one fifty-minute period each day).² The xxxxx xxxxxxxx acknowledged to OCR that because the School was under-staffed xxx xxx xxxxxxxxxx xxxxxxxx xxxxxx xx xxx xxxxxxx³, she sometimes was unable to provide students with the amount of SETSS mandated in their IEPs during the school year. Specifically, xxx stated that students did not receive SETSS if xxx xxx xxxxxx xx xxxxxx x xxxxxx xxx xxxxxxxx xxxxxxxxxx xxx xx xxxxxxx xx xxx xxxxxxxxxx xxx xxx xxxxxxxxxxxxxxxxxx xxxxxx xx xxxxxxxxxxxxxxxxxx xxxxxx xx xxxxxxxxxxxxxx xx xxx xxxxxxx. The xxxxxx xxxxxxxxxx stated that no one was available to provide SETSS xx xxx xxxxxxxxxx xx xxx xxxxxxxxxx xx xxxxxxxxxx xxx xxxxxxx xxxxxxxxxx xx xxxxxxxxxx xxxxx however, she acknowledged that it was not always possible to make up all missed sessions, and there were entire weeks during the school year when students might not have received SETSS as required by their IEPs or Section 504 Plans.

The xxxxxx xxxxxxxxxx informed OCR that she regularly logged student attendance in a notebook during school year 2011-2012; and that from September 2011 through March 2012, she also recorded student attendance on the NYCDOE's electronic Special Education Student Information System (SEGIS). xxx xxxxxx xxxxxxxxxx stated, however, that due to technical difficulties with both SEGIS and the School's computer network, it was

¹ SETSS are pull-out support services, provided by a certified special education teacher, which are designed to provide additional support in English/Language Arts and/or Math to students with disabilities as a related aid or service; or to non-disabled students as part of academic intervention services (AIS).
² Twenty-two of those students were mandated to receive SETSS by their IEPs; the other two students received SETSS as part of AIS.
³ During school year 2011-2012, the SETSS Provider was also a special education teacher and the School's special education liaison. As liaison, she was required to attend all IEP meetings. OCR determined that for school year 2012-2013, the Principal assigned the SETSS Provider to serve as a full-time special education liaison, and assigned another special education teacher to serve as a full-time SETSS provider.

time consuming to input attendance;⁴ and as of around March 2012, she determined that it was too burdensome to input information into SESIS. Thereafter, she relied exclusively upon the handwritten logs to record student attendance from late March 2012 through June 2012; however, she did not retain the logs beyond the end of school year 2011-2012. The NYCDOE did not provide OCR with alternate documentation confirming that it provided SETSS to students with disabilities as required by their IEPs from March through June 2012.

The NYCDOE agreed to implement the enclosed resolution agreement to resolve OCR's concerns with respect to Allegation 1. OCR will monitor the implementation of the resolution agreement. If the NYCDOE fails to comply with the terms of the resolution agreement, OCR will resume its investigation of this complaint.

With respect to Allegation 2, the complainant alleged that the School's xxxxxxxx xxxxxxxxxx retaliated against her for filing a prior complaint with OCR by failing to provide her with a copy of a form with the principal's signature xxxxxxxx xxx xxxxxxxx for xxxx xxxx in xxxxxxxx. In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant was subjected to an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in protected activity when she filed complaints with xxx on xxxxx xx xxxx, and xxxxxxxx x xxxx (xxx xxxx xxxx xx xx xxxx and xx xx xxxx, respectively). OCR further determined that the NYCDOE and School administrators were aware of the complainant's protected activity.

"X---paragraph redacted---X"

"X---paragraph redacted---X"

An adverse action is one that affects a person's education, work, or well-being in an unwarranted, serious, lasting, and usually tangible manner (i.e., something that is more than a transient, unpleasant incident). The complainant did not provide and OCR did not find any evidence to indicate that the xxxxxxxx xxxxxxxxxxxx refusal to provide the complainant with a copy of the signed Form constituted an adverse action, in that it did not affect the complainant in an unwarranted, serious, lasting or tangible manner. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 2.

With respect to Allegation 3, the complainant alleged that School staff and administrators retaliated against her for filing a prior complaint xxxx xxx by failing to notify her in advance of a meeting xxx xxx xxxxxxxx xxxxxxxxxx xxxx xx xxx xxxxxxxx xx xxxxxxxxxx xxx xxxx. The complainant alleged that she was not aware of the meeting until the day it occurred. The complainant did not indicate specifically who she believed failed to notify her of the meeting; xxxxxxxxxx xxx xxxxxxx xxxxx xxx xxxxxx xxxxxxx xxxxxxx xxx xxx xxxxxxxxxxxxxx xxx xxxxxxxxxx xxxxxxxxxx xxxxxx xxxxxx xxx xxxxxx xxxxxxxxxx xxxxxxxxxx xx xxxxxxxxxx. xxx xxxxxxxxxxxxxx xxx xxx xxxxxx xxx xxxxxxxxxx xxxxxxxxxx xxxxxx xxx xxx xxxxxxxxxx xxxxxxxxxx xxxxxx xxxxxxxxxx xx xxxxxx xxxxxxxxxxxxxx xxxxxxxxxx. The complainant asserted that the School's Assistant Principal deliberately scheduled a meeting with

⁴ The School's Principal confirmed that during school year 2011-2012, SESIS frequently shut down or froze while a user was inputting information; it would not always save changes; and was not always available via the internet. He further stated that the School's internet connection also was unreliable and slow. The Principal stated that he contacted the SESIS Help Desk and the NYCDOE for assistance, but they have not provided adequate support or remedies and the problems persisted throughout school year 2012-2013.

her xxx xxx xxxxxxxx xx xxxxxxxx xxx xxxxx during the same time the other meeting was being held. The complainant asserted that she was unable to reschedule either meeting and was left no alternative but to attend the meeting with the Assistant Principal xxx xxxx xxx xxxxxxx xxxxxxxx xx xxxxx xxxxxxxx xxxxxxxxxxxxxx xxx xxxxx xxxxxxx.⁵ The complainant asserted that this was an attempt by the administration to withhold information from her and to exclude her from discussions xxxxx xxx xxxxxxxx xxxxxxxx xxxxxxxxxxxxxx.

“X---paragraph redacted---X”

The Assistant Principal recalled meeting with the complainant on xxxxxxxx xxx xxxx; however, he denied having any knowledge of the xxxxxxx meeting or involvement in how the complainant or other xxxxxxx xxxxxxxx were notified about the meeting.⁶ The Principal denied having any specific knowledge of a xxxxxxx meeting that was conducted on xxxxxxxx xxx xxxx. The complainant acknowledged that approximately two weeks after the meeting on xxxxxxxx xxx xxxxx xxxxxxx x provided her with written materials discussed during the meeting, and that she otherwise was not affected xx xxxxxxx xxx xxxxxxx xxxxxxx.

Based on the foregoing, OCR could not corroborate that School staff and administrators failed to provide the complainant with xxxxxx of the xxxxxxx xxxxxxx or attempted to xxxxxxxx xxxxxxxxxxxxxx from her regarding the School’s xxxxxxx xxxxxxxxxxx, as the complainant alleged. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 3.

“X---paragraph redacted---X”

“X---paragraph redacted---X”

“X---paragraph redacted---X”

Based on the foregoing, OCR could not corroborate that the Principal or any other School staff member intentionally xxxxxx the xxxxxxxxxxx in the complainant’s School xxxxxxx, as she alleged. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 4.

“X---paragraph redacted---X”

“X---paragraph redacted---X”

Based on the foregoing, OCR could not corroborate that the incident on xxxxx x xxxx occurred as alleged. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation 5.

As stated above, the attached resolution agreement addresses Allegation 1. OCR will monitor implementation of the resolution agreement. If the NYCDOE fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

⁵ The complainant informed OCR that she surmised that the information conveyed at the xxxxxxx meeting was important because she observed test materials being distributed. The complainant stated that she asked the xxxxxxx leading the meeting if the meeting could be rescheduled, and the xxxxxxx responded “no.”

⁶ xxx xxxxxxxxxxx xxxxxxx xxx xxxx xxx xxxxxxxx xx xxx xxxxxxxx xxxxxxxx xxx xxxxxxx x xxx xxxxxxxxxxx xxxxxxx xxxxxxx xx xxx xxxx xxxx. The Assistant Principal denied having any recollection of the complainant indicating that she had another meeting to attend.

This letter should not be interpreted to address the NYCDOE'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 NYCDOE may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

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.

If you have any questions regarding OCR's determination, please contact Ronald L. Scott, Compliance Team Attorney, at (646) 428-3820 or ronald.scott@ed.gov; or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

/s/

Timothy C.J. Blanchard

cc: xxxxxxxx xxxxxxxx xxxxxxxx xxx