



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
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September 20, 2019

Sent by email only to jprzepasniak@pval.org

James Przepasniak
Interim Superintendent
Pine Valley Central School District
7755 Route 83
South Dayton, New York 14138

Re: Case No. 02-16-1341
Pine Valley Central School District

Dear Superintendent Przepasniak:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against Pine Valley Central School District (the District). The complainant alleged that the District discriminated against her daughter (the Student), on the basis of her disability, by (a) failing to provide information to the Student in multiple modalities and (b) continuing to grade the Student's quizzes in her XXXXXXXX XXXXXXXX XXXX (XXX) class, contrary to the Student's Section 504 Plan for school year 2015-2016 (Allegation 1). The complainant also alleged that on April 29, 2016, an XXX teacher (the teacher) subjected the Student to harassment because of her disability by excluding the Student from an XXX lesson/class activity for failing a test/quiz and yelling at the Student to "get in the hall" in front of her peers (Allegation 2). The complainant further alleged that in retaliation for the Student's informing the principal that the teacher was not following the Student's Section 504 Plan, the teacher yelled at the Student about speaking to the principal (Allegation 3).

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 District 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, 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 reaching a determination regarding this complaint, OCR interviewed the complainant and District staff. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

OCR determined that for school year 2015-2016, the District found the Student eligible for special education and related aids and services. The District placed the Student in a general education XXXXX grade class at the elementary school (the School) for school year 2015-2016, with related aids and services; and, developed Section 504 plans, dated May 13, 2015 (for the period from May 13, 2015, through April 11, 2016), and April 12, 2016 (for the period beginning April 12, 2016, and continuing through the end of the 2015-2016 school year) (collectively, the Section 504 Plans).

With respect to Allegation 1(a), the complainant alleged that the District discriminated against the Student, on the basis of her disability, by failing to provide information to the Student in multiple modalities in her XXX class, as set forth in the Student's Section 504 Plans, during school year 2015-2016. The complainant stated that she met with the Student's case manager and the teacher¹ at several different times throughout the school year, including in October 2015, January 2016, and March 2016, to complain that information was not being presented to the Student in multiple modalities during XXX class as set forth in the Student's Section 504 Plans (e.g., auditory information paired with visuals); however, in her complaint filed with OCR, the complainant provided only one example of an occasion in April 2016, when the teacher read a book aloud to the class without providing the book to the Student in another modality (i.e., a hard copy). The complainant asserted that, thereafter, the teacher administered a quiz on the book electronically, without providing a hard copy of the quiz to the Student, and the Student failed the quiz.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipients to provide a free appropriate public education to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met; and, are based upon adherence to the evaluation and placement procedures set forth in the regulation. Implementation of a Section 504 plan is one means of meeting this requirement.

¹ In a letter from counsel for the District to OCR dated April 24, 2019, the District advised OCR that the teacher is no longer employed by the District.

OCR determined that the Student's Section 504 Plans stated, in the Lesson Presentation section, "[p]resent information in multiple modalities for reinforcement (i.e., auditory information paired with visuals)." The Section 504 Plans further provided that for testing, the Student would also be "provided an alternate/option to 'XXXXXXXX XXXXXX' and XXXXXXXXXXXX(allow [the Student] to watch, read questions, watch again) and provide a hard copy of quizzes."

OCR determined that in the Student's XXX class on April 28, 2016, the teacher read a book aloud and administered a quiz on the book electronically.² The complainant asserted that the teacher read the book from an iPad, and did not present the information to the Student in another modality (e.g., hard copy). The teacher acknowledged to OCR that at some point during the lesson, she realized that the Student should have had the book and gave her a copy of the book. The teacher stated that the Student had a copy of the book for at least half of the lesson.³ District staff acknowledged that there was an in-class, electronic quiz on the book administered on that date. The quiz at issue was a "XXXXXXXX XXXXXX" quiz. The complainant alleged that the quiz was not administered consistent with the Student's Section 504 Plans in effect for school year 2015-2016, as the Student did not receive a hard copy of the quiz. District staff acknowledged this. The District explained that on this occasion, the Student was not provided with a hard copy of the quiz because the copier was broken. The case manager stated that since a hard copy of the quiz was not available, he read the electronic quiz aloud to the Student; reduced the number of questions in the Student's visual field by enlarging the text on the computer to ensure that the Student was able to view only one question with its responses at a time; explained the questions and choices to the Student; and, recorded the Student's answers. Nevertheless, the Student received a XXXXXXXX grade of XX on the quiz. The complainant informed OCR that the Student's identified disabilities limited the Student's ability to process information orally or on the iPad effectively, so that the case manager's provision of additional oral instructions/revisions to the electronic test administered on the iPad were not equivalent to receiving hard copies for quizzes, as set forth in the Student's Section 504 Plans.

The School's principal informed OCR that on or about February 2, 2016, she met with the case manager and the teacher to review the concerns the complainant had raised in an email on January 29, 2016, regarding the Student's continuing to not receive materials in multiple modalities in her XXX class. The principal informed OCR that they reviewed the Student's Section 504 Plans and the Student's quiz grades at this meeting to determine which grades needed adjusting. The case manager checked the Student's grades on quizzes and tests and was able to determine which ones were not administered with multiple modalities (i.e., were administered electronically and without providing a paper copy to the Student). The case manager stated to OCR that he reported that information in person to the complainant and the Student's father; and, conveyed to them that the District would drop failing grades on certain quizzes. The complainant asserted to OCR that she was never informed whether those grades were dropped.

² The Student's electronic grade report indicates that on April 28, 2016, there was a test, assignment "XXXXXXXX XXXXXX." Although designated as a test, the teacher acknowledged that the Student took a quiz on that date which was a "XXXXXXXX XXXXXX" quiz.

³ The District also stated that the Student had the option to ask for a hard copy of the book so she could follow along; however, OCR's review of the Student's Section 504 Plans in effect for school year 2015-2016 did not indicate that the Student was required to ask for a hard copy of a book in order to receive one.

Prior to the completion of OCR’s investigation with respect to Allegation 1(a), on September 12, 2019, the District signed the enclosed agreement to resolve this allegation without further investigation.

With respect to Allegation 1(b), the complainant alleged that the District discriminated against the Student, on the basis of her disability, by failing to implement the Student’s Section 504 Plans in her XXX class, during school year 2015-2016, by continuing to grade the Student on quizzes. The complainant asserted that the Student’s Section 504 Plans provided that she be allowed to complete quizzes without grading; but the Student nonetheless received grades on quizzes throughout school year 2015-2016, which was contrary to her Section 504 Plans.

With respect to grading of quizzes, the Student’s Section 504 Plans stated “provide an alternate/option to ‘XXXXXXXX XXXXXX’ and ‘XXXXXX XXX (allow [the Student] to watch, read questions, watch again) – due to increase in XXXXXXXX level allow completion of quizzes without grading. [The Student’s] comprehension of books read independently could be measured through a book report or some other means.” The District asserted that the provision in the Student’s Section 504 Plans regarding the “completion of quizzes without grading” applied only to “XXXXXXXX XXXXXX” and “XXXXXX XXX” electronic quizzes, not to all quizzes; however, the District did not provide Section 504 Committee meeting notes or similar evidence to support its interpretation of the provision at issue.⁴ Notwithstanding the District’s assertion that the Student’s Section 504 Plans providing for the “completion of quizzes without grading” applied only to “XXXXXXXX XXXXXX” and “XXXXXX XXX” electronic quizzes, OCR determined the Student’s grade report reflected that all quizzes were graded, including quizzes that were “XXXXXXXX XXXXXX” and “XXXXXX XXX.”

Based upon a review of documentation the District provided, OCR determined that the Student was graded on XXX quizzes throughout school year 2015-2016. The Student’s electronic grade report indicates that between October 27, 2015, and February 29, 2016, the Student was graded on 21 tests/quizzes in XXX.⁵ The District asserted that it took action to correct this by removing failing grades on certain quizzes from the Student’s final grade report in the fall semester; however, the quiz grade report the District provided to OCR did not reflect the removal of any quiz grades for that period. Further, the documentation the District provided reflects that the Student received a number of failing grades on quizzes.

Based on the foregoing, OCR determined that the District failed to implement the Student’s Section 504 Plans in her XXX class, during school year 2015-2016, by continuing to grade the Student on all quizzes, including “XXXXXXXX XXXXXX” and “XXXXXX XXX” electronic quizzes that it asserted were not supposed to be graded. On September 12, 2019, the District signed the attached resolution agreement to remedy the compliance issues identified in Allegation 1(b).

⁴ Additionally, the Student’s electronic grade report indicates that the Student received grades on two XXXXX XXX quizzes administered on March 10, 2016 (70), and March 11, 2016 (70); these are the only two quizzes identified on the Student’s grade report as XXXXX XXX quizzes. None of the remaining quizzes on the Student’s electronic grade report indicate whether it is a XXXXX XXX, XXXXXXXX XXXXXX, or other type of quiz; and, each of the remaining quizzes also indicate the Student’s grade on the quiz.

⁵ The electronic grade report does not distinguish between different types of quizzes for the period October 27, 2015, through June 13, 2016, with the exception of two dates: March 10, 2016, and March 11, 2016.

With respect to Allegation 2, the complainant alleged that on April 29, 2016, the teacher subjected the Student to harassment because of her disability by excluding the Student from an XXX lesson/class activity for failing a test/quiz and yelling at the Student to “get in the hall” in front of her peers. Specifically, the complainant stated that on that date, the teacher yelled at the Student, and another student (student A) who had also failed the quiz, to leave the classroom and remain in the hallway, shortly after she began showing a movie to the class.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. 35.130(a), contains a similar provision. Disability harassment that creates a hostile environment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Harassing conduct by an employee, by another student, or by a third party can include verbal, written, graphic, physical or other conduct; or conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student’s participation in or receipt of benefits, services or opportunities in the institution’s program.

As discussed above in connection with Allegation 1(a), OCR determined that on April 28, 2016, the Student failed a quiz related to a book her XXX class was studying. On the following day, April 29, 2016, the teacher required the Student to leave the classroom while the class watched a movie related to the book. OCR determined that the teacher had informed the class in advance of the quiz that any student who did not pass the quiz would not be permitted to view the movie. The teacher asserted that on April 29, 2016, while she was out of the room, a substitute teacher started showing the movie. The teacher stated that when she returned to the classroom, she realized that there were students present who should be excluded because they had failed the quiz. The teacher stated that she then paused the movie and announced to the class without mentioning names that those students “you know who you are, need to go to the hallway with your books.” In response, the Student and student A left the room. The teacher then continued the movie and propped the door of the classroom open in order to keep an eye on the Student and student A. The teacher denied raising her voice to or yelling at the Student, as alleged.

OCR determined that the teacher’s request that students go into the hallway was directed at all students in the classroom who had failed the quiz, including student A, who did not have a disability. The teacher did not make any references to the Student’s disability.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that on April 29, 2016, the teacher subjected the Student to harassment because of her disability by excluding the Student from an XXX lesson/class activity for failing a test/quiz and yelling at the Student to “get in the hall” in front of her peers. Therefore, OCR will take no further action with regard to Allegation 2.

With respect to Allegation 3, the complainant alleged that in retaliation for the Student’s informing the principal that the teacher was not following the Student’s Section 504 Plans, the teacher yelled at the Student about speaking to the principal. The complainant stated that on April 29, 2016, the Student tried to advocate for herself by telling the principal that the teacher had not followed her

Section 504 Plans; and as a result, she was denied the opportunity to view the movie on that date as discussed above in Allegation 2.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

The District denied that the Student complained to the principal about the teacher's implementation of her Section 504 Plans at any point on April 29, 2016. The principal stated that on the morning of April 29, 2016, the Student approached her and asked to meet with her on that day. The principal informed OCR that although she encouraged the Student to make an appointment or stop by during the Student's lunch period later that same day, the Student did not return to meet with her. The teacher informed OCR that the Student never asked to meet with the principal on or about April 29, 2016; and, denied knowing that the Student met or wanted to meet with the principal about the events on that date, or that she yelled at the Student for meeting or wanting to meet with the principal on that date. The complainant did not identify any witnesses to the alleged incident.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the preponderance of the evidence substantiated the complainant's assertion that the Student informed the principal that the teacher was not following the Student's Section 504 Plans, or that the teacher yelled at the Student about speaking to the principal on April 29, 2016.

Therefore, OCR determined that there was insufficient evidence to substantiate that the alleged adverse action occurred to support a prima facie case of retaliation. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 3.

OCR will monitor the implementation of the agreement. Upon the District's satisfaction of the commitments made under the agreement, OCR will close the case.

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 a right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District 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 individual may file a 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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.

If you have any questions regarding OCR's determination, please contact Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3763 or jane.momo@ed.gov; Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or jessica.daye@ed.gov; or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Enc.

cc: Andrew Freedman, Esq. by email only to XXXXXXXXX@XXXXXXXXXXXXXXX