



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515
100 PENN SQUARE EAST
PHILADELPHIA, PA 19107-3323

REGION III
DELAWARE
KENTUCKY
MARYLAND
PENNSYLVANIA
WEST VIRGINIA

August 18, 2015

IN RESPONSE, PLEASE REFER TO: 03-15-1099

Mr. Kyle B. Lively
Superintendent
Somerset Independent Schools
305 College Street
Somerset, KY 42501

Dear Mr. Lively:

This is to notify you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Somerset Independent Schools (the District). XXXXXX (the Complainant) alleged that the District discriminated against her XXXXXX, XXXXXX (the Student), on the bases of race, color, and disability. Specifically, the Complainant alleges the following:

1. XXXXXX;
2. XXXXXX; and
3. XXXXXX.

OCR enforces:

- Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulations, at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance.
- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.

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

- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Title VI, Section 504, Title II, and their implementing regulations.

The Section 504 implementing regulation, at 34 C.F.R. Sections 104.4(a) and (b)(i)-(vii), prohibits a recipient of Federal financial assistance from providing a service, financial aid or other benefit to an individual, which is different or is provided in a different manner from that provided to others under the program. In order to establish a finding of a violation of different treatment under Section 504, OCR must determine that the Complainant was treated differently than similarly-situated students in a way that limited the Complainant's opportunity to participate in or benefit from a recipient's program or activity, and that either the recipient cannot articulate a legitimate, nondiscriminatory reason for the different treatment or that the recipient has articulated a legitimate nondiscriminatory reason for the different treatment, but the reason is pretext for discrimination. Additionally, OCR also examines whether the recipient treated the individual in a manner that was consistent with established policies and practices and whether there is any other evidence of disability discrimination.

Under 28 C.F.R. § 35.103, the Title II regulation does not set a lesser standard than those under Section 504. Accordingly, OCR interprets the Title II regulation to require public entities to provide services to students with disabilities (including a free appropriate public education) to the same extent as is required under the Section 504 regulation. Under the Title II regulation at 28 C.F.R. § 35.171(a)(3), OCR uses its Section 504 procedures to investigate Title II complaints.

The regulation implementing Title VI, at 34 C.F.R. Section 100.3 (a), (b)(1)(ii), (iii), (iv) and (vi), states that no person in the United States shall, on the ground of race, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program to which this part applies. Furthermore, a recipient may not subject an individual to segregation or separate treatment in any matter related to his receipt of any service under the program, restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, or deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him an opportunity to do so which is different from that afforded others under the program.

As with other types of discrimination claims, OCR will first apply a standard different treatment analysis to allegations involving disability-related and/or racial incidents perpetrated by representatives of recipients. Under this analysis, a recipient violates Section 504, Title II, and/or Title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of disability and/or race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate

in or benefit from the services, activities or privileges provided by the recipient. In applying this standard different treatment analysis, OCR will address the following questions:

1. Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?
2. Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?
3. Was the different treatment based on disability and/or race color, or national origin?
4. Did the context or circumstances of the incident provide a legitimate, non-discriminatory, non-pretextual basis for the different treatment?

Recipients are responsible under Section 504, Title II, and Title VI for providing students with a nondiscriminatory educational environment. A disability-related and/or racially hostile environment that violates Section 504, Title II, and/or Title VI is found to exist when there is (1) disability-related and/or racially harassing conduct that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient, (2) actual or constructive notice of the disability-related and/or racially hostile environment to the recipient, and (3) failure by the recipient to respond adequately to redress the disability-related and/or racially hostile environment. Harassment based on disability and/or race, if sufficiently severe, denies or limits a student's ability to participate in or benefit from the recipient's program. When a recipient has notice of disability-related and/or racial harassment, it must take immediate and appropriate steps to stop the harassment and prevent it from happening again. The judgment and common sense of teachers and administrators are important elements of any response. The recipient is responsible for taking all reasonable steps to ensure a safe learning environment.

In considering allegations of discrimination that involve issues of speech or expression, OCR must consider the protections of the First Amendment of the U. S. Constitution, and that OCR's enforcement of regulations must be consistent with the requirements of the First Amendment. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. A disability-related and/or racially hostile environment may be created by oral, written, graphic or physical conduct related to an individual's disability and/or race, color and/or national origin that is sufficiently severe, persistent or pervasive so as to interfere with or limit the ability of an individual to participate in or benefit from the recipient's programs or activities. Because OCR's responsibility is protecting students from discrimination, not regulating the content of speech or curriculum, OCR is sensitive to First Amendment concerns that may arise in the course of addressing harassment complaints and takes special care to avoid actions that would impair First Amendment rights. However, recipients have significant latitude in controlling the educational environment and may address disability-related and/or racially harassing and abusive conduct that creates a hostile environment.

OCR considers a disability-related and/or racially hostile environment to be one in which there are acts of a disability-related and/or racial nature that are sufficiently severe, pervasive, or persistent to create an intimidating, abusive, threatening or offensive educational environment. Acts of a disability-related and/or racial nature may include verbal statements and physical conduct imposed on the basis of an individual's or group's disability and/or race, color, or national origin. To determine whether a hostile environment existed, OCR considers the totality of the circumstances, including factors such as the context, nature, scope, frequency, duration and the location of the alleged incident, as well as the number, identity and relationship of the individuals involved. OCR evaluates the severity, pervasiveness and persistence of the alleged incident in light of the age and impressionability of the students.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. If harassment is found, it should take reasonable timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created and remedy the effects of the harassment on the student who was harassed. The recipient must also take steps to prevent the harassment from recurring including disciplining the harasser where appropriate.

Although Title VI does not require a recipient to have specific anti-discrimination or anti-harassment policies, in evaluating a recipient's response to a racially hostile environment, OCR will examine disciplinary policies, grievance policies, and any applicable anti-harassment policies. OCR also will determine whether the responsive action was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

In evaluating whether grievance procedures are prompt and equitable, OCR considers whether the procedures provide for:

- notice of the procedure, including where complaints may be filed;
- application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
- adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the major stages of the complaint process;
- notice to the parties of the outcome of the complaint; and
- an assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Conclusion

Under OCR procedures, a complaint may be resolved before the conclusion of an investigation if a recipient asks to resolve the complaint by signing a resolution agreement. The provisions of

the resolution agreement must be aligned with the complaint allegations and be consistent with applicable regulations. Such a request does not constitute an admission of a violation on the part of the District, nor does it constitute a determination by OCR of any violation of our regulations.

Consistent with OCR's procedures, the District requested to resolve the complaint through a Voluntary Resolution Agreement (the Agreement). On August 14, 2015, the District signed an Agreement to address the allegations in this complaint. As is our standard practice, OCR will monitor the District's implementation of the Agreement, a copy of which is enclosed. Accordingly, OCR is concluding its investigation of the allegation as of the date of this letter.

This letter is not intended nor should it be construed to cover any other issues regarding the District's compliance with Section 504, Title II, and/or Title VI which may exist and are not discussed herein. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

Please be advised that Federal regulations prohibit recipients of Federal financial assistance from taking actions that intimidate, threaten, coerce, interfere, or discriminate against any individuals who exercise their statutory rights under the laws that OCR enforces, including filing a complaint with our office or taking part in the complaint resolution process.

If you have any questions, please contact Michael Wesley, the Equal Opportunity Specialist assigned to this case, at (215) 656-6908, or by email at michael.wesley@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader
Philadelphia Office

Enclosure