



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

October 31, 2015

IN RESPONSE, PLEASE REFER TO: 03151189

Mr. Brian J. Gasper, Superintendent
Jim Thorpe Area School District
410 Center Avenue
Jim Thorpe, PA 18229

Dear Mr. Gasper:

This is to notify you of the resolution of the complaint that was filed with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against the Jim Thorpe Area School District (the District) alleging discrimination on the basis of disability. XXXXXX (the Complainant) alleges that the District discriminated against XXXXXX (the Student), on the basis of disability XXXXXX. Specifically, she alleges that the XXXXXX (School):

1. Failed to timely reevaluate the Student, despite XXXXXX repeated requests during the XXXXXX school year;
2. x -paragraph - x

OCR enforces:

- 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. Section 504 also prohibits retaliation.
- Title II of the Americans with Disabilities Act of 1990 (Title II), and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities such as elementary and secondary education systems. Title II also prohibits retaliation.

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

Legal Standards

Disability

The regulation implementing Section 504 prohibits the District from discriminating on the basis of disability. The Section 504 regulation, at 34 C.F.R. § 104.4(a) states that no qualified individual shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Title II prohibits the same form of discrimination by public entities. Therefore, OCR applies the Section 504 standard when analyzing the same claims under Title II.

The regulation implementing Section 504 at 34 C.F.R. § 104.33 requires public school districts to provide a free and appropriate education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of a student with disabilities as adequately as the need of non-disabled students are met, and that are developed in accordance with the procedural requirements of subsections 104.35-104.36 pertaining to evaluation and placement and due process protections. Implementation of an individualized education program developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations at 28 C.F.R. §§ 35.130(a) and 35.130(b)(1)(ii) and (iii) to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Retaliation

Retaliation is prohibited under the Section 504 implementing regulation, at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d, *et seq.* The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation for engaging in a protected activity. The regulation implementing Title II, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

To establish a *prima facie* case of retaliation, OCR must determine whether: 1) the individual engaged in a protected activity; 2) the recipient had notice of the individual's protected activity; 3) the individual was subjected to some kind of adverse action; and 4) there was a causal connection between the protected activity and the adverse action. While OCR would need to address all the elements in order to find a violation, it is not necessary to address all these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established. If all of these elements establish a *prima facie* case, OCR then considers whether the recipient has identified a legitimate, nondiscriminatory reason for taking the adverse action, or whether the reason asserted is a pretext for retaliation.

In order for an activity to be considered "protected," the complainant must have either opposed conduct prohibited by one of the laws that OCR enforces or participated in an investigation conducted under the laws that OCR enforces. In determining whether an action taken by a recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Notice of the protected activity to the recipient, and not necessarily to the alleged individual retaliator(s), is sufficient to establish the notice requirement. In determining whether an action taken by the recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse. OCR follows the general

principle that as the time period between the protected activity and the materially adverse action increases, the likelihood that there is a causal link between these two activities decreases. Other evidence of a causal connection may include the recipient's treatment of the complainant compared to other similarly situated individuals, the recipient's deviation from established policies or practices, and changes to the treatment of the complainant after the protected activity occurred.

Factual Background

The Student was XXXXXX (the School) during the 2014-15 school year.

The Complainant alleges that the District failed to timely reevaluate the Student, XXXXXX. XXXXXX, the District completed its evaluation of the Student, determined that XXXXXX had a specific learning disability in the area of XXXXXX, and addressed it through a XXXXXX IEP. The District conducted XXXXXX to determine if there were additional areas of need other than those previously identified in the prior evaluation. On XXXXXX, it revised the IEP to include XXXXXX with all other subjects occurring in the general education setting.

The Complainant also alleges that XXXXXX during the 2014-15 school year x -paragraph - x

x -paragraph - x

The District requested to resolve this complaint via a resolution agreement at the start of OCR's investigation.

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 this complaint through a resolution agreement, and on October 28, 2015 the District signed a Voluntary Resolution Agreement (Agreement) with OCR in order to resolve the matter. Accordingly, OCR is concluding its investigation of this complaint. As is our standard practice, OCR will monitor the District's implementation of the Agreement, a copy of which is enclosed.

This letter is not intended, nor should it be construed, to cover any other issues regarding the District's compliance with Section 504 or Title II, and their implementing regulations, that 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.

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 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, we will seek to protect, to the extent provided by law, personally identifiable information, which, if

Page 4 – Mr. Brian J. Gasper

released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation with this matter. If you have any questions, please contact Beverly Johnson, Investigator, at 215-656-8581 or beverly.johnson@ed.gov. Additionally, you may contact Meg Willoughby, Attorney, at 215-656-8579 or Meg.Willoughby@ed.gov.

Sincerely,

/s/

Vicki Piel
Team Leader/Supervisory Attorney
Philadelphia Office

Enclosure

cc: Timothy E. Gilsbach, Esquire (via email, w/encl.)