



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE WANAMAKER BUILDING, SUITE 515
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PHILADELPHIA, PA 19107-3323

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October 30, 2015

IN RESPONSE, PLEASE REFER TO: 03-15-1190

Dr. John Fredericksen
Superintendent
Wicomico County Public Schools
101 Long Ave.
P.O. Box 1538
Salisbury, MD 21802

Dear Dr. Fredericksen:

This is to advise you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation and reached a determination in the above-referenced complaint against the Wicomico County Schools (the District). The Complainant alleged that the District discriminated against the Student on the basis of disability. Specifically, the Complainant alleged that the XX – Paragraph deleted – XX.

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance. 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.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination in this complaint, OCR reviewed documentation provided by the Complainant and the District. OCR also interviewed the Complainant, the Student, and District staff. OCR found insufficient evidence of disability discrimination as alleged. In the course of investigating the allegation, however, OCR found that the District's procedures for addressing complaints alleging disability discrimination and its statement of nondiscrimination do not meet relevant legal standards. The bases for our determinations are summarized below.

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

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Applicable Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified disabled person shall, on the basis on disability be excluded from participation in, be denied the benefits of, or otherwise subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulation, at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

A recipient, such as the District, has a duty to provide a nondiscriminatory environment that is conducive to learning. The existence of a hostile environment that a recipient creates, encourages, accepts, tolerates, or leaves uncorrected constitutes different treatment on the basis of disability in violation of Section 504 or Title II. OCR will find that a recipient violates Section 504 and/or Title II when it determines, based upon a review of evidence, that: 1) a student was subjected to harassment on the basis of disability; 2) the harassment rose to a level (was so severe, persistent, and pervasive) that it denied or interfered with the student’s ability to participate in or benefit from the educational program, services, activities, or privileges provided by the recipient; 3) the recipient had actual or constructive notice of the harassment; and, 4) the recipient failed to take prompt and remedial action to end the harassment and prevent its reoccurrence.

OCR considers the totality of all relevant circumstances to determine whether the alleged harassing conduct is sufficiently severe, persistent, or pervasive to rise to the level of a hostile environment so as to interfere with or limit the ability of a student to participate in or benefit from the recipient’s programs or activities. Factors considered include the context, nature, scope, frequency, duration, and location of the alleged harassment, as well as the age, identity, number, and relationships of the persons involved. OCR evaluates the conduct and circumstances from both a subjective and objective perspective.

Once a recipient is on notice of the existence of a hostile environment, an appropriate response includes taking immediate steps to determine what occurred, ending any harassment and eliminating the hostile environment, and preventing harassment from occurring again, and remedying the effects of the harassment.

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment.

In addition to the nondiscrimination provisions, the Section 504 regulation, at 34 C.F.R. §104.8, requires recipients to publish a notice of nondiscrimination. The Section 504 regulation, at 34 C.F.R. §104.7(a), requires that recipients designate at least one employee to coordinate compliance with the regulation.

The regulation, at 34 C.F.R. §104.7(b), requires recipients to adopt and publish a policy against disability discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of disability. The Title II regulation, at 28 C.F.R. § 35.107(b) contains similar requirements. OCR requires that the grievance procedures contain, at a minimum, the following elements:

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

Findings of Fact

XX – Paragraph deleted – XX

Alleged Incidents of Disability Harassment

XX – Paragraph deleted – XX

District Policies and Procedures

The District provided copies of several procedures in response to OCR’s data request as noted above. The submission included the following notable documents/procedures: 1) Nondiscrimination Statement 2) a document entitled, “Discrimination and Sex Harassment;” and, 3) a document entitled, “Discrimination and Sex Harassment –R,” that included complaint processing forms.

1. Nondiscrimination statement

The District’s submission included its nondiscrimination notice, which is found in the footer of District letterhead. The notice contained the following statement:

The Wicomico County Board of Education does not discriminate in admissions, access, treatment, or employment in its programs and activities on the basis of race, sex, sexual orientation, marital status, color, gender identity and expression, national origin, creed, religion, age, ancestry, genetic information, or physical or mental disability.

The statement does not identify a contact person or an address, telephone number or email address for questions or complaints regarding compliance with Section 504.

2. Policies - Discrimination and Sexual Harassment /Discrimination and Sexual Harassment-R

The documents entitled, “Discrimination and Sexual Harassment,” and, “Discrimination and Sexual Harassment-R,” arguably apply to all discrimination complaints, but focus on sexual harassment.¹ The document entitled “Discrimination and Sexual Harassment” procedure contains a provision that states that the District “provides equal educational and employment opportunities regardless of age, gender, race, color, religion, national origin, disability or sexual orientation.” Neither procedure has a provision that specifically prohibits disability discrimination of any kind. The procedure appears to limit complaints to students and employees, thereby excluding third party complaints. There is no requirement that the parties be allowed to provide evidence or witnesses. The only reference to time states that “complaints will be investigated promptly,” but does not provide any specific timeframes. The policy does not require that the parties be notified of the outcome nor is there any assurance that the District will take steps to prevent recurrence of any harassment.

The document entitled “Discrimination and Sexual Harassment-R” limits complaints to students and employees. The policy has four levels and includes an informal resolution policy. Level One requires a complainant to identify concerns to either his supervisor or the Title VII or Title IX Coordinator.² Level Two permits the Complainant to file a complaint if the matter cannot be informally resolved by the Title VII or Title IX Coordinators. Level Three of the policy permits the Complainant to file a complaint to the Superintendent if not satisfied with the results of the Level

¹ While the District provided both documents in response to OCR’s data request, it is not clear if the two documents are to be read together or if the document entitled Discrimination and Sexual Harassment-R is controlling. As such, both documents are discussed.

² The document does not refer to a Section 504/Title II Coordinator.

II response. The Superintendent must respond in writing within 10 days. Level Four permits a complainant to appeal to the District Board of Education within 10 days of receipt of the Level II decision.

Analysis

Hostile Environment

XX – Paragraph deleted – XX

XX – Paragraph deleted – XX

XX – Paragraph deleted – XX

Notice of Nondiscrimination

OCR has determined that the District’s nondiscrimination statement is not compliant with the regulation. Specifically, it does not include the identification of the individual(s) designated to coordinate the District’s Section 504/ADA compliance efforts. As such, the statement does not comply with Section 504 or Title II’s requirements for notice.

Grievance Procedures

OCR reviewed the District’s procedures for addressing complaints of disability discrimination, as required by Section 504 and Title II of the ADA. OCR identified the following deficiencies: the procedures do not specifically state that they apply to complaints of disability discrimination; the procedures only address discrimination against students and staff and do not include third parties who may be the victims of discrimination; the procedures do not provide timeframes for the various stages of the investigative process nor do the procedures indicate that the parties will be notified of the outcome of the investigation; the procedures do not provide either the complainant or respondent an opportunity to provide evidence or witnesses; and, the procedures do not contain an assurance that the District will take steps to prevent the recurrence of any discrimination or harassment.

The District has agreed to address these procedural compliance concerns by entering into the enclosed agreement with OCR. When fully implemented, the resolution agreement will address all of OCR’s compliance concerns. Consistent with our usual practice, OCR will monitor the implementation of the agreement until we have determined that the District is in compliance with the requirements of the regulations of Section 504, at 34 C.F.R. §§ 104.7(b) and 104.8(a), and Title II, at 28 C.F.R. §§ 35.106 and 35.107(b).

This letter sets forth OCR’s determination in an individual OCR case and should not be construed to address any other issue(s) regarding the District’s compliance other than those addressed in this letter. 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 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 you 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 released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR is committed to a high-quality resolution of every case. If you have questions or concerns about OCR's finding, you may contact Jacques Toliver, Team Attorney, at (215) 656-8512, or by email at: jacques.toliver@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader
Philadelphia Office

Enclosure

cc: Manisha S. Kavadi, Esq. - Carney, Kelehan, Bresler, Bennett & Scherr LLP