



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
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REGION III
DELAWARE
KENTUCKY
MARYLAND
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April 22, 2016

IN RESPONSE, PLEASE REFER TO: 03161030

Herbert Sheldon
Acting Commissioner
Delaware Academy of Public Safety and Security
801 North Dupont Highway
New Castle, DE 19720

Dear Mr. Sheldon:

This is to advise you that we have completed our investigation and reached a determination in the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Delaware Academy of Public Safety and Security (the Academy). The Complainant, XXXXXX, alleged that the Academy retaliated and discriminated against XXXXXX (the Student), on the basis of disability. Specifically, she alleged that the Academy:

1. Discriminated against the Student on the basis of his disability by failing to implement his Section 504 Plan during the 2014-2015 and 2015-2016 school years; and
2. Retaliated against the Student for complaints that the Complainant made to the Academy for failing to implement the Student's Section 504 Plan, by XXXXXX.

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. Section 504 and Title II also prohibit retaliation. As a recipient of Federal financial assistance from the Department and a public entity, the Academy 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 its investigation, OCR reviewed documentation from the Complainant and the Academy. OCR also interviewed the Complainant and several Academy staff members. OCR concludes that the evidence is insufficient to establish that the Academy retaliated against the Student, as alleged with respect to Allegation #2. The Academy requested to resolve Allegation #1 voluntarily with OCR, and has executed an agreement (attached) to resolve that allegation.

LEGAL STANDARDS:

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

Disability Discrimination

The regulation implementing Section 504 prohibits the Academy 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 Section 504 implementing regulation, at 34 C.F.R. § 104.33, requires that a recipient of Federal financial assistance that operates a public elementary or secondary education program or activity provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34–104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of a Section 504 plan is one means of meeting this standard.

Retaliation

The regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), at 34 C.F.R. § 100.7(e), provides that no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. The Section 504 regulation at 34 C.F.R. § 104.61 incorporates by reference the regulatory provisions of Title VI which prohibit retaliation for engaging in an activity that is protected under the laws OCR enforces. Title II also prohibits 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. In doing so, OCR must determine whether the alleged adverse action could well dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination. 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.

FINDINGS OF FACT AND LEGAL ANALYSIS

Allegation 1: The Academy discriminated against the Student on the basis of his disability by failing to implement his Section 504 Plan during the 2014-2015 and 2015-2016 school years.

Factual Summary

XXX- paragraph redacted –XXX

XXX- paragraph redacted –XXX

XXX- paragraph redacted –XXX

Resolution

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 voluntary resolution agreement. The provisions of the agreement must be aligned with the information obtained in the investigation to date and be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of a recipient, nor does it constitute a determination by OCR of any violation of our regulations.

Consistent with OCR's procedures, and prior to the conclusion of OCR's investigation, the Academy requested to resolve the complaint allegations through a voluntary resolution agreement (the Agreement) which was executed on April 13, 2016. Accordingly, OCR is concluding its investigation of Allegation #1. A copy of the signed agreement is enclosed. As is our standard practice, OCR will monitor the Academy's implementation of the Agreement.

Allegation 2: The Academy retaliated against the Student for complaints the Complainant made to the Academy for failing to implement his Section 504 Plan XXXXXX

Factual Summary

XXX- paragraph redacted –XXX

Analysis

XXX- paragraph redacted –XXX

This concludes OCR's investigation of this complaint. This letter should not be interpreted to address the Academy'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 determinations 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. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Academy may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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

Thank you for your assistance with this matter. If you have any questions, please contact Lucy Glasson at (215) 656-8533 or by email at Lucy.Glasson@ed.gov.

Sincerely,

/s/

Beth Gellman-Beer
Team Leader

Enclosure
cc: James D. Taylor, Jr.