



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

January XX, 2018

IN RESPONSE, PLEASE REFER TO: 03161202

Via email/ kevin.booth@pittstonarea.com

Mr. Kevin Booth
Superintendent
Pittston Area School District
5 Stout Street
Pittston PA 18640

Dear Mr. Booth:

This is to inform 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 Pittston Area School District (the District). The Complainant alleged that the District discriminated against XXXXXX:

1. XXXXXX
2. XXXXXX
3. XXXXXX
4. XXXXXX

Based on the above, OCR investigated the following issues:

1. XXXXXX
2. XXXXXX

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29. U.S.C. § 794 and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation, at 28 C.F.R. Part 35, over complaints alleging discrimination on the basis of disability that are filed against public entities. Title II and Section 504 also prohibit retaliation. As a recipient of Federal financial assistance and a public entity, the District is subject to the provisions of 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 District and the Complainant. OCR also spoke with District staff and the Complainant. After carefully considering all of the information obtained during the investigation, OCR determined that the District violated Section 504 and Title II by: failing to timely evaluate the Student for disability-related services; failing to make an individualized determination regarding self-testing during a Section 504 Plan meeting; and retaliating against the Complainant's family by filing a complaint with Children and Youth Services. OCR also noted that the District's notice of non-discrimination and grievance procedures do not comply with the requirements of Section 504 and Title II. The District agreed to resolve the identified compliance concerns through the enclosed resolution agreement. OCR did not find sufficient evidence of a violation with respect to the issue of properly trained staff. OCR's findings and conclusions are discussed below.

Applicable Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires a recipient that operates a public elementary or secondary education program or activity to provide a free appropriate public education to each qualified nondisabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. A recipient that operates a public elementary or secondary education program or activity must also conduct an evaluation in accordance with the requirements of Section 504 of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. In interpreting evaluation data and making placement decisions, a recipient must (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with the Section 504 regulation's requirements at 34 C.F.R. §§ 104.35 (a), (b), and (c).

The regulations implementing Section 504, at 34 C.F.R. §104.7(b), and Title II, at 28 C.F.R. §35.107(b), require a recipient to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination.

The regulation implementing Section 504, at 34 C.F.R. §104.8(a) and (b), require a recipient to take appropriate and continuing steps to notify program participants, beneficiaries, applicants,

employees, and unions or professional organizations that it does not discriminate on the basis of disability. The notification must also identify the responsible employee designated under 34 C.F.R. §104.7(a) to coordinate its efforts to comply with the regulations.

The regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), at 34 C.F.R. § 100.7(e), which is incorporated by reference in the Section 504 regulation at 34 C.F.R. § 104.61, prohibits recipients from intimidating, threatening, coercing or discriminating 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, proceedings or hearing held in connection with a complaint. Title II has a similar prohibition at 28 C.F.R. § 35.134.

In order to find a violation of unlawful retaliation, OCR must find that: (1) an individual suffered an adverse action by the recipient; (2) the recipient knew that the individual engaged in a protected activity or believed 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 the protected activity. If one of the above elements cannot be established, then OCR cannot find a violation. 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. Merely unpleasant or transient incidents usually are not considered adverse. An activity is “protected” when an individual opposes an act or policy that is unlawful under one of the laws that OCR enforces, or the individual has participated in a proceeding under one of the laws OCR enforces.

There are several ways to establish a causal connection, and proof of a causal connection may be established through either direct or circumstantial evidence. One method of establishing a causal connection is proximity in time. Specifically, the time span between when the individual engaged in a protected activity and when the recipient took the materially adverse action could, standing alone, or in conjunction with other evidence, establish that the materially adverse action was taken because of the protected activity. 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.

Once all of the above elements have been established, the burden is on the recipient to articulate a legitimate, non-retaliatory rationale for the adverse action. Generally, the recipient’s non-retaliatory reasons must be both (1) clear and reasonably specific and of such a character to justify the recipient’s action; and (2) the District’s response must be proportional to the District’s alleged concerns.

OCR then determines whether the rationale offered by the recipient is a pretext for retaliation. This can be shown either: (1) directly, by establishing that a retaliatory reason more likely motivated the recipient; or (2) indirectly, by, for example, establishing that the stated reason

has no basis in fact, the stated reason was not the true reason or the stated reason was insufficient to explain the recipient's action.

Findings of Fact

XX – paragraphs redacted – XX

Notice of non-discrimination and Section 504/Title II grievance procedures

During the course of our investigation, OCR noted that the District does not have a published non-discrimination policy regarding Section 504 as is required by the Section 504 regulation, at 34 C.F.R. Sections 104(a) and (b). In addition, Title II and Section 504 require that recipients have a grievance procedure for the prompt and appropriate resolution of complaints alleging disability discrimination. While the District does have a grievance procedure, the procedure is narrowly limited to concerns regarding the evaluation, identification and placement process and provides only an informal hearing process or a formal hearing.

Conclusion

The District has agreed to address the noted 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 Section 504 regulation, at 34 C.F.R. §§ 104.7(b), 104.8(a) and (b), 104.33 and 104.35, and Title II and its implementing regulation, at 28 C.F.R. §§ 35.107(a) and 35.134.

This concludes OCR's investigation of the complaint and 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 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 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 released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions or concerns, please contact Christina Haviland, the attorney assigned to this complaint, at 215-656-5805, or Christina.Haviland@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader
Philadelphia Office

cc: William J. McPartland, Esq.
Enclosure