



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

May 31, 2017

Via U.S. Mail and Email/ twoodward@k12.wv.us

Mr. Timothy Woodward
Superintendent
Calhoun County Schools
540 Alan B. Mollohan Dr.
Mt. Zion, WV 26151

Re: OCR Complaint No. 03-17-1069

Dear Mr. Woodward:

This is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received against Calhoun County Schools (the District). XXXXXX (the Complainant) alleged that the District discriminated against XXXXXX (the Student), on the basis of XXXXXX and retaliated against XXXXXX. Specifically, XXXXXX alleged:

1. XXXXXX
2. XXXXXX

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction pursuant to Section 504 and Title II.

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.

During our investigation, we reviewed documents submitted by the Complainant and the District and also conducted interviews with the Student, the Complainant and District staff

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

members. Before OCR completed its investigation of Allegation 1, the District expressed a willingness to resolve the allegation by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement. The Resolution Agreement was developed prior to the conclusion of the investigation. OCR completed its investigation of Allegation 2 and determined there was insufficient evidence that retaliation occurred, as alleged.

Legal Standards

The Section 504 implementing regulation, at 34 CFR 104.4(a), prohibits discrimination on the basis of disability. It also requires, at 34 C.F.R. 104.33(a), that recipients of Federal funding will provide a free appropriate public education (FAPE) to each qualified individual with a disability in the recipient's jurisdiction, regardless of the nature or severity of the disability.

The Section 504 implementing regulation, at 34 C.F.R. Section 104.7(b), requires a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulation, at 28 C.F.R. Section 35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR's October 2014 Dear Colleague Letter titled "Responding to Bullying of Students with Disabilities" makes clear that schools have an obligation to respond to disability based bullying, and also to ensure that disabled students who are bullied are not denied FAPE as a result, regardless of whether the bullying is based on their disability.

Disability harassment that is severe, pervasive or persistent can result in the denial or limitation of a student's ability to participate in or receive benefits, services or opportunities from the school's program. If a recipient receives information indicating that a student may have been harassed on the basis of disability, the recipient is responsible for investigating the allegations and, if a hostile environment is found, to take immediate effective action to eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.

To establish a violation under the hostile environment approach, OCR must determine whether the conduct constitutes a hostile environment from the totality of the circumstances, including a consideration of whether the disability harassment is severe, pervasive, or persistent. In making this determination, OCR examines the context, nature, scope, frequency, duration, and location of harassing incidents, as well as the identity, number, and relationships of the persons involved. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. In addition, as with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim. For example, the age and maturity of the students involved must be considered. Under OCR policy, the harassment must, in most cases, consist of more than

casual or isolated incidents to constitute a hostile environment on the basis of disability. In addition, where a recipient has notice of the conduct, we determine whether it took prompt and effective action to eliminate the hostile environment and prevent its recurrence.

Regardless of whether the bullying is based on disability, or any of the other factors above are not met, schools are still obligated to ensure that disabled students who have been bullied continue receiving FAPE.

The Section regulation, at 34 C.F.R. Section 104.61, and the Title II regulation, at 28 C.F.R. Section 35.134 prohibit retaliation against an individual who has opposed any act or practice made unlawful by these regulations, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.

When investigating a retaliation claim, OCR examines whether: (1) the individual experienced an adverse action caused by the recipient; (2) the individual engaged in a protected activity; (3) the recipient had notice of the individual's protected activity or believed the individual might engage in a protected activity in the future; and (4) 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 finds insufficient evidence of a violation. If these four elements are present, then a prima facie case of retaliation is established, and OCR next considers whether the recipient has identified a legitimate, nondiscriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for discrimination.

Factual Background

xx – paragraphs redacted – xx

Allegation 1- Analysis and Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on May 16, 2017 which, when fully implemented, will resolve Allegation 1 in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. As is our standard practice, OCR will monitor the District's implementation of the Agreement.

Allegation 2 – Analysis and Conclusion

OCR cannot establish that the District retaliated against the Student when it XXXXXX.

XXXXXX. Thus, based on a preponderance of the evidence, OCR finds insufficient evidence to support a violation of Section 504 or the ADA regarding Allegation 2.

Conclusion

This concludes OCR’s investigation of the complaint. This letter 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or 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.

We appreciate the District’s cooperation in the resolution of this complaint. If you have any questions, 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
Office for Civil Rights

Enclosure