



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION III
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October 29, 2018

IN RESPONSE, PLEASE REFER TO: 03181031

Lynn R. Rauch, General Counsel
Office of General Counsel
School District of Philadelphia
440 North Broad Street
Philadelphia, Pennsylvania 19130

Dear Ms. Rauch:

Sent via email: LRauch@philasd.org

This is to notify you of the resolution of the complaint filed with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against the School District of Philadelphia (the District) by XXXXXX (the Complainant).

1. She alleged that XXXXXX (the Student) was discriminated against on the basis of sex when:
 - a. XXXXXX.
 - b. XXXXXX.
2. XXXXXX:
 - a. XXXXXX;
 - b. XXXXXX;
 - c. XXXXXX;
 - d. XXXXXX; and
 - e. XXXXXX.
3. She also alleged that the Student was retaliated against for XXXXXX.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), and its implementing regulation, at 34 C.F.R. Part 106. Title IX prohibits discrimination on the basis of sex by a recipient of Federal financial assistance from the Department. OCR also enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990, as amended (Title II), 42 U.S.C. § 12131, *et seq.*, and its implementing regulations at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability in programs, services, and activities of public entities. Title IX, Section 504 and Title II also prohibit retaliation. As a recipient of financial assistance from the Department and a public entity, the District is subject to Title IX, Section 504, Title II, and their implementing regulations.

Legal Standards

1a. Sex – Failure to Respond

The Title IX regulation at 34 C.F.R. § 106.31 provides generally that, except as provided elsewhere in the regulation, no person shall on the basis of sex be excluded from participation in, denied the benefits of, or subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance.

Under Title IX, recipients that receive Federal financial assistance are responsible for providing students with a nondiscriminatory educational environment. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. Sexual harassment of a student creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the recipient's program.

OCR considers a variety of related factors to determine if a sexually hostile environment has been created and considers the conduct in question from both an objective and a subjective perspective. Factors examined include the degree to which the misconduct affected one or more students' education; the type, frequency, and duration of the misconduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject of the harassment, the size of the school, location of the incidents, and the context in which they occurred; and other incidents at the school. The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.

Once a recipient knows or reasonably should know of possible sexual harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. A recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, prevent the harassment from recurring and, as appropriate, remedy its effects. These duties are a recipient's responsibility, regardless of whether a student has complained, asked the recipient to take action, or identified the harassment as a form of discrimination. A recipient has notice of peer sexual or third party harassment if a responsible employee actually knew or, in the exercise of reasonable care, should have known about the harassment. If a recipient delays responding to allegations of sexual harassment or responds inappropriately, the recipient's own action may subject students to a hostile environment. If it does, the recipient will be required to remedy the effects of both the initial sexual harassment and the effects of the recipient's failure to respond promptly and appropriately. A recipient's obligation to respond appropriately to sexual harassment complaints is the same regardless of the sex or sexes of the parties involved.

1b. Sex – Different Treatment

Under the Title IX implementing regulation, at 34 C.F.R. § 106.31(b), a recipient may not, on the basis of sex, subject any person to separate or different rules of behavior, sanctions, or other treatment in providing an aid, benefit, or service.

In order to establish a violation of Title IX in this case, OCR would have to find that the student was treated differently than similarly-situated students on the basis of sex in a way that limited the student's opportunity to participate in or benefit from a school program or activity, and that either the recipient cannot articulate a legitimate nondiscriminatory reason for the different treatment or that the recipient has articulated a legitimate nondiscriminatory reason for the different treatment, but the reason is pretext for discrimination. Additionally, OCR examines whether the recipient treated the student in a manner that was consistent with established policies and practices and whether there is any other evidence of discrimination based on sex.

2. Disability

Section 504 at 34 C.F.R. § 104.4 and Title II at 28 C.F.R. § 35.130, requires that no person, on the basis of disability, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any program or activity. The Title II regulation, at 28 C.F.R. § 35.103, does not set a lesser standard than those under Section 504. Accordingly, OCR interprets the Title II regulation to require public entities to provide services to students with disabilities (including a free appropriate public education) to the same extent as is required under the Section 504 regulation. Under the Title II regulation at 28 C.F.R. § 35.171(a)(3), OCR uses its Section 504 procedures to investigate Title II complaints.

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j), defines a person with a disability as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. Any mental or psychological disorder is considered to be a mental impairment under 34 C.F.R. § 104.3(j)(2)(i)(B). Learning is considered to be a major life activity under 34 C.F.R. § 104.3(j)(2)(ii). With regard to public elementary and secondary educational services, such an individual is deemed "qualified" when he or she is of an age during which it is mandatory under state law to provide such services, or of an age during which it is mandatory under state law to provide such services to persons with disabilities. 34 C.F.R. § 104.3(l)(2)(i),(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.

2a. Disability – Manifestation Determination Hearing

The Section 504 regulation, at 34 C.F.R. § 104.35, requires districts to conduct an evaluation before any significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(a) requires a recipient that operates a public elementary or secondary education program or activity to conduct an evaluation 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.

2b. Disability – Failure to Carefully Consider and Document

34 C.F.R. § 104.35(c) of the Section 504's implementing regulation provides that in interpreting evaluation data and in making placement decisions, a recipient shall (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 § 104.34.

2c. Disability – Procedural Safeguards

The Section 504 regulation, at 34 C.F.R. § 104.36, provides that a recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

2d. Disability – Failure to implement

In evaluating an issue of whether a recipient failed to provide services called for in a Section 504 plan, OCR considers: whether the recipient has identified the student as a student with a disability; whether the student had a Section 504 plan, and whether the recipient provided the services in the Section 504 plan; if the recipient did not fully implement the terms of the Section 504 plan, whether the failure limited the student's educational opportunity.

2e. Disability - Evaluation

The Section 504 regulations at 34 C.F.R. § 104.35(a) require that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the evaluation requirements under at 34 C.F.R. § 104.35(b) 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. The Section 504 regulations at 34 C.F.R. § 104.35(b) require that a recipient establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services which ensure that: tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer; tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

The Section 504 regulation at 34 C.F.R § 104.35(d) regarding *reevaluation* provides that a recipient shall establish procedures, in accordance with the evaluation procedures of 34 C.F.R.

§ 104.35 (b), for the periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this requirement. There is no requirement under Section 504 that the District conduct a complete battery of educational tests and assessments in order to meet the reevaluation requirement. Rather, the student's multidisciplinary team can meet and determine that existing educational data regarding the student is sufficient for the purposes of conducting the student's reevaluations. Nor is there any requirement under Section 504 that the reevaluation be conducted at established three-year intervals as is required under the IDEA.

3. Retaliation

The regulation implementing Title VI, at 34 C.F.R. § 100.7(e), prohibits retaliation; Title IX prohibits retaliation at 34 C.F.R. §106.71, which incorporates Title VI by reference at 34 C.F.R. § 100.7(e). To establish a prima facie case of retaliation, OCR must determine whether: (1) an individual experienced an adverse action caused by the recipient; and (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 any of those elements cannot be established, then OCR cannot find evidence of a retaliation violation. 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 these 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.

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. Notice of the protected activity to the recipient, and not necessarily to the alleged individual retaliator, is sufficient to establish the notice requirement. In determining whether an action taken by the recipient was adverse, OCR considers whether the action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims. In addition, OCR considers whether the alleged adverse action caused lasting and tangible harm. 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

XX – paragraphs redacted – XX

Request to Resolve Complaint through a Voluntary Resolution Agreement

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 and OCR determines that such a resolution is appropriate. The provisions of the Resolution Agreement must be aligned with the complaint allegations, the information obtained in the investigation to date, 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.

Under the resolution agreements in OCR cases 03111063 and 03161123, OCR has required the District to revise and submit its Title IX grievance procedures and notice of non-discrimination for OCR's approval. As OCR's monitoring of these cases is ongoing, this issue will be addressed in those cases.

Consistent with OCR's procedures, on July 26, 2018, the District requested to resolve the complaint through a Resolution Agreement. On October 10, 2018, the District signed this Agreement. As is our standard practice, OCR will monitor the District's implementation of the Agreement, a copy of which is enclosed. Accordingly, OCR is concluding its investigation of the allegation as of the date of this letter.

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

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.

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.

If you have any questions or concerns, please call me at (215) 656-8522.

Sincerely,

/s/

Vicki Piel
Team Leader/Supervisory Attorney
Philadelphia Office

CC: Emily M. Beck, Esq.

Enclosure