

discrimination on the basis of disability by recipients of Federal financial assistance. Section 504 also prohibits retaliation.

- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. Title II also prohibits retaliation.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to the provisions of Section 504 and Title II and their implementing regulations.

Legal Standards

Free Appropriate Public Education

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. 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.

Failure to Implement

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

Failure to Carefully Consider and Document

Under 34 C.F.R. § 104.35(c) of the Section 504's implementing regulation, 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.

Hostile Environment

Under Section 504/Title II, recipients that receive Federal financial assistance are responsible for providing students with a nondiscriminatory educational environment. Disability harassment that creates a hostile environment is a form of discrimination prohibited by Section 504/Title II. Disability 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 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 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 harassment may, if sufficiently severe, create a hostile environment.

Once a recipient knows or reasonably should know of possible 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 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 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 harassment and the effects of the recipient's failure to respond promptly and appropriately.

Retaliation

Section 504 prohibits retaliation at 34 C.F.R. §106.61, incorporating by reference the prohibition in Title VI of the Civil Rights Act of 1964 at 34 C.F.R. § 100.7(e); Title II prohibits discrimination at 28 C.F.R. § 35.134. 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; 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.

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The District determined that the Student was a qualified individual for which it provided him services under an IEP during the 2018-2019 school year. XXXXXXXXXXXXXXXXXXXX
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XX- Paragraph 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. The provisions of the Resolution Agreement must be aligned with the complaint allegations 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.

Consistent with OCR's procedures, on July 8, 2019, the District requested to resolve this complaint through a Resolution Agreement. The District made this request prior to submitting data in response to this complaint. This complaint is appropriate for resolution via a Resolution Agreement because OCR would need to obtain and analyze additional information to make compliance determinations regarding the allegations in these complaints.

On August 21, 2019, the District signed a Voluntary Resolution Agreement (Agreement) with OCR in order to resolve the matter. Accordingly, OCR is concluding its investigation of this complaint. As is our standard practice, OCR will monitor the District's implementation of the Agreement, a copy of which is enclosed.

This letter is not intended, nor should it be construed, to cover any other issues regarding the District's compliance with Section 504, Title II or their implementing regulations that may exist and are not discussed herein. The Complainant may have the right to file a private lawsuit 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, 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.

Thank you for your cooperation in this matter. Additionally, we would also like to take this opportunity to thank Laura Sutton, Esquire for her assistance and cooperation with regard to this matter. If you have any questions, please feel free to contact Dale J. Leska, Investigator, at (215) 656-8562 or by email at dale.leska@ed.gov.

Sincerely,

/s/

Vicki Piel
Team Leader/Supervisory Attorney
Philadelphia Office

Enclosure

cc: Laura Sutton, Esquire (via email only w.encl.)