



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION III
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July 20, 2023

IN RESPONSE, PLEASE REFER TO: 03231139

Dr. Donna Heston, NBCT
Superintendent
Marion County Schools
1516 Mary Lou Retton Drive
Fairmont, WV 26554

Via e-mail: donna.heston@k12.wv.us

Dear Dr. Heston:

This is to notify you of the resolution of the complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Marion County Schools (the District) in West Virginia. The Complainant filed the complaint on behalf of her son (the Student). The Complainant alleged that:

1. The District discriminated against the Student on the basis of disability by failing to make a reasonable modification in how the school-wide Positive Behavior Support Program (PBSP) is applied with respect to the Student; and
2. The District retaliated against the Complainant and the Student because she advocated for changes to the Student’s IEP and filed a Section 504 grievance by:
 - a. staff at the School giving the Student discipline referrals on XXXXXXXXX and XXXXXXXXXXXX, which led to an in-school suspension; and
 - b. the Principal rescinding the Student’s XXXXXXXXXXXXXXXXXXXXXXXX.

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. Section 504 and Title II also prohibit retaliation. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws.

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint pursuant to Section 302 of OCR’s Case Processing Manual (CPM) by taking the steps set out in the enclosed Voluntary Resolution Agreement, which when fully implemented will

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

resolve this complaint. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Voluntary Resolution Agreement.

Legal Standard

Reasonable Modification

The Section 504 regulation, at 34 C.F.R. §104.4 (a), states that no qualified person with a disability shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance on the basis of disability. In addition, the Section 504 regulation states, at 34 C.F.R. § 104.4(b)(1)(ii) and (iii), that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangement, on the basis of disability afford a qualified disabled person an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others. Further, the Section 504 regulation, at 34 C.F.R. § 104.4(b)(1)(i), (ii) and (iv), provides in relevant part that a recipient shall not deny a qualified individual with a disability an aid, benefit, or service or provide such aid, benefit or service to an individual that is not equal to or is different from that provided to others because of the individual's disability.

While schools lawfully may impose discipline on students with disabilities, they must still avoid discrimination. Under Section 504, schools must make reasonable modifications to their criteria, policies, practices, or procedures when necessary to avoid discrimination on the basis of disability. Reasonable modifications may include, but are not limited to, not applying a policy to students for behaviors that are manifestations of their disability or disabilities or adapting a policy to support a student's behavioral needs.

Retaliation

The regulation implementing Title VI, at 34 C.F.R. Section 100.7(e), which is incorporated by reference in the Section 504 at 34 C.F.R Section 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.

In order for OCR to make a finding that prohibited retaliation occurred, OCR must determine that: (1) an individual experienced an adverse action caused by the recipient; (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. In determining whether an action taken by the District is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm or had a deterrent effect. Merely unpleasant or transient incidents are not considered adverse. If any of these elements are not present, then OCR cannot make a finding of prohibited retaliation. If all of these elements are present, the OCR would then consider whether the recipient has a legitimate, non-retaliatory reason for taken the action, and whether or not the recipient's stated reasons are a pretext for retaliation.

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.

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, please contact investigator Josh Galiotto at 215-656-8587 or by e-mail at joshua.galiotto@ed.gov.

Sincerely,

/s/

Christina M. Haviland
Supervisory Attorney

Enclosure

CC: Christina Hare (via email chare@k12.wv.us)