



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION IV

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November 8, 2017

Zickeyous M. Byrd, Ed.D  
Superintendent  
Conecuh County Board of Education  
100 Jackson Street  
Evergreen, AL 36401

Re: OCR Complaint #04-15-1481

Dear Mr. Byrd:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint which was filed on August 11, 2015, against the Conecuh County Board of Education (District), alleging retaliation on the basis of disability (XXXXXX)<sup>1</sup>. Specifically, the Complainant alleged that after she stated during an Individualized Education Plan (IEP) meeting on XXX XX, XXXX, that she was a strong advocate for her children, the District retaliated against her two children (Student 1 and Student 2) by sending the Complainant a letter on XXX XX, XXXX, stating that the Students could no longer attend XXXXXX XXXXXX XXXX School (School) because they did not live in the District.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability; and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. Accordingly, OCR had jurisdiction over this complaint.

Based on the allegation, OCR investigated the legal issue of whether the District retaliated against the Students on the basis of disability on XXX XX, XXXX, by informing them that they could no longer attend the School after the Complainant stated during an IEP meeting on XXX XX, XXXX, that she was a strong advocate for her children, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

During the course of the investigation, OCR reviewed and analyzed documents pertinent to the complaint issues and interviewed the Complainant, the Superintendent, and the School Principal. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion

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<sup>1</sup> In her written complaint, the Complainant also alleged retaliation on the basis of race (XXXXXXXX XXXXXXXX). However, on September 21 and 25, 2017, the Complainant expressed her desire to withdraw the Title VI race retaliation allegation. Since OCR's investigation was not yet complete and OCR determined that there were no systemic issues regarding this allegation, OCR administratively closed this allegation pursuant to Section 110(l) of OCR's *Case Processing Manual*, and will take no further action with regard to this allegation.

that a recipient failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

Prior to the completion of OCR's investigation, the District agreed to resolve the issues of this investigation pursuant to Section 302 of OCR's *Case Processing Manual*. Set forth below is a summary of OCR's factual findings.

### **Applicable Regulatory Requirements**

The Title VI regulation at 34 C.F.R. § 100.7(e) provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VI. The Section 504 implementing regulation at 34 C.F.R. § 104.61, incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et. seq. Retaliation is also prohibited under Title II at 28 C.F.R. § 35.134, which contains a similar prohibition against retaliation.

### **Findings of Facts**

During the 2014-2015 school year, Student 1 and Student 2 were enrolled at the School. Student 1 was X years old and was in the XX class. He had been diagnosed with moderate autism. Student 2 was X years old and was in the X grade. Student 2 had previously attended grades XX, XX, and X grade at the School. Student 1 had only completed XX at the School. For the 2015-2016 school year, Student 1 would be going into the XX class and Student 2 into X grade.

On XXX XX, XXXX, the Complainant attended a meeting to determine Student 1's eligibility for an IEP. The Complainant, her husband, a XXXXXXX XXXXXXXXXX, the Student's XX teacher, and the Principal were in attendance at the meeting. During the eligibility meeting, Student 1 was found to be eligible for IEP services due to an XXXXXX diagnosis. The team then proceeded to the IEP-creation portion of the meeting for Student 1.

On XXX XX, XXXX, the Complainant received a letter stating that Student 1 and Student 2 could not come back to School the following year because they lived out of district. According to the District, the Complainant was the only parent who received the letter from the District for that year. The Complainant informed OCR that none of her neighbors' children who attend the School received the letter nor were they withdrawn from the School. On XXXXXX XX, XXXX, when the Complainant attempted to enroll the Students on the first day of school, they were given withdrawal slips from the School because the Students were not permitted to enroll.

### **Legal Analysis and Conclusion**

To establish a prima facie case of retaliation, OCR uses a four step analysis: (1) whether the Complainant engaged in a protected activity protected by the laws OCR enforces; (2) whether the District was aware of the protected activity; (3) whether the District took adverse action against the Complainant contemporaneous with or subsequent to participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above

elements are established, OCR then determines whether the recipient has a legitimate, non-discriminatory explanation for the adverse action. If such an explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

#### A. Protected Activity and the District's Knowledge of the Protected Activity

An individual has engaged in a protected activity, and thus is protected from retaliation if: 1) the individual has opposed any act or policy that is unlawful under one of the laws that OCR enforces or, 2) the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing conducted under the laws that OCR enforces.

In XXX XXXX, the Complainant attended an IEP meeting where, during the meeting, she was advocating for Student 1's XXXXXX services and informed the team members that she was a strong advocate for him.

OCR finds that the Complainant undertook a protected activity on the basis of disability and that the District had knowledge of her advocacy efforts during the XXX XXXX IEP meeting.

#### B. Adverse Action

OCR next determined whether the District took adverse action against the Students contemporaneous with or subsequent to the protected activity. In order to determine whether an action is adverse, OCR must determine whether the District's action significantly disadvantaged the Students in their ability to gain the benefits of the recipient's program. Even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if it could reasonably be considered to have 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.

The Complainant alleges that the adverse action was the Students being prohibited from attending the School during the 2015-2016 school year. OCR finds this action was an adverse action against the Students. By prohibiting the Students from attending the school, the District's action denied the Students from gaining the benefits of the District's program. Therefore, this prong of the retaliation analysis is fulfilled.

#### C. Causal Connection between the Protected Activity and the Adverse Action

The closeness in time of the events may be sufficient to infer a causal connection. The Complainant engaged in a protected activity by advocating for Student 1 at an IEP meeting on XXX XX, XXXX. On XXX XX, XXXX, the Complainant received a letter stating that the Students could not attend the School the following year because they lived out of District. Because the two dates are close in time, it can be inferred that a causal connection exists.

#### D. Legitimate, Non-retaliatory Reason for the Recipient's Action

Once OCR has established a *prima facie* case of retaliation, the recipient must articulate a legitimate, non-retaliatory reason for its action. OCR then determines whether the recipient's proffered reasons are a pretext for retaliation.

The District provided a copy of its Attendance Policy (Policy), which describes how the District may deny admission to non-resident students. If the District does permit non-resident students to attend its schools, the District may require payment “of an established tuition fixed by the Board.” The District provided OCR with documents of students who had been in both categories: where the District had denied admission to non-resident students, as well as requiring payment from non-resident students.

Data from the District showed that in 2014, the District withdrew one student for being a non-resident student. The District also provided a list to OCR of non-resident students enrolled in the District for the 2013-2014 and 2015-2016 school years, by school. The District explained that some students on the list had parents/guardians teaching in the District, which is one exception to the rule. Another exception to the rule is students enrolled in the District’s Pre-K program, which does not have an in-District residency requirement. For all other students who were non-residents, the District acknowledged that none of them were required to pay tuition. The Complainant stated that her neighbors’ children, who also attend the School, were not required to pay the non-resident fee nor had they ever received a letter withdrawing them from attending the School.

In February 2017, OCR interviewed the School’s Principal regarding the implementation of the non-resident policy. He stated that he was following the Superintendent’s directive to deny enrollment to any non-resident students requesting to attend the School. He acknowledged sending the Complainant a letter in XXX XXXX informing her that the Students could no longer attend the school because they were non-residents, but he could not recall sending the letter out to any other students. The Complainant informed OCR that she did not believe any of her neighbors, who are also non-residents, received the letter.

During OCR’s interview with the Superintendent, he stated that when he began his position in March 2015, he discovered the tuition requirement for non-resident students who attended District schools. He informed all Principals to enforce the rule, i.e. require tuition to be paid by non-residents. However, he did not realize that non-resident students had been attending tuition-free. The Superintendent stated that he was not sure of the date, but when he learned about the Students being removed due to the non-resident rule, he instructed the Special Education Coordinator to reach out to them and permit them to re-enter the District’s schools. He stated that they would not have to pay tuition but Student 1 would have to attend XXXXXXXXXX School, which the District believed would be a more appropriate placement, due to Student 1’s need for XXXXXX services. However, Student 2 could return to the School.

If OCR finds that the recipient has offered a reason for the adverse action that appears to be legitimate and nondiscriminatory, OCR further investigates to determine if the reason provided is pretextual. Pretext may be shown by evidence that the explanation for the adverse action is not credible or believable or that: 1) the individual was treated differently than other individuals who were similarly situated but had not engaged in a protected activity; 2) the treatment of the individual was inconsistent with established practice or policy; 3) the recipient took adverse action against other individuals who engaged in a protected activity.

### **Information Needed to Complete Investigation**

Prior to the completion of the investigation, the District voluntarily offered to resolve the complaint. Pursuant to § 302 of OCR’s CPM, a complaint may be resolved when, before the conclusion of an

investigation, the recipient expresses an interest in resolving the complaint. In order for OCR to complete its investigation and make a determination on the Complainant's allegations, OCR would need to complete its interviews with additional District personnel, such as the Special Education Coordinator or other members of Student 1's IEP team, in order to determine whether retaliation occurred. Based on the foregoing, OCR accepted the District's request to resolve this complaint. Accordingly, the District has agreed to implement the attached Resolution Agreement (RA) for the legal issues in this complaint.

On October 23, 2017, OCR received the enclosed signed RA which, when fully implemented, will resolve the complaint. OCR will monitor the implementation of this RA to ensure that it is fully implemented. If the District fails to fully implement the RA, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

Please be advised that the District may not harass, coerce, or discriminate against any individual because he or she has filed a complaint, or participated in the complaint resolution process. If this happens, an individual may file another complaint alleging such treatment.

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 a 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 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 the courtesy and cooperation that you and your staff extended to the staff of OCR. If you have any questions or concerns regarding OCR's determination, please contact Sonia Lee, General Attorney, at (404) 974-9371, or me, at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer, Esq.  
Compliance Team Leader

Enclosure