



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

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

April 3, 2019

Mr. Randy Wilkes, Superintendent
Phenix City School District
1212 9th Avenue
Phenix City, AL 36867

Re: Complaint # 04-16-1527

Dear Superintendent Wilkes:

The U.S. Department of Education (the Department), Office for Civil Rights (OCR) has completed its case-resolution process for the above-referenced complaint filed on June 15, 2016, against the Phenix City School District (the District). The Complainant alleged that the District discriminated against her son (the Student), who attended XXXXXXXX XXXX XXXXXXXXXXXXXXXX School (the School) during the 2015-16 school year, on the basis of disability and engaged in retaliation. Specifically, the Complainant alleged that: (1) on XXXXXXXX XX, XXXX, the District denied the Student’s disability-related request to use the restroom, resulting in the Student XXXXXXXX XXXXXXXX, and subsequently failed to take prompt and equitable steps to respond to allegations of disability-based harassment against the Student resulting from the incident, including name-calling and physical violence; (2) throughout the 2015-16 school year, the District failed to evaluate the Student for a suspected disability in response to the Complainant’s requests; and (3) the District retaliated against the Complainant after she filed complaints regarding the alleged disability-based harassment when, in XXXXXXXX XXXX, the Complainant’s younger son’s (Student 2’s) teacher falsely reported the Complainant to the Alabama Department of Human Resources (DHR) for suspected child abuse/neglect.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 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 by public entities. These laws also 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. The District receives Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdiction over this complaint.

Based upon the Complainant’s allegations, OCR opened an investigation of the following legal issues:

1. Whether the District discriminated against the Student on the basis of disability by subjecting him to a hostile environment when it failed to allow the Student to use the restroom on XXXXXXXX XX, XXXX, and when it failed to take prompt and equitable steps to respond to allegations of disability-based harassment against the Student from other students, including

name-calling and physical violence, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130;

2. Whether, throughout the 2015-16 school year, the District denied the Student a free appropriate public education (FAPE) when it failed to timely evaluate the Student for special education and related services, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.35, and the Title II implementing regulation at 28 C.F.R. § 35.130; and
3. Whether, in XXXXXXXX XXXX, the District retaliated against the Complainant by falsely reporting her to the Alabama DHR after she filed a complaint alleging harassment against the Student, 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.

Pursuant to OCR's *Case Processing Manual* (CPM) at Section 302, a complaint may be resolved when, before the conclusion of an investigation, the recipient expresses an interest in resolving the allegations, and OCR determines that it is appropriate to resolve them with an agreement. After submitting information in response to OCR's data request letter, the District informed OCR of its desire to take voluntary action necessary to resolve legal Issues 1 and 2 in this complaint prior to OCR's conclusion of its investigation of these issues, and OCR agreed. Accordingly, OCR has not issued findings concerning these issues. The attached Resolution Agreement (Agreement) will require the District to take actions to remedy all compliance concerns concerning Issues 1 and 2.

Regarding Issue 3, OCR determined, based upon a preponderance of the evidence, that there is insufficient evidence to support a conclusion that the District engaged in retaliation, as alleged, in noncompliance with Section 504 and Title II. Set forth below is a summary of the evidence obtained thus far with respect to Issues 1 and 2 prior to the signing of the Agreement as well as summary of how OCR reached its determination concerning Issue 3.

Issue 1: Whether the District discriminated against the Student on the basis of disability by subjecting him to a hostile environment when it failed to allow the Student to use the restroom on December 15, 2015, and when it failed to take prompt and equitable steps to respond to allegations of disability-based harassment against the Student from other students

During the 2015-16 school year, the Student attended sixth grade at the School. The Complainant alleged that, on XXXXXXXX XX, XXXX, the Student suffered stomach pain during class, but his teacher (the Teacher) denied the Student's request to use the restroom, which resulted in the Student XXXXXXXX XXXXXXXX in class. The Complainant alleged that, subsequently, the Student's classmates made fun of the Student because of the episode (e.g., calling him "XXX-XXX XXX") and that the Student engaged in physical altercations with other students in XXX XXXX as a result of bullying related to the XXXXXXXX XX, XXXX, incident. On XXX XX, XXXX, the Complainant withdrew the Student from the District.

OCR reviewed a written complaint the Complainant filed with the District on XXXX XX, XXXX. In her complaint, the Complainant wrote that, on XXXXXXXX XX, XXXX, the Student's pediatric

gastroenterologist evaluated the Student for “XXXXXXXXXX and XXX-XXXXXXXXXX pain associated with intermittent cyclic episodes of XXXXXXXXX sometimes associated with headaches” and that a preliminary diagnosis indicated that the Student was XXXXXXXX XXXXXXXXXX. The Complainant also alleged that she “had informed [the School] and appropriate teachers about [the Student’s] medical condition through various doctors’ notes or excuses for him to return to school after each doctor’s medical evaluation.”

The complaint continues:

On XXXXXXXX XX, XXXX, [the School] chose [the Student] to make a class presentation on the STEM Program to visiting local and state education officials Before the presentation, [the Student] had asked permission from his XXXXX grade [*sic*] teacher to relieve himself in the bathroom because, as [the Student’s gastroenterologist] noted in [*sic*] XXXXXXXX XX, he has to use the bathroom as needed because of his medical condition. Into the XXXXXXXX class period, [the Student] repeated his request to use the bathroom, but each time [the Teacher] refused, saying that because the State Superintendent of Education was still visiting the school [the Student] was not allowed to leave the classroom. Eventually [the Student] lost control of his XXXXX XXXXXXXXXX and XXXXXXXX his XXXXXXXXXX and clothes while delivering his STEM speech in front of his classroom.

While [the Student] was in the bathroom cleaning himself up, a number of students came in and started to taunt, call him names (including “XXX-XXX XXX”), and push him around, telling him to XXXX a XXXXXXXX, all because of his mishap. . . . The bullying, harassment, and intimidation in school and on the school bus continued. For instance, on XXXX XX, XXXX, a fellow student bullied, harassed, and punched him in the face, once in the presence of [the Teacher]. [The Student] defended himself against the bully for which [the School] put him on an in-school suspension program for three days while the bully got a five-day suspension from school.

Based upon OCR’s review thus far of the documentation submitted by the District, the evidence does not demonstrate that the District conducted a prompt and equitable investigation of the Complainant’s XXXX XX, XXXX, complaint.¹ However, pursuant to CPM Section 302, OCR did not reach a final investigatory determination of this issue.

Issue 2: Whether, throughout the 2015-16 school year, the District denied the Student a FAPE when it failed to timely evaluate the Student for special education and related services

The evidence shows, during the 2015-16 year, the Student experienced gastrointestinal symptoms which necessitated multiple visits to the School nurse, visits to a pediatric gastroenterologist, as well as associated absences from school. Further, the evidence shows the Complainant advised District staff of the Student’s gastrointestinal issues on several occasions, including in a conversation with a School counselor on XXXXXXXX XX, XXXX, during which the Complainant raised concerns about the Student losing weight and being unable to keep food down; and in correspondence, dated XXXXXXXX

¹ The Complainant’s XXXX XX, XXXX, complaint with the District contains identical allegations to those OCR opened under Issue 1 in this OCR complaint (#04-16-1527).

XX, XXXX, the Complainant submitted from the Student's gastroenterologist, which discussed an evaluation conducted in relation to the Student's gastrointestinal issues.

The evidence OCR has reviewed thus far is not sufficient to determine whether, during the 2015-16 year, the District was put on notice that the Student had or was regarded as having a disability, and, if the District did have notice, whether the District's response met the evaluation, placement, and procedural safeguard requirements of the FAPE provisions in the Section 504 regulation. However, pursuant to CPM Section 302, OCR did not reach a final investigatory determination of this issue.

Issue 3: Whether, in XXXXXXXX XXXX, the District retaliated against the Complainant by falsely reporting her to the Alabama DHR after she filed a complaint alleging harassment against the Student

The Complainant alleged that the District retaliated against her after she advocated on behalf of the Student when, in XXXXXXXX XXXX, Student 2's teacher (Teacher 2), who taught Student 2 at a District elementary school (School 2) during the 2015-16 school year, falsely reported the Complainant to the Alabama DHR for suspected neglect of Student 2.

OCR determined that the Complainant engaged in protected activity as follows: (1) in an email dated XXXXXXXX XX, XXXX, to the School Assistant Principal, a School counselor wrote that the Complainant had requested to speak to School administrators regarding the Student's "medical condition and tests," including his loss of weight and his scheduled medical tests; and (2) according to notes on a conversation between the Assistant Principal and the Complainant on XXXXXXXX XX, XXXX, the Complainant alleged that the Teacher's refusal to allow the Student to use the restroom resulted in the Student XXXXXXXX himself.

The evidence shows Teacher 2 filed a "Mandatory Report of Child Abuse or Neglect" (Report) with the Alabama DHR against the Complainant on XXXXXXXX X, XXXX. Accordingly, OCR finds the standards for an adverse action were met and that there was a causal connection between the adverse action and the protected activity based on closeness in time.

According to the Report, Teacher 2 overheard Student 2 say that Student 2 and the Student would be "XXXXXXX XXXX XXX XXX XXXX XXXX XX XXXXXX."² The District also submitted documentation pursuant to Alabama's mandatory reporting law, which requires teachers, and other mandatory reporters, "to report . . . to a duly constituted authority" when a "child is known or suspected to be a victim of child abuse or neglect."³ Based on the above, OCR finds the District provided a facially legitimate and nondiscriminatory reason for filing the Report.

OCR next reviewed the evidence to determine whether the District's articulated reason for the adverse action was a pretext for unlawful retaliation. Specifically, OCR reviewed documentation pertaining to the District's compliance with Alabama's mandatory reporting law. The District's "Instructions for Written Report of Suspected Child Abuse/Neglect" policy discusses staff's responsibilities under Alabama's mandatory reporting law. In particular, this policy states that public and private K-12 employees, including teachers, "are required by law to report known or suspected child abuse or neglect

² At that time, Student 2 was XXXXX years old and the Student was XXXXXX years old

³ See Ala. Code §§ 26-14-1, 26-14-3.

under a penalty of a misdemeanor, fine or sentence.” The District also submitted materials from an annual training provided to all District employees on the District’s adherence to Alabama’s mandatory reporting law. In particular, the materials define “neglect” as “negligent treatment or maltreatment of a child, including the failure to provide adequate food, medical treatment, supervision, clothing or shelter.” Further, the training materials specifically identify “apparent lack of supervision” as a possible sign of neglect that District mandatory reporters are required to report under Alabama law if observed or reasonably suspected.

OCR also reviewed a list of students at School 2 whose parents or guardians were reported to the Alabama DHR during the 2016-17 school year. Specifically, aside from Student 2, District employees filed one additional report to the Alabama DHR for suspected abuse or neglect regarding a School 2 student. According to the District, the District had no knowledge of the parents/guardians of the student who was the subject of the additional DHR report engaging in any protected activity.

Issue 3: Analysis and Conclusion

OCR has concluded, based upon a preponderance of the evidence, that the District’s proffered justification for filing the Report was not a pretext for unlawful retaliation. Specifically, the District provides training to staff regarding expectations for mandatory reporting under Alabama law, which includes a requirement that mandatory reporters report suspected “apparent lack of supervision” of a child to the Alabama DHR. The suspected child abuse/neglect that Teacher 2, who is a mandatory reporter, described in the Report – i.e., hearing Student 2 state that he and the Student would be XXXXXXXX XXXX XXXXX XXX XXX XXXX – comports with District policy and Alabama state law.

Accordingly, OCR concluded that, based upon a preponderance of the evidence, there is insufficient evidence to support a conclusion that the District engaged in unlawful retaliation in violation of Section 504 or Title II, as alleged.

Conclusion

In sum, based on the information gathered during the investigation of Issue 3, OCR found insufficient evidence of noncompliance with Section 504 or Title II. Further, pursuant to the District’s request to voluntarily resolve Issues 1 and 2, prior to the conclusion of OCR’s investigation of these issues, OCR received the enclosed signed Agreement that, when fully implemented, will resolve these issues.

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.

The complainant has a right to appeal OCR’s determination of the allegation for which OCR found insufficient evidence of noncompliance within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any

error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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.

This concludes OCR's investigation of this complaint. If you have any questions regarding this matter, please contact Daniel Sorbera, Investigator, at (404) 974-9466, or me, at (404) 974-9367.

Sincerely,

Ebony Calloway, Esq.
Compliance Team Leader

Enclosure