

June 22, 2018

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City Schools of Decatur  
125 Electric Avenue  
Decatur, GA 30030

Re: OCR Complaint #04-18-1244

Dear XXXXXX:

On February 2, 2018, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint filed against City Schools of Decatur (District) alleging discrimination on the basis of disability. Specifically, XXXXXX (Complainant) alleged that the District discriminated against XXXXXX (Student), on the basis of disability when it failed to implement the provisions of her Section 504 plan in class at 4/5 Academy at Fifth Avenue (School) from August 1, 2016 through April 20, 2017, and during a class field trip in March 2017. She also alleged that the District retaliated against the Student by removing her picture from the school yearbook and giving her personal belongings in her locker to another student after she left the School in April 2017, after she reported that the Student's Section 504 plan was not being followed in November 2016.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990, 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. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

Prior to the completion of OCR's investigation, the District requested to voluntarily resolve the following issues in this complaint:

Whether the District denied the Student a free appropriate public education (FAPE) by failing to implement the provisions of her Section 504 plan in class from August 1, 2016 through April 20, 2017, and during a class field trip in March 2017, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.33 and the Title II implementing regulation at 28 C.F.R. § 35.130; and

Whether the District retaliated against the Student by giving her personal belongings in her locker to another student after she had left the School in April 2017, after the Complainant reported that the Student's Section 504 plan was not being followed in November 2016, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.136.

Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved, before the conclusion of an investigation, when the recipient or public entity expresses an interest in resolving the complaint. The attached Resolution Agreement (Agreement) will require the District to take actions to remedy any compliance concerns.

On June 22, 2015, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the two issues identified above. OCR will monitor the District's implementation of this Agreement to ensure that it is fully implemented. If the District fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

Also, OCR investigated the following legal issue:

Whether the District retaliated against the Student by removing her picture from the school yearbook after she had left the School in April 2017, after the Complainant reported that the Student's Section 504 plan was not being followed in November 2016, in noncompliance with the Section 504 regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.136.

During the investigation, OCR reviewed documents from the Complainant and the District. OCR also interviewed the Complainant and the School Principal. Based on its investigation, OCR found insufficient evidence to support a finding of noncompliance with the regulations applicable to this allegation. Below are the factual and legal bases for OCR's determination.

### **Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. § 104.61 incorporates by reference the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, at 34 C.F.R. § 100.7(e), which 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 the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing in connection with a complaint.

When investigating a complaint of retaliation, OCR determines whether: (1) an individual engaged in a protected activity; (2) the recipient had notice of the protected activity; (3) the recipient took a materially adverse action against the individual; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all four elements are established, an initial or *prima facie* case of retaliation exists. OCR then inquires whether the recipient had a legitimate, non-retaliatory reason for taking the adverse action. If so, the evidence is analyzed to determine whether the proffered reason is merely an excuse or pretext for retaliation.

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

### **Factual Findings**

The Complainant alleged the District retaliated against the Student by removing her picture from the School yearbook after she had left the School in April 2017, after the Complainant reported that the Student's Section 504 plan was not being followed in November 2016.

#### **Protected Activity and Knowledge of Protected Activity**

OCR first determines whether a complainant or student engaged in a protected activity, and whether the recipient had knowledge of the protected activity.

The Complainant alleged that in November 2016, she reported that the Student's teacher was not implementing the provisions of her Section 504 plan in class.

OCR reviewed documents provided by the Complainant regarding this issue. The complaint filed by the Complainant states that the Student's teacher "admitted she was not making accommodations and refused to acknowledge our child's disabilities" at the Student's Section 504 meeting on November 8, 2016. A letter from the Complainant to the District Superintendent states that during the Student's November 2016 Section 504 meeting, ". . . it became clear that the accommodations in the plan were not being made." A notation to this letter shows that it was dated April 13, 2017. For purposes of analysis, OCR finds that the Complainant engaged in the protected activity of reporting that the Student's Section 504 plan was not being implemented, and that the District was aware of the protected activity.

### Adverse Action

In determining whether an action is adverse, OCR examines whether the recipient's action significantly disadvantaged an individual in his or her 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 opportunities, the action could be considered to be retaliatory if the challenged action 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 alleged that the District retaliated against the Student by removing her picture from the yearbook in April 2017. OCR reviewed the page of the yearbook where the Student's picture would have appeared, which shows that the Student was not pictured. OCR finds that removing the Student's picture from the yearbook could constitute an adverse action.

### Causal Connection

OCR then assesses the evidence to determine whether there was a causal connection between the protected activity and the adverse action. One factor OCR considers in making such a determination is whether there is close proximity in time between the recipient's knowledge of the protected activity and the adverse action.

The Complainant alleged that she reported that the Student's teacher was not following her Section 504 plan in November 2016. According to the School Principal, the Student's picture was likely omitted from the yearbook in April 2017. Therefore, OCR finds that a close proximity in time exists, and that there could be a causal connection between the protected activity and the adverse action.

### Legitimate, Non-Discriminatory Reason for the University's Actions

OCR then determines whether the District has provided a legitimate, non-discriminatory reason for the adverse action that is not a pretext for discrimination.

OCR interviewed the School Principal regarding this allegation. The Principal stated that the Student was not pictured in the yearbook because the Complainant withdrew her from the School, and that her last day was March 31, 2017. The Principal explained that the Parent Teacher Organization (PTO) has a standard practice of providing each teacher at the School with a sample page of the yearbook for his or her class every April. Each teacher then marks the students who are no longer enrolled in the class, and returns the sample page to the PTO. The PTO then omits the pictures of the students who are no longer enrolled from the sample page, and publishes the

page containing the pictures of students who are currently enrolled in the yearbook. The Principal further stated that in this case, the PTO sent the sample yearbook page to the Student's teacher. The teacher then marked the pictures of three students who were no longer enrolled in her class, including the picture of the Student, then returned the sample page to the PTO. The PTO then omitted the pictures of those students from the yearbook.

OCR also reviewed an email from a PTO member to the Complainant dated May 26, 2017. In the email, the PTO member confirmed that she provided every homeroom teacher with a sample page of the yearbook to review. The teachers then indicated if students no longer attended the School or had moved to a new class. She also stated that the yearbook pages were provided to the teachers during the second week of April, as the production submission deadline was April 18, 2017.

OCR also reviewed an email from the Complainant to the Student's teachers dated March 30, 2017, stating that the Student's last day at the School would be March 30, 2017. The Complainant also verbally confirmed to OCR that the Student did not return to the School after March 31, 2017, which was her actual last day. Based on this evidence, OCR finds that the District's rationale for omitting the Student's picture from the yearbook constitutes a legitimate, non-discriminatory reason for the adverse action.

### Pretext

Next, OCR determines whether the University's legitimate, non-discriminatory reason for the adverse action is a pretext for discrimination. Pretext may be shown by evidence that: (1) the explanation for the adverse action is not credible or believable; (2) the individual was treated differently than other individuals who were similarly situated but had not engaged in a protected activity; or (3) the treatment of the individual was inconsistent with established practice or policy.

First, based on the rationale provided above, OCR finds that the District's explanation for omitting the Student's picture from the yearbook is credible or believable. Next, OCR analyzed whether the Student was treated differently than other similarly situated individuals. OCR reviewed the yearbook page showing that the pictures of two other students in the Student's class were omitted from the yearbook during the 2016-2017 school year. Enrollment documents show that one of the students was withdrawn on December 16, 2016 because he was transferred out of state; and that the other student was withdrawn on October 21, 2016 because he was transferred to another school in Georgia. According to the District, both of those students have documented disabilities and neither of their parents filed complaints of discrimination. Therefore, OCR finds that the Student was not treated differently than other students who had also been withdrawn but had not engaged in a protected activity. Finally, OCR finds that the treatment of the Student is consistent with the PTO's practice of omitting pictures from the yearbook who are no longer enrolled. For these reasons, OCR finds that the District's legitimate, non-discriminatory reason

for omitting the Student's picture from the yearbook does not constitute a pretext for discrimination.

OCR provided the Complainant with the opportunity to provide additional information regarding this issue. The Complainant submitted several additional documents to OCR for review, including an email from the Student's teacher to a District staff member dated April 10, 2017 stating that she believed the Complainant was going to withdraw the Student but she was still on her roster, so she counted her absent; and a document showing that the Complainant began homeschooling the Student on May 2, 2017. Based on the teacher's April 10, 2017 email, the Complainant questioned whether the Student's teacher had received the request from the PTO to identify students who were no longer enrolled in her class prior to omitting the Student's picture from the yearbook. The Complainant confirmed that the Student did not return to the School after March 31, 2017.

OCR contacted the District regarding this allegation. The District provided the same email from the Complainant to the Student's teachers dated March 30, 2017 stating that the Student's last day at the School would be March 30, 2017. The District also provided a withdrawal document showing that March 31, 2017 was the Student's actual last day at the School.

### **Analysis and Conclusion**

Based on a preponderance of the evidence standard, OCR finds that there is insufficient evidence that the teacher retaliated against the Student by intentionally omitting her picture from the yearbook. Although there is some evidence indicating that the teacher was unsure whether the Student was enrolled as of April 10, 2017, both the Complainant and the District agree that the Student did not return to the School after March 31, 2017. An email from a PTO member dated May 26, 2017 supports that the PTO had a practice of omitting pictures of students from the yearbook who had been withdrawn in April each year. According to the School Principal, the PTO submitted the yearbook page to the teacher, the teacher marked the Student as no longer enrolled in the class, and the PTO then omitted her picture. Therefore, OCR finds there is insufficient evidence to support a finding that the District violated Section 504 or Title II regarding this allegation.

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, 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. If OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please contact Laura Mitchell at (404) 974-9456.

Sincerely,

A handwritten signature in cursive script that reads "Andrea de Vries".

Andrea de Vries  
Compliance Team Leader