



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

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ATLANTA, GA 30303-8927

REGION IV
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August 26, 2019

Ms. Ann Levett
Superintendent
Chatham County School District
208 Bull Street
Savannah, Georgia 31404

Re: OCR Complaint #04-19-1263

Dear Ms. Levett:

The U.S. Department of Education (the Department), Office for Civil Rights (OCR), has completed its investigation of the above referenced complaint. The Complainant, the mother of the Student A and Student B, students at Georgetown Elementary School (the School), in the Chatham County School District (the District) allege that the District discriminated against Students A and B on the basis of disability and retaliated against the Complainant Students A and B.

Specifically, the Complainant alleged that the District discriminated against Students A and B by subjecting them to a hostile environment based on their disability in their classrooms. The Complainant alleged that a teacher told Student A that “you are a coward,” and “a sorry excuse for a student;” and kept him in her classroom beyond dismissal time. The Complainant further stated that another teacher said to Student B that when he bends over, he “looks like a butterball.” The Complainant also alleged that the District retaliated against the Students by suspending them after the Complainant filed a state complaint regarding their educational placement.

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 from the Department. OCR is also responsible for enforcing provisions of 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 by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws that prohibit discrimination on the basis of disability.

Based on the above, OCR opened the following legal issues for investigation:

1. Whether the District discriminated against the Students on the basis of disability by creating a hostile environment and denying the Students the opportunity to participate in

the Program, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.4(a) and (b)(1)(i), and the Title II implementing regulation at 28 C.F.R § 35.130(a) and (b)(1)(i).

2. Whether the District, by referring the Students for discipline referral, retaliated against them because the Complainant filed a state complaint against the District in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and Title II and its implementing regulation at 28 C.F.R.§ 35.134.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals who are not students with disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the recipient's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a recipient type must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a recipient type must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation

against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the District took an adverse action against the Complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District's reason for its action is a pretext, or excuse, for unlawful retaliation.

Background

During the 2018-2019 school year Student A was an eleven-year-old fifth grader who was enrolled at Georgetown Elementary School. The Students Individualized Education Plan (IEP) dated September 21, 2018 indicates that the student is eligible to receive special education and related services under the categories of Autism listed as serviced through Other Health Impairment, and Speech language impairment.

During the 2018-2019 school year, Student B was an eleven-year-old fifth grader who was enrolled at Georgetown Elementary School. The Students Individualized Education Plan (IEP) amendment dated September 21, 2018 indicates that the student is eligible to receive special education and related services under the categories of Autism listed as serviced through Other Health Impairment, and Speech language impairment.

Student B also had a Crisis Behavioral Intervention Plan dated September 21, 2018 which indicated that the behavior that warranted crisis intervention was physical aggression or property destruction that poses imminent harm to self or others.

Issue 1- Whether the District discriminated against the Students on the basis of disability by creating a hostile environment and denying the Students the opportunity to participate in the Program.

In Issue 1, OCR considered whether the District treated Student A and Student B differently on the basis of their disability status in noncompliance with Section 504 implementing regulation at 34 C.F.R §104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

The Complainant stated that in October 2018 that she placed recorders into both Student A and Student B bookbags.¹ The Complainant stated that Student A's teacher is heard calling him a "coward" and "bully," and that he was a "sorry excuse for a student," and she would antagonize and tell him the other boys in the classroom were not his friend. The teacher would also keep him past his time in the classroom. The Complainant further stated that on October 25, 2018, that the student did not feel well and the teacher told him over and over again that he wasn't sick

¹ OCR staff listened to the recordings, which were inconclusive, at times inaudible, and lacking in context.

while he is crying, and then she tells him that he is not really crying. The Complainant stated that when she finally picked the student up from school that he had a temperature of 103.8°F and that she had to rush and get him medical attention.

In Student B's classroom, the Complainant stated that the teachers constantly yell at the students who are nonverbal and that they throw away kids' breakfast who don't eat fast enough. The Complainant further stated that although she does not have the video, that on the audio tape that it sounds like her son was hit by the teacher and that you can hear him scream you "son of a bitch" back.

On November 16, 2018 the Complainant stated that she informed the Principal of her abuse allegations regarding Student A and Student B. On November 26, 2018, the Principal alerted the police and that the Complainant asked that a written report be taken regarding the incidents on October 23-25 2018, when she placed recording devices in both students book bags. The police began their investigation on January 14, 2019 looking into whether any criminal acts had been committed. The police department concluded their investigation on February 8, 2019. The District did not independently investigate the Complainant's allegations of harassment on the basis of disability as required under Section 504.

Before OCR could confirm if Student A and Student B had been subjected to a hostile environment on the basis of disability, the District expressed a willingness to resolve the complaint by taking the steps outlined in the enclosed Resolution Agreement.

Issue 2: Whether the District, by referring the Students for discipline referral, retaliated against them because the Complainant filed a state complaint against the District in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and Title II and its implementing regulation at 28 C.F.R. § 35.134.

The Complainant alleged that a when she started asking questions about the Students education that the boys began receiving referrals for disruptive behaviors and started getting suspended.

In determining whether the District retaliated against the Complainant, OCR first considered if the Complainant participated in a protected activity. In her complaint with OCR, the Complainant stated that she began to complain about some issues in August of 2018, and that her first IEP meeting on September 23, 2018. OCR concludes that she asserted a right under the laws enforced by OCR.

Next, OCR sought to determine if there was adverse action. On October 16, 2018, Student A was suspended for three days for grabbing a teacher's crotch, and on October 12 2018, Student B was suspended for one day for slapping another student. Accordingly, OCR considers suspension from school to be adverse action.

Because OCR found evidence that the Complainant engaged in protected activity and an adverse act occurred, OCR next considered if there was a causal connection between the protected activity and the adverse action. The suspensions occurred within a month or two of the Complainant's advocacy on behalf of the Students and their IEP meeting. These events occurred

within close proximity in time. Prior to the Complainant's advocacy, the Students had not been subject to discipline referrals. Consequently, there is a change in treatment subsequent to the protected activity. Because of both proximity in time and change in treatment, OCR concludes that there is causal connection between the protected activity and the adverse action.

OCR concludes that there is a prima facie claim for retaliation.

Before OCR conducted interviews and could confirm if Student A and Student B had been subjected to retaliation, the District expressed a willingness to resolve the complaint by taking the steps outlined in the enclosed Resolution Agreement.

Conclusion

As noted above, the District requested to resolve Issues 1 and 2 by entering into a resolution agreement (Agreement) dated August 20, 2019, with OCR pursuant to Section 302 of OCR's Case Processing Manual. The Agreement terms, when fully implemented, will resolve Issues 1 and 2.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues 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.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have questions or concerns regarding OCR's determination or this letter, please contact Darryl Dennis, Senior Investigator, Senior Investigator, at Darryl.dennis@ed.gov (404) 404-974-9357, or me at (404) 974-9354.

Sincerely,

Scott R. Sausser
Supervisory General Attorney