



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV

ALABAMA
FLORIDA
GEORGIA
TENNESSEE

September 29, 2019

Via Email Only: XXXXXXXXXXXX
XXXXXXXX

Re: Complaint 04-19-1382

Dear XXXX:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint which you (Complainant) filed on July 9, 2019, against the Jackson County School District (District) alleging retaliation. The Complainant alleged that she was retaliated against as a result of her advocacy for her daughter (Student), a second grade student who attends the Malone School (School) and has been diagnosed with Downs Syndrome; speech and language impairment and has been served with an educational plan under the Individuals with Disabilities Education Act (IDEA) since kindergarten.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibits discrimination on the basis of disability by recipients of Federal financial assistance (FFA); and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 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 the District is subject to these laws.

OCR investigated the following legal issue:

Whether the District/School retaliated against the Complainant since January 2019 when the District:

- a) imposed limitations to classroom observations starting in January 2019; and
- b) sought to intimidate the Complainant by copying its legal counsel on email to her since January 2019 in noncompliance with the Section 504 regulation at 34 C.F.R. §104.61 and the Title II regulation at 28 C.F.R. §35.134¹.

¹ OCR initially opened a broader complaint investigation of the following issue and subparts, whether the District/School retaliated against the Complainant since January 2019 when the District:

- a) imposed limitations to classroom observations starting in January 2019;
- b) sought to intimidate the Complainant by copying its legal counsel on email to her since January 2019;
- c) denied the Complainant access to the Student's educational records prior to meetings since January 2019;
- d) charged the Complainant for a copy of the Student's records with the School board, but has not done so with another individual of whom the Complainant is aware, (Friend) since January 2019;

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I. Summary of Investigation & Findings

In reaching a determination in this matter, OCR reviewed documents submitted by the Complainant and the District, including District policy, and emails and correspondence relevant to the complaint allegations. OCR conducted interviews of the Complainant, the Special Complainant's advocate, the Student's teachers, the School Principal, and the District's Education Coordinator (Coordinator). Based on a review of the evidence, OCR has determined that weight of the evidence supports a finding of insufficient evidence to support a finding of noncompliance with 1(b). Prior to OCR completing its investigation of allegation 1(a) of the complaint the District requested to voluntarily resolve the complaint by executing a resolution agreement (Agreement) which would address the concerns raised in that portion of the complaint.

II. Legal Standard

The Title VI implementing 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 Title VI, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VI. To find retaliation, OCR must establish a causal connection between the alleged protected activity and the alleged adverse action. The Section 504 implementing regulation at 34 C.F.R. § 104.61 adopts the anti-retaliation provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title II implementing regulation at 28 C.F.R. § 35.134 similarly prohibits retaliation by public entities.

For a prima facie case of retaliation three elements must be met: (1) the complainant experienced an adverse action caused by the recipient ; (2) the recipient had knowledge that the complainant engaged in a protected activity; and, (3) there is some evidence of a causal connection between the protected activity and the adverse action. If all the elements of a prima facie case are met OCR then determines if the recipient has a legitimate non-discriminatory reason for its actions that are not a pretext for retaliation.

Pretext may be shown by evidence that (1) the explanation for the adverse action is not credible or believable, (2) the treatment of the individual was inconsistent with established practice or policy; or,

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- e) has limited communication from the Complainant to the ESE Director only via email one day per week since March 22, 2019;
 - f) refused to let the Complainant's Friend sit in on an IEP meeting in the Complainant's place since January 2019;
 - g) School held an IEP meeting in February 2019 without the Complainant's presence; and
 - h) The School refused to inform the Complainant of the names of tests which they wish to conduct for the Student's re-evaluation, despite requests from the Complainant since January 2019 in noncompliance with the Section 504 regulation at 34 C.F.R. §104.61 and the Title II regulation at 28 C.F.R. §35.134.

On August 30, 2019, pursuant to OCR's case processing manual (CPM), Section 108(h)(i) OCR dismissed subparts (c)-(h) of the complaint allegations because the same or similar allegation based on the same operative facts had been filed by the Complainant against the District with the Florida Department of Education (FLDOE), which had an investigation underway. The Complainant was notified that she had the right to refile the dismissed portions of her complaint with OCR within 60 days of completion of FLDOE's action. OCR has received notice from the Complainant of FLDOE's completed investigation and her dissatisfaction with a portion of the result, however, the Complainant had not refiled a complaint of the dismissed portions of her complaint.

(3) the individual was treated differently than other individuals who were similarly situated but had not engaged in a protected activity.

III. Factual Findings

Protected Activity & Notice of the Same by the District

The Complainant has alleged, and the District confirmed, that she has engaged in regular protected activity in the advocacy of the Student. Among the protected activities in which the Complainant has engaged, she has filed complaints with the District and the FLDOE of which the District is aware. Each of the District staff persons interviewed by OCR confirmed that they were aware of the Complainant's protected activity. Based on the foregoing, OCR concluded that the Complainant has engaged in protected activity of which the District had notice.

Alleged Adverse Actions

- The District has imposed limitations to classroom observations starting in January 2019.

The Complainant alleged that before January 2019 she was permitted to observe the Student in the classroom for an unlimited amount of time. The Complainant claimed that she could sit all day, as long as the School Principal was available to sit with her. The Complainant confirmed that she was aware that the District has a memo to staff which makes recommendations² regarding classroom observation which imposed a 50 minute time limitation on classroom visitation per teacher. The Complainant alleged that prior to January 2019 the Principal never applied the time limit to her and that he did so in retaliation for her advocacy for the Student. The Complainant notified OCR that during the course of the investigation that the District has imposed an additional restriction on her access to classroom observation, specifically, that she will be limited to one observation per term, before the Student's next IEP meeting.

In an interview with OCR the Principal confirmed that on more than one occasion in the past he allowed the Complainant to observe the Student in class for several hours at a time. The Principal was aware at the time that this was inconsistent with the Memorandum. The Principal further confirmed that in January 2019 he decided to stop permitting the Complainant to observe for more than 50 minutes and that the Complainant will be limited to one classroom observation per term.

Based on the foregoing, OCR finds that the District has engaged in an adverse action against the Complainant since January 2019 by limiting her access to observation of the Student's educational environment.

Proffered Basis for the Adverse Action

When interviewed by OCR, the Principal stated that he limited the Complainant's access to classroom observations, shortening the length of time for observation to 50 minutes and frequency of observation to once per term based on the Complainant's breach of the District's Memorandum and after having received a report from another parent that the Complainant was texting/messaging her

² Administrative Memorandum 13-017 (Memorandum).

regarding what the Complainant had observed going on with the other parent's child, Student 2. The Principal reported that Student 2's mother complained that the Complainant had messaged her on Facebook about what Student 2 was eating and her interaction with her assigned paraprofessional.

The District confirmed to OCR that the District's Memorandum referenced above was produced to principals and District directors on October 15, 2012, but not the public. The Memorandum includes "recommended guidelines and procedures for requests to observe classrooms." The Memorandum recommends that the recipient of a request first, ask the individual why they want to observe and if there is a problem. The Memorandum notes then that Principals have the authority to deny a request to observe a class or classes.

The Memorandum then recommends that the principal meet with the individual requesting the observation and, if they agree to allow the visit/observation, explain the following:

- A. The individual must check in at the School Office prior to the observation.
- B. An assistant principal or other responsible staff member will accompany the observer while they are on campus. The person accompanying the observer should take objective notes regarding what occurs during the visit. The notes should be filed for possible review in the future.
- C. No recording or recording devices are allowed during the observation.
- D. No interaction with the teacher being observed is allowed. No interaction with the students is allowed, not even a child of the visitor/observer.
- E. Scheduling the time and day of the observation is at the discretion of the Principal.
- F. As a general rule, observations should be limited to 50 minutes per teacher.

Notably, the Memorandum does not describe factors to consider in denying or approving a request, does not identify observation of other students in class or communication with other parents as prohibited conduct and does not notify a parent/guardian that any single deviation from the guidelines set forth in the memo could result in denial of access to their child's classroom. When interviewed by OCR, the Principal stated that he had not received any training regarding when or why it might be appropriate to deny a requested observation as referenced in the Memorandum, or the civil rights implications of denying a request. The Coordinator confirmed that he has not received any such training, nor to his knowledge, has any been conducted for the principals charged with implementing the Memorandum.

In rebuttal, the Complainant disputed the District's characterization of her messages with Student 2's mother. The Complainant does not believe that Student 2's mother complained about the Facebook contact, that instead she seemed appreciative of the Complainant "looking out" for Student 2 while she was in the classroom observing. OCR sought to interview Student 2's mother to ascertain whether the District's characterization was accurate and discuss the alleged complaint. Prior to OCR completing its investigation of this allegation, the District requested to resolve this allegation of the complaint via a voluntary resolution agreement the terms of which will require that the District publicize its classroom visitation policies to members of the public, remove the one visitation per term limitation on the Complainant's visitation to the Student's classroom and train its employees regarding the requirements of Section 504 and its prohibitions against retaliation.

- The District sought to intimidate the Complainant by copying its legal counsel on email to her.

The Complainant alleged that starting in January 2019 the Principal carbon copied (copied) the District legal counsel when he emailed her about the classroom observation policy to intimidate her. The Complainant stated that the District's legal counsel is now copied on all her email from the District.

The District confirmed both in its written response and interviews that its legal counsel has been copied on email from the Complainant since January 2019. OCR reviewed emails between the Complainant and District staff since January 2019 on which legal counsel has been copied to ascertain if there was a reasonable basis to consider it threatening or retaliatory. OCR found that although the District's legal counsel was copied on emails he did not interject any commentary or legal opinions into the written dialog between staff and the Complainant.

To establish an action as sufficiently adverse in the prima facie retaliation case, OCR must determine if the recipient's action significantly disadvantaged the complainant as to his or her status in relation to the recipient, or his or her ability to gain the benefits of the program. In the alternative, 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 reasonably 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.

To make this determination, OCR considers whether the alleged adverse action caused lasting and tangible harm or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse. OCR must consider each alleged retaliatory act on a case-by-case basis and exercise judgment in light of all the facts and circumstances of the case.

There is no reason to conclude from the record that the Complainant's communication or access to the District has been restricted by the District copying its legal counsel on email to her. Reviewing the District's decision to copy legal counsel on the email objectively, there is no indication that copying legal counsel on email correspondence with a parent is in and of itself is intimidating. In fact, despite the Complainant's subjective statement that she was intimidated, there is no indication from the record that the copying of legal counsel on email was stifling to future complaints or restricted the Complainant's inclination to make a complaint or that she was precluded from pursuing her discrimination claims.

Based on the foregoing, OCR has determined that the District's decision to copy its legal counsel on emails to the Complainant is not sufficiently adverse to amount to retaliation.

This concludes OCR's investigation of the complaint. 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. If we receive such a request, we will seek to protect, to

the extent possible, any personally identifiable information, the release of which 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.

The Complainant has a right to appeal OCR's determination regarding the allegation for which OCR has found insufficient evidence (the copying of legal counsel on email to you) within 60 calendar days of the date indicated on this letter. An appeal can be filed electronically (online or by email), by mail, or by fax. The Complainant must submit either a form completed online at <https://wdcrobcolp01.ed.gov/CFAPPS/OCR/ocrAppealsForm.cfm>, or a written statement of no more than ten (10) pages (double-spaced, if typed). If a written statement is submitted by mail, please send to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; if submitted via e-mail, send to OCR@ed.gov; or if submitted via fax, please send to 202-453-6012. The filing date on an appeal is the date the appeal is postmarked, submitted electronically or submitted via fax. In the appeal, the complainant must explain why they believe the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would result in the allegation being opened for investigation; failure to do so may result in dismissal of the appeal.

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 any questions, please contact Colleen Grogan at (404) 974-9395.

Sincerely,

Colleen V. Grogan for

Andrea de Vries, Esq.
Compliance Team Leader

Enclosure: copy of Resolution Agreement