



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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WISCONSIN

October 21, 2016

Dr. Jeffrey Studebaker
Superintendent of Schools
Administrative Services Center
6701 Delaware Street
Merrillville, IN 46410

Re: OCR Docket #05-16-1275

Dear Dr. Studebaker:

This is to advise you of the resolution of the above-referenced complaint investigation of Merrillville Community School Corporation (Corporation). Specifically, the complaint alleged:

1. In spring 2016, the Corporation discriminated against Student A, a student at the Clifford Pierce Middle School (School), on the basis of disability (Attention Deficit Hyperactivity Disorder (ADHD)) when it failed to implement the following provisions of his Section 504 plan: preferential seating; check-in/check-out system using agenda book or folder system; verification of understanding of assignments, directions and instructions; nonverbal redirection; math tutoring, monthly meetings with guidance counselor; extended time on standardized tests; extended time for assignments; and open communication with parents with the assistant principal carbon copied on all email communications; and
2. In spring 2016, the Corporation subjected the Complainant and Student A to retaliation by disposing of his agenda book because the Complainant advocated on Student A's behalf with respect to his Section 504 plan.

OCR is responsible for enforcing 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, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 – 12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department and public entities, respectively. These laws also prohibit retaliation. As a recipient of Federal financial assistance from the Department and as a public entity, the Corporation is subject to these laws. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

During the complaint investigation, OCR reviewed documents provided by the Complainant (the Parent) and the Corporation. OCR also interviewed the Parent and Corporation personnel including the Principal, Assistant Principal, Guidance Counselor, and several of Student A's 7th grade teachers. Based on the preponderance of the evidence, OCR determined that there is insufficient evidence to conclude that the Corporation subjected the Parent and Student A to retaliation as alleged in Allegation #2. With respect to Allegation #1, OCR determined there is insufficient evidence to conclude that the Corporation failed to implement certain provisions of Student A's Section 504 plan, but prior to the conclusion of OCR's investigation regarding two provisions, the Corporation expressed an interest in voluntarily resolving this case under Section 302 of OCR's *Case Processing Manual*. In light of the Corporation's willingness to address the issues raised in that portion of Allegation #1, OCR determined that entering into a voluntary resolution agreement would be appropriate.

Relevant Policies and Procedures

The Corporation's policies and procedures are available on the Corporation's website at <http://merrillville.schoolwires.net/domain/1382>, and are summarized in the Clifford Pierce Middle School Student Handbook.

The Corporation's Nondiscrimination Policy prohibits discrimination on the basis of disability in its educational programs, activities, or employment policies as required by Section 504 and Title II.

The Corporation's Section 504 Policy provides that the Corporation will provide a free and appropriate public education to each handicapped student within its jurisdiction, regardless of the nature or severity of the handicap. The policy sets forth the process for the identification, evaluation, and placement of a student with a suspected disability, as well as the criteria for eligibility for regular and special education and related services under Section 504. The policy provides that, if the student qualifies for services under Section 504, the committee will create an intervention plan, identify who is to implement provisions in the plan, and provide for monitoring dates. Parents are to be provided with a copy of the Section 504 plan, which will be revised annually, as well as a copy of the Notice of Parental Rights.

The Corporation's Notice of Parental Rights contains information about parental rights regarding the identification, evaluation, and placement of a student who is believed to be disabled; the right to request a hearing before an impartial hearing officer regarding any decision made by the Corporation with respect to the identified disability, evaluation, or educational placement of the child; and the Corporation's grievance procedure for complaints of discrimination.

All three policies – the Nondiscrimination Policy, the Section 504 Policy, and the Notice of Parental Rights – identify the Assistant Superintendent of Curriculum and Personnel as the Section 504 Coordinator and provides his contact information (address, telephone number and email); however, OCR learned during its investigation that Assistant Superintendent of

Curriculum and Personnel retired from the Corporation and the Section 504 Coordinator duties were reassigned to the Director Secondary Curriculum and Instruction and the Director of Diversity and Student Support.

Allegation #1

Legal Standard

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

The Section 504 regulation, at 34 C.F.R. § 104.4(a), states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

The Section 504 regulation, at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation, at 34 C.F.R. § 104.33(b)(1), defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual education needs of disabled persons as adequately as the needs of non-disabled persons are met and are based upon adherence to the procedures that satisfy the requirements of §§ 104.34, 104.35 and 104.36. Implementation of a properly developed Section 504 plan is one means of providing a student FAPE.

Facts

During the 2015-2016 school year, Student A was a 7th grader at the School. In fall 2015, after the Parent informed School personnel that Student A had been diagnosed with ADD, a Section 504 plan was developed for Student A on December 3, 2015. Student A's Section 504 plan contained the following provisions:

- Preferential seating near teachers;
- Teacher/student/parent will utilize the check-in/check-out system using the student assignment/agenda book with signatures daily;
- Teacher will verify orally that student understands class assignment(s), directions/instructions, and redirect verbally and nonverbally, as needed;
- Student will receive math tutoring during lunch, when available;

- Student will meet with guidance counselor monthly for locker room clean out and organization;
- Provide additional time (time and a half) on ISTEP+ test;
- Provide additional time (time and a half) to complete in-class assignments (if assignment is not completed student will be allowed to complete for homework and return assignment to teacher on the next school day);
- Provide additional time (time and a half) on classroom test/quizzes; and
- Provide open communication with parent(s)/teachers regarding grades, assignments, and behavior via email or phone, (Teachers/parent(s) will include assistant principal on email communication with parent(s)).

OCR's investigation to date revealed that all but two provisions of his Section 504 plan were implemented in one way or another by School staff in spring 2016. Regarding preferential seating, School staff provided testimony indicating that each teacher seated Student A in a seat that was closest to the area where the teacher spent the most time (either in the front of the class during lessons or near the teacher's desk). Teachers interviewed by OCR provided examples of how they verified orally or redirected to ensure Student A understood instructions and/or assignments, and explained that he received all the time he needed to complete class assignments, tests and quizzes, and homework. Regarding teachers whom OCR was not able to interview, the Assistant Principal indicated that when she spoke with and/or observed them, they described and/or she observed them interacting with Student A and ensuring he understood instructions. The Guidance Counselor told OCR that any time she located assignments or homework in Student A's backpack or locker that had not turned in, all of his teachers accepted those assignments for grades. Regarding math tutoring during lunch, the Section 504 plan reflects that this was to be initiated by Student A. Student A's math teacher told OCR that, although she gave Student A a permanent, laminated pass to come to her classroom during lunch for tutoring, he did not do so. The Guidance Counselor told OCR that she cleaned Student A's locker out "at least" monthly, if not more, and both the Counselor and Assistant Principal confirmed that Student A received additional time on his ISTEP+ test. Although the Parent did not believe these items were being implemented as described, because she was not in the classroom, she was not able to provide OCR any examples of specific failures by School staff to implement these provisions.

As to the following two provisions, OCR's investigation to date was conflicting regarding the nature and extent of their implementation by all of Student A's teachers in spring 2016:

- Teacher/student/parent will utilize the check-in/check-out system using the student assignment/agenda book with signatures daily;
- Provide open communication with parent(s)/teachers regarding grades, assignments, and behavior via email or phone, (Teachers/parent(s) will include assistant principal on email communication with parent(s)).

According to the Parent, with the exception of a few teachers (i.e., Student A's English Teachers), Student A's teachers did not communicate with her about Student A's grades or assignments regularly unless she contacted them first. She also stated that they did not sign the agenda book or binder forms regularly. As a result, she was not timely informed when Student A had homework, failed to turn in an assignment, or was receiving poor grades.¹ School staff interviewed by OCR each stated that they signed the agenda book when it was available but stated there were times when Student A did not bring it with him to class. School staff also stated that they communicated with the Parent. The Corporation provided documentation of e-mails sent to the Parent during spring 2016, but some personnel indicated that they were not able to retrieve old e-mails.² One teacher explained that she communicated with the Parent about Student A's grades and assignments through the Corporation's online gradebook system, but documentation submitted by the Corporation showed that Student A's parents never accessed the system to view the gradebook.³ The Corporation also provided copies of some pages from Student A's agenda book, which reflect assignments and teacher signatures appear for some days, but on other days there is nothing written down. The Corporation explained that it was not able to copy the entire book on account of returning it to the Parent pursuant to her request. In addition, the Assistant Principal told OCR that on or around January 27, 2016, she provided Student A with a new agenda because the one he had was torn and falling apart. The Parent disputes that the Assistant Principal met with Student A as she described, but confirmed that agenda book was torn and in bad shape.

The Corporation advised OCR that it wished to resolve the portion of Allegation #1 related to these two Section 504 provisions prior to completion of the investigation. In accordance with Section 302 of OCR's CPM, it is appropriate to resolve this issue at this juncture because OCR's investigation has not proceeded to a point where a finding is clear. OCR would need to gather additional information, including interviewing Student A, obtaining Student A's agenda book and binder from the Parent to compare the number of days they were filled out versus the number of days they were not, and interviewing Student A's teachers that OCR was not able to interview the day it visited the Corporation regarding their implementation of these provisions.

¹ All School staff interviewed told OCR that Student A's behavior in school was never an issue.

² The Counselor told OCR that she deleted her e-mails regarding Student A at the end of the school year only after Student A's parent told her the family was moving to Florida and would not return. The Parent confirmed that conversation took place.

³ Although this teacher claimed that the Parent agreed to access the online gradebook at a Section 504 conference, both the Parent and Assistant Principal told OCR that the Parent was emphatic about not committing to access the online gradebook.

Allegation #2

The complaint alleged that the Corporation subjected the Complainant and Student A to retaliation by disposing of his agenda book because the Complainant advocated on Student A's behalf with respect to his Section 504 plan.

The regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7 (e), which is incorporated by reference into the Section 504 regulation, at 34 C.F.R. § 104.61, prohibits a recipient from intimidating or retaliating against an individual for the purpose of interfering with any right or privilege secured by the regulation or, in relevant part, because the individual has made a complaint or participated in any manner in an investigation or proceeding under the regulation. The Title II regulation, at 28 C.F.R. § 35.134, also prohibits retaliation.

A *prima facie* case of retaliation is established when it is determined that (1) an individual engaged in an activity (opposed a discriminatory policy, asserted protected rights, or participated in an OCR complaint or proceeding) protected by a statute OCR enforces; (2) the recipient took a materially adverse action directed toward the complainant contemporaneous with or subsequent to the protected activity; and (3) a causal connection between the protected activity and the materially adverse action can be inferred. If all of the elements of a *prima facie* case of retaliation are met, OCR then considers whether the recipient presented a legitimate, non-retaliatory justification for taking the adverse action, and whether the reason is a pretext for retaliation.

A finding of noncompliance under these regulations requires a threshold determination that the recipient took an adverse action against the individual, i.e., the recipient took actions, including such acts as intimidation or coercion, that significantly disadvantaged the individual or would reasonably have deterred or precluded an individual from engaging in further protected activities.

According to the Parent, the Corporation informed her that School personnel disposed of the agenda book Student A used while he was on the Red Team when the Counselor was cleaning out Student A's locker at the end of January 2016. She indicated that she believed this action was retaliatory because she received conflicting testimony from the Counselor and Principal regarding what had occurred.

According to the Corporation, that agenda book was never thrown out. Rather, the Assistant Principal told OCR that, on January 27, 2016, she met with Student A to explain to him how the check-in/check-out system in the agenda book was supposed to work and showed him how to write down his assignments in it. The Assistant Principal stated that, because the agenda book was torn and falling apart, she gave Student A a new agenda book to use and kept the old one in her office. When she learned in summer 2016 that the Parent believed it had been thrown away, she provided it to the Corporation administrator who then in turn

returned it to the Parent. The Parent confirmed to OCR that the agenda book was returned to her.

OCR concludes that the evidence establishes that the Parent engaged in a protected activity of which the Corporation had notice when the Parent advocated on behalf of Student A regarding the implementation of his Section 504 plan in the 2015-2016 school year. However, OCR determined that the evidence established that Student A did not suffer an adverse action because Student A's agenda book was not thrown away as alleged. As such, a *prima facie* case of retaliation cannot be established and OCR therefore determined that the evidence is insufficient to conclude that the Corporation subjected the Parent or Student A to retaliation as alleged in Allegation #2.

Resolution Agreement and Conclusion

The enclosed Resolution Agreement (Agreement) is fully aligned with the portion of Allegation #1 that the Corporation requested to resolve prior to the conclusion of OCR's investigation. The Agreement requires the Corporation to:

- review and revise its Nondiscrimination Policy, Section 504 policies, and Notice of Parental Rights to identify and provide updated contact information (address, telephone number, and email address) for the Corporation's Section 504 Coordinator(s);
- review, and revise if necessary, its Section 504 policies and Notice of Parental Rights to ensure that it adheres to the identification, evaluation, placement requirements, including procedural safeguards, in the implementing Section 504 regulation at 34 C.F.R. §§104.35 and 104.36, and complies with its obligation to provide a free and appropriate public education consistent with the implementing Section 504 regulation at 34 C.F.R. § 104.33;
- provide all administrators, teachers, and staff with written notice regarding the new policies and procedures;
- provide training to the Corporation's Section 504 Coordinator(s) regarding the Corporation's Section 504 responsibilities and Section 504 Coordinator(s) responsibilities, including how to implement the Corporation's policies and procedures with respect to the identification, evaluation, placement of students, the provision of a free and appropriate public education, and procedural safeguards in a manner consistent with the implementing Section 504 regulation at 34 C.F.R. §§ 104.33, 104.35, and 104.36;
- provide training to all administrators, teachers, and staff at Clifford Pierce Middle School who are responsible for implementation of Section 504 Plans, which

specifically informs the administrators, teachers, and staff of the Corporation's obligation to provide a free and appropriate education as well as the individual staff member's obligation to strictly adhere to the provisions of each student's Section 504 Plan; and

- convene a Section 504 team meeting to determine whether Student A is in need of compensatory services for any educational deficits that resulted from the alleged failure to implement the identified two provisions of his Section 504 plan during spring 2016 and, if applicable, will develop a plan to provide any such compensatory services.

OCR will monitor the Agreement. Please note that the first monitoring deadline is November 30, 2016.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Corporation'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.

Please be advised that the Corporation 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.

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

Page 9 – Mr. Studebaker

We wish to thank you and your staff for your cooperation and courtesy during our investigation. In particular, we would like to thank Marnita Taylor, Director of Secondary Curriculum & Instruction for the Corporation. If you have questions about this letter, you may contact Geraldo Perez, Equal Opportunity Specialist, at 312-730-1646 or geraldoperez@ed.gov.

Sincerely,

Marcela Sanchez-Aguilar
Supervisory Attorney

Enclosure