



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

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REGION V
ILLINOIS
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NORTH DAKOTA
WISCONSIN

June 15, 2017

Mr. Dale Hogie
Superintendent
Lake Park Audubon School District
611 Vigen Lane
Lake Park, MN 56554

Re: OCR Docket # 05-17-1112
Lake Park Audubon School District

Dear Mr. Hogie:

This letter is to inform you of the disposition of the complaint filed against Lake Park Audubon School District (District) on December 20, 2016, with the U.S. Department of Education (Department), Office for Civil Rights (OCR) (OCR Docket # 05-17-1112).

Specifically, the complaint alleged:

1. the District discriminated against a former student (Student A) at the District's Lake Park Audubon High School (School), on the basis of disability (XXXXXXXX) from September 2016 to January 2017 by failing to implement the provision of his approved 504 Plan requiring the District to train School staff on the proper use of Student A's XXXXXXXX symptoms Student A may exhibit when having XXXXXXXXXXXX.
2. the District discriminated against Student A on the basis of disability (XXXXXXXX) in November 2016 when Student A's teacher (Teacher) subjected Student A to disability-based harassment.
3. on or around XXXXXXXXXXXXXXXX, the District's Section 504 Coordinator retaliated against Student A because Student A's Complainant advocated for Student A's rights as a student with a disability by failing to inform Student A that the School's XXXXXXXXXXXXXXXXXXXXXXXX on a snow day.

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. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR is also responsible for enforcing 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. Title II prohibits discrimination on the basis of disability by public entities. These laws also prohibit retaliation for certain protected activities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to the Section 504 and Title II.

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

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During the complaint investigation, OCR reviewed documents provided by the Complainant and the District. OCR also interviewed the Complainant and reviewed answers to questions provided by the District's Section 504 Coordinator.

Prior to the conclusion of the investigation the District agreed to resolve Allegations 1 and 2 in accordance with Section 302 of *OCR's Complaint Processing Manual*. Discussions between OCR and the District resulted in the District signing the enclosed Resolution Agreement (Agreement), which, when fully implemented, will resolve the issues raised in Allegations 1 and 2.

With respect to Allegation 3, OCR carefully considered the relevant evidence in this case and has determined based on a preponderance-of-the-evidence standard that there is insufficient evidence to conclude the District retaliated against Student A as alleged. The bases for OCR's determination are set forth below.

Factual Summary Allegation 3

For the 2016-2017 school year, Student A was enrolled in the XXXXX at the District's Lake Park Audubon High School.¹ During the school year, Student A was a member of the School's XXXXXXXXXXXXXXXXXXXX.

In fall 2016, the Complainant reported concerns to District and School administrators regarding the alleged failure of the School to fully implement Student A's 504 Plan (at issue in Allegation 1) and alleged disability-based harassment of Student A by a teacher (at issue in Allegation 2).

According to the Complainant and the District, on XXXXXXX, 2016, there was severe weather, which included snow and freezing temperatures, which made travel difficult.² Both parties agree that, on account of the weather, that day's XXXXXXX was cancelled by the XXXXXXX (who also serves as the District's 504 Coordinator). The Complainant stated to OCR that she learned that XXXXXXX on account of a phone conversation with parent of another XXXXXXX who informed her that XXXXXXX had been cancelled.

¹ The School serves grades 7-12.

² According to the Weather Underground website, temperatures in Lake Park, Minnesota, on XXXXXXX, ranged from 10° F to 17° F, with light snow falling until 1:30 pm and clear skies thereafter.
https://www.wunderground.com/history/airport/KDTL/2016/12/27/DailyHistory.html?req_city=Lake+Park&req_state=MN&req_statename=Minnesota&reqdb.zip=56554&reqdb.magic=1&reqdb.wmo=99999

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The Complainant told OCR that, had she not spoken with the parent that day, she would have gone out in “blizzard conditions” to take Student A to XXXXXX. The Complainant told OCR she believed the 504 Coordinator deliberately failed to inform her of the XXXXXXXX XXXXXX in retaliation for her advocacy for Student A’s rights as a student with a disability in fall 2016.

The 504 Coordinator denied that he retaliated against Student A by not informing him or the Complainant that the XXXXXXXX XXXXXXXX had been cancelled. The XXXX informed OCR that he texted the telephone number provided to him by Student A. The XXXX also told OCR the XXXXXXXX was optional, and stated that Student A was one of his more skilled players and received more playing time than other players.

Applicable Regulations and Legal Standards

Discrimination

The Section 504 implementing 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 regulation implementing Section 504 at 34 C.F.R. § 104.33(a) provides that a recipient that operates a public elementary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s disability. The implementing regulation at 34 C.F.R. § 104.33(b) states that the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students are met and are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34 – 104.36. The development and implementation of a Section 504 Plan is one means by which FAPE may be provided.

The Title II implementing regulation at 28 C.F.R. § 35.130(a) provides that no qualified individual with a disability may, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any public entity.

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The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to these allegations do not provide greater protection than the applicable Section 504 regulations and has therefore applied the relevant Section 504 standards.

Retaliation

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the provision of the implementing regulation of Title VI of the Civil Rights Act of 1964 that prohibits acts of retaliation. As such, 34 C.F.R. § 104.61 prohibits a recipient from retaliating against an individual for the purpose of interfering with any right or privilege secured by Section 504 or because the individual has made a complaint, testified, assisted or participated in any manner in an investigation, hearing or proceeding under Section 504. The regulation implementing Title II, at 28 C.F.R. § 35.134(b), contains a similar provision prohibiting retaliation, intimidation, threats, coercion, and interference with an individual's right to engage in activities protected by Title II.

To establish a *prima facie* case of retaliation, the evidence must establish: (1) an individual experienced an adverse action caused by the recipient; (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the protected activity.

In the retaliation context, an adverse action is an act of intimidation, threat, coercion, or discrimination that is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. Petty slights, minor annoyances, and lack of good manners are not typically retaliation. In determining whether a recipient took an adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, and the recipient's deviation from established policies or practices.

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If all of the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action. OCR determines whether a legitimate, non-retaliatory reason is credible by considering all relevant evidence such as changes in the treatment of the individual after the protected activity occurred, the proximity in time between the protected activity and the adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, and the recipient's deviation from established policies or practices.

Analysis and Conclusion

OCR determined that the Complainant engaged in protected activity in fall 2016 when she made the District aware of her concerns regarding the alleged failure of the School to fully implement Student A's 504 Plan and alleged disability-based harassment at issue in Allegations 1 and 2. OCR also determined the District knew of this activity. Accordingly, the second element of a *prima facie* case of retaliation has been met.

OCR's investigation failed, however, to establish that Student A was subjected to an adverse action. While the Complainant explained to OCR her fears of what could have happened had she driven Student A to the XXXXXXXXXXXX, the Complainant, herself, acknowledged she was informed by another parent of the XXXXXXXXXXXX before leaving her home. The Complainant did not drive Student A to XXXXXXXXXXXXXXX on XXXXXXXXXXX, 2016. The Complainant suffered no negative consequences from the matter, other than being annoyed by the situation. Additionally, OCR has determined that the alleged retaliatory act would not dissuade a reasonable person in the Complainant's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

Accordingly, the evidence obtained by OCR failed to establish a *prima facie* case of retaliation with regard to the District action alleged in Allegation 3. As such, OCR will close Allegation 3 effective the date of this letter.

As noted above, Allegations 1 and 2 were resolved when the District signed the Agreement on June 14, 2017. OCR will monitor the District's implementation of the Agreement. We look forward to receiving the District's first monitoring report which is due by December 8, 2017.

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.

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OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

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. 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.

OCR would like to take this opportunity to thank Ms. Kristi Hastings, Esq., for her cooperation in the resolution of this complaint. If you have any questions, you may contact Geraldo Perez, Investigator, at (312) 730-1646 or by email at geraldperez@ed.gov.

Sincerely,

Ann Cook-Graver
Supervisory Attorney

cc: Kristi A. Hastings, Attorney
Pemberton, Sorlie, Rufer & Kershner, PLLP

Enclosure