



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

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July 6, 2018

Dr. Janice Jackson
Chief Executive Officer
Chicago Public Schools, District #299
42 West Madison Street
Chicago, Illinois 60602

Via electronic mail only: XXXXXXXXXXXXXXXXXXXX

Re: OCR Cases #05-18-1127 and 05-18-1266

Dear Dr. Jackson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigations of the above-referenced complaints filed against Chicago Public Schools District #299 (District), alleging discrimination on the basis of disability and also retaliation.

Specifically, the complaints alleged that staff at XXXXXXXXXXXX (School) discriminated on the basis of disability against the Complainant's son (Student A) during the 2017-18 school year, when Student A was XXXXXXX student at the School, as follows:

1. Staff failed to implement numerous provisions of Student A's Section 504 Plan (Plan);
2. Staff attempted to change Student A's Plan without following the procedural requirements of Section 504; and,
3. Staff harassed Student A by regularly suggesting that he attend a different school.

The Complainant also alleged that School staff retaliated against Student A because of the Complainant's first OCR complaint (# 05-18-1127) when:

4. During the Spring of 2018, Student A's science teacher (Teacher) failed to provide Student A with additional time for a "multi-step final" homework assignment; and
5. During the 2017-18 school year, Staff suggested that Student A attend a different school.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 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 at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. 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. Both of these laws prohibit retaliation.

As part of its investigation, OCR reviewed documentation provided by the Complainant and the District, and interviewed the Complainant and School staff. Prior to the completion of OCR's investigation, the District requested to resolve the allegation that the School failed to implement several provisions of Student A's Section 504 Plan beginning in the fall of 2017 (Allegation #1). The provisions of the resolution agreement are aligned with this allegation and consistent with applicable regulations. Regarding the rest of Complainant's allegations,¹ OCR completed its investigation and, as explained below, has determined that the evidence is insufficient to establish that the District subjected Student A to discrimination based on disability or retaliated against him.

Legal Standards

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.

Discrimination Generally

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, 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.

Free Appropriate Public Education (FAPE)

The Section 504 implementing 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 and 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 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 individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The development and implementation of a Section 504 Plan is one means by which FAPE may be provided.

Evaluation, Re-evaluation and Placement Determinations

The Section 504 regulation at 34 C.F.R. § 104.35(a), requires a recipient to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the

¹ On February 26, 2018, the Complainant withdrew an additional allegation concerning the scheduling of Student A's Section 504 Team meetings because the District resolved her concerns.

person in regular or special education and any subsequent significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(c), requires a recipient, when interpreting evaluation data and making placement decisions, to draw upon information from a variety of sources, ensure that information obtained from all sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student and meaning of the evaluation data, and the placement options.

Harassment Based on Disability

Harassment based on disability is a form of discrimination prohibited by Section 504. Harassment based on disability is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the recipient's program. Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.

OCR determines whether conduct constitutes a hostile environment based on disability by examining the totality of the circumstances. These circumstances include the context, nature, scope, frequency, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved. To show harassment under a hostile environment approach, the evidence must establish that: (1) a hostile environment existed, i.e., harassing conduct (physical, verbal, graphic, or written) on the basis of disability occurred that was sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient; (2) the recipient had notice of the hostile environment; and (3) the recipient failed to respond adequately to address the hostile environment. If a hostile environment based on disability exists and a recipient has actual or constructive notice of it, then the recipient is required to take appropriate and adequate responsive action reasonably calculated to end the harassment, eliminate any hostile environment that has been created, prevent its recurrence and, where appropriate, remedy the effects of the harassment on the student(s) subjected to the harassment.

The extent of a recipient's responsibilities if an employee harasses a student based on disability is determined by whether or not the harassment occurred in the context of the employee's provision of aid, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context. The factors include the type and degree of responsibility given to the employee, including both formal and informal authority, to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally; the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place; where and when the harassment occurred; the age and educational level of the student involved; and as applicable, whether, in light of the student's age and educational level and the way the school is

run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

Retaliation

The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the regulation or because the individual has made a complaint, testified, assisted or participated in any manner in an investigation, hearing or proceeding under the regulation or opposed any act or policy that is unlawful under the regulation.

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. an individual experienced an adverse action caused by the recipient; and
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.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR. Petty slights, minor annoyances, and lack of good manners are typically not adverse actions.

Facts

The Complainant asserted that throughout the 2017-18 school year, each of Student A's teachers except for his math teacher failed to implement numerous provisions of his Plan.

She also asserted that a "District Representative" who was not a member of Student A's Section 504 team attempted to electronically change Student A's Plan in March 2018, outside the context of the Section 504 team's scheduled meetings and without ensuring that the changes were made by a group of persons knowledgeable about Student A, the meaning of the evaluation data, and the placement options. Specifically, the Complainant asserted that the District Representative sought to modify provisions of the Plan that the team had agreed to in its prior meetings to the extent that the provisions applied to classes in which Student A was doing well academically. The Complainant objected to the District Representative's changes and further objected to the fact that the changes were proposed outside of the context of a properly convened Section 504 team meeting. The Complainant contacted the District's Director of Special Education to object to the proposed changes. Thereafter, the Complainant informed OCR that the changes proposed by the District Representative were not finalized or incorporated into the Section 504 Plan.

The Complainant also asserted that School employees harassed and retaliated against Student A because of the Complainant's first OCR complaint by suggesting that he attend a different school in the upcoming school year. According to the Complainant, in December 2017, Student A's former counselor asked whether Student A would attend a different school in the fall of 2018. She further reported to OCR that several times in March 2018, Student A's new counselor and the School Principal asked where Student A would attend school in the upcoming school year. According to the Complainant, these inquiries were made directly to her by School staff, who did not ask Student A his plans for the upcoming school year. The Complainant maintains, however, that as a result of the inquiries that were made to her, Student A began to XXXXXXXXXX, which caused him to occasionally miss school. The Complainant did not explain how Student A learned that the Principal and counselors allegedly asked her where Student A would attend school the next year.

The former counselor denied suggesting that Student A attend a different school or asking where Student A planned to enroll the following year. The Principal also denied asking the Complainant where Student A would go to school the following year, and further that any School staff inquired about his upcoming attendance plans.

Lastly, the Complainant asserted that School staff retaliated against Student A because of the Complainant's protected activity when Student A's science teacher failed to provide Student A with additional time (100%) for a "multi-step final" homework assignment. The science teacher confirmed during her interview with OCR that the final exam had multiple steps because she first taught the lessons, then required students to do homework and document data from lab results, and finally required the students to take an untimed, online exam. According to the science teacher, the final exam represented less than 15% of the overall grade. She posted the exam to the School's online learning platform on January 28, 2018 at 1:31p.m. The students had until January 30 to complete the exam. The science teacher granted a one day extension to the entire class, allowing them to complete the exam by no later than 9:00 p.m. on January 31, 2018. She gave Student A an extra day, until 6:00 p.m. on February 1, 2018, to complete the exam.

The Complainant asserted that Student A attempted to submit the final exam on February 1, 2018, but he experienced a technical error. At XXXXXX on February 1, the Complainant sent an email to the science teacher in which she wrote that Student A "hit two buttons on the keyboard and it deleted the assignment." The science teacher confirmed for OCR by providing a screenshot from the School's online learning platform related to the final exam that Student A did not submit his work. Therefore, she decided to exclude the final exam from her calculation of Student A's final grade in her class, and as a result Student A earned an A (95.91%) as his final grade.

Case Status

With respect to allegation # 1, on July 5, 2018, the District signed the enclosed resolution agreement (Agreement), the provisions of which are aligned with this allegation and consistent with the applicable regulations.

Pursuant to the Agreement, the District will provide training to specific School staff regarding the Section 504 regulations governing the provision of a FAPE and the prohibition against retaliation, and convene a meeting of Student A's Section 504 Team to determine whether Student A was denied a FAPE during the 2017-2018 school year as a result of any failure by the School to implement the provisions of Student A's Section 504 Plan, and, if so, whether the School needs to provide compensatory services and/or remedial measures to Student A.

OCR will monitor the District's implementation of the Agreement until the District is in compliance with all of its terms. OCR looks forward to receiving the District's first monitoring report, which is due on September 30, 2018.

Analysis

Allegation # 2 – Section 504 procedural requirements

OCR determined that had the District Representative been successful in her efforts to revise Student A's Section 504 Plan in the manner she allegedly attempted, her actions would have been inconsistent with the requirements of Section 504 to the extent that any changes made by the District Representative that constituted a significant change in placement would have been made without adhering to the procedural requirements of the Section 504 regulation at 34 C.F.R. § 104.35.

The Complainant stated, however, that the District Representative did not in fact make changes to Student A's Section 504 Plan after the Complainant contacted the District's Director of Special Education to object to the proposed changes. Under these circumstances, OCR determined that this complaint allegation is resolved and has closed this allegation effective the date of this letter.

Allegations #3 and 5 – Inquiring about Student A's attendance plans

Other than the Complainant's own assertion, OCR did not obtain any information to establish that School staff inquired about whether Student A would continue to attend the School during the 2018-19 school year. Moreover, even if staff had asked about his attendance plans, OCR concludes that a handful of inquiries by School staff to the Complainant about where Student A would attend school in the fall are insufficient to establish disability harassment or retaliation.

With respect to harassment, the alleged inquiries, which were not expressly based on Student A's disability nor made to or in his presence, if established, would not have been sufficiently severe, pervasive or persistent to interfere with or limit Student A's ability to participate in or benefit from the services, activities or privileges provided by the School. For similar reasons with respect to the Complainant's assertion of retaliation, these alleged inquiries, if established, would not rise above the level of a petty slight or minor annoyance, and thus do not constitute an adverse action. Therefore, OCR determined that there is insufficient evidence to establish a *prima facie* case of retaliation as alleged. For all of these reasons, OCR finds insufficient

evidence of disability harassment or retaliation, and has closed Allegations #3 and 5 effective the date of this letter.

Allegation #4 – Multi step assignments

Although it is undisputed that Student A did not receive 100% additional time on his science final exam as permitted by his Section 504 Plan, it is also undisputed that he did not submit his final exam due to technical difficulties unrelated to either his disability or implementation of the provision of his Section 504 Plan that granted him additional time. The evidence further establishes that the science teacher did not penalize Student A for failing to submit his exam and he earned an A as his final grade in her class. Under these circumstances, OCR determined that the science teacher did not subject Student A to an adverse action. Therefore, the evidence is insufficient to establish a prima facie case of retaliation and OCR has closed Allegation #4 effective the date of this letter.

This concludes OCR's investigation of these complaints and 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 file a private suit in federal court, whether or not OCR finds a violation.

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 individual may file another complaint alleging such treatment.

Additionally, 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 privacy.

OCR wishes to thank the District, especially XXXXXXXX, for its responsiveness and cooperation throughout OCR's investigation of these two complaints and during the negotiations of the Agreement. If you have any questions regarding this letter, please contact Mark Erickson at 312-730-1574 or via email at mark.erickson@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney

Enclosure

cc: XXXXXXXXXXXXXXXXXXXXXXXXXXXX
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