



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

XXXX XXXX, XXXX

Mr. Jon Collins, Superintendent
West Memphis School District
301 South Avalon Drive
West Memphis, AR 72301

RE: OCR Case No. 06131710
West Memphis School District

Dear Superintendent Collins:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its processing of the XXXX XXXX, XXXX, complaint filed against the West Memphis School District (WMSD), West Memphis, Arkansas. The complaint alleged:

1. WMSD retaliated against XXXX XXXX by intimidating XXXX and not allowing XXXX to attend an end of year Admission, Review and Dismissal (ARD) meeting as an advocate for XXXX XXXX (the Student) with a disability.
2. WMSD failed to provide special education students in self-contained classes at L.R. Jackson Elementary School (JES) and at West Memphis High School (WMHS) textbooks for home use and access to computers that connect to the internet (e.g., the school district website) during the spring 2013 and fall 2013 semesters, although WMSD provided this to regular education students.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 704, and its implementing regulations at 34 C.F.R. Part 104, which prohibit discrimination against individuals with disabilities. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. § 12131, and its implementing regulations at 28 C.F.R. Part 35, which prohibit public entities from discriminating against individuals with disabilities. WMSD is a recipient of Federal financial assistance from the Department and is a public educational institution. Additionally, the regulations implementing Section 504 and Title II prohibit retaliation at 34 C.F.R. §104.61 and 28 C.F.R. §35.134, respectively. Therefore, OCR had jurisdictional authority to investigate this complaint under 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.

OCR investigated:

1. Whether WMSD retaliated against XXXX XXXX by intimidating XXXX and not allowing XXXX to attend a meeting for XXXX XXXX (the Student) with a disability because XXXX verbally disagreed with the WMSD Special Education Supervisor (SE Supervisor) about the applicability of accommodations for students with disabilities and informed the SE Supervisor that XXXX (the complainant) would attend an upcoming ARD meeting to make sure that assistive technology for a certain student would be discussed in violation of Section 504, at 34 C.F.R. §104.61, and Title II, at 28 C.F.R. §35.134.
2. Whether WMSD treated the students assigned to self-contained classrooms differently on the basis of disability in the context of an educational program or activity (by failing to provide them with textbooks for home use and access to the internet) without a legitimate, nondiscriminatory reason, and thereby, interfered with or limited the ability of the students to participate in or benefit from the services, activities or privileges provided by WMSD during the 2012-13 and 2013-14 school years, in violation of Section 504, at 34 C.F.R. §104.4, and Title II, at 28 C.F.R. §35.130.

During the investigation, OCR reviewed information provided by the complainant and documentation provided by WMSD, conducted interviews of WMSD employees and a witness of the complainant, and conducted a rebuttal interview of the complainant. OCR's disposition of Issues 1 and 2 is outlined below.

Issue 1

Legal Standard

In order for an allegation of retaliation to be sustained, OCR must determine whether:

- 1) A prima facie case of retaliation can be established, which involves consideration of whether
 - a. an individual experienced an adverse action caused by the recipient; *and*
 - b. 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*
 - c. there is some evidence of a causal connection between the adverse action and the protected activity
- 2) The recipient identifies a facially legitimate reason for taking the adverse action other than the protected activity; and
- 3) Whether the recipient's reason is a pretext for retaliation and/or whether multiple motives exist for the recipient taking the adverse action.

If OCR does not find that a prima facie case exists, OCR will conclude that there is insufficient evidence to support a finding of retaliation. If, however, the evidence demonstrates a prima facie case of retaliation, an inference of unlawful retaliation is raised and OCR proceeds to the next stage of the analysis. To ascertain whether this inference might be rebutted, OCR will then

determine whether the recipient can identify a non-retaliatory reason for its actions. If such a reason is identified, OCR's investigation proceeds to the third stage. At the third stage, OCR examines the evidence to resolve what the real reason was (or reasons were) for the intimidation, threat, coercion, or discrimination.

Analysis

Prior to the completion of OCR's investigation, WMSD expressed a desire to voluntarily resolve Allegation number 1. Consistent with Section 302 of OCR's Complaint Processing Manual, WMSD submitted the attached Resolution Agreement (Agreement), signed on October 27, 2017, which OCR has determined addresses the compliance issues raised with this allegation and which, when fully implemented, will resolve this allegation. Specifically, the Agreement includes training of WMSD staff on: (1) the Notice rights of parents regarding the identification, evaluation, and educational placement of students with a disability; and (2) the District's obligation under Section 504 and Title II to refrain from retaliation. The Agreement also includes a requirement to provide to parents of students with disabilities written notice of the prohibitions against retaliation under Section 504 and Title II, and to include in each of the District's Student Handbooks written notice of the prohibitions against retaliation under Section 504 and Title II.

Issue 2

Legal Standard

Section 504's implementing regulation at 34.C.F.R. §104.4 prohibits recipients from excluding an individual from participation in, denying an individual the benefits of, or otherwise subjecting an individual to discrimination with respect to the services, activities, or privileges provided by the recipient because of the individual's disability. In considering allegations that a recipient has discriminated on the basis of disability, OCR looks for evidence of discriminatory intent. Discriminatory intent can be established either through direct evidence (i.e., statements, documents, or actions that clearly evidence a discriminatory intent), or through indirect (also known as circumstantial) evidence (i.e., a set of facts from which one may infer a discriminatory intent). Absent direct evidence that a recipient discriminated on the basis of disability, OCR applies a disparate treatment analysis under which OCR must determine whether the facts support a *prima facie* case of discrimination based on disability. A *prima facie* case exists if a preponderance of the evidence indicates that a recipient treated one person with a disability differently than one or more similarly situated non-disabled persons. If a *prima facie* case of different treatment is established, OCR must then determine whether the recipient had a legitimate, non-discriminatory reason for its action(s) that would rebut the *prima facie* case against it. If one or more legitimate, non-discriminatory reasons for the different treatment are identified, OCR must then determine whether the recipient's asserted reasons for its actions are pretext for discrimination based on disability. Ultimately, however, the weight of the evidence must support a finding that actual discrimination occurred.

Analysis

The complaint alleged that WMSD failed to provide special education students in self-contained classes at JES and at WMHS textbooks for home use and access to computers that connect to the internet (e.g., the school district website) during the spring 2013 and fall 2013 semesters, although WMSD provided this to regular education students.

OCR's review of WMSD's policies (*Instructional Resources* policy) regarding access to textbooks, computers and internet revealed that they did not differentiate between special education students in self-contained classes as compared to regular education students. Under WMSD's *Instructional Resources* policy, teachers are "encouraged to avail themselves of the wide range of instructional materials at their disposal. Textbooks, supplementary materials in their own rooms as well as in their school libraries, the popular media (...computers, Internet access) and resources within the community are just some of the instructional aids to which teachers may have access." WMSD's *Instructional Materials* policy provides that the utilization of a wide variety of materials and equipment in the instructional program is strongly encouraged, and that the selection of media should be determined by the objectives of the course and the experiences and activities to be provided in efforts to meet such objectives. Based on testimony from WMSD employees, OCR found that WMSD books were available to students for home use, as long as the student submitted a Book Card signed by their parent and, either: (a) the book was assigned to the student for home use by the teacher, or (b) a parent requested that their student be allowed to take a particular book home.

Textbooks for Home Use

Based on testimony from WMSD employees, OCR found that none of the approximately fifteen special education students assigned to a self-contained classroom at JES were assigned textbooks for home use. However, OCR found that textbooks were not used by any students in grades Kindergarten, 1st, and 2nd (K through 2) at JES; instead, the JES used a "refrigerator curriculum" as adopted by the Arkansas Department of Education that used multiple consumable materials, which resulted in neither regular education students nor special education students at JES in grades K through 2nd receiving textbooks for home use. As such, OCR concluded that special education students in self-contained classes in grades K through 2 at JES were not treated differently than similarly situated regular education students in grades K through 2 at JES.

With regard to JES students in grades 3 through 6, OCR found that regular education students were assigned one or more textbooks for home use, while special education students assigned to self-contained classes were not assigned textbooks for home use. Therefore, OCR determined that special education students assigned to self-contained classes in grades 3 through 6 at JES were treated differently than similarly situated regular education students. However, based on testimony from WMSD employees, OCR found that textbooks were not assigned to these special education students for home use because their educational curriculum was not textbook-based. Rather, each of these student's instructional programs was individually designed around the student's IEP, and the curriculum resources were often based in electronic media, using Chromebooks and iPads for students on a regular basis. Nevertheless, the teachers of special education students in self-contained classes informed OCR that, if a parent requested that a

student be allowed to take home a WMSD book, the teacher would allow it as long as a signed Book Card was on file. Thus, OCR concluded that WMSD had a legitimate, non-discriminatory explanation for why the students assigned to grade 3 through 6, self-contained classes at JES did not have textbooks assigned to them for home use.

Further, OCR found no evidence that the District's reason for not assigning special education students textbooks for home use was pretext for discrimination. The evidence showed the fact that special education students were not assigned textbooks for home use was consistent with the fact that their educational curriculum was not textbook-based. The evidence also showed that special education students were provided the opportunity take home WMSD books upon request by their parent as long as a signed Book Card was on file.

With regard to WMHS, prior to the completion of this investigation, WMSD entered a voluntary resolution agreement for a different complaint (OCR complaint number 06141573) addressing the issue of equal access to textbooks for home use by special education and regular education students at WMHS. As a result, the findings for this current investigation do not include a determination regarding textbooks for home use by WMHS students.

Access to Internet

With regard to access to computers that connect to the internet, OCR found that regular education students at JES were provided approximately 40 minutes per week to use computers when their teachers took them to the computer lab and/or when their teachers checked out from the campus library a set of Chromebooks for use in class. OCR found that special education students in self-contained classes at JES were provided use of Chromebooks and iPads (which both had internet access) in their classrooms as a regular part of their instructional program (on a daily to weekly basis). As such, OCR concluded that special education students in self-contained classes at JES were provided with as much or more access to computers with internet connections than similarly situated regular education students at JES.

With regard to access to computers that connect to the internet at WMHS, OCR found that regular education students and special education students in self-contained classes at WMHS were provided access to the school computer lab. OCR also found that iPad sets (with internet connections) were checked out from the library by teachers for their classes of regular education students, while the special education students assigned to self-contained classes had a set of iPads (with internet connections) exclusively assigned to their classroom. Further, the WMHS's Apex software (for virtual learning systems) was made available to all WMHS students and was accessible at school and at home. As such, OCR concluded that special education students in self-contained classes at WMHS were not treated differently than similarly situated regular education students at WMHS with regard to computers that connect to the internet.

Based on the above information, OCR concluded that there is insufficient evidence to support a conclusion of noncompliance under Section 504 and Title II with respect to Issue 2.

Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding this complaint; however, OCR will actively monitor the implementation of the Agreement (for

Allegation number 1) by WMSD to determine whether the commitments made by WMSD have been implemented consistent with the terms of the Agreement. Although, in some instances, verification of the remedial actions taken by WMSD can be accomplished by a review of reports and other documentation provided by WMSD, in other instances, a future monitoring site visit may be required to verify actions taken by WMSD.

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

If you have any questions, please feel free to contact Tiffany Gray, the attorney-investigator, by telephone at (214) 661-9611 or Adriane Martin at (214) 661-9600.

Sincerely,

Taylor D. August, Regional Director
Office for Civil Rights
Dallas Office

Attachment