



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

Re: OCR Docket #06141285

Dr. Fred Hayes, Superintendent
Nacogdoches Independent School District
2801 Park Street
Nacogdoches, Texas 75964

Dear Dr. Hayes:

The U.S. Department of Education, Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint filed against the Nacogdoches Independent School District (NISD), which OCR received on March 20, 2014. The complainant alleged that the NISD discriminated against XXXX (the Student) on the basis of her disabilities (X---phrase redacted---X). Specifically, the complainant alleged that the NISD: (1) denied the Student a free appropriate public education (FAPE) during the 2013-2014 school year; (2) failed to take prompt and effective responsive action to address disability-based harassment directed at the Student by other students during the 2013-2014 school year; and (3) retaliated against the Student by having her XXXX XXXX XXXX because the complainant advocated for the Student's rights during the 2013-2014 school year.

OCR is responsible for determining whether organizations or entities that receive or benefit from Federal financial assistance (recipients), either from the Department or from an agency that has delegated investigative authority to the Department, are in compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (amended 1992), and its implementing regulation, at 34 C.F.R. Part 104, which prohibit both discrimination on the basis of disability and retaliation. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit disability discrimination and retaliation by public entities. Because the NISD is both a recipient of Federal financial assistance from the Department and a public elementary and secondary education system, OCR had jurisdiction to investigate this complaint pursuant to Section 504 and Title II.

Based on the allegations, OCR investigated the following legal issues:

1. Whether during the 2013-2014 school year, the NISD discriminated against the Student on the basis of disability by failing to provide regular or special education and related aids and services deemed necessary to meet the

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

Student's individual educational needs (e.g., X---phrase redacted---X), and thereby denied the Student a FAPE, in violation of Section 504 and Title II and their implementing regulations, at 34 C.F.R. § 104.33 and 28 C.F.R. § 35.130, respectively.

2. Whether during the 2013-2014 school year the NISD discriminated against the Student on the basis of disability by failing to take prompt and effective responsive action to address disability-based harassment directed at her by other students, which was sufficient to constitute a hostile environment, of which it had or should have had notice, in violation of Section 504 and Title II, at 34 C.F.R. § 104.4, and 28 C.F.R. § 35.130, respectively.
3. Whether during the 2013-2014 school year the NISD retaliated against the Student by having her XXXX XXXX because the complainant made complaints to the NISD advocating for the Student's rights, in violation of Section 504 and Title II, at 34 C.F.R. § 104.61, and 28 C.F.R. § 35.134, respectively.

A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination or retaliation occurred). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

In reaching our compliance determination, OCR reviewed documents provided by the NISD, as well as information obtained during OCR interviews with NISD staff. In addition, OCR conducted multiple interviews with the complainant and corresponded with the complainant via electronic mail message (email) throughout the course of the investigation. Based on our review and analysis of the information obtained during this investigation, OCR has determined that there is sufficient evidence to establish a violation of Section 504 and Title II with respect to Allegation 1 and, in part, Allegation 2, but insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to Allegation 2, in part, and Allegation 3. Provided below is an explanation of how this determination was reached.

Allegation 1

The complainant first alleged that the NISD denied the Student a FAPE during the 2013-2014 school year. Specifically, she alleged that the NISD failed to provide the Student with X---phrase redacted---X as delineated in her IEP.

Legal Standard

Under the Section 504 and Title II implementing regulations, at 34 C.F.R. § 104.33(a) and 28 C.F.R. § 35.130, respectively, a recipient must provide a FAPE to each qualified student with a disability in its jurisdiction. The Section 504 regulation, at 34 C.F.R. § 104.33(b), defines an “appropriate education” as the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met, and (ii) are based upon adherence to procedures that satisfy Section 504 requirements. Compliance with this provision is generally determined by assessing whether a district has implemented a student’s Section 504 plan, also known as an “individualized education program,” or “IEP.” When evaluating whether a district has failed to provide the related aids and services deemed necessary to provide the student a FAPE, OCR determines: (1) whether the district evaluated the student in accordance with Section 504 requirements and determined that the student was a qualified individual with a disability as defined by Section 504; (2) whether the student’s needs were determined on an individualized basis by a group of persons knowledgeable about the student and the information considered; and (3) whether the placements, aids, and services identified by the district through this process as necessary to meet the student’s individual needs were or are being provided. If they have not been provided, OCR will determine the district’s reason for failing to do so and the impact of the failure.

OCR interprets the general prohibition against discrimination in the Title II implementing regulation to require the provision of a FAPE to the same extent that the Section 504 implementing regulation specifically requires the provision of a FAPE.

Findings of Fact and Analysis

OCR determined that the Student was formerly enrolled in the XXXX grade at XXXX XXXX (the School) located in the NISD during the 2013-2014 school year. OCR determined that the Student’s initial IEP prescribed some, but not all, of the accommodations that are in question in this case, specifically, X---phrase redacted---X; although the NISD informed OCR that XXXX XXXX was previously provided to the Student in accordance with her behavioral intervention plan (BIP), it was not added to her IEP until the XXXX, 2014, Admission, Review, and Dismissal (ARD) meeting. OCR further determined that while the Student’s other accommodations were carried over at this ARD meeting, she was dismissed from XXXX XXXX at that time. OCR determined that the Student was withdrawn from the School XXXX XXXX on XXXX, 2014.

OCR obtained written statements from the Student’s X---phrase redacted---X teachers, and also conducted interviews with all of them except the XXXX teacher; the Student’s teachers consistently informed OCR that they provided all of the accommodations set forth on the Student’s IEP, particularly X---phrase redacted---X. Moreover, neither the complainant nor OCR identified any specific instances when the Student failed to receive these accommodations. However, the NISD was unable to provide documentation demonstrating that any XXXX XXXX services were provided to the Student. Accordingly, the NISD informed OCR that on XXXX, 2014, an ARD meeting was held to address its failure to provide the Student with XXXX XXXX as required by her IEP, at

which time the complainant accepted the NISD's offer of compensatory XXXX XXXX services, and agreed to return the Student to the NISD. The NISD also provided OCR with documentation demonstrating that, in preparation for the 2014-2015 school year, another ARD meeting was scheduled for XXXX, 2014, but, on the date of the meeting, the complainant emailed the NISD, indicating that the complainant would not be reenrolling the Student in the District, and that she was declining compensatory services; the complainant formally declined the offer of compensatory services on XXXX, 2014.

Based on the complainant's allegation and the information provided by the NISD, OCR has determined by a preponderance of the evidence that the NISD violated Section 504 and Title II with respect to Allegation 1, specifically regarding the NISD's failure to provide the Student regular or special education and related aids and services deemed necessary to meet her individual educational needs, namely, XXXX XXXX, thereby depriving her of a FAPE. Accordingly, OCR secured the enclosed voluntary resolution agreement from the NISD pursuant to OCR's Case Processing Manual (CPM) Section 303(b) to address the Section 504 and Title II compliance concerns implicated by Allegation 1, and will monitor the NISD to ensure that the agreement is fully implemented.

Allegation 2

The complainant further alleged that the NISD discriminated against the Student on the basis of her disabilities when it failed to take prompt and effective responsive action to address disability-based harassment directed at her by other students during the 2013-2014 school year. Specifically, the complainant alleged that she and the Student informed School and NISD staff that the Student was being bullied and harassed about characteristics related to her disabilities (e.g., X---phrase redacted---X), but that no action was taken in response to the complaints.

Legal Standard

Disability harassment is a form of disability discrimination prohibited by Section 504 and Title II. According to OCR policy, a violation of Section 504 and Title II may be found if a recipient has created or fostered a disability-based hostile environment, i.e., harassing conduct (e.g., physical, verbal, graphic or written) that is based on disability and that is 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 the recipient. Harassment must consist of more than casual or isolated incidents to create a disability-based hostile environment. Further, a determination of whether conduct is "severe" or "pervasive" must examine the gravity as well as the frequency of the harassing conduct. A recipient has violated Section 504 and Title II if it has effectively caused, encouraged, accepted, or failed to correct a disability-based hostile environment of which it has actual or constructive notice.

In order to establish a violation of Section 504 and Title II based on a hostile environment, OCR must find that: (1) a disability-based hostile environment existed; (2)

the recipient had actual or constructive notice of the hostile environment; and (3) the recipient failed to respond adequately to redress the hostile environment. Whether a disability-based hostile environment existed must be determined from the totality of the circumstances, such as the frequency and/or severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating, and what kind of psychological harm results from the conduct (psychological harm is not required, but is taken into account). If OCR finds that a hostile environment existed and the recipient had notice of its existence, OCR then determines whether the recipient responded appropriately by taking reasonable, timely, and effective steps to respond to the specific incidents of harassment and discrimination. To be effective, OCR does not require that a recipient's response to harassing conduct ensure that all future harassment or other discriminatory conduct will be prevented, but rather that the response is reasonably calculated to end the harassment, prevent its recurrence, and make whole any victims of the harassment.

OCR policy also provides that the bullying or harassment of a student with a disability who is receiving FAPE services, regardless of the basis for the bullying/harassment, can result in a denial of FAPE that must be remedied under Section 504. Accordingly, if it is established that a student with a disability receiving FAPE services has been bullied/harassed in any respect, the recipient has an obligation to evaluate the student for the purpose of determining whether the effects of the bullying/harassing behavior have changed the student's individual educational needs such that the student's established IEP must be modified.

Findings of Fact and Analysis

Based on documentation provided by the NISD, OCR determined that the NISD had policies and procedures prohibiting disability discrimination, including disability harassment. The NISD also had grievance procedures providing for the reporting and investigation of student and parent complaints of disability discrimination and harassment, as well as an online reporting procedure for complaints of bullying. OCR determined that the above policies and procedures were included in Board Policies FFH (Local), referenced in the Student Handbook, and are located on the District's website.

The complainant provided OCR with the names of several School and District staff to whom she stated she complained about the alleged name-calling, including two XXXX XXXX, the XXXX NISD Police Department (NISD PD) (XXXX), and a former XXXX XXXX who is no longer employed by the District.¹ OCR interviewed the two XXXX XXXX and obtained information from XXXX; all of them stated that neither the complainant nor the Student ever complained or reported to them that the Student was bullied or harassed on the basis of her disabilities or that other students called her names, or that they were otherwise aware of any such incidents. Moreover, although both the complainant and Student complained to School staff about multiple disciplinary incidents

¹ OCR attempted to interview the former XXXX XXXX, but XXXX was no longer employed by the NISD at the time of OCR's investigation, and therefore was not required to speak with OCR. OCR cannot require a recipient to produce for interviews persons who are no longer in their employ.

involving the Student, none of the Student's statements given during the investigations of these incidents alluded to possible disability harassment. Accordingly, OCR determined that there was no evidence to show that the complainant or the Student ever made a complaint of disability harassment to School or NISD staff.

OCR has determined that, even if the harassing conduct occurred as alleged (i.e., that other students X---phrase redacted---X), and even if it was sufficiently severe, pervasive or persistent to deny or limit the Student's participation in or ability to benefit from the NISD's educational program, there is insufficient evidence to establish that the recipient ever received notice that the harassment occurred. Therefore, OCR determined that there is insufficient evidence to establish that the NISD discriminated against the Student on the basis of her disabilities by failing to take prompt and effective responsive action to address disability-based harassment directed at her by other students during the 2013-2014 school year as alleged.

In this case, the evidence obtained during the investigation did substantiate the complainant's assertion that she and Student did report general bullying behavior by other students, which obligated the NISD under Section 504 to reevaluate the Student's individual educational needs in light of the alleged harassment/bullying. The evidence indicated that the NISD did not reevaluate the Student to determine whether the effects of the bullying/harassing behavior had changed the Student's individual educational needs.

Thus, OCR has determined by a preponderance of the evidence that the NISD violated Section 504 and Title II with respect to Allegation 2, specifically regarding the NISD's failure to reevaluate the Student's individual educational needs in light of the alleged harassment/bullying.

Allegation 3

The complainant further alleged that the NISD retaliated against the Student by X---phrase redacted---X because the complainant advocated for the Student's rights during the 2013-2014 school year.

Legal Standard

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

- (1) The complainant or other alleged injured party engaged in a protected activity;
- (2) The recipient had notice of the protected activity;
- (3) The recipient took an adverse action against the complainant or other alleged injured party contemporaneously with or subsequent to the protected activity; and
- (4) There was a causal connection between the protected activity and the adverse action.

If any one of these elements cannot be established, then OCR finds insufficient evidence of a violation. If, however, all of the aforementioned elements are established, OCR

inquires as to whether the recipient can identify a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR considers whether the reason given is merely a pretext for retaliation.

OCR first considers whether the complainant engaged in a protected activity. A “protected activity” is one in which a person either opposes an act or policy that is unlawful under any of the laws that OCR enforces; files a complaint, testifies, assists or participates in an investigation, proceeding or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR.

OCR next considers whether the NISD had notice of the complainants’ protected activity. A recipient must have notice of any protected activity for OCR to conclude that it retaliated because of the protected activity. The third step in OCR’s analysis involves determining whether the complainant or other alleged injured party was subjected to an adverse action. To be an “adverse action,” the recipient’s action must significantly disadvantage the complainant or other alleged injured party as a student or employee, 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 employment or educational opportunities, the action could be considered 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 claim(s). To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) 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.

An adverse action can be considered retaliatory only if it was motivated by a protected activity. Absent direct evidence of a retaliatory motive, a causal connection is inferred in cases where the adverse action occurs in close proximity in time to the protected activity. Other indicia of a causal connection can include, but are not limited to, inconsistent treatment of the alleged victim of retaliation before and after the protected activity, inconsistent or harsher treatment of the alleged victim as compared to individuals who did not engage in protected activity, and evidence that the recipient’s actions would not have been the same absent the protected activity.

Findings of Fact and Analysis

OCR interviewed the NISD PD Officer (the Officer) who X---phrase redacted---X and one of the teachers who the Student XXXX XXXX; the other teacher was no longer employed by the NISD at the time of OCR’s investigation, but OCR reviewed a written statement regarding XXXX XXXX that she prepared the day after the incident, as well as the statements of XXXX XXXX who witnessed the incident. Based upon the information provided by XXXX XXXX, OCR determined that on or about XXXX, 2014, at the end of the school day, the Student X---phrase redacted---X. In the process, the Student X---phrase redacted---X. After X---phrase redacted---X. OCR determined that

the Officer was not present at the time X---phrase redacted---X. The next day, on or about XXXX, 2014, in consultation with the XXXX XXXX, the Officer X---phrase redacted---X. The Student X---remainder of paragraph redacted---X.

OCR determined that, during the 2013-2014 school year, the complainant made ongoing complaints to School and NISD administrators and staff regarding the School's alleged failure to provide the Student with all of the accommodations set forth on her IEP. As a result, OCR has determined that the complainant engaged in protected activity, and the NISD acknowledged having notice of her complaints that the Student was not receiving all of her IEP accommodations. OCR determined that the Student was subjected to an adverse action when, on or about XXXX, 2014, the Officer X---phrase redacted---X,² against XXXX NISD teachers. Further, the protected activity, the complainant's ongoing complaints, occurred throughout the 2013-2014 school year; the adverse action occurred on or about XXXX, 2014, when the Officer X---phrase redacted---X against the Student. Because the complainant's protected activity was ongoing at the time of the adverse action, OCR determined that the proximity in time between the two is sufficiently close to infer a causal connection. As such, OCR considered whether the NISD has articulated a legitimate, non-retaliatory, non-pretextual reason for taking the adverse action against the Student.

OCR determined that the NISD's proffered reasons for taking the adverse action against the Student were legitimate and not a pretext to hide a retaliatory motive. Specifically, OCR was unable to identify any truly similarly situated students, as both the Officer and teacher interviewed by OCR stated that this was a unique circumstance for them. The Officer informed OCR that it is his practice to X---phrase redacted---X, but that this was a unique circumstance, in that X---phrase redacted---X; the teacher also informed OCR that X---phrase redacted---X. OCR's investigation did not reveal, and the complainant did not identify, any evidence indicating that the Student was treated differently than any similarly situated persons who did not engage in protected activity, that the Student was treated inconsistently before and after the NISD received notice of the complainant's protected activity, or that the NISD deviated from any established policy or practice in its dealings with the Student upon receiving notice of the complainant's protected activity; the investigation did not reveal any direct evidence of pretext. Consequently, OCR has determined that there is insufficient evidence to establish that the Student was subjected to retaliation as alleged, in violation of Section 504 and Title II. Therefore, OCR will take no further action with respect to Allegation 3.

Conclusion

On September 21, 2015, OCR secured a Resolution Agreement (Agreement) from the NISD to address the above-referenced compliance concerns. In the Agreement, the NISD will conduct a meeting consistent with the requirements of Section 504 to determine whether the Student needs compensatory and/or remedial services as a result of the NISD's failure to provide her XXXX XXXX services during the 2013-2014 school year,

² The Student's X---phrase redacted---X because the teachers were acting in the course of their duties as public servants XXXX XXXX XXXX.

and also based on the NISD's failure to consider the effects of the alleged bullying. If compensatory and/or remedial services are determined necessary, the NISD will develop a plan for providing timely services to the Student. The NISD will also conduct an OCR-approved training session regarding the NISD's obligation under Section 504 and Title II to provide a FAPE to all qualified students with disabilities attending its schools, including its duty to fully implement students' IEPs, and its obligation to evaluate a student with a disability receiving FAPE services who has been bullied or harassed in any respect.

OCR has determined that the Agreement, when fully implemented, will resolve the compliance concerns identified during the investigation. Accordingly, as of the date of this letter, OCR is closing its investigation of this complaint; however, OCR will actively monitor the District's implementation of the Agreement. Please be advised that if the District fails to take the action required under the Agreement, OCR will immediately resume its compliance efforts.

This concludes OCR's investigation of the complaint and should not be interpreted to address the NISD'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 have the right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that the NISD 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.

If you have any questions about this letter, you may contact Ms. Lori Bringas at (214) 661-9638, or by email at lori.bringas@ed.gov, or you may contact Mr. Timothy Caum, Team Leader, at (214) 661-9648, or by email at timothy.caum@ed.gov.

Sincerely,

Taylor D. August
Regional Director

Encl.