



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION VI
ARKANSAS
LOUISIANA
MISSISSIPPI
TEXAS

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Responsive Education Solutions
P.O. Box 292730
Lewisville, TX 75029

Re: OCR Docket #06151203

Dear XXXXX:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of a complaint against Responsive Education Solutions (RES), Lewisville, Texas, which was received on January 21, 2015. The complainant alleged that, on or about January 8, 2015, her daughter (the "Student") was discriminated against on the basis of disability (asthma) when the principal at Quest Middle School of Lewisville (the School), a campus of RES, denied the Student an equal opportunity to continue her enrollment at the School. The complainant further alleged that she was subjected to retaliation in January 2015 when the School: (a) contacted Texas Child Protective Services (CPS) regarding the complainant's possible neglect of the Student; and (b) refused to release the Student's education records after she enrolled at another educational institution.

OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance 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, and its implementing regulations at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability. This agency is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulations at 28 C.F.R. Part 35, which prohibit disability discrimination by public entities.

RES is a recipient of Federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdiction to investigate this complaint under Section 504 and Title II.

During our complaint resolution proceedings, OCR collected and analyzed information provided by the complainant and RES, including pertinent policies, procedures, and student records. Additionally, OCR obtained information through interviews with the complainant and employees of RES.

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

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 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. Based on our review and analysis of the information obtained during this investigation, OCR has determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II regarding one of the complaint allegations investigated. The basis for this determination is outlined below.

Issue One

Based on the complainant's allegation, OCR investigated the legal issue of whether RES treated the Student differently on the basis of disability in the context of an educational program or activity without a legitimate, nondiscriminatory reason, and thereby, interfered with or limited the ability of the Student to participate in or benefit from the services, activities or privileges provided by RES during the 2014-2015 school year, in violation of Section 504, at 34 C.F.R. § 104.4, and Title II, at 28 C.F.R. § 35.130.

Legal Standard

The Section 504 implementing regulations, at 34 C.F.R. § 104.4(a), prohibit 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 disability discrimination. A *prima facie* case exists if a preponderance of the evidence indicates that a recipient treated one person 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 disability discrimination. Ultimately, however, the weight of the evidence must support a finding that actual discrimination occurred.

Analysis

OCR's investigation established that the Student was enrolled in the 7th grade at the School from August 2014 to January 2015. The complainant stated that the Student was diagnosed with asthma prior to her enrollment at the School. OCR's review disclosed that the Student

experienced several asthma-related emergencies while attending the School. Specifically, the Student was taken by ambulance from the School to a nearby hospital on September 22, 2014, and November 6, 2014. The complainant alleged that, on or about January 8, 2015, the School's principal (Principal) prevented the Student from attending the School, due to her asthma condition. At the time this complaint was filed, the complainant had formally withdrawn the Student from the School.

In its response to OCR, RES denied the complainant's allegation of disability discrimination. RES stated that "the Student was informed via her parent that she would not be able to attend school without information from the Student's physician regarding her ability to attend school. . . the action to require information from the Student's physician regarding her ability to self-administer her asthma medication while at school was a critical health concern." RES provided information to support its position, including a letter to parents of students with asthma, a sample "Asthma Action Plan" (the Plan), and the School's Parent/Student Handbook (Handbook). The letter to parents included the following statement – "In order to provide the best possible school asthma management for your child, we request your assistance with the following: Please [o]btain an asthma action plan (a statement of your child's treatment goals, medication and peak flow plan, and environmental risk reduction measures) from your physician." OCR noted that the Handbook included guidelines for student possession and self-administration of asthma medication at the School (*i.e.*, *Asthma and Anaphylaxis Medication*).

During the Student's enrollment, the School made numerous requests for the complainant to: (a) complete the Plan; (b) obtain the signature of the Student's doctor on the Plan; and (c) return the Plan to the School. OCR's investigation disclosed that the Principal requested the Plan from the complainant via e-mail messages on September 23, 2014; November 10, 2014; December 4, 2014; December 12, 2014; January 6, 2015; and January 7, 2015. OCR's review showed that the complainant provided a completed Plan to the School; however, the Plan did not include the signature of the Student's doctor. The complainant indicated that the high cost of a health care visit delayed her ability to obtain a Plan signed by the Student's doctor.

OCR's investigation revealed direct evidence of discrimination by the School, *i.e.*, evidence that the Student was excluded from the School's program on the basis of disability. The evidence is detailed below:

- (1) On December 12, 2014, the Principal sent an e-mail message to the complainant stating, in part, that "[the Student] cannot come back to [the School] until we have the signed action plan from the doctor . . ."
- (2) On January 6, 2015, the Principal sent an e-mail message to the complainant stating, in part, that "we must have the signed form for [the Student] from the doctor by tomorrow . . . regarding her action plan, or [the Student] cannot come back to [the School] tomorrow."
- (3) On January 7, 2015, the Principal sent an e-mail message to the complainant stating, in part, that "[the Student] cannot come to school until I have a completed action plan along

with a doctor's signature . . . We have asked for this document several times, and now it is non-negotiable.”

- (4) On January 8, 2015, the Principal called the complainant and, via a voicemail message, stated that “I cannot permit [the Student] back on campus. . . We cannot allow this any further. We need [the Plan] one hundred percent filled out and signed by the doctor or she cannot return to campus.”
- (5) In separate interviews with OCR, the Principal and the Director of Health & Safety (Director) for RES confirmed that the Student was prevented from attending the School because of her asthma condition.

When questioned by OCR, neither the Principal nor the Director identified any legal authority or regulation which permitted the School's actions. Moreover, OCR's review of the Handbook's asthma guidelines referenced above failed to reveal any warning that a student could be barred from the School for failure to provide a signed Plan upon request. OCR determined that the School's administrators did not consider their actions to be discriminatory, as the Principal stated that she consulted with her immediate supervisor and the Director before barring the Student from the School. Additionally, the Director's responses to OCR indicated her belief that the School was acting within proper legal authority when the Student was barred from the School.

Based on a review of the above information, OCR determined that the School's actions were not in compliance with the applicable legal standards under Section 504 and Title II. Accordingly, OCR has determined that the School discriminated against the Student on the basis of disability when she was excluded from attending the School, and thereby denied her an equal opportunity to participate in and benefit from RES's educational program. Therefore, based on a preponderance of the evidence, OCR has determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504/Title II with regard to Issue One.

Consistent with Section 303(b) of OCR's Case Processing Manual, RES submitted the enclosed Resolution Agreement (Agreement), dated March 21, 2016. The Agreement includes action steps that, when implemented, will remedy the discriminatory conduct revealed during OCR's investigation. Under the Agreement, RES will:

- Provide the Section 504/Title II Coordinator and all other relevant staff with specialized training by an independent party knowledgeable about RES's legal obligations and responsibilities regarding Section 504/Title II complaints, grievance procedures and processes, including guidance clarifying that a student cannot be excluded from attending the School for failure to provide an Asthma Action Plan signed by the student's physician; and
- Convene a group of knowledgeable persons, including the complainant, to determine whether the Student needs compensatory/remedial services as a result of the failure of RES to provide her appropriate regular and/or special education services, during the 2014-2015 school year.

OCR has determined that the Agreement, when fully implemented, will satisfactorily resolve the compliance concerns identified during the investigation. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding this issue; however, OCR will actively monitor RES's efforts to implement the Agreement. Please be advised that if RES fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts related to this issue.

Issue Two

Based on the complainant's allegation, OCR investigated the legal issue of whether RES retaliated against the complainant by notifying CPS of the complainant's possible neglect of the Student during the 2014-2015 school year, because the complainant filed a complaint with OCR, in violation of Section 504, at 34 C.F.R. §104.61, and Title II, at 28 C.F.R. §35.134.

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; in other words, whether the reason is not credible or believable.

Analysis

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 determined that the complainant engaged in a protected activity when she filed an OCR complaint on January 21, 2015.

OCR next considers whether RES had notice of the complainant's protected activity. A recipient must have notice of any protected activity for OCR to conclude that it retaliated because of the protected activity.

Based on our review of the information obtained during this investigation, OCR has determined that RES did not have notice of the complainant's protected activity prior to the alleged adverse action. RES acknowledged to OCR that, on January 8, 2015, the Principal filed a report with

CPS regarding the complainant. According to RES, the Principal’s report was “based on medical concerns for the Student.” OCR’s investigation did not reveal any evidence that the complainant pursued a grievance or complaint of any kind prior to January 21, 2015, when she filed the OCR complaint that led to this investigation. OCR policy provides that if the alleged adverse action occurs *before* the protected activity, then the retaliation claim will fail, as it is impossible to establish that the protected activity *caused* the adverse action. In this instance, the alleged adverse action (*i.e.*, reporting the complainant to CPS) occurred approximately 13 days *before* the protected activity (*i.e.*, the complainant’s filing of the OCR complaint). Because the evidence does not support a finding that RES had notice of the complainant’s protected activity prior to or contemporaneously with the alleged adverse action, OCR must conclude that there is insufficient evidence to establish that the second element of a *prima facie* retaliation case has been met. In absence of any notice, OCR will not proceed with a retaliation analysis. Therefore, OCR finds that the evidence is insufficient to conclude that RES retaliated against the complainant with respect to Issue Two, as alleged.

Issue Three

Based on the complainant’s allegation, OCR investigated the legal issue of whether RES retaliated against the complainant by refusing to release the Student’s education records during the 2014-2015 school year, because the complainant withdrew the Student from the School, in violation of Section 504, at 34 C.F.R. §104.61, and Title II, at 28 C.F.R. §35.134.

Analysis

Several weeks after the OCR complaint was received, the complainant and RES both acknowledged that the School had released the requested education records to the Student’s new school. Because OCR obtained credible information indicating that this allegation was resolved, and there were no remaining systemic allegations for resolution, no further action was taken regarding this allegation.

For the reasons stated above in Issue One, OCR has determined a preponderance of the evidence supports the complainant’s allegation that RES discriminated against the Student. Therefore, OCR has determined that there is sufficient evidence that RES violated Section 504 and Title II with respect to Issue One, as alleged.

In light of the foregoing, OCR is closing this complaint as of the date of this letter. This concludes OCR’s investigation of the complaint and should not be interpreted to address RES’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

Please be advised that RES 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.

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.

If you have any questions about this letter, you may contact Mr. Kenyatta Braggs, the OCR attorney-investigator assigned to this case, at (214) 661-9659, or by e-mail at Kenyatta.Braggs@ed.gov. You may also contact me at (214) 661-9687, or by e-mail at Terri.Gonzales@ed.gov.

Sincerely,

Terri Gonzales
Supervisory Attorney/Team Leader
Office for Civil Rights
Dallas Office

cc: XXXXXXXX
XXXXXX