

April 2, 2018

Reference No: 06161594

Sent via email to: ([***redacted***)
(Counsel for District)

Tim Harkrider, Superintendent
Willis Independent School District
10000 FM 830
Willis, TX 77318

Dear Superintendent Harkrider:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its investigation of the above-referenced complaint, which was filed against the Willis Independent School District (WISD, the District), in Willis, Texas. In that complaint, the Complainants alleged that, as a result of raising allegations of discrimination on the basis of [***redacted***] (the Student's) disability, WISD retaliated against the Student by disciplining him [***redacted***].

On this basis, OCR opened the following issues for investigation:

Whether WISD retaliated against the Student by taking disciplinary actions against the Student during the 2015-2016 school year [***redacted***], because the Complainants filed a complaint with OCR, in violation of Section 504 and Title II, at 34 C.F.R. 104.61 and 28 C.F.R. 35.134, respectively.

Under Section 504, OCR is responsible for determining whether entities that receive or benefit from Federal financial assistance from the U.S. Department of Education or an agency that has delegated investigative authority to the Department are in compliance with Section 504, which prohibits discrimination on the basis of disability. Under Title II, OCR has jurisdiction over complaints alleging disability discrimination against public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related institutions), and public libraries – regardless of whether these institutions receive federal financial assistance. OCR has determined that the WISD is a recipient of federal financial assistance from the Department and is a public entity. Therefore, OCR has jurisdictional authority to process this complaint for resolution under Section 504 and Title II.

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 a particular proposition is more likely than not). 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.

During the course of this investigation, OCR spoke with the [***redacted***] (one of the Complainants), conducted interviews with WISD personnel, reviewed documents, audio recordings, records of communications, and other information provided by the Complainants, by WISD, and

collected independently by OCR from other sources. After a review and analysis of the information obtained during this investigation, OCR has determined that while several concerns raised by the Complainants were insufficient to constitute retaliation, some acts of retaliation did occur. The bases for these determinations are outlined below.

Legal Standard

A prima facie case of retaliation requires that OCR find that 1) the complainant or the student experienced an adverse action; 2) the complainant or student engaged or intended to engage in a protected activity, about which the recipient was aware; and 3) there is a causal connection between the protected activity and 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 pretext for retaliation, or in other words, whether the reason is not credible or believable.

Facts and Analysis

Complainants have maintained that the disciplinary actions taken against [***redacted***] occurred just before tryouts for sports [***redacted***], and that the school intended to use these incidents to justify keeping the Student off of sports teams or discourage him from participating, in retaliation for the Complainants' protected activities. In the paragraphs below, OCR considers various different alleged incidents and analyzes them under the framework described above.

Disciplinary Referrals before Tryouts

The Complainants have maintained that the disciplinary actions taken against [***redacted***] occurred just before tryouts for sports he was interested in during the [***redacted***], and that the school intended to use these incidents to justify keeping the Student off of sports teams, in retaliation for the Complainants' protected activities.

OCR first looks to see whether an adverse action occurred in this matter. On [***redacted to end of paragraph***].

The Complainant engaged in a protected activity about which the Recipient was aware. The Complainant engaged in an ARD meeting for the Student [***redacted***]; during this meeting, the Complainant voiced her perception that [***redacted***] may have affected the Student's [***redacted***] in violation of Section 504. The Complainants filed a complaint with OCR on [***redacted***], and OCR issued a Notification Letter to WISD on [***redacted***] indicating that an investigation had been opened into the Complainant's disability discrimination complaint. Between [***redacted***] the parents met with WISD staff regarding [***redacted***], and stated that they intended to file a complaint with OCR. OCR notes that the OCR-facilitated Early Complaint Resolution process in which the complainants participated terminated on [***redacted***].

OCR next looks to see whether a causal connection exists between the protected activities engaged in by Complainants and the adverse actions described above. The [***redacted***]disciplinary incident occurred fewer than two months after the ARD meeting. However, a conversation which took place between [***redacted***] and the Student on [***redacted***]. The protected activity took place the next day. Then, [***redacted***], WISD told the Complainant that the Student would

be provided an opportunity [***redacted***]. That is, this second communication of the offer provided a more lenient set of terms that the Student would need to meet to obtain [***redacted***], and occurred just days after the protected activity. Additionally, the Student had already been referred by another teacher on [***redacted***], and the [***redacted***] specifically to ensure that [***redacted***]. In short, the timeline of events immediately following the protected activity appears to demonstrate a concerted effort by WISD staff to ensure that the Student receive a chance [***redacted sentences***]. Based on the forgoing information, the balance of evidence does not support the finding of a causal connection between the [***redacted***] disciplinary incident and this protected activity.

OCR also reviewed the evidence to assess whether a causal connection exists between the disciplinary actions occurring during the spring of 2016 and the complainants protected activities. As stated above, Between [***redacted***], the parents met with WISD staff regarding the student's [***redacted***], and stated that they intended to file a complaint with OCR. OCR sent the District notice of the Complainant's complaint on [***redacted***]. The Student served ASD o[***redacted***]; he was referred [***redacted***]. These adverse actions occurred within a relatively short proximity in time of the highlighted protected activities. The evidence is sufficient to establish a causal connection between the adverse actions and protected activity.

OCR next considers whether the District has demonstrated a legitimate, nondiscriminatory reason for the adverse actions. Evidence indicates that the [***redacted***] ASDs were assigned because the Student [***redacted***]; the [***redacted***] was issued for the Student's [***redacted***] tardy. The [***redacted***] referral, which resulted in the Student receiving ISS from [***redacted***], was made because the Student allegedly [***redacted to end of paragraph***].

OCR next considers whether the legitimate, nondiscriminatory reason proffered is pretext. Review of WISD policies and procedures does not indicate that referrals for these actions, or the punishments assigned, were inappropriate. OCR has obtained no evidence to suggest that the alleged actions leading to the referrals did not actually occur. The balance of evidence does not support a finding of pretext. Therefore, OCR has insufficient evidence to support a finding of retaliation on the basis of a pattern of disciplinary actions taken against the Student prior to [***redacted***] during [***redacted***].

*Disciplinary Referral and [***redacted***] Injury*

The Student's mother avers that the Student was injured during [***redacted***], and that WISD staff did not alert her, as a parent, regarding the child's injury. Complainants have averred that while the Student was injured, he was punished with three days of ISS, from [***redacted***], for not giving a full effort in [***redacted***] while recovering from this injury.

The Student experienced some sort of injury [***redacted***]. [***redacted***]. The Student did not visit the school nurse or [***redacted***], nor was OCR able to obtain any outside medical records substantiating an injury. The Complainant has stated that she did, in fact, receive a phone call regarding the Student's injury; OCR's investigation further indicates that the individual who called the Complainant was a member of WISD staff at the time of the incident. OCR has obtained no evidence indicating that the Student was in ISS between [***redacted***]. However, the Student received a referral on [***redacted***] which resulted in [***redacted***] on [***redacted***]. Therefore, evidence does indicate that the Student experienced an adverse action, in that he received [***redacted***] due to a referral.

As previously stated, the Complainant engaged in a protected activity about which the Recipient was aware. OCR next looks to see whether a causal connection exists between the protected activities engaged in by Complainants and the adverse actions described above. OCR notes that the Complainants were engaged in OCR's Early Complaint Resolution process until just days before the [***redacted***]. Given the close proximity in time between the protected activity and this adverse action, OCR may infer a causal connection.

OCR next considers whether a legitimate, nondiscriminatory reason existed for the adverse action. On [***redacted***] the Student received a referral by a teacher in another class, after [***redacted***]. This information is sufficient to demonstrate a legitimate, nondiscriminatory reason for the action at issue.

OCR has not found any evidence that this legitimate, nondiscriminatory reason is a pretext for discriminatory conduct. In this regard, OCR notes that the teacher who had assigned this referral had used this type of disciplinary tool (that is, [***redacted***]) for the Student in [***redacted***], prior to any of Complainants' protected activities. OCR further notes that this teacher had also utilized this type of technique to address the behavior of other students. OCR has obtained no evidence indicating that the articulated basis for this referral was inaccurate. Based on the foregoing, OCR has insufficient evidence to find that retaliation occurred on this basis.

*Treatment during [***redacted***] ISS*

The Complainants aver that the Student was not allowed to [***redacted***] during ISS on [***redacted***], and written up for a referral during this period. On [***redacted***], the Student was in ISS during [***redacted***]. When in ISS, students receive three opportunities to use the restroom; these opportunities occur during specific class periods. During the 2015-2016 academic year, [***redacted***]. OCR has insufficient evidence to support Complainant's allegation that the Student was referred for behavior occurring during this period, but was able to establish that the Student was not [***redacted***]. Although other students during this period were permitted to [***redacted***], the facts and circumstances in this case do not indicate that this omission created a lasting and tangible harm, nor could it reasonably be considered to have a deterrent effect. In this regard, OCR notes that the ISS classroom received [***redacted***], and that this class period was [***redacted***]. This action therefore does not rise to the level necessary to constitute a materially adverse action. Because an adverse action cannot be established, OCR has insufficient evidence to find that retaliation occurred in this instance.

Academic Consequences (Repeating an Assignment)

The Complainants have averred that during the week of [***redacted***], the Student was made to repeat an assignment in [***redacted***] class which he had already completed. Evidence indicates that the Student completed three assignments during the week of [***redacted***]. [***sentence redacted***]. All of these assignments were completed on time, and were due on [***redacted***]. These assignments were [***redacted***]. The class was assigned the [***redacted***], but the assignment was actually done in class on [***redacted***]. OCR has insufficient evidence to demonstrate that the Student completed any of these assignments more than once, and therefore, cannot establish a material adverse action on this basis. Because an adverse action cannot be established, OCR has insufficient evidence to find that retaliation occurred in this instance.

*Academic Consequences (Receipt of Assignments on [***redacted***])*

The Complainant has averred that the Student received all the assignments due during the time period when [***redacted***] one day before they were due. Evidence indicates that the Student completed

three assignments during the week of [***redacted***]. All of these assignments were completed on time, and were due on [***redacted***]. These assignments were [***redacted***]. The class was assigned the [***redacted***] but the assignment was actually done in class on [***redacted***]. Evidence indicates that the Student was [***redacted***]. On [***redacted***] the Student [***redacted***]. The Student submitted the [***redacted***]. However, OCR has insufficient evidence to conclude that the Student received the [***redacted***]. OCR also notes that all of these assignments were completed on time. Based on the foregoing information, OCR has insufficient evidence to establish that the Student experienced a material adverse action in this instance.

*Academic Consequences (Placement in Hallway during [***redacted***] Class)*

Evidence indicates that during his [***redacted***] class on [***redacted***] the Student was [***redacted***]. Based on this information, it is clear that the Student suffered a materially adverse action, in that he was out of placement in his [***redacted***] class for [***redacted***]. As previously discussed, the Complainants had engaged in protected activities about which the Recipient was aware.

OCR next looks to see whether a causal connection exists between the adverse action and protected activity. The ECR process that the parties had engaged in pursuant to the Complainants original complaint against WISD terminated on [***redacted***]. The acts at issue in this section occurred less than three weeks later. OCR further notes that [***redacted***] teacher was also one of the [***redacted***] about whom the allegations were made in the Complainant's first complaint. OCR finds that a causal connection did exist between the protected activity and the adverse action in this matter.

OCR next considers whether a facially legitimate, non-retaliatory reason for the action taken in this case exists. WISD staff have alleged that the Student had been removed from the classroom as a consequence for the Student telling him that [***redacted***]. The teacher at issue has also alleged that this action was taken because the Student had [***redacted***]. WISD staff additionally alleges that the Student was [***redacted***], in accordance with his accommodations and [***redacted***]. These explanations constitutes facially legitimate, non-retaliatory reasons for the act.

OCR next considers whether the facially legitimate, nondiscriminatory reasons provide are pretextual. The teacher had explained to other WISD staff that the Student would be permitted to [***redacted***]. Evidence indicates that the staff member to whom the teacher provided this explanation viewed the [***redacted***]. This staff member raised the concern with WISD administration. The following day, the Student was permitted [***redacted***]. In short, the teacher's action in this instance appear to have contravened WISD practice, and the action was not a legitimate response to the Student's conduct. Furthermore, communications described above demonstrate that the purpose of the [***redacted***]. The reasons asserted for this action are therefore pretextual, and OCR finds that WISD was not in compliance with Section 504 and Title II in this instance.

*Athletic Consequences ([***redacted***])*

During [***redacted***] of the grading period, the Student received [***redacted***] grade in [***redacted***] because he did not [***redacted***]. During [***redacted***], the Student received [***redacted***] because he did not [***redacted***]. Moreover, records of text messages between WISD staff and the Complainants demonstrate that [***redacted***] determined on [***redacted***] that the Student would not be permitted [***redacted***] for the remainder of the

year. The Student therefore suffered adverse actions in that he was prohibited from participating in a class, and received negative grades for this lack of participation.

As previously noted, the Complainant has engaged in a protected activity about which the District was aware. OCR next looks for a causal connection between the adverse action and the protected activity. The ECR process that the parties had engaged in pursuant to the Complainant's original complaint against WISD terminated on [***redacted***]. The acts at issue in this section occurred less than three weeks later. The evidence is sufficient for OCR to infer causal connection between the adverse action and protected activity.

OCR next considers any facially legitimate, non-retaliatory reasons WISD may have had for this action. WISD appears to allege that this action was taken in an effort to address the Student's poor effort in the class. Evidence suggests a perception on the part of the staff member at issue here that [***redacted***] class, and that this problem escalated in [***redacted***].

OCR next considers whether the legitimate, nondiscriminatory reason is pretext. Evidence indicates that [***redacted***] is a class comparable to [***redacted***], in which students receive grades, as in any other class. Text messages between the Student's parent and a staff member on [***redacted***] indicate that the Student was [***redacted sentences***]. OCR therefore finds that the legitimate, nondiscriminatory reason here is pretext. Based on the foregoing, OCR finds that WISD was not in compliance with Title II and Section 504 when it prevented the Student from [***redacted***].

Physical Restraints and DAEP

On [***redacted***], the Student was brought to the Assistant Principal's (AP) office, who [***redacted sentences***] constitute material adverse actions. As stated above, the Complainant has engaged in a protected activity about which the District was aware.

OCR next considers whether there exists a causal connection between the materially adverse actions and the Complainant's protected activities. As previously stated, the Early Complaint Resolution process in the pending OCR investigation had ended on [***redacted***], or fewer than six weeks prior to [***redacted***]. [***redacted sentences***]. The short interval of time between the protected activity and adverse actions, taking into account limitations of the school calendar, is sufficient to find a causal connection between these adverse actions and the Complainant's protected activity.

OCR next considers whether there is a facially legitimate, non-retaliatory reason for the adverse actions. Relevant personnel at WISD have alleged that [***redacted sentences***].

OCR next considers whether the facially legitimate, nondiscriminatory reasons set forth are pretextual. Willis ISD policy document FOF (Legal) Student Discipline: Students with Disabilities states that [***redacted sentences***]. These rules applied to the [***redacted***] instance. Video footage obtained from WISD confirms that the Student was [***redacted sentences***]. The action therefore appears to contravene WISD practice. For the foregoing reasons, OCR considers the facially legitimate, nondiscriminatory reasons identified concerning the basis for [***redacted***] to be pretextual.

Concerning the assignment of [***redacted***], evidence does indicate that [***redacted***] as described above. WISD's Discipline Manual indicates that a violation of [***redacted***] may

result in [***redacted***]. WISD's Discipline Manual permits the assignment of [***redacted***]. However, as early as [***redacted***], WISD staff was on notice of Student using [***redacted sentences***]. None of these instances resulted in the Student receiving [***redacted***]. The [***redacted***] has alleged that qualitative differences can exist between different incidents under [***redacted***], and that when assigning punishments, elements including the nature of the statement or action and whether or not the conduct is actually directed at a teacher are relevant to the punishment assigned. OCR has insufficient information to determine what [***redacted sentences***].

OCR further notes a number of procedural irregularities in the assignment of [***redacted***] following this incident. [***redacted sentences***]. In short, the balance of evidence supports a finding of pretext with regard to [***redacted***]. Evidence therefore supports a finding of noncompliance with Title II and Section 504.

Conclusion

Based on the above, OCR has determined that the preponderance of evidence supports a finding of noncompliance with Title II and Section 504. This letter concludes OCR's investigation of this complaint and should not be interpreted to address WISD's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

On March 27, 2018, WISD agreed to implement the enclosed resolution agreement to address the compliance issues that OCR identified. OCR will monitor the implementation of the resolution agreement.

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 Complainants may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Please be advised that WISD 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, please feel free to contact the attorney-investigator, Kulsoom Naqvi, by telephone at (214) 661-9640 or by e-mail at: Kulsoom.Naqvi@ed.gov. You may also contact me by telephone at (214) 661-9608 or by e-mail at: Paul.Coxe@ed.gov.

Sincerely,

Paul E. Coxe
Supervisory Attorney/Team Leader

Office for Civil Rights
Dallas Office

Attachment