



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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DALLAS, TX 75201-6810

REGION VI
ARKANSAS
LOUISIANA
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TEXAS

March 12, 2018

Mr. Keith Bryant, Superintendent
Lubbock-Cooper Independent School District
16302 Loop 493
Lubbock, TX 79423

Ref: 06-17-1990

Dear Mr. Bryant:

This letter is to notify you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, against the Lubbock-Cooper Independent School District (LCISD), in Lubbock, Texas. The complaint was received in our office on September 25, 2017, and was filed on behalf of the complainant and XXXX XXXX, one a student at XXXX XXXX XXXX (Student 1) and the other a former student at XXXX XXXX XXXX (Student 2) (collectively, "the Students"). The complainant alleged that the LCISD has retaliated against her and the Students because she XX – to end of sentence redacted – XX. Specifically, the complainant alleged that the LCISD has retaliated against her and the Students by:

- a. Altering service logs evidencing the provision of related aids and services the LCISD had identified as necessary to meet the Students' individual educational needs;
- b. Refusing to permit the complainant the opportunity to choose a different medical service provider for the Students after the complainant discovered that service logs had been altered;
- c. Providing confidential information regarding the Students to a XX – phrase redacted – XX without the complainant's consent;
- d. XX – paragraph redacted – XX;
- e. Changing Student 1's Individual Education Program (IEP) in or around XXXX without the complainant's input;
- f. Refusing to respond to the complainant's requests for the Students' XX – to end of paragraph redacted – XX; and
- g. Failing to provide the complainant with information relating to Student 1 in a timely manner so as to enable the complainant's informed participation in Admission, Review, and Dismissal (ARD) committee meetings (e.g., teacher input/questionnaires).

This agency 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

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

investigative authority to this Department are in compliance with 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, which prohibits discrimination on the basis of disability. OCR also enforces 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. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against public entities, including public postsecondary educational institutions. OCR also enforces Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibits discrimination on the basis of race, color, or national origin and also states, at 34 C.F.R. § 100.7(e), the following:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this part.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the prohibition against retaliation found in Title VI. The regulation implementing Title II, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

The LCISD is a recipient of Federal financial assistance from the Department and is a public elementary and secondary educational institution. Therefore, OCR has jurisdiction to process this complaint to resolution pursuant to Section 504 and Title II.

Issue

Based on the complaint allegations and OCR's jurisdictional authority, OCR opened the following legal issue for investigation:

1. Whether the LCISD has retaliated against the Students and the complainant because the complainant XX – phrase redacted – XX, in violation of Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. § 35.134, by:
 - a. Altering service logs evidencing the provision of related aids and services the LCISD had identified as necessary to meet the Students' individual educational needs;
 - b. Refusing to permit the complainant the opportunity to choose a different medical service provider for the Students after the complainant discovered that service logs had been altered;
 - c. Providing confidential information regarding the Students to a XX – phrase redacted – XX without the complainant's consent;
 - d. XX – paragraph redacted – XX;
 - e. Changing Student 1's Individual Education Program (IEP) in or around XXXX without the complainant's input;

- f. Refusing to respond to the complainant's requests for the Students' XX – to end of paragraph redacted – XX; and
- g. Failing to provide the complainant with information relating to Student 1 in a timely manner so as to enable the complainant's informed participation in Admission, Review, and Dismissal (ARD) committee meetings (e.g., teacher input/questionnaires).

As a preliminary matter, 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 that it is more likely than not that unlawful discrimination occurred). Where 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 its investigation of this complaint, OCR considered information provided by the complainant in a telephone interview and in written documentation provided to OCR. OCR also requested and received written documentation from the LCISD responding to the complainant's allegations. A discussion of the legal standard applied by OCR, as well as an analysis of the information obtained by OCR during its investigation, is provided below.

Legal Standard

OCR interprets the regulations it enforces, consistent with case law regarding analogous provisions, to require satisfaction of the following three elements to find a *prima facie* case of retaliation:

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 of intimidation, threat, coercion, or discrimination constitutes adverse action for the purposes of the anti-retaliation regulations if it is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes and regulations enforced by OCR. Under that perspective, petty slights, minor annoyances, and lack of good manners will not normally constitute adverse actions. Whether an action is adverse is judged from the perspective of a reasonable person in the complainant's position.

Although all three elements must exist to establish a *prima facie* case, OCR need not address all three elements if it determines one is missing. 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 reason was (or reasons were) for the intimidation, threat, coercion, or discrimination.

Background

The complainant alleged that the LCISD has engaged in multiple acts of retaliation against her and the Students since she XX – to end of sentence redacted – XX. The complainant reported to OCR that Student 1 is currently in the XXXX XXXX at XXXX XXXX XXXX. According to the complainant, Student 1 has been identified by the LCISD as eligible to receive special education services for XX – to end of sentence redacted – XX. XX – remainder of paragraph redacted – XX.

Documentation obtained from the LCISD confirms that Student 1 was evaluated by the LCISD and determined eligible to receive special education services in XX – to end of sentence redacted – XX. At this time, Student 1 was XX – to end of sentence redacted – XX. XX – sentence redacted – XX. With regard to Student 2, documentation provided by the LCISD confirms that Student 2 enrolled at XXXX as a XXXX student in XXXX XXXX, and that LCISD received notice that Student 2 had an active IEP at his previous school district. The LCISD transferred Student 2's IEP from his previous school district, recognizing Student 2 as eligible to receive special education services as a result of the following disabilities: XX – to end of sentence redacted – XX. Thereafter, the LCISD conducted its own evaluation of Student 2, determined that Student 2 remained eligible for special education services from the LCISD, and developed an IEP for Student 2.

Documentation provided by both the complainant and recipient indicates that, since the time the Students enrolled in the LCISD at the commencement of the XXXX school year, the complainant and LCISD have had multiple disagreements regarding the provision of special education services to the Students. The scope of OCR's investigation with regard to this complaint is limited to the specific issue opened for investigation.

OCR began its investigation of this complaint by considering information provided by the complainant and obtaining and reviewing documentation from the LCISD pertaining to the Students. OCR also received and reviewed a narrative response from the LCISD responding to each of the complainant's allegations. Provided below is a summary of the information obtained by OCR during its preliminary investigation of this complaint.

Altering of Service Logs

In a telephone interview with OCR, the complainant stated that in response to XX – to end of sentence redacted – XX. The complainant alleges that, when she received this information in XXXX XXXX, representing services provided to the Students during the XXXX school year, it did not "match" information that she had previously received representing services the Students had received. Specifically, the complainant alleged that documentation that was sent home did not align with the "service logs." By way of example, the complainant alleged that the service logs indicated that Student 1 received XXXX XXXX. But, according to the complainant, when

she later received service logs from the entire academic year, in XXXX XXXX, they were “completely different.” The complainant stated that, now, the service logs for Student 1 no longer indicate that Student 1 received XXXX XXXX during the XXXX academic year but, rather, indicate that Student 1 received XXXX XXXX XXXX. The complainant also alleged that the service logs were amended for Student 2, to remove any services which were not Medicaid-reimbursable. The complainant indicated to OCR that she believes that the LCISD changed the Students’ service logs so that they could be reimbursed costs through the Texas Medicaid program.

The LCISD reported to OCR that it uses School Health and Related Services (“SHARS”) Medicaid software, MSB X-logs, to upload service schedules provided to students. The LCISD informed OCR that service schedules are uploaded for an entire school year, and service providers then enter their notes regarding the provision of services and progress toward individual goals for each student, and these notes are used to create individualized progress reports for a student. According to the LCISD, the progress reports are provided to parents/guardians, and the complainant regularly received progress reports from various service providers regarding Student 2’s progress toward his IEP goals for the XXXX school year. According to the LCISD, Student 1 did not receive any related services during the XXXX school year. Accordingly, Student 1’s progress reports were generated by the District’s IEP management software system and also provided to the complainant.

The LCISD reported to OCR that the computer-generated schedule is merely a tool for staff members to assist in organizing their days, but XX – to end of phrase redacted – XX the system’s primary purpose is to allow for reporting of Medicaid-eligible sessions to the Texas Health and Human Resources Commission for billing under the SHARS Medicaid program. According to the LCISD, the District documents general student attendance using a different software program. The LCISD asserts that the complainant received scheduling reports generated for her students in the District’s Medicaid software program in response to XX – to end of sentence redacted – XX. The LCISD asserts that the complainant reviewed these records, and decided that they were in error because XX – to end of sentence redacted – XX. XX – sentences redacted – XX. The LCISD maintains that it has not altered service records for the Students, contrary to the complainant’s allegations.

Refusing Different Medical Service Provider

In her telephone interview with OCR, the complainant stated to OCR that, upon reviewing the Students’ service logs, she attempted to conduct research regarding the Medicaid program. The complainant stated that she learned that XXXX XXXX XXXX are allowed to have “freedom of choice” with regard to their service providers. Therefore, according to the complainant, she requested from the LCISD that she be permitted to change the service providers for the Students, as she believed that LCISD staff had falsified the Students’ service records. The complainant told OCR that she was told by XXXX XXXXX that this Medicaid provision does not apply to the public school system. According to the complainant, however, she “knows that they are lying to her.”

The complainant also submitted documentation evidencing her research to OCR, including a “School Health and Related Services (SHARS) Frequently Asked Questions” document which indicates that it was updated on July 24, 2017. The complainant stated to OCR that she had previously found the document on the TEA’s website, but that the document has since been removed. The document provides an overview of the intersection between the federal Medicaid program and the Individuals with Disabilities Education Act (IDEA). OCR does not enforce Medicaid, IDEA, or Texas state laws governing the intersection of these two laws; however, OCR reviewed the documentation provided by the complainant to better understand the complainant’s assertion that the LCISD retaliated against her by not permitting her to select a specific medical service provider to provide services for the Students. OCR notes that the document cited by the complainant contains the following language:

If a parent requests a provider other than the employees or currently contracted staff of the school district, provide a required service listed in the student’s IEP, the district must make a good faith effort to comply with the parent’s request. The requested provider must meet, comply with, and provide all the employment criteria and documentation that the SHARS provider normally requires of its employees or currently contracted staff.

In separate documentation provided to OCR, the complainant conceded that XX – to end of sentence redacted – XX.

XX – sentences redacted – XX. It is the LCISD’s position that schools have the right to assign the staff who provide related aids and services to students with disabilities. Further, while the LCISD concedes that there is a provision of the Medicaid regulations which enables Medicaid recipients to choose qualified medical service providers, the LCISD asserts that there is no guidance which clarifies whether this provision applies to public school districts participating in the SHARS Medicaid program. XX – sentence redacted – XX.

During the course of OCR’s investigation, the complainant contacted OCR to provide additional information. The complainant provided OCR with a copy of a letter from the LCISD’s Special Education Department dated January 26, 2018, which states the following: “Again, your claims the district must allow you to choose your student’s educational providers just because the district, as a whole, participates in the SHARS Medicaid program are incorrect. XX – sentence redacted - XX.” In a response letter to the LCISD authored on February 6, 2018, the complainant writes in response, “The request LCISD denied without a good faith attempt, when I requested XXXX XXXX be my son’s provider is unsupported by State law.” The complainant continues to assert that her right to “freedom of choice” is supported by Federal and state laws.

Disclosing Confidential Information to Third Party Medical Provider without Consent

In her telephone interview with OCR, the complainant alleged that the LCISD used a third party provider to provide services to the Students, and these providers had access to the Students’ personally identifiable information. According to the complainant, however, the consent form that she signed for the Students was limited in scope, and she did not provide consent for these third parties to have access to the Students’ information.

In response to this allegation, the LCISD reported that it has no knowledge of its basis. According to the LISD, the complainant has provided consent at times for the LCISD to communicate with the complainant's selected outside providers; however, the LCISD also reported that the complainant has revoked that consent on occasion. The LCISD asserts that it has either communicated or ceased communications with outside entities pursuant to the complainant's desire at the time, and pursuant to its obligations under Federal and state laws.

Student 1's XXXX XXXX XXXX

XX – paragraph redacted – XX.

XX – paragraph redacted – XX.

Student 1's IEP Amendment

The complainant also alleged in her telephone interview with OCR that, in or around XXXX XXXX, the LCISD changed Student 1's IEP without considering the complainant's input. The complainant stated that the LCISD added an "IEP Amendment" which she did not sign. According to the complainant, the LCISD told her that that it added items to the Student's IEP XX – to end of sentence redacted – XX. But, according to the complainant, the LCISD also removed an accommodation from Student 1's IEP that had previously been identified as necessary for him (i.e., XXXX XXXX XXXX).

The LCISD reported to OCR that the District modified Student 1's special education eligibilities using an IEP Amendment on or around XXXX XXXX XXXX. According to the LCISD, no other changes were made to Student 1's IEP other than the modification of Student 1's eligibilities. According to the LCISD, the complainant subsequently attended an ARD meeting held for Student 1 which lasted several hours, and at which the complainant was offered "substantial opportunity to provide input." Documentation provided to OCR by the complainant, which consists of communications between the LCISD and the complainant, indicates that there is a disagreement between the parties regarding whether Student 1's IEP should provide for XX – to end of sentence redacted – XX. It appears based on OCR's review of these communications that this accommodation may have been in Student 1's IEP at some point, but removed at an ARD committee meeting held during the XXXX school year. According to the documentation, however, the LCISD asserts that the accommodation was not removed without the complainant's consent or knowledge; rather, according to the LCISD, the complainant chose to leave this ARD committee meeting prior to its conclusion, and did not respond to the LCISD's request to reconvene the meeting at a later date.

Provision of XXXX XXXXX XXXX and Progress Reports

The complainant also stated to OCR in her telephone interview that, since June 2017, she has been requesting that the LCISD provide her with Student 1's XX – to end of sentence redacted – XX. XX – to end of paragraph redacted – XX.

Further, the complainant reported in her telephone interview that, despite making multiple open records requests, the LCISD has refused to provide her with progress reports evidencing the provision of XXXX XXXX XXXX to Student 2. The complainant stated to OCR that the LCISD has only provided her with service logs, and not the progress reports.

The LCISD denies the complainant's allegations, and maintains that it has gone to "great efforts" to respond to the complainant's requests for the Students' records. XX – remainder of paragraph redacted – XX.

Provision of Teacher Input/Questionnaires to Complainant

Finally, in her telephone interview with OCR, the complainant alleged that the LCISD has not provided her with copies of teacher questionnaires that are referenced in Student 1's evaluation documents. According to the LCISD, the complainant is requesting documents that are no longer in existence, but were used in XX – to end of sentence redacted – XX. XX – sentence redacted – XX. The LCISD asserts to OCR that any documents that have been maintained by the District have been provided to the complainant.

Analysis – Issue 1(b)

OCR has determined that the evidence is insufficient to support a finding of retaliation with respect to Issue 1(b). The evidence reviewed by OCR – which consists of information provided by both the complainant and the LCISD – reveals that the parties continue to express disagreement regarding the interpretation of laws and regulations that OCR does not enforce. Here, OCR's investigation is limited to considering whether the LCISD's failure to adhere to the complainant's request that the LCISD use her privately selected XXXX XXXX XXXX to provide related services to Student 1, as the complainant argues is her right pursuant to the regulations implementing the Medicaid program, was an act of retaliation against the complainant for XX – to end of sentence redacted – XX. The LCISD does not dispute that the complainant XX – phrase redacted – XX, nor does the LCISD dispute that the complainant has been denied her choice of service provider. Therefore, the preponderance of the evidence indicates that the complainant experienced the "adverse action" she alleges, and that the LCISD had notice of the complainant's "protected activity" – her XX – phrase redacted – XX. With regard to the final prong in establishing a *prima facie* case of retaliation – a causal connection between the adverse action and protected activity – the evidence provided by the LCISD indicates that it was acting in accordance with its interpretation of the law and its established practices in denying the complainant's request. There is no evidence to indicate that the LCISD treated the complainant any differently than the LCISD treats all parents/guardians of students receiving special education services, as the LCISD acted in accordance with its stated legal position. Accordingly, the preponderance of the evidence does not support a finding that the LCISD's refusal to permit the complainant her selection of service provider was caused by the complainant's protected activity. Therefore, OCR has determined that a *prima facie* case of retaliation has not been established.

Preliminary Analysis – Issue 1(a) and (c) through (g)

With regard to the remainder of the allegations made by the complainant, the evidence reviewed by OCR reveals that the complainant and the LCISD have a history of disagreement regarding the provision of related aids and services to the Students, the provision of educational records to the complainant, and the XX – phrase redacted – XX by Student 1. OCR has not received or reviewed sufficient documentation to determine whether the LCISD has engaged in the specific retaliatory actions alleged by the complainant.

Proposed Conclusion and Resolution

Shortly after being informed of the allegations opened for investigation, the LCISD, through its legal counsel, contacted OCR and expressed its interest in taking action to voluntarily resolve this complaint. OCR obtained preliminary documentation from the LCISD, which OCR carefully reviewed, in order to draft a resolution agreement that would appropriately resolve Issue 1(a) and (c) through (g).

Under Section 302 of OCR's *Case Processing Manual* (CPM), a complaint may be resolved at any time when, prior to the conclusion of the investigation, a recipient expresses an interest in resolving the allegations and issues and OCR determines that it is appropriate to do so. In light of the LCISD's willingness to address the identified complaint allegations without further investigation, OCR has determined that entering into a voluntary resolution agreement with the LCISD is appropriate in this case.

The LCISD submitted a signed Voluntary Resolution Agreement (Agreement) to OCR on **March 9, 2018**. Enclosed is a courtesy copy of the Agreement. The provisions of the Agreement are aligned with the complaint allegations (a) and (c) through (g) and the information obtained during OCR's investigation, and are consistent with applicable law and regulations. OCR has determined that this Agreement, upon full implementation, satisfactorily resolves Issue 1(a) and (c) through (g). Therefore, OCR is closing the investigative phase of this complaint. OCR will monitor the LCISD's implementation of the 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 complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that a recipient 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.

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.

OCR would like to thank the LCISD for its cooperation with OCR in order to successfully resolve this complaint. If you have any questions about this matter, please contact Ms. Rachel E. Caum, the OCR Attorney assigned to this complaint, at (214) 661-9632, or at rachel.caum@ed.gov. You may also contact me, at (214) 661-9638, or at lori.bringas@ed.gov.

Sincerely,

/s/

Lori Howard Bringas
Supervisory Attorney/Team Leader
Office for Civil Rights
Dallas Office

Enclosure: Voluntary Resolution Agreement

cc: XXXX (*via email only*)