



September 5, 2014

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Re: OCR Docket # 07141105

Dear XXXXXX XXXXXX:

On March 10, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Lebanon R-III School District (District), Lebanon, Missouri, alleging discrimination on the basis of disability and retaliation. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve allegations 1 and 2. For the reasons set out below, we have determined there is insufficient evidence to conclude that the District retaliated against the Complainant as alleged in allegation 3 of the complaint.

The Complainant alleged the District:

1. discriminated against his son (the Student) on the basis of disability (XXXXXX XXXXXX) when District staff members made inappropriate comments to the Student during the fall of 2013, thereby creating a hostile education environment;
2. discriminated against the Student on the basis of disability when, during December 2013 and January 2014, District staff members inappropriately used physical restraint on the Student as a form of punishment or discipline, instead of only using restraint in situations where the Student's behavior posed imminent danger of serious physical harm to himself or others, thereby creating a hostile education environment; and
3. retaliated against the Complainant after he raised concerns about the treatment of the Student by threatening legal action against the Complainant and sending the Student home early on three of the last five days the Student was enrolled in the District.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.

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- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.
- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits recipients of Federal financial assistance from the Department from discriminating on the basis of race, color, or national origin. The Title VI regulation at 34 C.F.R. § 100.7(e) also prohibits retaliation. The Title VI regulation prohibiting retaliation is incorporated, by reference, into the regulation implementing Section 504 at 34 C.F.R. § 104.61. The Title II regulation at 28 C.F.R. § 35.134 contains a similar retaliation prohibition.

As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Section 504, Title II, and the regulations prohibiting retaliation. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR applies a preponderance-of-the-evidence standard to determine whether evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

OCR investigated the Complainant's allegations against the District. OCR reviewed information the Complainant provided in his complaint and OCR conducted telephone interviews with the Complainant on March 13 and April 14, 2014, and conducted an in-person interview on May 22, 2014. OCR received documents and information from the District on May 13 and June 4, 2014, and conducted interviews with District staff members on May 23 and 30, 2014. OCR carefully considered all of the information obtained. OCR's determination regarding the applicable legal standards, findings of fact, and the analysis and conclusion regarding allegation 3 are set forth in this letter.

Allegations 1 and 2

Prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy enclosed) on September 5, 2014, that, when fully implemented, will address allegations 1 and 2 of the complaint. The Agreement requires the District to: send a letter to the Complainant stating that upon the Student's re-enrollment in the District and within five days of receiving the Complainant's consent to evaluate the Student, the District will begin an evaluation of the Student and make placement and eligibility decisions as well as identify the individual the Complainant may contact with concerns about the evaluation, placement or eligibility determinations; revise its notice of nondiscrimination; provide training to District staff regarding the District's policy regarding restraint and seclusion, particularly the District's process for notifying parents or guardians of instances of restraint and seclusion

and the District's responsibility to identify whether a student needs to be reevaluated and the process for reevaluating students, particularly if a student is repeatedly placed in restraint; and provide training regarding the investigation of disability harassment complaints to all District officials and staff responsible for conducting investigations of disability harassment complaints. Please consult the Agreement for further details.

OCR considers allegations 1 and 2 resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

Allegation 3

The Complainant alleged the District retaliated against him after he raised concerns about the treatment of the Student by threatening legal action against the Complainant and sending the Student home early on three of the last five days the Student was enrolled in the District.

Legal Standard

The regulation implementing Title VI at 34 C.F.R. § 100.7(e) states no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing. The Title VI regulation prohibiting retaliation is incorporated, by reference, into the regulation implementing Section 504 at 34 C.F.R. § 104.61. The Title II regulation at 28 C.F.R. § 35.134 contains a similar retaliation prohibition.

When OCR investigates retaliation allegations, it uses a four-part *prima facie* analysis. A *prima facie* case of retaliation is established by showing: 1) an individual engaged in an activity protected, such as participating as a witness in a protected activity or filing a complaint; 2) the recipient was aware of, or had knowledge of, the protected activity; 3) the recipient took adverse action against the individual contemporaneously with or subsequent to the individual's participation in the protected activity; and 4) there was an inferable causal relationship between the adverse action and the individual's participation in the protected activity. OCR presumes a causal connection exists between an individual's protected activity and a recipient's adverse action when there is a close proximity in time between the protected activity and adverse action. Once OCR has established a *prima facie* case of retaliation, OCR exams whether the recipient can articulate a legitimate, non-discriminatory reason for its action. If the recipient asserts a reason for its actions, OCR analyzes whether the reason articulated by the recipient is a pretext, or cover-up, for retaliation.

Findings of Fact

The Student was in second grade during the 2013-14 school year and has been diagnosed with XXXXX XXXXX. The Student attended XXXXX XXXXX in a special education classroom with five other students, aged kindergarten through sixth grade, with behavioral issues. District staff in the classroom included a classroom teacher and four paraprofessionals.

The Complainant told OCR he put a tape recorder in the Student's backpack on three days in December 2013 because he was getting reports about behaviors that were uncharacteristic for the Student. On December 16, 2013, the Complainant emailed a transcript he created from the recordings on the tape recorder on December 5, 11, and 12, 2013, to the school board president and the principal and asked to discuss the recordings.

The December 16, 2013 email stated:

In order for both sides to better prepare for our meeting on Wednesday I have provided transcripts taken from my son's classroom on 3 separate days. Due to concerns raised from our previous meetings I felt it necessary to record what was actually transpiring in the classroom and with Missouri being a designated as one party state I am within legal rights by having the consent of one party with that party being [the Student]. I am alarmed at many of the things that are happening in the classroom and the actions and statements made on these recordings need to be addressed. Many of the issues [Student's teacher] faces from my son are a direct result of her approach and actions she is taking in this classroom from her failure to address his condition properly. Furthermore, based on what he heard, a complaint with the Office of Civil Rights has been filed along with a complaint with the Missouri Department of Elementary and Secondary Education based on the knowledge that goals #4 and #5 of his IEP are not being followed by the school. At this point neither my wife nor I feel that [the Student] is safe in [Student's teacher] classroom. He has been subjected to multiple instances of threats and bullying from the teaching staff of the classroom, been the subject of inappropriate comments from the teaching staff, and physically assaulted by the teaching staff. It is our goal to resolve this situation for the best interests of our son XXXXX to ensure he receives a quality education that takes his disability into account and assists in his development in a positive way. I look forward to discussing this matter at our meeting.

The Complainant told OCR that when he arrived at school for the December 18, 2013, meeting, the director of special programs (director) provided a copy of the District's recording policy and said the District would not discuss anything from the recordings. The Complainant said the director threatened to take legal action against the Complainant; the Complainant thought this was an attempt to intimidate him and to encourage him to withdraw the complaints he filed.

The director told OCR the Complainant raised the issue of the tape recordings at the December 18, 2013, meeting, but she said she did not tell the Complainant the District may take legal action against him. The director said she told the Complainant the District did not have an audio recording of his transcript and would not discuss the transcript because it could not yet verify the transcript was accurate. The director said she told the Complainant the recordings were obtained in violation of the District's recording policy. The director said the District has not taken legal action against the Complainant and that she did not talk to other District staff members about whether the District could take legal action against him.

The principal and psychologist who attended the December 18, 2013, meeting both told OCR the director did not threaten the Complainant with legal action. The principal said the director told the Complainant the recordings would not be discussed and that she believed they were obtained in violation of the District's recording policy. The psychologist also stated the director told the Complainant the recordings would not be discussed; her understanding was the director did not want to discuss the recordings until the District had an opportunity to listen to the audio tape.

The Complainant also alleged the District retaliated against him by sending the Student home from school on three of the last five days he was in school in the District. The Complainant told OCR the Student left school early on January 13, 14 and 17.

The Student's attendance record states the following:

1/13/2014 "Check-out at 11:25 am [principal] called Behavior."

1/14/2014 "Check-out at 12:00 pm Parent Choice"

1/17/2014 "Check-out at 8:15 am [Student] would not stay at school...Mom took home"

According to OCR's interview with the principal, it was the principal's decision to send the Student home on January 13, 2014. According to the Student's January 13, 2014 behavior log, at 8:20 a.m., the Student was running around the classroom, ripping posters off the wall, knocking items off a paraprofessional's desk and throwing pencils. At 9:45 a.m., he was still running around the classroom, throwing papers and hit two of the paraprofessionals. The Student was asked repeatedly to stop running and to help clean up the classroom.

The principal said that late in the morning on January 13, 2014, the teacher or one of the paraprofessionals called the principal's office and asked the principal to go to the classrooms. She explained someone from the classroom would typically call the office and have her come over if there was an issue with a student that may result in someone getting hurt.

The principal went to the classroom and stayed for approximately 20 minutes, during which time the Student's behavior became worse. The principal said the Student was running between the classrooms pulling things off desks and shelves and becoming increasingly

uncontrolled. The principal said the Student's actions that day caused her to fear for his safety. She said the Student's behavior had become increasingly uncontrollable since Thanksgiving. On other days when the Student's conduct was a concern, school staff had called the Student's parents to give them the option to pick up the Student, but on January 13, 2014, the principal decided to contact the parents and ask them to pick up the Student. The principal told OCR she did not consider the Complainant's OCR and Missouri Department of Elementary and Secondary Education (DESE) complaints when she decided to send the Student home.

During OCR's interview with the Complainant on May 22, 2014, he told OCR it was his decision to take the Student home on January 14, 2014, because he was concerned about the Student.

On January 17, 2014, the Student refused to let go of his mother when she was dropping him off at school. She asked District staff members if they were going to help; the Complainant told OCR none of the staff made any verbal or physical efforts to encourage the Student to enter the school building. The complaint states that the Student's mother took the Student home and he did not return to the school.

Analysis and Conclusion

In determining whether the District retaliated against the Complainant, OCR must first determine whether the Complainant engaged in a protected activity. A protected activity involves making a complaint, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under the regulations enforced by OCR, or similar such activities, such as advocating for rights guaranteed by these regulations. The Complainant filed a complaint with OCR and with DESE regarding the treatment of the Student and implementation of his IEP. Filing these complaints was a protected activity.

The next element of a *prima facie* case of retaliation is that the recipient was aware of, or had knowledge of, the protected activity. This is an essential element of a *prima facie* case of retaliation because even if adverse action is taken against an individual, if the person or entity responsible for the adverse action had no knowledge of the protected activity, then OCR cannot conclude that the adverse action was taken as result of the protected activity. The Complainant sent the email transcribed above to the principal on December 16, 2013 notifying the principal of his OCR and MDESE complaints. The principal forwarded the email to the director on December 17, 2013. The director told OCR that she received the email on that date. This email correspondence demonstrates that the principal and the director had knowledge of the Complainant's protected activity.

The Complainant alleged the District engaged in two adverse actions. The director threatened him with the legal action and the student was sent home early on three of the last five days he attended school in the District.

A preponderance of the evidence does not support the Complainant's allegation that the director threatened him with legal action. The director told OCR she did not threaten to take legal action against the Complainant but did tell the Complainant she believed the recording was obtained in violation of the District's policy. She told OCR she did not have any discussion with other District staff members about whether the District could take legal action against the Complainant and the District has not taken any legal action against him. OCR also interviewed the principal and psychologist who attended the December 18, 2013, and both stated the director did not threaten to take legal action against the Complainant.

OCR next considered whether sending the Student home from school was an adverse action. Although the Complainant originally alleged the school sent the Student home on three of the last five days he attended school in the District, the preponderance of the evidence established that the District chose to send the Student home on only one of the three dates identified by the Complainant. The Student's attendance record and the Complainant's statements indicate the Complainant or the Student's mother chose to take the Student home from school on January 14 and 17, 2014. Furthermore, in determining whether an action taken by the District was adverse, OCR considers whether the 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 claims. Sending the Student home on this date did not deter the complainant from engaging in further protected activity as he filed his second OCR complaint on March 10, 2014.

Even if the preponderance of the evidence had established that sending the Student home on January 13, 2014, was an adverse action, there is insufficient evidence to establish a causal connection between the principal's decision to send the Student home and the Complainant's protected activity. In determining whether a causal relationship exists between the adverse action and the protected activity, OCR infers a causal connection when there is a close proximity in time between the adverse action and the protected activity. The Student was sent home from school one month after the District received notice of the Complainant's protected activity. Other than the Complainant's assertion that the Student was sent home because of his protected activity, OCR did not identify any evidence of a causal connection between the two. The Complainant's original allegation asserted there was a pattern of sending the Student home that could have supported a conclusion that District staff engaged in retaliatory actions; however, OCR determined that of the three dates the Complainant identified that the Student left school early, the District was responsible for the Student's departure from school early on only one of the three days. Given that a pattern was not established and that a month passed between the notice of the protected activity and the Student being sent home, a preponderance of the evidence does not support the Complainant's allegation regarding the second type of adverse action.

OCR concludes that a preponderance of the evidence does not support a finding that the District retaliated against the Complainant because of his complaint filings. Consequently, OCR is closing allegation 3 as of the date of this letter.

As noted above, OCR considers allegations 1 and 2 resolved effective the date of this letter and will monitor the District's implementation of the Agreement. When OCR concludes the District has fully implemented the terms of the Agreement, OCR will close the complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

The determinations discussed in this letter are not intended and should not be construed to pertain to any compliance issues under the regulations implementing Section 504, Title II, or any other statute enforced by OCR that may exist but are not specifically addressed herein.

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 District 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.

OCR is committed to prompt and effective service. If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXX@ed.gov.

Sincerely,

/s/ Joshua Douglass

Joshua Douglass
Supervisory Attorney

Enclosure

cc: Dr. Chris Nicastro
Commissioner of Education

