



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS -- REGION VII

May 2, 2016

Michael D. Hodge
General Counsel
Special School District of St. Louis County
12110 Clayton Road
Town & Country, MO 63131

Re: Docket # 07161032

Dear Mr. Hodge:

On November 4, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint alleging discrimination on the basis of disability (Oral-deaf communication, autism) by the Ladue Public School District (District), St. Louis, Missouri. This letter is to confirm the District has voluntarily submitted a Resolution Agreement (Agreement) to resolve allegations one and two of the complaint. With respect to allegation 3, we have determined there is insufficient evidence to conclude that the District retaliated against the Student as alleged in the complaint.

Specifically, the Complainant alleged the District:

1. failed to properly consider parent requested auxiliary aids and services during the evaluation, which would aid the Student's ability to communicate;
2. failed to adequately consider information from a variety of resources during the Student's evaluation;
3. retaliated against the Student by determining he was ineligible for compensatory services, after she filed a complaint with the Missouri Department of Elementary and Secondary Education.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The provision of the Title VI implementing regulation prohibiting retaliation is incorporated, by reference, into the regulation implementing Section 504 at 34 C.F.R. § 104.61.

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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. 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 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

In accordance with OCR's case processing procedures, OCR determined that it was appropriate to attempt to resolve this complaint through the RRP. Accordingly, OCR contacted the District on December 8, 2015, to provide notice of the complaint allegation, as well as the opportunity to resolve the allegation through the RRP. The Districts in Docket numbers 07161031 and 07161032 provided OCR a joint data response to the complaints on January 22, 2016.

Findings of Facts Common to All Allegations

OCR reviewed the records and information provided by the Districts and the Complainant and determined the following. The Student enrolled in the District in the second grade. He is currently a ninth grade Student, and was an eighth grade Student during the 2014-15 school year. He has a diagnosis of autism and oral-deaf communication.

The Complainant began requesting CART services for the Student in the 2012-13 school year. Initially the District refused the Complainant's request citing that the service would have an adverse impact on the Student's social interactions with peers and stated that his accommodations at the time were sufficient. The Student had been provided with an FM system which required teachers to utilize a microphone. However, during the 2014-15 school year the Student and his teachers began to have some concerns about the Student's ability to engage in classroom discussions. The District implemented CART services on a trial basis to determine if the use of CART services would be more effective for the Student. The CART trial lasted for 9 weeks with the District conducting periodic observations to determine the effectiveness of the services. Although the trial period and the observations did not provide clear evidence of whether the services were effective, at the end of the trial period, the District decided that it did not observe the Student utilizing the service and thus discontinued the service. The Complainant filed a complaint with the Missouri Department of Elementary and Secondary Education on March 24, 2015, alleging that the District failed to implement the Student's Individualized Education Program (IEP) by failing to provide access to a functioning assistive hearing device, an FM system, as required by the IEP due to not conducting the daily assistive hearing device monitoring and annual hearing aid/amplification system evaluation. On May 14, 2015, MODESE's decision required the IEP team to meet to discuss if the Student was provided a free appropriate public education (FAPE) from March 2014 through March 2015 when daily monitoring of his assistive hearing device was not conducted. If FAPE was not provided, the IEP team was required to determine what, if any, compensatory services were necessary and to develop a plan to provide those services.

On Tuesday September 1, 2015, the IEP team met to determine if FAPE was provided. The IEP team reviewed the Student's IEP goals 1-5 for both the 2013-14 and 2014-15 school years. The IEP team also reviewed the Student's GPA, his state and District testing assessments, and the Student's course recommendations for high school. The IEP team concluded the Student was on progress with meeting his IEP goals; his GPA was 3.4 in term 1, 3.1 in term 2, and a 3.4 in term 3. Additionally, his grades were mostly A's and B's and one C each term. The Student also tested proficient or advanced on the state and District exams. Based on the team's analysis of the data, the IEP team determined that FAPE was provided and thus no compensatory services were necessary.

Allegations 1 and 2

In accordance with OCR's case processing procedures and prior to the completion of OCR's investigation, the District submitted a signed Agreement (copy enclosed) on April 28, 2016 that, when fully implemented, will address allegations 1 and 2 of this complaint.

Allegation 3

The Complainant alleged that the District retaliated against the Student by determining he was ineligible for compensatory services, after she filed a complaint with the Missouri Department of Elementary and Secondary Education.

Legal Standard

The regulation implementing Title VI of the Civil Rights Act of 1964 at 34 C.F.R. § 100.7(e), which is incorporated by reference into the regulation implementing Section 504 at 34 C.F.R. § 104.61, prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulations. The Title II regulation at 28 C.F.R. § 35.134 contains a similar retaliation prohibition.

In analyzing an individual's claim of retaliation against a recipient, OCR initially determines whether a *prima facie* case of retaliation has been established. To establish a *prima facie* case of retaliation, OCR must determine that 1) the individual engaged in a protected activity (that is, exercised a right or took some action that is protected under the Federal laws that OCR enforces); 2) the recipient had notice of the individual's protected activity; 3) the recipient took adverse action against the individual contemporaneously with or subsequent to the protected activity; and 4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all of these elements establish a *prima facie* case, OCR next considers whether the recipient has identified a legitimate, non-discriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for discrimination.

Regarding prong 3 above, to be an “adverse action,” a recipient’s action must significantly disadvantage the Complainant’s ability to gain the benefits of the recipient’s program, or reasonably act as a deterrent to further protected activity or preclude the Complainant from pursuing her discrimination claims. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual’s employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claim(s). To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) whether the alleged adverse action caused lasting or tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse.

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

Findings of Fact

See findings of facts common to all allegations, above.

Legal Analysis and Conclusion

The Complainant alleged that the District retaliated against the Student by determining he was ineligible for compensatory services, after she filed a complaint with the Missouri Department of Elementary and Secondary Education.

A preponderance of the evidence establishes that the Complainant engaged in a protected activity when she filed a complaint with MODESE regarding the Student’s broken FM system. The evidence also establishes the District was made aware of this complaint when MODESE issued its findings report on May 14, 2015.

Because the Complainant engaged in a protected activity, OCR next determined whether the failure to provide compensatory services constituted an adverse action. MODESE required the District to convene an IEP meeting to determine if FAPE was provided during the period the FM system was not being properly monitored or evaluated. If the IEP team determined FAPE was not provided, they were required to determine if compensatory services were warranted. The District convened the IEP meeting on September 1, 2015. OCR’s review of the documentation indicates the IEP team relied on a variety of sources (progress meeting IEP goals, state and

District test results, GPA, his teachers' recommendations, and high school course recommendations) in making its determination.¹

OCR considered whether the District's determination, that compensatory services were not warranted, significantly disadvantaged the Student's ability to gain the benefits of the District's program, reasonably acted as a deterrent to further protected activity, or precluded the Complainant from pursuing her discrimination claims. OCR has determined the IEP team's decision regarding compensatory services did not significantly disadvantage the Student's ability to access the benefits of the District's programs, act as a deterrent to future protected activity, or deter the Complainant further pursuing her discrimination claims. The purpose of the team's determination was to evaluate whether the Student was disadvantaged by the alleged denial of FAPE from March 2014 to March 2015, when the District failed to provide daily monitoring of the Student's assistive hearing device and an annual hearing/amplification system evaluation. If the IEP team had determined the Student was disadvantaged, they were required to consider compensatory services. The District determined the Student was progressing or maintaining progress towards the goals in his IEP in addition to advancing in the general education curriculum. Subsequent to the District's determination, the Student continued to utilize assistive technology devices to access his educational programming. Further, the Complainant has continued to pursue her claims against the District, including filing this complaint with OCR. The Complainant filing this complaint indicates the District's determination did not deter or preclude the Complainant from pursuing her discrimination claims. Therefore, the preponderance of the evidence is insufficient to establish the District's determination caused tangible harm or had a deterrent effect.

Based on the information above, the preponderance of the evidence was insufficient to establish the District took adverse action against the Student. Consequently, OCR was unable to establish a *prima facie* case of retaliation. OCR has concluded there is insufficient evidence to support a finding the District retaliated against the Student as alleged. Accordingly, OCR is closing allegation 3 of this complaint as of the date of this letter.

OCR considers the complaint 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 this complaint. If the District fails to carry out the Agreement, OCR may resume the investigation.

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.

¹ Absent extraordinary circumstance, OCR does not assess the appropriateness of pedagogical decisions made by school district employees.

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 Lachauna Edwards, Attorney, at (816) 268-0485 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at Lachauna.Edwards@ed.gov.

Sincerely,

/S/ Maria L. North
Supervisory Attorney

Enclosure