



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 10, 2020

Sent via email only to greggcruickshank@homerknights.org

Mr. Gregg Cruickshank, Superintendent
212 South 3rd Street
PO Box 340
Homer, Nebraska 68030

Re: Homer Community Schools
OCR Case Number: 07-20-1141

Dear Mr. Cruickshank:

On February 19, 2020, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against the Homer Community Schools (District), in Homer, Nebraska, alleging the District discriminated against the Complainant's daughter (the Student) on the basis of disability by failing to provide accommodations agreed upon in her Section 504 Plan and for retaliating against the Complainant and the Student based on disability. This letter is to confirm that OCR has found insufficient evidence for part of the complaint and that the District has voluntarily submitted a Resolution Agreement (Agreement) to OCR to resolve the remainder of the complaint, as further discussed below.

OCR investigated whether the District (1) failed to provide the Student a free and appropriate education (FAPE) in violation of Section 504 and/or Title II, and (2) retaliated against the Complainant and/or Student in violation of Section 504 and/or Title II.

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, prohibit discrimination on the basis of disability in programs and activities receiving Federal financial assistance (FFA). The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the regulatory provision of Title VI of the Civil Rights Act of 1964 (Title VI) regulation at 100 C.F.R. § 100.7(e), which provides that 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 a law OCR enforces, or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under these laws or regulations. Under Section 504, OCR has enforcement jurisdiction over recipients of FFA from the Department.

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

Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive FFA. The regulation implementing Title II, at 28 C.F.R. § 35.134 prohibits retaliation by public entities. Under Title II, OCR has enforcement jurisdiction over public school districts.

As a recipient of FFA from the Department and a public educational institution, the District is subject to Section 504, Title II, and to OCR's jurisdiction. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

An analysis of the evidence obtained to date is set forth below. To protect individuals' privacy, the names of employees, witnesses, and other parties were not used in the letter. To reach a determination regarding the complaint allegations, OCR interviewed the Complainant, the Superintendent, the School Counselor, and the Principal, reviewed documents provided by both the Complainant and the District including correspondence, the Complainant's internal grievance, the District's relevant policies and procedures, and the Student's educational records including her Section 504 Plan.

Section 303 of the Case Processing Manual (CPM) states that, at the conclusion of an investigation, OCR will determine, using a preponderance of the evidence standard, whether there is insufficient evidence to support a conclusion of noncompliance, or the evidence supports a conclusion of noncompliance.¹

Allegation 1

Legal Standard

Section requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements.

If a school district fails to provide academic adjustments included in a student's Section 504 Plan, OCR determines whether that failure resulted in a denial of FAPE to the student. In doing so, OCR considers whether the failure had a meaningful adverse impact that deprived the student of educational opportunity.

Findings of Fact

The Complainant alleged teachers were not following the Student's Section 504 Plan by penalizing the Student for late work. The Complainant said teachers were supposed to contact the Complainant if the Student was missing assignments and allow the Student to turn in late

¹ OCR's Case Processing Manual is available online at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

assignments without any penalty. The Complainant said the second week of school two of the Student's teachers were not following those academic adjustments when they did not contact the Complainant when the Student did not turn in assignments that were due, and deducted points for late assignments.

Records show that the Complainant contacted the Student's Language Studies Teacher on August 28, 2019 because the Student had two assignments showing zero points. The Language Studies Teacher responded and said she had one of the assignments she was getting ready to enter the points for and the Student did not turn in the other assignment. The Language Studies Teacher said she could give the Student half credit if she turned it in late.

On August 29, 2019, the Student's English Teacher emailed the Complainant and stated she originally took off six points for the Student's assignment being turned in late, but she would change it to only take off two points.

On September 5, 2019, the District's School Counselor (Counselor) sent all the Student's teachers an email stating:

If [Student] has a missing assignment, please send mom an email letting her know. Please try to do this within a day or two. No punishment for late work, at all. It can be marked late, just do not put in a zero or deduct points. Marking it late will be an important feature because it may go to show a pattern of some kind. I know we previously spoke about a 2 day limit and then adding it as a zero. [Student] is starting to struggle in some areas already so we want to make this as positive for her as possible. Entering grades as a zero hasn't helped.

The Principal also told OCR that in addition to the Counselor's email, the Principal had face-to-face conversations with each of the Student's teachers to make sure they were following the Student's academic adjustments for late assignments.

Following that email, District correspondence shows the Student's teachers contacted the Complainant multiple times for the remainder of the school year to inform her of the Student's missing assignments.

In March 2020, the Complainant contacted the Principal to state some of the Student's teachers were giving the Student zeroes for late work again. On March 17, 2020, the Complainant wrote to the Principal and thanked him for resolving the matter.

Internal emails show that one teacher had given the Student zeroes due to the confusion of switching from in-class learning to on-line learning due to Covid-19 measures and that many students' grades were being corrected. Another teacher told the Principal the Student refused to do an assignment, and the teacher was not sure what to do when the Student was given all the time to do the assignment but refused to do the assignment. The Principal told OCR that the Student's Section 504 Plan did not specify what to do in this circumstance, and therefore, he told the teacher the ambiguity should work in the Student's favor and to contact the Complainant and inform her of the missing assignment and then allow the Student to turn in the work late.

In a follow up interview, the Complainant told OCR the grades in March were resolved, but she had to contact the Principal to resolve them. The Complainant said she was not sure if the two assignments from August were corrected to receive full credit. The Complainant said she did not know if those assignments would have impacted the Student's grades. The Complainant said she could not think of other instances where the Student's academic adjustments for late assignments were not being followed. The Complainant said once they switched to online learning, the Complainant did not have any additional concerns regarding implementation of the Student's Section 504 Plan.

Analysis and Conclusion

The evidence shows that, except for a few occasions that were later corrected by the District, the District did follow the academic adjustments provided for in the Student's Section 504 Plan for most class assignments. A preponderance of the evidence does not establish that the occasional failure to provide more time on assignments in this case had a meaningful adverse impact that deprived the Student of an educational opportunity, primarily because any failures to provide extra time on assignments were corrected by the District in a timely manner once the Complainant brought those instances to the attention of the District. Therefore, OCR finds insufficient evidence to establish that the District failed to provide a FAPE for the Student, and OCR is therefore closing Allegation 1 as of the date of this letter.

Allegation 2

OCR also investigated whether the District retaliated against the Student or the Complainant because the Complainant advocated for the Student's disability rights with the District.

The Complainant alleged that after she told the District that she planned to file a complaint with OCR, the District retaliated against her by (a) requiring her to provide the Student's medical records, (b) sending a draft Section 504 Plan with accommodations omitted, (c) attempting to schedule the Student's Section 504 meeting when she was not available, (d) requiring the Student to attend the Achievement Center, (e) leaving her name off the donor list for the Fine Arts pamphlet, (f) not responding to her internal discrimination grievance, and (g) including her work supervisors on email communications regarding her advocacy for the Student.

OCR has determined that there is insufficient evidence to find that the District retaliated against the Complainant or the Student as alleged in Allegations 2(a) through (e), and the District has entered into an agreement to resolve Allegations 2(f) and 2(g), as explained below.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the District took an adverse action against the Complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, OCR then determines whether the District has a legitimate, non-retaliatory reason for its action and whether the District's reason for its action is a pretext, or excuse, for unlawful retaliation.

Findings of Fact

The Findings of Fact for Allegation 1 are incorporated in this analysis. Additionally, the following facts apply to Allegation 2.

On the morning of September 5, 2019, the Complainant emailed the Counselor and stated she felt the teachers were not following the Student's Section 504 Plan by not providing the academic adjustments (referred to by the Complainant as accommodations) for late assignments. The Complainant wrote that she was "tempted to file a complaint with the OCR..."

Later, the same morning, the Counselor emailed the Complainant and stated they needed copies of the Student's medical records in order to proceed with evaluating the Student for her Section 504 Plan. The Counselor told OCR he was reviewing all the student files for Section 504 Plans and Individual Education Programs and saw the only medical record they had on file for the Student was a note from a doctor which did not include a diagnosis and only stated "educational concerns." The Counselor said the file created by the previous administrator said the Student was diagnosed with XXXXX, but he did not know what that was based on. The Counselor said that to date, the Complainant has still not provided him with any medical documentation.

In this case, the Student's Section 504 Plan remained in place, and the accommodations were not changed even when the District did not receive the requested medical documentation. The evidence is insufficient to show that the Counselor's request for the Student's medical records constituted an adverse action.

In the afternoon of September 5, 2019, the Complainant met with the Counselor, the Principal, and the Superintendent to discuss the Complainant's concerns and the District's request for medical records. During the meeting, the Complainant talked about how the Student's disability affects the Student's executive function with some skills like time management. The Complainant told OCR she discussed brain development and how it relates to brain-based learning, and she presented options for brain-based learning.

The Complainant alleged she asked what medical documents the District now wanted, and the Counselor told her they wanted the Student's brain scans. The Complainant alleged the Counselor told her they were now asking for the Student's medical records because they believed the Student had brain damage and that the Complainant gave them that impression because she talked about executive function and brain damage. The Complainant alleged to OCR that the Counselor became angry with the Complainant when she explained the Student did not have

brain damage, and he said the Student is “just a kid with XXXXX.” The Counselor acknowledged to OCR he told the Complainant that the Student had the “Cadillac 504 Plan” for a kid with XXXXX.

The following day, the Counselor sent an email to the Student’s Section 504 Team with a copy of a document titled “Draft 504 Plan.” The draft was for the Student and did not include the academic adjustments for having no points deducted for late work or for spelling. The draft also included an academic intervention which was not on the previous plan. The evidence shows this draft was never implemented and while the Student’s Section 504 Team was reviewing this draft, the Student’s previous Section 504 Plan remained in place. On September 23, 2019, the Section 504 Team met and implemented a new Section 504 Plan for the student which included accommodations for late work and spelling. Therefore, the evidence is insufficient to show that the Counselor sending the Draft Section 504 Plan constituted an adverse action.

On September 9, 2019, the Complainant filed an internal Section 504/ADA Grievance with the District regarding the Student’s Section 504 Plan not being followed. The Complainant also alleged retaliation and discrimination by District administrators.

The Counselor sent the Complainant times to schedule a Section 504 meeting during times the Complainant was unable to attend. As mentioned above, the Section 504 Team decided to meet on September 23, 2019, and the Complainant attended this meeting. Considering the District scheduled a Section 504 meeting and the Complainant was able to attend, the evidence is insufficient to show the Counselor’s proposal of meeting at other times constituted an adverse action.

During September 23, 2019 Section 504 meeting, the Section 504 Team determined to keep the same academic adjustments as the previous year including the provisions for late work and spelling. At the request of the Complainant, this meeting was facilitated by the Special Education Director for XXXXX XXXXX XXXXX, who is also the Complainant’s direct supervisor.² District administrators told OCR they felt this meeting addressed the Complainant’s issues from her September 9, 2010 grievance. However, they acknowledged they did not speak about the grievance during the meeting nor address her allegations of retaliation and discrimination at the meeting.

On November 1, 2019, the Counselor sent the Complainant an email stating that any additional correspondence should include the Special Education Director for XXXX. After sending this email, the Counselor amended his statement to state that all in person conversations should include the Special Education Director for XXXXX.

On November 5, 2019, the Superintendent copied the Director of XXXXX on an email to the Complainant. The Complainant alleged to OCR that the District included her supervisors on emails as a means of retaliation.

² The Complainant works for XXXXX XXXXX XXXXX which provides services to the District for student support for individuals with special needs among other services.

In November 2019, the Student was required to go to the Achievement Center. The evidence shows the Achievement Center is an alternative to study hall where students can go to receive extra assistance or work in study groups. The Achievement Center is open to all students and does not indicate a student has a disability. The Complainant alleged the Student was required to go as retaliation. The evidence is insufficient to show that being required to go to the Achievement Center is an adverse action.

The Complainant alleged the District retaliated against her by leaving her name off the donor list for the Fine Arts pamphlet. The Complainant explained she donated XXXXX dollars in years past and did so this year as well. Every year the donors are listed in the programs. She said following filing a complaint with the District, her name was left off the pamphlet. The Complainant explained to OCR in a follow up interview that she spoke with the Student's Band Teacher, who works with the Fine Arts Booster Club to create the pamphlets, and the Band Teacher explained it was an oversight on her part. The Complainant asked the Band Teacher if she knew about her grievance or issues with the District, and the Band Teacher told her she did not.

The Superintendent told OCR he talked to the Band Teacher about the issue after the Complainant raised it with him and explained that it was a mistake and that they always want to show appreciation for their donors. The Superintendent, Principal, and Counselor told OCR they did not speak to any of the Student's teachers about the Complainant's grievance. The evidence does not support there was a causal connection between the Complainant advocating for the Student and her name being left of the donor list for the Fine Arts pamphlet.

Legal Analysis and Conclusion for Allegations 2(a) through 2(e)

In Allegations 2(a) through 2(d) the evidence fails to show that the District's alleged actions subjected the Student or Complainant to an adverse action. In allegation 2(e), the evidence fails to show a causal connection between the Complainant's engagement in a protected activity and the alleged adverse action of not having her name listed in the Fine Arts pamphlet. Therefore, Allegations 2(a) through 2(e) fail to meet the elements of a retaliation claim and OCR finds insufficient evidence that the District retaliated against the Complainant as alleged in allegations 2(a) through 2(e). Allegations 2(a) through 2(e) are therefore closed effective the date of this letter.

Resolution of Allegations 2(f) and 2(g)

On August 6, 2020, prior to the conclusion of OCR's investigation of Allegations 2(f) and 2(g), the District agreed to enter into a Resolution Agreement (Agreement) in accordance with Section 302 of OCR's CPM to resolve Allegations 2(f) and 2(g). OCR considers Allegations 2(f) and 2(g) 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 investigating the complaint.

The Agreement requires the District to provide a formal response to the Complainant's September 9, 2019 grievance in accordance with the District's policies and procedures. The District will conduct training for its administrators regarding its policies and procedures related to discrimination and anti-retaliation. The District will also make assurances not to include employees from the Complainant's place of work in emails related to the Student or the Complainant's communication with the District associated to the Student unless the Complainant agrees to such inclusion.

OCR considers the complaint to be resolved effective the date of this letter and will monitor the University'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 its 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. A complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

The Complainant has a right to appeal OCR's determination of Allegation 1, and Allegations 2(a) through 2(e) within 60 calendar days of the date indicated on his letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Recipients of FFA are prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by federal civil rights law. Complaints alleging such retaliation may be filed with OCR. A complainant may also have the right to file a private suit in federal court whether or not OCR finds a violation.

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, it will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

If you have any questions, please contact XXXXX XXXXX, Attorney, at (816) 268- XXXXX or (877) 521-2172 (telecommunications device for the deaf), or by e-mail at XXXXX.XXXXX@ed.gov.

Sincerely,

Megan Levetzow,
Supervisory Attorney

Enclosure