



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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October 14, 2014

Dr. Brad Winter
Interim Superintendent
Albuquerque Public Schools
6400 Uptown Blvd. NE
Suite 600 East
Albuquerque, New Mexico 87110

Re: Albuquerque Public Schools
Case Number: 08-10-1106

Dear Dr. Winter:

On February 10, 2010, we received a complaint of discrimination filed against Albuquerque Public Schools (the District). The Complainant alleged that the District discriminated against him based on his disability and retaliated against him for engaging in a protected activity. Specifically, the Complainant alleged that the District did not provide employment accommodations for his disability (visual impairment). The Complainant further alleged that in response to his request for accommodations for his disability and his informing District staff that he intended to file complaints with the Equal Employment Opportunity Commission (EEOC) and OCR, the District retaliated against him by: (1) treating him harshly during accommodation meetings; (2) placing him in a classroom contrary to one of his accommodation requests; (3) auditing his files; (4) accusing him over the course of three meetings of not performing his job satisfactorily; (5) threatening to place him on an Employee Improvement Plan (EIP); (6) encouraging him to resign from his position at the District; and (7) not communicating with him after he dropped his complaint against a District employee.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities that receive Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability in programs or activities of public entities. Additionally, individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from retaliation or intimidation by 34 C.F.R. §104.61, as it incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. §35.134. The District, a public entity, receives Federal financial assistance from the Department and is subject to these laws and regulations.

We investigated the following issues:

Whether the District discriminated against the Complainant on the basis of disability by refusing to provide reasonable accommodations in employment for the known disability of the Complainant, in violation of 34 C.F.R. § 104.12 and 28 C.F.R. § 35.140; and

Whether the District retaliated against the Complainant in response to his informing District staff that he intended to file complaints with the EEOC and OCR, in violation of 34 C.F.R. § 104.61, as it incorporates 34 C.F.R. § 100.7(e) and 28 C.F.R. § 35.134.

During our investigation, we interviewed the Complainant, District administrators, and staff. Additionally, we reviewed documents submitted by the Complainant and the District. Through our investigation we found no credible evidence that the District retaliated against the Complainant with regard to elements 1, 2, 3, 4, 5, and 7 as alleged. Nevertheless, we did find that the District discriminated against the Complainant by not providing all approved reasonable accommodations, and we found that the District retaliated against the Complainant based on a preponderance of the evidence with regard to element 6. The District has entered into the enclosed Resolution Agreement to address the compliance concerns.

Alleged Failure to Accommodate

The Complainant, a speech language pathologist (SLP), alleged that during the 2009-2010 school year, the District failed to provide requested employment accommodations for his disability.

The regulation implementing Section 504 at 34 C.F.R. § 104.12, provides that a recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity. The regulation implementing Title II at 28 C.F.R. § 35.140 incorporates a similar requirement.

In addition to the above regulations, the employer and employee requesting accommodation have a duty to engage in an interactive process of assisting in the search for appropriate reasonable accommodation and to act in good faith. A party that obstructs or delays this process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. The interactive process is important in order to determine the extent of the disability, what affect it may have on a major life activity, and whether alternative accommodations might be effective.

In determining whether a recipient has violated the regulations, OCR first considered whether the employee is a qualified individual with a disability. We found that, based on information from the Complainant's physician, the District concluded that the Complainant is a qualified individual with a disability eligible for employment accommodations. Next, we considered whether the employee requested reasonable accommodations during the time in question. We found that in May 2009, the District received the Complainant's request for 14 employment accommodations, as well as medical information from the Complainant's physician.

On June 22, 2009, the Complainant met with District staff to discuss his accommodations. The meeting resulted in recognition by District staff of some of the Complainant's accommodations as reasonable based on his disability, but they requested additional medical information from the Complainant in order to determine if the remaining accommodations he requested were necessary to accommodate his disability. In July 2009, the District received additional medical information from the Complainant's physician and spoke with him via telephone. On August 10, 2009, the Complainant met with District staff again to discuss his 14 accommodation requests. The meeting resulted in the District's identifying five accommodations acceptable for inclusion in the Complainant's Employee Accommodation Plan (Plan). A hand-written Plan signed by the Director of the Office of Equal Opportunity Services (OEOS Director) and the Complainant describes the five "reasonable accommodation(s) to be implemented." The meeting ended with the remaining accommodations pending further discussion.

On August 13, 2009, the OEOS Director sent a letter to the Complainant that could reasonably be misread as approving an additional three accommodations. The District asserted to us, however, and we find convincing from a careful examination of the context of the letter, that the August 13 letter does no more than summarize the eight requests out of 14 that are medically supported to perform the essential functions of the Complainant's job and indicate that further medical documentation would be required in order to consider the remainder of the 14 requests.¹

On August 21, 2009, the District invited the Complainant to a meeting to discuss the remaining three supported accommodations requested. On August 22, 2009, the Complainant declined to attend the meeting and advised the District that he would not attend any further meetings until the District resolved his internal complaint² that he previously filed with the District.

Typically, in requesting an accommodation, the employee with the disability has the responsibility to identify his or her disability, to provide adequate documentation of the disability and effect of the impairments, and to make a specific and supportable request for an accommodation. Once a request has been made, the obligation is then on the employer to engage in an interactive process with the individual in considering whether the requested accommodation is reasonable or feasible for the employer, consistent with Section 504 and Title II. The employer should consider all pertinent and appropriate information, including the nature of the individual's disability and the requested accommodation, as well as alternative ways to accommodate the individual. The employer should engage in reasonable deliberations to

¹ Although signed by the OEOS Director who was a party to the Plan, the letter makes no reference to the Plan agreed to only three days earlier. It would not be unreasonable for one whose memory of the meeting was still fresh to misread the letter by assuming that it augmented the outcome of the meeting, rather than ignored the fact that the meeting took place and resulted in partial agreement between the parties. We believe that a significant amount of animosity between the parties – and a great deal of difficulty on our part in analyzing the facts from this investigation – could have been avoided by a more carefully, more collegially drafted letter to the Complainant.

² The Complaint filed an internal complaint against his supervisor on August 19, 2009, alleging discrimination based on disability. The internal complaint alleged that the Complainant's supervisor failed to modify the Complainant's work schedule, which was one of the accommodations he requested.

identify the accommodations that would enable the individual to reasonably perform the essential functions of his or her job.

The District's procedures related to an employee accommodation request states that all agreed-upon accommodations are to be documented in the employee's Plan. The procedures further state that all accommodation requests require an interactive process between the employee and employer in order to determine if an accommodation can be made.

Based on our investigation, we determined that on August 10, 2009, the District and Complainant had agreed to five accommodations through the interactive process and were still engaged in the interactive process to address three additional accommodations. On August 21, 2009, the District intended to meet with the Complainant to finalize his Plan. The Complainant, however, declined to meet with District staff on the scheduled date or any future date to complete the Plan. Because the Complainant's actions prevented the District from completing the interactive process, the District was not obligated to provide the three unresolved accommodations requested by the Complainant. Therefore, we conclude that the District did not fail to initiate and work in good faith through the interactive process.

Nevertheless, the District did fail to provide all of the reasonable accommodations agreed to in the August 10, 2009 Plan. The District's and the Complainant's statements differ with respect to whether the District implemented at least two of the accommodations. Both parties agree, however, that the District did not implement an accommodation to provide a large-print manual for the New Mexico Standards Based Assessment. Accordingly, OCR found that the District discriminated against the Complainant by not providing all approved reasonable accommodations.

Alleged Retaliation

The Complainant alleged seven acts of retaliation by the District in response to his requesting accommodations for his disability and for informing District staff that he intended to file complaints with the EEOC and OCR.

Under the implementing regulations, recipients are prohibited from retaliating against or intimidating any individual for the purpose of interfering with any right or privilege protected by Section 504 and Title II. In analyzing a retaliation claim, we determine whether: the individual engaged in an activity protected by Section 504 and Title II of which the recipient had knowledge; the recipient took adverse action against the individual; a causal connection existed between the protected activity and the adverse action; and, the recipient has a legitimate, non-retaliatory, non-pretextual reason for its action.

Analysis

Protected Activity and Recipient's Knowledge

First, we examined whether the Complainant engaged in an activity protected by Section 504 and Title II and, if so, whether the District had knowledge of the Complainant's protected activity. The Complainant requested employment accommodations for his disability and filed internal complaints of discrimination. The District acknowledged that it received the Complainant's request for accommodations on May 27, 2009, and that it received the Complainant's internal discrimination complaint on July 1, 2009. For two months beginning June 22, 2009, the Complainant and District engaged in an interactive process regarding his request for accommodations. In addition, the Complainant filed two more internal discrimination complaints with the District, including the one referenced in footnote 2, as well as advising District staff of his intent to file a complaint with the EEOC. Thus, the Complainant engaged in protected activities of which the District had knowledge.

Adverse Action, Causal Connection and Legitimate, Non-Retaliatory, Non-Pretextual Reasons

For each alleged act of retaliation, OCR individually analyzed whether the District subjected the Complainant to an adverse action and if a causal connection exists. For each adverse action for which a causal connection could be inferred, OCR further considered whether the District's proffered reasons for each action was legitimate, non-retaliatory, and non-pretextual.

(1) Treated Harshly

The Complainant alleged that District staff treated him harshly during accommodation meetings. The Complainant described the harsh treatment as staff being smug, openly hostile, and insinuating that he was lazy and rude.

As stated previously in this letter, the District held two accommodation meetings with the Complainant on June 22 and August 10, 2009. Interviews with District staff and a witness identified by the Complainant did not corroborate that staff treated the Complainant harshly during either meeting. Rather, the interviews revealed that overall tension existed between both parties during each meeting. In addition to witness testimony, the Complainant and District provided audio recordings of the August meeting. Although OCR could not identify who was speaking, the recordings did not reveal any harsh treatment by a group of individuals directed to one person. For an action to be regarded as adverse, it generally must adversely affect a person's work, education, or well-being in a serious, lasting, and usually tangible manner – something that is more than a transient, unpleasant incident, or that had a deterrent effect. Therefore, with respect to the alleged harsh treatment of the Complainant, we find insufficient evidence to establish that the District subjected the Complainant to an adverse action as alleged.

(2) Classroom Change

The Complainant alleged that the District placed him in a classroom contrary to one of his accommodation requests. Specifically, he requested to move to a room with space for therapy and indirect natural light because his current room was limited in space and had flickering fluorescent lights. The Complainant identified room 125 as having the qualities he desired.

The August 13, 2009 letter from the OEOS Director to the Complainant reflects his determination that the requested accommodation “do[es] not correspond to verified medical needs as described by your doctor and will need to be addressed with your supervisor, the SLP program or the APS Human Resources Department.” This request and several others rejected for the same reason are contrasted with requested accommodations that “can truly be considered accommodations to a disability that affects your performance of essential functions of your job.” The letter concludes: “These items will not be considered part of an accommodation plan absent supporting documentation from a medical provider.”

We determined that the District subjected the Complainant to an adverse action by moving him to a room other than the one he requested during August 2009, and that the move occurred after he engaged in the identified protected activities. Based on the proximity in time between the protected activities and the adverse action, a causal connection between the two can be inferred. Nevertheless, we determined that the District’s rationale for relocating the Complainant, as expressed by the OEOS Director, to be legitimate and non-retaliatory.

Finally, we considered whether the District’s rationale was nevertheless a pretext for retaliation. Our investigation revealed that the Complainant’s original room was located in the school library adjacent to the Librarian’s office. This office did not have windows. During the summer of 2009, the school underwent construction, which included adding equipment to the Librarian’s office. The addition of the equipment decreased the size of the Librarian’s office. Because of this, the Principal, the Complainant’s supervisor, relocated the Librarian to the Complainant’s room and the Complainant to room 110W. The Principal informed us that at the start of the school year³, he relocated the Complainant to room 110W because it has blinds and tinted windows and because of its proximity to other service providers and the Special Education Head Teacher, with whom the Complainant worked closely in his role as an SLP. The Principal considered moving the Complainant to room 125 but determined that this room assignment would separate the Complainant from other service providers at the school. A diagram of the school indicates that room 110W is comparable in size to other rooms within its vicinity.

The Complainant confirmed that the school underwent construction and that equipment was added to the Librarian’s office. The Complainant also confirmed that room 110W has blinds and tinted windows, and is within proximity to other service providers. However, the Complainant contended that the room is very bright even after he closes the blinds and the tint on the windows

³ SLPs were generally required to report to their schools on August 13, 2009, and the first day of classes was August 20, 2009. <http://www.aps.edu/aps/SpecialEd/Documents/SLP%20Archives/slpfm05082009.pdf>, viewed February 7, 2014.

is not adequate for his needs. The Complainant further contended that the room has florescent lighting, which he does not use because it is too bright.

The District's rationale for denying the request as a reasonable accommodation was that the request is not supported by the medical documentation, but the Complainant contended that the room to which he was moved was too bright, both because of the windows and fluorescent lighting. Medical documentation received from the Complainant by the District on July 7, 2009, supports the District's position and contradicts the Complainant's assertions. The documentation notes that the Complainant's "visual impairment significantly increases the difficulty of any task that has even a moderate visual demand. . . . [A]ny task that requires paperwork, computer work, or travel through unfamiliar or *poorly-lit environs* will be much more difficult than for someone without his level of impairment." (Emphasis added.) Nothing in the medical documentation suggests that natural or fluorescent light adversely affects the Complainant's abilities to complete the essential functions and responsibilities of his employment. Therefore, we determined that there is insufficient evidence to conclude that the District's stated reason for moving the Complainant to a room other than the room he requested was a pretext for illegal discrimination. Accordingly, with respect to the reassignment of the Complainant's classroom, we find that the District did not retaliate against the Complainant as alleged.

(3) Auditing Files

The Complainant alleged that the District audited his files in retaliation for participating in a protected activity.

We learned that the District entered into a settlement agreement with the New Mexico Public Education Department (NMPED) dated July 2, 2008. The settlement agreement requires the District's Special Education Department to perform random inspections of SLPs' contact logs twice a year to ensure that services are delivered and documented. During the 2009-2010 school year, the District employed the Complainant as a SLP.

The District implemented the random inspection requirement of the settlement agreement at the beginning of the 2008-2009 school year. During this period, the District inspected the files of 38 SLPs. The Complainant's files were not randomly selected for this inspection. The District continued its inspection during the 2009-2010 school year, in accordance with the settlement agreement. During this period, the District inspected the files of 32 SLPs. The Complainant's files were randomly selected for this inspection.

The District inspected the Complainant's files on February 18, 2010, which can reasonably be viewed as an adverse action. The inspection occurred after he engaged in the identified protected activities. Based on the proximity in time between the protected activities and the adverse action, a causal connection between the two can be inferred. However, the District's settlement agreement with the NMPED required the District to conduct such inspections both prior to and after the Complainant's protected activities. Accordingly, we determined that the District's action to be legitimate and non-retaliatory.

Finally, we considered whether the District's rationale was nevertheless a pretext for retaliation. The District inspected the files of 31 other SLPs during the 2009-2010 school year, in accordance with the same settlement agreement with the NMPED. The District demonstrated to us that the file selection was random as was required by the agreement with the NMPED. Therefore, we determined that the District's stated reason for inspecting the Complainant's files was not a pretext for illegal discrimination. Accordingly, with respect to the auditing of the Complainant's files, we find that the District did not retaliate against the Complainant as alleged.

(4) Meetings to Address Job Performance

The Complainant alleged that during the 2009-2010 school year, the District accused him of not performing his job satisfactorily.

Our investigation revealed that during the 2009-2010 school year, the District held three meetings with the Complainant to discuss his job performance. The meetings occurred on November 30, 2009, February 19, 2010, and March 30, 2010.⁴ Based on this information, we find that the District subjected the Complainant to an adverse action by meeting with him regarding his job performance. In addition, a causal connection between the two can be inferred based on the proximity in time between the protected activities and the adverse action.

According to the District, the Complainant's job performance during the 2009-2010 school year warranted the meetings. We learned that the sum of the three meetings addressed 15 job performance areas the District believed required improvement. Accordingly, we determined that the District's action to be legitimate and non-retaliatory.

Finally, we considered whether the District's rationale was nevertheless a pretext for retaliation. We learned that documentation related to the Complainant's alleged job performance issues existed prior to each meeting and that the Complainant was aware of a majority of the District's concerns before each meeting was held. For example, the Complainant contested the District's obligation to review his files even though District staff explained to him that this was a requirement issued by the NMPED. In addition, the Complainant's request for assistance with managing his files suggests that he was aware that he needed help, which resulted in the discovery of alleged deficiencies by the staff member assigned to assist him. Therefore, we determined that the District's stated reason for meeting with the Complainant to discuss his job performance was not a pretext for illegal discrimination. Accordingly, with respect to the meetings to address the Complainant's job performance, we find that the District did not retaliate against the Complainant as alleged.

⁴ The November 30, 2009 and February 19, 2010 meetings were attended by the Complainant, the District's Human Resources Staffing Specialist for Special Education (Staffing Specialist), the Complainant's Union Representative, and the Complainant's Supervisor. The March 30, 2010 meeting was attended by the Complainant, the District's Coordinator for Special Services, a SLP Liaison, an Employee Assistance Program Mediator, the District's Staffing Specialist, the Complainant's Union Representative, and the Complainant's Supervisor.

(5) Employee Improvement Plan

The Complainant alleged that during the 2009-2010 school year, the District threatened to place him on an EIP.

As noted previously in this letter, the District met with the Complainant three times during the 2009-2010 school year concerning his job performance. Regarding the first meeting with the Complainant held on November 30, 2009, the District was unable to provide specific details but confirmed that this meeting was held to discuss the Complainant's job performance. During the second meeting, held February 19, 2010, the District's Staffing Specialist and the Complainant's supervisor recommended placing the Complainant on an EIP. Prior to the third meeting, the Complainant's supervisor provided him a copy of an EIP with his name on it. We determined that the District subjected the Complainant to an adverse action by informing him during a meeting concerning his job performance that an EIP was recommended, and by subsequently providing him a copy of the EIP. Based on the proximity in time between the protected activities and the adverse action, a causal connection between the two can be inferred.

The District contends that the Complainant's job performance warranted the EIP. The District informed OCR that during the time in question the Complainant was a Schedule A employee and was, therefore, subject to the same procedures as teachers. District procedures entitled "Steps to take for unsatisfactory job performance (Teacher, Counselors, Librarians – all schedule A employees)" are as follows:

- Step One – Meet with employee to discuss job performance issues. Prior to meeting with employee, the supervisor consults with the applicable staffing specialist. If improvement is not achieved, move to step two.
- Step Two – This step is entitled "Written Plan." An EIP is developed and presented to the employee. The applicable staffing specialist assists in developing the EIP. The EIP is implemented. If improvement is not achieved, move to step three.
- Step Three – This step is entitled "Intensive Evaluation." The District's procedures specify that this step is applied only when step two is completed in full.

The District also provided procedures entitled "Evaluation System within 3-Tier Licensure." The District's procedures state that, "If during the year, a teacher is not meeting a competency, then the principal must place the teacher on an improvement plan at that point. The principal must also contact Human Resources so that the APS process for an improvement plan is followed."

We found that the District completed the required steps to recommend an EIP for the Complainant at the conclusion of the second meeting. Therefore, we determined that the District's rationale for recommending an EIP to be legitimate and non-retaliatory.

We next considered whether the District's rationale for recommending an EIP was nevertheless a pretext for retaliation. We note that Step Two was never completed because the EIP was not implemented. The District asserted to us that it did not place the Complainant on an EIP because he refused to meet with school staff "to discuss the unsatisfactory performance, recommendations for assistance to the teacher and timelines for the necessary changes in performance," as required by the Negotiated Agreement between the District and Albuquerque Teachers Federation, which was in force during the time in question. The District contends that this is a necessary step before placing an employee on an EIP.

The District's assertion is not in accord with the facts. The Complainant met with school staff at least three times to discuss his job performance, including one occasion when implementing the EIP was appropriate under District procedures. In an email sent to the Complainant's supervisor and the Executive Director for Human Resources following the second meeting, the District's Staffing Specialist memorialized her stated belief that placing the Complainant on an EIP was the next step in the District's progressive discipline process. In addition, the Staffing Specialist stated in her email that, "If [the Complainant] does file [a discrimination complaint] against [the Principal] and myself like he mentioned [during the second meeting] who supports us? I just want to make sure that we follow what I already know is the right process." Contrary to the District's assertion that the Complainant refused to meet again after discussing an EIP at the second meeting and providing him a copy of the EIP, the District held a third meeting with the Complainant on March 30, 2010, to discuss his job performance, but did not implement the EIP as would have been appropriate under Step Two of the District's procedures.

In addition, the Complainant's employee Evaluation Report for the 2009-2010 school year dated May 25, 2010, did not reflect any of the concerns identified in the EIP and, in fact, rated the Complainant as meeting acceptable performance standards for his job. Furthermore, the Complainant's supervisor recommended the Complainant for re-employment. Finally, our investigation also revealed email communications dated between July 2009 and April 2010 from District staff in Human Resources and Equal Opportunity Services ridiculing the Complainant⁵.

We find that the District met with the Complainant three times during the 2009-2010 school year to discuss his job performance. During the second meeting on February 19, 2010, the Staffing Specialist and the Complainant's supervisor recommended placing the Complainant on an EIP, and subsequently provided the Complainant a copy of an EIP with his name on it. The Staffing Specialist's email indicates that she anticipated the Complainant might file a discrimination complaint against her and the Principal (Complainant's supervisor); therefore, she recommended placing the Complainant on an EIP. Based on the District's procedures for addressing unsatisfactory performance, the next step was to implement the Complainant's EIP, which did not occur. However, through our investigation we also learned that it is undisputed that, throughout the 2009-2010 school year, the Complainant's job performance was not sufficient to meet the requirements of his position. Based on this information, we find insufficient evidence to conclude that the District intended to retaliate against the Complainant by informing him that it was prepared to place him on an EIP. Accordingly, we find that the District did not retaliate

⁵ For example, staff stated that, "no good deed goes unpunished," and "he is off his rocker."

against the Complainant as alleged. Nevertheless, the District was negligent in the application of its policy related to EIPs, which contributed to the Complainant's belief that the District was retaliating against him for participating in a protected activity.

(6) Encouraging the Complainant to Resign

The Complainant alleged that on August 26, 2009, he received an email from the District's Staffing Specialist encouraging him to resign. We confirmed that the Staffing Specialist sent this email to the Complainant and that it advised him, among other things, of his option to resign. We determined that, by sending this message, the District subjected the Complainant to an adverse action. Based on the proximity in time between the protected activities and the adverse action, a causal connection between the two can be inferred.

The District contends that the Staffing Specialist simply reiterated to the Complainant in the email the options that were discussed during the August 10, 2009 accommodation meeting and that preference was not given to any one option. The email addressed the Complainant's employment accommodation request related to modifying his work schedule and identified three options for the Complainant. Specifically, the email advised the Complainant that, "If you need additional time to get to work then you can reduce your contract and a site with less than full time FTE will be identified. If that site is not acceptable to you then you can pursue a leave of absence or resign from APS." Documentation from the District dated August 17, 2010, indicates that the Staffing Specialist advised seven other District employees of their option to resign in relation to their inquiries about employment accommodations.

Under Title I of the ADA⁶, employers are required to make reasonable accommodation for qualified applicants and employees with disabilities who request such accommodation. *Reasonable accommodation* means modifications or adjustments to a job application process, the work environment, the way in which a job is customarily performed, or employment policies that enable a qualified individual with a disability to be considered for the position, perform the essential functions of the job, or enjoy benefits and privileges of employment equal to those available to a similarly-situated employee without a disability. 29 C.F.R. § 1630.2(o)(1). Examples of reasonable accommodation include adjusting work schedules, restructuring the job, reassigning the employee, acquisition or modification of equipment and devices, providing qualified readers or interpreters, or modifying the work site. 29 C.F.R. § 1630.2(o)(2). An employer need not provide the specific accommodation requested by an employee if an alternative means of accommodation that is less costly, but equally effective, is available. It is mandatory, however, to provide an accommodation that gives a qualified individual with a disability an opportunity to attain the same level of job performance as co-workers with similar skills and abilities.

⁶ Subpart C of the regulation implementing Title II addresses employment discrimination, but refers to Title I and Section 504 for specific requirements concerning employment. However, the Rehabilitation Act Amendments of 1992 amended Section 504 to incorporate Title I employment standards. As a result, all school districts are subject to Title I standards.

The August 26, 2009 email presented the Complainant information in a direct manner, including the option to resign. In addition, information provided by the District indicates that this is not an isolated incident but instead is a common practice for the Staffing Specialist when an employee under her responsibility requests an accommodation for a disability. Based on our analysis, we conclude that the offer of resignation is not reasonable as an option for an employee to attain the same level of job performance as co-workers with similar skills and abilities. Moreover, we determined that the Staffing Specialist's practice of advising employees who request an accommodation for a disability that they may resign if they disagree with the accommodation options presented by the District likely has a chilling effect on the interactive process. Therefore, based on a preponderance of the evidence, we find that the District's reason for presenting the Complainant the option to resign is not legitimate and is, thus, retaliatory. Further, we find that by introducing the option to resign into the discussion of identifying a reasonable accommodation, the District attempted to intimidate the Complainant for the purpose of interfering with the Complainant's rights secured by Section 504 and Title II.

(7) Not Communicating with Complainant

The Complainant alleged that District staff did not communicate with him after he dropped his employment discrimination complaint against the District's Staffing Specialist. On September 3, 2009, the Complainant filed an internal complaint of discrimination against the Staffing Specialist alleging that she retaliated against him for participating in a protected activity. The Complainant withdrew this internal complaint on November 4, 2009. Contrary to the Complainant's assertion, we confirmed that the Complainant and District staff communicated several times throughout the remainder of the school year after he withdrew his internal complaint. Therefore, with respect to the alleged non-communication with the Complainant, we find that the District did not subject the Complainant to an adverse action as alleged.

Conclusion

This concludes our investigation of this complaint. We regret and apologize for the protracted delay in concluding the investigation. On October 13, 2014, the District accepted and signed the enclosed Resolution Agreement. We will closely monitor the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively and that the District's policies and practices are administered in a nondiscriminatory manner. We will keep the Complainant apprised of monitoring activities related to this case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

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.

The Complainant may have the right to file a private suit in federal court regardless of whether OCR finds a violation.

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.

Thank you for the courtesy and cooperation your staff extended to OCR during the investigation of this case. If you have any questions regarding this complaint, please contact the investigator assigned to this case, xxxxxx, at (303) 844-xxx.

Sincerely,

/s/

Thomas E. Ciapusci
Supervisory Team Leader

Attachment: Resolution Agreement

cc: Honorable Hanna Skandera
Secretary of Education