



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 7, 2014

Dr. H.T. Sánchez
Tucson Unified School District
1010 E. Tenth St.
Tucson, AZ 85719

Re: Tucson Unified School District
Case Number: 08-13-1238

Dear Dr. Sánchez:

We are notifying you of our decision in this case. The Complainant alleged Tucson Unified School District (District) discriminated on the basis of disability and retaliated. Specifically, the Complainant alleged the District failed to implement her daughter's (Student) Section 504 plan by not reading directions or providing frequent breaks during Arizona's Instrument to Measure Standards (AIMS) testing. The Complainant also alleged that the District retaliated by placing restrictions on her access and communication with school staff and by intimidating the Student at a meeting, in class, and on the playground.

We investigated this complaint pursuant to 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 and activities that receive Federal financial assistance from the Department; 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 by public entities. Individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134.

As a recipient of Federal financial assistance and a public entity, the District is subject to these laws and regulations.

During our investigation the District indicated its desire to voluntarily enter into an agreement to resolve the allegation concerning the implementation of the Student's Section 504 plan during AIMS testing as it applies to reading directions and mathematics test items; and to ensure compliance with Section 504 and Title II. Pursuant to Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint, OCR believes that doing so is appropriate, and the remedies align with the allegations.

On May 7, 2014, we received the District's signed Resolution Agreement (enclosed). When the Agreement is fully implemented, the allegations will have been resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. We will closely monitor the 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 promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, which may include enforcement actions, as described in the Agreement.

Concerning the remaining allegations, OCR completed a full investigation of these issues and determined there is insufficient evidence to establish that the District did not allow the Student to take breaks during AIMS testing, or that the District retaliated by restricting the Complainant's access and intimidating the Student. The reasons for our conclusions are set forth in this letter.

In reaching a compliance determination regarding these issues, we reviewed documentation submitted by the Complainant and the District. We also interviewed the Complainant and relevant District staff members.

Background

The student, a XXXX grader in the District during the 2012-2013 school year, began receiving accommodations pursuant to a XXXX Section 504 Accommodations Plan (Plan) under the classification of XXXX.

The Student's Plan provides for accommodations in academics, during formal State/District assessments, and for informal classroom tests and assignments for mathematics and spelling. During State/District assessments, the Plan provides that the Student can have reading test directions repeated, small group testing for mathematics, frequent breaks, have a familiar test administrator, the opportunity to read reading passages (directions) "out loud" to self, and to have the mathematics test items or science test items read to her.

From April 16-18, 2013, the Student was administered the AIMS, a State standards based assessment that measures student proficiency of the Arizona Academic Content Standards in Writing, Reading, Mathematics, and Science. On April 18, 2013, the Complainant sent the Student to testing with a recording device, because the Complainant believed the XXXX, who was the test administrator and provided the Student's accommodations during one-to-one testing on the first two days, may not have provided the accommodations required under the Student's Plan. The Student recorded the reading and mathematics portions of the exam.

The next day, April 19, 2013, the Complainant raised her concerns with the District in the morning. A meeting was held that afternoon to address her concerns.

Alleged failure to implement the 504 plan

The Complainant alleged that during AIMS testing from April 16-18, the XXXX did not provide the Student with frequent breaks, as required by the Student's Plan.

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of a Section 504 Plan is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

As discussed, the Student's Plan has a provision for "frequent breaks" during State/District assessments. The Student's Plan does not distinguish whether the breaks must be requested by the Student or whether a test administrator must encourage or even require it of the Student. We reviewed the State's guideline for the administration of the AIMS test. The guideline provides, "Students with IEPs and students with 504 plans may use, as appropriate, any of the universal test administration conditions listed..." Included in the list at #10 is the accommodation for "more breaks and/or several shorter sessions." Similar to the Student's Plan, the State guidance does not distinguish how breaks are to be provided when a student is on an IEP or Section 504 plan.

We interviewed the XXXX and she stated the student was informed on the first day of testing that should she need a break, she could take one at any time. The XXXX said that she monitored the Student to ensure that if she exhibited signs of fatigue or other indications of needing a break, she would have suggested one. The XXXX added that administrators are trained that if a student is working diligently and does not show signs of needing a break due to fatigue or indicating that they need one, the administrator should allow students to continue uninterrupted, which she did. According to the XXXX, the Student never asked for a break but if she had she would not have been denied. The XXXX stated that on the third day of testing the student was allowed to take a break without hesitation between the two testing portions, reading and mathematics.

We reviewed the audio recording of the testing submitted by the Complainant and confirmed the Student took a break between portions and did so without any resistance from the XXXX.

We gave the Complainant an opportunity to rebut the information provided by the XXXX. Without providing supporting evidence, the Complainant argued that the Student did not know she could take a break. However, the Complainant acknowledged the Student took a break on day three between portions, as the recording demonstrates.

Based on the evidence, we concluded there is insufficient evidence to establish the District failed to implement the Student's Plan during AIMS testing by not permitting the Student to take breaks.

Alleged retaliation

The Complainant alleged the District retaliated against her for asserting the Student's Section 504 rights by placing restrictions on the Complainant's access and communication with school staff and by intimidating the Student on three separate occasions. Individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134.

In analyzing a retaliation claim, we determine whether: the individual engaged in a protected activity 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, whether the recipient has a legitimate, non-retaliatory, non-pretextual reason for its action.

It is undisputed by the District that the Complainant engaged in protected activity when she asserted the Student's Section 504 rights by complaining about the AIMS testing issue and the provision of accommodations.

We next examined whether the actions by the District subjected the Student or the Complainant to an adverse action.

Retaliation - restriction on access

The Complainant alleged the District retaliated by restricting her access and communication with School staff. As evidence of the restriction, the Complainant submitted copies of an April 30, 2013 email, a May 1, 2013 letter, and a May 8, 2013 email.

We reviewed the emails and the letter. We note that the May 1, 2013 letter clearly established a communication protocol. In particular, it states that it is intended to "clarify expectations regarding communications." It follows with instructions that the Principal be present at all conferences and/or meetings between the Complainant and the school's staff and that if the Complainant desires to meet with school staff that these meetings be scheduled with the Principal. We note that the letter does not state any restriction to the Complainant's access to the school's campus, but it warned the Complainant that if she does not comply with the communication protocol it may result in limited access to the campus. With respect to the two emails from the District's XXXX dated April 30 and May 8, 2013, we note that the language is substantially similar, without the warning for non-compliance.

While it is unclear whether requiring that the Principal be present at meetings with staff members clearly constitutes an adverse action, for the purposes of our analysis we will assume that this action is sufficiently adverse.

We next considered whether the District had a legitimate, non-retaliatory reason for its action. The District stated the protocol was in response to staff member reports that the Complainant was interfering with their ability to perform their work and disrupting the teaching process because the Complainant often misconstrued or misinterpreted their conversations and would then seemingly target them based on the misinterpretations. The District asserted it followed District policy when handling staff member's concerns relating to the Complainant. The District provided a copy of District policy KFA - Public Conduct on School Property. The policy states in part that members of the public are prohibited from engaging in any conduct intended to obstruct, disrupt, or interfere with teaching. The District contends it did not limit the Complainant's access to property and personnel, which is allowed under District policy. Rather, the District established a communication protocol to ensure staff members would not have to meet alone with the Complainant. We concluded that the District applied its policy in this instance when it established a communication protocol with the intent of having the Principal act as a witness during meetings with the Complainant. Therefore, we found the District's action was legitimate and non-retaliatory.

We then analyzed whether the action of the District was pretextual in nature. In doing this, we compared the Complainant's treatment to other similarly situated parents. In this instance, a similarly situated parent is a parent who, because of similar conduct, had restrictions placed on them. The District provided copies of numerous letters to parents restricting their communications with staff for obstructing or disrupting the educational process. Based on this information, we found that the reason proffered by the District for establishing the communication protocol was non-pretextual.

We provided the Complainant with an opportunity to rebut the District's statement. In rebuttal, the Complainant explained that the protocol does establish greater restrictions than the District was willing to admit. She provided an example of when she needed to pick up the Student from the school after ATI testing and the Principal was not present. She stated that she had to get permission from the Principal to pick up the Student and that she understood the protocol meant that she was not able to come on campus to pick up the Student. However, we note that the protocol does not require her to obtain the Principal's permission to pick up the Student or to require the Principal to be present for all communication with school staff. Additionally, we note the XXXX emailed the Complainant to inform her that someone from the School would contact her to inform her when the Student was ready to be picked up. The Complainant confirmed that someone from the school contacted her, and she was able to pick up the Student without the Principal being present. Finally, we also note that the District has imposed more serious restrictions upon other parents for their similar conduct.

We conclude based on the evidence that the reason proffered by the District was legitimate, non-retaliatory, and not pretext for retaliation.

Alleged Intimidation – Incident #1

The Complainant alleged the District retaliated on April 19, 2013 when the XXXX intimidated the Student during the meeting. The Complainant asserted that the XXXX was confrontational and inferred the Student was lying. As an example of questioning she believed to be intimidating, the Complainant stated the XXXX asked the Student questions such as, “Don’t you remember, right?”

The District stated that it invited the Complainant to a meeting to discuss the Complainant’s concerns she had raised earlier in the day regarding accommodations she believed the District failed to implement during AIMS testing. The District stated that the XXXX asked the Student only on a couple of occasions, such as, “Do you remember when I said…” or “Don’t you remember when I said…?” The District denied that the tone of any participant of the meeting was confrontational or intimidating.

The Complainant additionally stated that the fact that the Principal brought the Student to the meeting is evidence of the District’s intention of intimidating the Student. However, the District stated that the Student’s attendance at the meeting was the decision of the Complainant and that the Student was in and out of the room during the meeting.

We gave the Complainant an opportunity to provide additional information or evidence that would support her claims of intimidation. The Complainant did not have any additional information.

Based on the evidence provided, we could not establish that the XXXX’s conduct and communication with the Student was intimidating or that the District brought the Student to the meeting to intimidate her. Additionally, we determined that, although the Student may have felt uncomfortable at the meeting, there is insufficient evidence to find the District’s actions were sufficiently adverse to have a chilling effect on the assertion of protected activities. Consequently, we find that there is insufficient evidence to support the Complainant’s allegation that the District retaliated as alleged.

Alleged Intimidation – Incident #2

The Complainant next alleged the XXXX retaliated by embarrassing and intimidating the Student on XXXX during a multi-class lesson led by the XXXX. According to the Complainant, the class was already watching a video in the classroom when the Student arrived and the XXXX pointed to her from a distance and stated, “There’s the student that’s back…” The Complainant asserted the actions by the XXXX were meant to embarrass and intimidate the Student. The Complainant complained of the incident, and the District investigated the matter.

Our complaint procedures provide that we will close a complaint allegation if a recipient has conducted its own investigation of the same allegation, and the resolution meets OCR regulatory

standards; *i.e.*, all allegations were investigated, appropriate legal standards were applied, and any remedies secured meet OCR’s standards.

We reviewed the records of the District’s investigation. We note that, as part of the District’s investigation, interviews were conducted with eleven students, the teacher whose classroom the lesson was held in, the teacher who sent the Student to the room, and the XXXX. The XXXX admitted she welcomed the Student back and told her she was missed but said that it was whispered to the Student as she escorted her to a spot on the rug. The teacher whose class was used reported he was in close proximity to the XXXX at all times and didn’t hear the XXXX say anything to the Student. Ten of the eleven students reported they didn’t hear anything. The one student who heard the XXXX corroborated the XXXX’s statement that she welcomed the Student back nicely, but the student also stated that she (the student who was interviewed) might have been embarrassed if she was singled out as well. The District found that the evidence does not support a finding that the XXXX engaged in intimidating or retaliatory behavior toward the Student in this instance.

We provided the Complainant with an opportunity to rebut the information. The Complainant stated that irrespective of whether the XXXX was nice, the Student should not have been in the classroom with the XXXX pursuant to an agreement¹ the Complainant had with the District that allowed the Student to sit and read in the office during any lesson by the XXXX. We note, however, that the existence of this agreement is not evidence that the XXXX intimidated the Student as alleged.

We found that this same allegation was investigated and its resolution of the matter meets OCR regulatory standards. Also, we found no further evidence that the allegation remains unresolved. Therefore, we determined this allegation was appropriately resolved and accordingly, we are closing our investigation of this complaint allegation effective the date of this letter.

Alleged Intimidation: Incident #3

Next, the Complainant alleged the District retaliated on XXXX, when the XXXX walked toward the Student on the playground while staring at her, in an effort to intimidate the Student. The Complainant stated that she complained of this incident, and the District confirmed that it also conducted an investigation of this allegation.

As part of the District’s investigation, the District interviewed the Student, the two other students the Student identified she was with at the time of the incident, the XXXX, and another District staff person who was on the playground at the time of the incident. During the investigation, the

¹ The District confirmed an agreement was reached with the Complainant to allow the Student to sit in the office during lessons by the XXXX. However, the District stated that while escorting the Student to the office, the Student expressed a desire to her teacher to view the movie with the other students. When the teacher explained to the Student that “she could not because there was an agreement with her mom,” the Student responded “no, my mom said it was up to me.” When informed of this, the Complainant stated to OCR that the Student also told her she wanted to watch the movie, despite knowing the XXXX was in the room.

XXXX confirmed she was on the playground on that day but denied that she stared at the Student. Rather, she stated she did not see the Student and was not aware of her presence. She explained she was on the playground, in addition to other parts of the campus, because she was looking for a particular student who had asked to meet with her. The XXXX's detailed description of the steps she took to locate the student and a staff member interviewed by the Principal support the XXXX's statements. Further, the Principal interviewed two students present with the Student when the incident was alleged to have occurred and both students stated the XXXX never stared at the Student. Additionally, their statements support the XXXX's story that she was looking for another student and the steps she took to locate the student. Consequently, the District determined that the evidence does not support the Complainant's allegation that the XXXX retaliated by intimidating the Student as alleged.

We found that this same allegation was investigated and its resolution meets OCR regulatory standards. Also, we found no further evidence that the allegation remains unresolved. Therefore, we determined this allegation was appropriately resolved and accordingly, we are closing our investigation of this complaint allegation effective the date of this letter.

This concludes our investigation of this complaint. We are closing our investigation of this complaint effective the date of this letter. We will continue to monitor the Agreement that was reached regarding reading directions and mathematics test items. This letter addresses only the issues discussed in this complaint and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504 or Title II, or other Federal civil rights laws in any other regard. The Complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by Federal law.

Under the Freedom of Information Act, we may release this document and related correspondence and records upon request. If we receive a request, we will protect personal information to the extent provided by law.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

If you have any questions, please contact XXXX, Equal Opportunity Specialist at XXXX or by email at XXXX. You can also reach me at XXXX or by email at XXXX.

Sincerely,

/s/

Thomas M. Rock
Supervising General Attorney

Enclosure

cc: Honorable John Huppenthal
Superintendent of Public Instruction

XXXX