



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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January 12, 2016

Mr. Joe Royer
Superintendent
Widefield School District 3
1820 Main Street
Colorado Springs, Colorado 80911

Re: Widefield School District 3
Case Number: 08-14-1176

Dear Superintendent Royer:

On May 14, 2014, the U.S. Department of Education, Office for Civil Rights (OCR), received a complaint of discrimination filed against Widefield School District (District). The Complainants alleged that the District discriminated against their son (Student) by not implementing his Individualized Education Program (IEP). The Complainants also alleged that the District sent an armed individual to their home and banned them from the Student's school in retaliation for their advocacy on behalf of the Student.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 Code of Federal Regulations (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 (Title II) 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.

During our investigation, we interviewed one of the Complainants¹, District administrators, and staff. Additionally, we reviewed documents submitted by the Complainants and the District.

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

¹ One Complainant in this case took the lead in our investigation. The Complainant provided thorough information to us informed by and often in the presence of the other Complainant, her spouse.

evidence supports or is insufficient to support the conclusion. Based on a preponderance of the evidence, we found that the District discriminated against the Student by not implementing the Student's IEP. However, we found insufficient evidence that the District retaliated against the Complainants as alleged. The District has entered into the enclosed Resolution Agreement to address the compliance concerns.

Alleged failure to implement

The Complainants alleged that during the 2013-2014 school year the District failed to implement the Student's IEP by exposing him to serious food allergens.

The District stated that the Student's food allergies are identified in his IEP as part of his medical record, but "... are not an area of disability qualification." The District further stated that the Student does not have a separate Section 504 plan to address his food allergies; rather, his food allergies are handled through his Health Care Plan (Plan). Furthermore, the District stated that at the beginning of the 2013-2014 school year, the Student's Plan and IEP were given to his teachers.

The Section 504 regulation, at 34 C.F.R. § 104.3(j) defines a person with a disability as "any person who ... has a physical or mental impairment which substantially limits one or more major life activities." The Title II regulation includes an equivalent definition at 28 C.F.R. § 35.104.

The Section 504 regulation, 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 an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) 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 regulation.

During our investigation, we found that the Student had an IEP prior to and during his attendance at the relevant school. Specifically, the District provided OCR three IEPs for the Student. The IEPs are dated March 20, 2013, April 5, 2013, and February 26, 2014. Each IEP contained information about the Student's food allergies. The IEP dated March 20, 2013, contained an evaluation report citing the medication prescribed to the Student, and the Student's allergy to nuts and red dyes. The IEP dated April 5, 2013, states, under the health portion, that the Student has life threatening allergies to nuts and red dyes. This IEP also states that a health care plan is available in the office, and cites the medication prescribed to the Student for his allergies. The IEP dated February 26, 2014, states, under the health portion, that the Student has life

threatening allergies to nuts and red dye, and that a health care plan² is available in the health office. This IEP also cites the medications prescribed to the Student for his allergies. No further information about necessary services for the Student because of his life threatening allergies is contained in the three IEPs provided by the District.

The District acknowledged that on November 21, 2013, the Student had an allergic reaction to nuts while working on the teacher's computer. Specifically, the Student left the classroom for a period of time to take an assessment in the Counseling Center. During the time the Student was gone his teacher ate trail mix containing nuts while she typed on her computer. Before the Student returned, the teacher stopped eating the trail mix, and left the container on her desk. When the Student returned to the classroom, he requested to work at the teacher's computer, which was granted. Shortly after he started working at the teacher's computer, he asked to see the nurse because he thought he was having an allergic reaction to the trail mix that was sitting on the teacher's desk. Following the incident, the Complainant expressed concern that the teacher was eating nuts in the classroom. The District asserted that the Student's allergy list was only for ingestion allergies, not for airborne allergies.

After the November 21, 2013, allergic reaction, the Complainant provided the District a revised Plan dated November 2013 which the District adopted. The revised Plan identified the same food allergies as the February 2013 Plan with the addition of peanuts and the statement that the Student not ingest or be exposed to his food allergens.

On April 30, 2014, the Student's teacher, the same teacher who was involved in the November 2013 incident, handed out Dum Dum suckers to her students. The teacher reminded the Student not to take one that is red due to his red dye allergy. Shortly thereafter, the Student informed the teacher that he was having an allergic reaction to airborne red dye. The teacher sent the Student to the office so the school nurse could help him.

Based on our investigation, we found that the Student had active IEPs when the November 21, 2013, and April 30, 2014, incidents occurred. The IEPs stated, in the health portion, that the Student has life threatening allergies, cited the Student's allergens, identified his medications, and stated that his health care plan is in the health office. However, the IEPs did not identify related aids and services to reduce the Student's exposure to his allergens. In addition, the District acknowledged that the Student's allergies are merely identified in his IEPs, and that the Student does not have a Section 504 plan for addressing his allergies. Furthermore, our investigation showed that prior to each incident, the relevant teacher was aware of the Student's impairment. Nevertheless, during the first incident, the teacher consumed peanut products while working on her computer, and shortly thereafter, the Student came in contact with the teacher's

² The Student's first Plan, dated February 2013, specifies ingestion as the point of contact to avoid for his allergens. The treatment identified in the first Plan is based on the severity of his symptoms, and includes observation, the administration of Benadryl, an EpiPen injection, and calling 911 followed progressively. The Student's second Plan, dated November 2013, contains all of the same criteria and treatment services from the February 2013 plan but also includes the addition of peanuts and exposure, in addition to ingestion, as another point of contact to avoid for his allergens.

computer allegedly causing an allergic reaction. The Plan that was active during this incident indicated that an allergic reaction would occur if one of the Student's allergens was ingested. The next incident allegedly occurred while the teacher handed out candy to her students. During this incident, the Plan that was in effect included ingestion or exposure to the Student's food allergens.

The description of the Student's life-threatening allergy identifies a significant impairment of a major life activity, specifically, breathing. Contrary to the District's assertion that the Student's allergies "... are not an area of disability qualification," we find that the Student is a person with a disability with respect to the identified allergies. In accordance with 34 C.F.R. § 104.33, the District must provide regular or special education and related aids and services that are designed to meet the Student's individualized education needs consequent to this impairment.

We find that the IEP includes the health plan by reference. We further find that the IEP and health plan were inadequate to provide a FAPE for the Student in that they failed to address any related aids and services to be provided in order to reduce the Student's exposure to the identified allergens. Identifying a risk of exposure yet not addressing what services the District could provide to reasonably eliminate the risk of exposure does not address the duty of the District to provide a FAPE for the Student in alignment with 34 C.F.R. § 104.33.

There is sufficient evidence to conclude that the District was aware that the Student had a life-threatening set of allergies that substantially impaired the major life activity of breathing. There is further sufficient evidence that the District failed to provide regular or special education and related aids and services that are designed to meet the Student's individualized education needs consequent to this impairment. Accordingly, we conclude that the District discriminated against the Student on the basis of disability by not providing him a FAPE, in violation of 34 C.F.R. §104.33.

Retaliation Allegation

The Complainants alleged that the District sent an armed individual to their home and banned them from the Student's school in retaliation for their advocacy on behalf of the Student.

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-discriminatory reason for its action that is not a pretext for retaliation.

Analysis

Protected Activity and Recipient's Knowledge

First, we examined whether the Complainants engaged in an activity protected by Section 504 and Title II and, if so, whether the District had knowledge of the Complainants' protected activity. We found that the Complainants advocated for the Student's special education and the development of the Plan during the Student's enrollment at the District and, specifically, at the relevant school. During the Student's enrollment at the relevant school, the Complainants dealt directly with staff knowledgeable about the Student. The Complainants' advocacy occurred before and during October 2013 to April 2014. Thus, the Complainants engaged in protected activities of which the District had knowledge.

Adverse Action and Causal Connection

OCR analyzed whether the District subjected the Complainants to adverse actions and if so, whether a causal connection exists.

The District acknowledged that it restricted the Complainants' access to school property, and that the Complainants were informed of this restriction via a letter delivered to them by the District's security officer who was armed at the time. The District acknowledged that the letter was delivered to the Complainants at their home subsequent to the Complainants' confrontation with school staff on April 30, 2014. The confrontation occurred shortly after the Student's second allergic reaction, which was exposure to red dye. The Complainants' documentation and an interview with one of the Complainants confirmed that both Complainants yelled obscenities, were being confrontational, and refused to deescalate the situation.

The letter, dated May 1, 2014, informed the Complainants that all future contact with Watson Junior High School (School) must be scheduled with the main office via telephone at which time an appointment may be scheduled pending administrative approval. The letter does not state that the Complainants are "banned" from the Student's School, as alleged. However, the letter stated that the Complainants must first schedule an appointment through the main office and receive administrative approval before visiting the Student's School. Thus, the letter did place restrictions on the Complainants' attendance at the School.

Comment [JAR1]: If possible, please provide the date of the letter, or when it was actually provided to the complainants by the security officer, if it isn't dated. We later discuss the other two letters we reviewed and give their specific dates and the date of the letter to the complainants will also help clarify how close in proximity it was delivered to April 30. Done EE

We find that the District's armed security officer made several attempts to hand deliver the letter to the Complainants at their home over several days and ultimately was successful. We also find that these attempts were witnessed by other individuals. Accordingly, we determined that the District subjected the Complainants to adverse actions by restricting their access to school property and sending an armed security officer to their home to hand deliver the letter to them. In addition, based on the proximity in time between the incident on April 30, 2014, the District's restricting the Complainants' access to school property via the letter dated May 1, 2014, and the delivery of that letter soon thereafter a causal connection between the protected activity and the adverse actions can be inferred.

Legitimate, Non-Discriminatory Reasons

OCR further considered whether the District's proffered reasons for its actions were legitimate and non-discriminatory.

The District stated that the Complainants were restricted from school property because of aggressive behavior and foul language directed at school staff on April 30, 2014, in violation of District Policy KFA entitled Public Conduct on School Property (Policy). The District further asserted that this kind of letter is used when there is a violation of this Policy. The Policy states that any person may be excluded from District property who has engaged in conduct prohibited by the Policy. The Policy specifically identifies 11 instances of prohibited conduct, two³ of which applied to the Complainants' conduct described by the District. The evidence confirmed that the Complainants exhibited aggressive behavior and used vulgar language directed at school staff on April 30, 2014, while on the telephone with school staff, and while on school property. Accordingly, we found that the District proffered a legitimate, non-discriminatory reason for the issuance of the letter.

Pretext

Finally, OCR considered whether the proffered reasons for the adverse actions were nonetheless pretext for retaliation against the Complainants.

In their complaint, the Complainants contend that by having the letter delivered by an armed security officer, the District chose the most aggressive means available to inform them of the restriction. They argued that the District could have opted for less threatening and intimidating means of communicating such as registered mail, certified mail, email, or a process server.

OCR questioned the District as to why it sent an armed security officer to hand deliver the letter to the Complainants. The District stated that it is standard practice for the District's security officer to hand deliver such a letter to persons exhibiting behavior in violation of the Policy. The District indicated that it does not have a policy related to the delivery of such letters; however, interviews with the Principal and security personnel demonstrated that the issuance of such letters is common practice when visitors to District property exhibit behavior that is threatening or aggressive. In support of their statements, the District provided two letters similar to the letter issued to the Complainants. The letters were issued by different principals at different schools within the District, and are dated January 25, 2008, and February 27, 2014. Our interviews further confirmed that such letters were delivered in the same manner and by the same person as the letter delivered to the Complainants. We find that as a matter of practice, the District issues letters like the letter to the Complainants when visitors exhibit threatening or aggressive behavior. We also find that the District's security officer delivers these types of letters when warranted. The security officer confirmed that he has delivered all three letters the District has

³ The two instances that apply to the Complainants' conduct include: Any conduct that obstructs, disrupts, or interferes with or threatens to obstruct, disrupt, or interfere with District operations or any activity sponsored or approved by the District, and profanity or verbally abusive language.

had to issue in similar circumstances. We sought to determine if other individuals acted in violation of the Policy but did not receive such a letter via hand-delivery by an armed security officer. The Complainants were unable to identify any such individuals and we could not find any similarly situated individual who was treated differently in our review of the evidence.

Accordingly, we found insufficient evidence to conclude that the District's proffered reason for the adverse actions were pretext for retaliation. Thus, we found insufficient evidence that the District retaliated against the Complainants as alleged.

Conclusion

This concludes our investigation of this complaint. On December 28, 2015, the District accepted and signed the enclosed Resolution Agreement. We will monitor the implementation of the Resolution Agreement until all provisions have been satisfied. We will keep the Complainants apprised of monitoring activities related to this case. We wish to underscore that, other than the specific timeframes and requirements to report to OCR, the provisions within Item 1 of the Resolution Agreement address the obligation of the District under Section 504 to seek consent for an evaluation and to conduct an evaluation upon receipt of consent at any time that the Student may re-enroll in the District.

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.

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.

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

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Thank you for the 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, XXX, at (303) 844-XXXX.

Sincerely,

/s/

Thomas E. Ciapusci
Supervisory Team Leader

Attachment: Resolution Agreement

cc: Honorable Elliott Asp, Ph.D., Superintendent of Public Instruction

Lisa Humberd, Executive Director of Special Education

Darryl L. Farrington
Semple, Farrington & Everall, P.C.