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May 8, 2015

Dr. Christina M. Kishimoto
Superintendent
Gilbert Public Schools
140 South Gilbert Rd.
Gilbert, Arizona 85296

Re: Gilbert Public Schools
OCR Case Numbers 08-15-1044 and 08-15-1184

Dear Dr. Mishimoto:

In a letter dated December 19, 2014, we notified Gilbert Public Schools (the District) that we were opening for investigation the above-referenced complaint filed against the District. In our notification letter, we stated that we were opening the following allegations for investigation: 1) whether the District's policy regarding the criteria for participation in junior high school sports is discriminatory on the basis of disability; and 2) whether the District discriminated by excluding the Complainants' daughter (the Student) from participating in junior high school sports on the basis of disability. During the course of our investigation, we notified you that we were also opening for investigation another complaint (OCR case number 08-15-1184) filed by the Complainants alleging: 3) the District retaliated when the Student was not allowed to serve as the girls' basketball team manager.¹ We have completed our investigation and are notifying you of our decisions.

We investigated these allegations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability by recipients of 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 by public entities. Additionally, 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 from the Department and a public entity, the District is subject to these laws and regulations.

In the investigation, we considered information provided by the Complainants, documents submitted by the District and the Complainants, and the District's response to the complaints. We also interviewed the Complainants' and District's witnesses with information relevant to the allegations. Our investigation found insufficient evidence that the District violated Section 504 or Title II with respect to the second and third allegations identified above. This letter explains our findings.

With regard to the first allegation, during the investigation, a concern arose with respect to the District's JJJ policy for Interscholastic and Extra-curricular Programs. After this concern became apparent, the District requested to voluntarily enter into an agreement to resolve it pursuant to Section 302 of our *Case Processing Manual* (CPM). We reviewed this request and determined that it justified entering into an agreement to resolve the first allegation. The District has agreed to update the policy to provide a clearer

¹ We also informed you that we were addressing the new retaliation allegation with OCR case number 08-15-1044.

explanation that an exception will be made for students with disabilities when an Individualized Education Program (IEP) team or Section 504 team makes the decision to retain a student because of a disability or when necessary to provide a free appropriate public education (FAPE) in accordance with a student's IEP or Section 504 Plan. We received the District's signed Resolution Agreement (enclosed). When the Agreement is fully implemented, the potential compliance concern we identified will have been resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. We will monitor implementation of the Agreement through periodic reports demonstrating the terms of the Agreement have been fulfilled. 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.

Allegation 1- Whether the District's policy regarding the criteria for participation in junior high school sports is discriminatory on the basis of disability

With respect to the Complainants' allegation that the District's policy regarding the criteria for participation in junior high school sports is discriminatory on the basis of disability, the District has agreed to resolve that allegation as part of the attached Resolution Agreement. Thus, no further discussion of that allegation is necessary.

Allegation 2 - Whether the District discriminated by excluding the Student from participating in junior high school sports on the basis of disability

Legal Standard

The regulations implementing Section 504 at 34 C.F.R. § 104.4(a) and Title II at 28 C.F.R. § 35.130, provide that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity. In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged individual, whether it followed its policies and procedures for taking such action and whether similarly situated non-disabled individuals were treated differently. If the alleged injured individual was treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Factual Findings

The Complainants alleged that the District discriminated by excluding the Student from participating on junior high school sports teams based on her disability. The Complainants retained their daughter in the eighth grade for the 2014-2015 school year at Desert Ridge Junior High School because of homework-related concerns. The Complainants explained that despite their daughter receiving good grades, they had concerns with the amount of time it took her to complete her homework. The District stated that although they allowed the Complainants to retain the Student, who was not identified as a student with a disability at that time, they disagreed with the decision to retain her as she earned good grades and had no indication of having an educational, social, or behavioral disability that would suggest that she needed to be held back.

At a meeting in the spring of 2014, the District provided the Complainants with a copy of the District's JJJ policy for Interscholastic and Extra-curricular Programs and informed them that if they retained the Student, she would not be eligible to participate on school sports teams because she had maximized her opportunity based on the Policy regulation, which limits the amount of time a student is eligible to participate on a sports team if they have maximized their eligibility, although there is an exception for

Special Education students who are retained based on a Section 504/IEP team decision. Because the Student was not identified as a student with a disability at the time that the Complainants made the decision to retain her in the eighth grade, the District informed the Complainants that if they retained their daughter, she would not be allowed to participate on a junior high school sports team because she had already participated in four consecutive semesters of athletics at the junior high school level. During this meeting, the Complainants requested an evaluation for a suspected disability. In August 2015, the District's psychologist conducted an assessment and determined that the Student did not have a disability.

We reviewed the District's JJJ Board Policy for Interscholastic and Extra-curricular Programs, which states that "eligibility requirements for participation on a junior high District competitive team states that once a student enrolls in seventh grade, he/she has a maximum opportunity in four consecutive semesters, with a maximum of two seasons per sport." The policy also states, "eligibility of special education students shall be determined on a case-by-case basis in relationship to the respective students' individualized educational programs." When we asked the District to clarify how exceptions are granted for students with disabilities, the principal and the District's legal counsel explained that if a Section 504/IEP team makes a team decision to retain a student based on their disability, the student is granted the exception to participate on a team sport even if they have maximized their eligibility. The principal stated that she worked on the board that revised the JJJ policy in May 2012. She asserted that the District implemented the "maximum number of seasons for eligibility" provision to ensure that all students have the opportunity to participate on a junior high school sports team. She explained that prior to the implementation of this regulation, the District found that incoming seventh and eighth graders were frequently prevented the opportunity to make a junior high school sports team because an alarming rate of eighth grade students were retained not based on a disability or for academic reasons, but rather, were retained to gain an additional year to physically grow and develop more experience prior to competing in sports at the high school level.

The Complainants confirmed that their daughter maximized her eligibility during the two prior school years. However, they believe that she should be able to participate for a third year because they retained her based on a disability. The Complainants stated the Student requested to try out for the school softball team in November 2014 and the basketball team in February 2015 but was denied despite their assertion to the District that their daughter was retained based on a disability and that she needed to participate on a team sport for her social and emotional development. The District Athletic Director asserted in an interview with OCR staff that he had multiple telephone conversations and email communications with the Complainants regarding this matter. He stated that during the summer of 2014, he provided the Complainants with clarification of the JJJ Board policy and informed them that their daughter would not be eligible to participate in extra-curricular athletics during the 2014-15 school year based on the provisions of the policy. We also reviewed an email from the District Athletic Director to the Complainants on November 7, 2014, at which time he explained to the Complainants that their daughter did not qualify for the disability exception to the policy.

District staff confirmed that toward the end of November 2014, the Complainants provided the District with the results of an independent evaluation that identified the Student as having a receptive expressive language learning disability. In December 2014, the District convened a Section 504 meeting and placed the Student on a Section 504 Plan. The District asserted that although the Student was placed on a Section 504 Plan, her disability would not have prevented her from promotion to the ninth grade and did not qualify the student for a disability exception to the JJJ Board policy.

The Complainants provided the names of two students that they alleged were retained and allowed to participate on a junior high school sports team despite maximizing the eligibility requirements. The District stated that they were unable to find one of the identified students in its system. In regard to the second student that the Complainants identified, who was not a student with a disability, the District was

able to confirm that he did play baseball during the school year he was retained. However, the District asserted that this was not a matter of an exception being made to the policy, but was an oversight because this particular student attended a different junior high school for seventh and eighth grade before transferring to Desert Ridge Junior High for his second eighth grade year. We asked the District to provide information regarding any other students, besides the Student and those identified by the Complainants, that were retained in seventh or eighth grade, had maximized their eligibility by participating on a junior high school sports team for four consecutive semesters, and requested to participate for a third year. The District identified two similarly situated students. One of the students did not have a disability and his request to participate a third year was denied. The second student was identified as a student with a disability, and this student's request was denied because the student had already participated in four consecutive semesters on a junior high school sports team, the IEP team determined that the student should be promoted, but the parents made a unilateral decision to retain the student, and the IEP team determined that an exception to the policy for an additional year of participation in athletics was not warranted or necessary for a FAPE.

Analysis and Conclusion

We analyzed whether the District's actions in denying the Student the opportunity to participate in junior high sports for a third year were discriminatory in two ways. First, we considered whether the District followed its own policies and procedures. The evidence shows that the Student was not retained based on a disability or based upon the recommendation of an IEP or Section 504 team. In fact, the Student was not identified by the District as a student with a disability at the time that the Complainants filed this complaint. Further, the eligibility determination in December 2014 was based upon the Complainants' report of issues that they saw at home related to homework. The evidence also shows that the Student's report card during the 2013-2014 school year reflected that she consistently earned As and Bs in all of her class subjects. Further, even though the Student was eventually placed on a Section 504 Plan, she was not eligible for an exception to the JJJ Board Policy for Interscholastic and Extra-curricular Programs because the Complainants unilaterally made the decision to retain their daughter despite the District staff's recommendation that she should be promoted to the ninth grade. Thus, the Student did not meet the requirements of the disability exception in the JJJ Board Policy. Based on this, we find that the District appropriately followed its own policy with respect to the Student.

The second way we viewed the District's actions was whether it treated similarly situated students without disabilities differently than it treated the Student. The evidence shows that the Student was not denied the same opportunity to participate in sports as her non-disabled peers. We determined that the District equally applied the JJJ Board Policy for Interscholastic and Extra-curricular Programs to all non-disabled students that had a year of retention and had maximized their eligibility. More specifically, three of the four students we learned about in our investigation who were retained in eighth grade were, like the Student, not permitted to participate in sports for a third year. Further, although there was one student who was allowed to participate in sports after being retained in eighth grade, we find the District's explanation -they did not realize the student had already participated for two years prior to being retained because he transferred in that year from a different junior high -to be legitimate and non-pretextual.

Therefore, we find that the Student was not treated differently than similarly situated non-disabled students who were retained.

As a result we find insufficient evidence to find that the District violated Section 504 or Title II as alleged.²

² During a rebuttal interview, the Complainants referenced OCR's January 25, 2013 Dear Colleague Letter (DCL) regarding extracurricular athletics as support for their assertion that any student that is retained should be granted the disability exception and be allowed to participate on a junior high school sports team for a third year. In accordance

Allegation 3 - Whether the District retaliated when the Student was not allowed to serve as the girls' basketball team manager

Legal Standard

When evaluating an allegation of retaliation we determine whether: (1) the complainant engaged in a protected activity of which the district was aware, (2) the district subjected the complainant to an adverse action, and (3) is there a causal connection between the protected activity and the adverse action. If these steps are established, we then determine whether the district has a legitimate, non-retaliatory reason for its action and whether the reason presented by the district is a pretext for retaliation. Retaliation is prohibited by OCR regulations 28 C.F.R. § 35.134 and 34 C.F.R. § 104.61, as it incorporates 34 C.F.R. § 100.7(e).

Protected Activity and the Recipient's Knowledge

During the course of our investigation of case number 08-15-1044, the Complainants raised the allegation that the District retaliated against the Student based on their OCR complaint when their daughter was denied the opportunity to serve as the girls' basketball team manager. To determine whether retaliation occurred, we first considered whether the Complainants engaged in a protected activity of which the District was aware. Filing a complaint with OCR constitutes a protected activity. The Complainants filed a complaint raising allegations of disability discrimination with OCR in November 2014, and we notified the District of that complaint on December 19, 2014. Based on this advocacy, we determined that the Complainants engaged in a protected activity of which the District was aware.

Adverse Action and Causal Connection

OCR next considered whether the District subjected the Complainants to an adverse action. An adverse action is an action that adversely affects 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.

The Complainants alleged that the Student was denied the opportunity to serve as the girls' basketball team manager in February 2015. The Complainants stated that after the Student was informed that she was not eligible to try out for the basketball team, she asked the basketball coach if she could serve as the team manager. The basketball coach informed the Student that he had never had a team manager and would need to talk to the school Athletic Director. The basketball coach explained to OCR that he wanted to consult with the Athletic Director because this was his second year as the basketball coach at Desert Ridge Junior High School; he has never had a team manager; and the Athletic Director has to know who is in the school building after hours. The basketball coach stated that the Athletic Director told him that it was a coach's decision whether to have a team manager. The Complainants also confirmed with OCR that the Athletic Director told them that whether coaches have team managers is an individual coach's decision. The basketball coach stated that it was not his policy to have a team manager, and he

with the January 25, 2013 DCL, Section 504 requires that students with disabilities have an *equal opportunity* for participation in nonacademic and extracurricular services and activities. A recipient that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the recipient can show that doing so would be a fundamental alteration to its program. While OCR encourages recipients to develop broad opportunities to include students with disabilities in all extracurricular athletic activities, Section 504 does not require the District to allow students that are unilaterally retained based on a parents decision, and not based on an IEP or Section 504 team decision, to participate on a school sports team if they have maximized their eligibility as the Complainants suggest.

decided he did not want to start the practice of having one for the team. Thus, he rejected the Student's request to be the team manager.³ We find that the basketball coach's decision to deny the Student the opportunity to serve as the basketball team manager could be construed as an adverse action.

Having found an adverse action against the Student, OCR next considered whether a causal connection existed between the Complainants' filing an OCR complaint in November 2014 and the subsequent decision by the girls' basketball coach to deny the Student the opportunity to serve as the team manager in February 2015. In making any determinations on this question, OCR must determine by a preponderance of the evidence that the adverse action was taken because of the protected activity, either through direct or circumstantial evidence, and including factors such as proximity in time, the recipient's treatment of the Student compared to other individuals, or the recipient's deviation from established policies or practices.

Based on the information in our investigation, we find that at the time the basketball coach made the decision to deny the Student's request to serve as team manager, he was unaware of the OCR complaint or other protected activities by the Complainants. Thus, the Complainants' protected activity could not have played any role in his decision not to allow the Student to serve as team manager because he was unaware of the protected activity at that time. Further, it appears to OCR that although the District staff that met with the basketball coach about whether the Student could serve as team manager knew that the Complainants had filed an OCR complaint, we do not find that they played a meaningful role in or dictated the basketball coach's decision not to allow the Student to serve as team manager.

Thus, because we find that the coach was not even aware of the Complainants' protected activity when he made his decision and those with knowledge of the OCR complaint did not dictate the coach's decision, we find insufficient evidence of a causal connection between the Complainants' protected activity and the adverse action against the Student. As a result, we find insufficient evidence that the District retaliated against the Complainants in violation of Section 504 or Title II as alleged.⁴

Conclusion

For the reasons provided above, we find insufficient evidence that the District violated Section 504 or Title II with respect to allegations 2 and 3. With respect to allegation 1, we are pleased that the District voluntarily entered into the enclosed Resolution Agreement to address this allegation. This concludes our investigation of this complaint and OCR complaint 08-15-1 184.

This letter addresses only the issues raised in this complaint and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504, Title II, or other Federal civil rights laws in any other regard.

³ The Complainants claim that the basketball coach initially told them the Student could serve as the team manager but changed his mind after speaking with District administrators. The basketball coach denies telling the parents the Student could serve as the team manager. Instead, he says that when they asked him if the Student could be the team manager, he told them he would need to speak with the Athletic Director.

⁴ Further, even if we were to find that a causal connection existed between the protected activity and the adverse action, we still would have found insufficient evidence of retaliation because the District has a legitimate, non-pretextual justification for its actions. More specifically, the basketball coach had not utilized a team manager in the past, the decision to have team managers is at the discretion of the team coaches, and we found him credible when he stated that he did not want to begin using a team manager. Further, although the Complainants identified a student that was allowed to "unofficially" help the boys' basketball team, where a family member was affiliated with the team, even though he had been retained and was no longer eligible to participate athletically, that fact is not inconsistent with the District's justification. As noted, the District's practice is to give coaches the discretion to make their own decisions about whether to have a team manager. The fact that one coach at the school used a team manager does not make another coach's decision not to use one illegitimate.

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.

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 about this letter or our findings, please contact Ms. Rachel Phillips-Cox, Equal Opportunity Specialist, at (303) 844-4559 or by e-mail at Rachel.Phillips-Cox@ed.gov.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

cc: XXX XXX, Counsel for the District

Honorable Diane Douglas
Arizona Department of Education
Office of Superintendent of Public Instruction
