



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 7, 2017

Dr. Gabriel Trujillo
Interim Superintendent
Tucson Unified School District
1010 E. Tenth St.
Tucson, AZ 85719

Re: Tucson Unified School District
OCR Case Number: 08-17-1180

Dear Dr. Trujillo:

On February 8, 2017, we received a complaint alleging Tucson Unified School District (District) at XX (School) discriminated on the basis of disability and engaged in retaliation. Specifically, the complaint alleged that that the District discriminated on the basis of disability during the 2016-17 school year when it failed to promptly and equitably respond to complaints of disability harassment and retaliated.

OCR is 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 and 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 CF.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws and regulations.

During our investigation we reviewed documents provided by the District and interviewed the Complainant. Below is a discussion of our review of the complaint allegations, the relevant facts, the legal requirements, and our findings.

Background

During the 2016-17 school year, the Student was enrolled in the XX grade at the School. During the relevant period, the Student was and continues to be eligible for an Individualized Education Program (IEP) under the eligibility category of XXX, related to her medical diagnosis of XXX. The Student's most recent IEP was drafted on March 6, 2017. It includes placement in a self-contained special education classroom for the majority of the day

Alleged Failure to Promptly and Equitably Respond to Complaints of Disability Harassment

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

The Complainant described three incidents during the 2016-17 school year where the District allegedly failed to promptly and equitably respond to complaints of disability harassment. Each incident involved an aide in the Student's classroom. The Student did not receive services from this aide.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires school districts to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability.

The Complainant was unable to recall information about the first incident, except that it occurred in September of 2016 and she asked the School to keep the aide away from her daughter. The District provided an email dated September 22, 2016, where the Complainant asks the School's principal to not allow the aide to interact with the Student. The email does not provide a reason for the request. The Complainant was subsequently unhappy that the aide remained in the classroom. Without additional information we cannot determine that the Complainant raised a concern of disability harassment.

The second of the three incidents occurred sometime in November of 2016 when the aide called the Complainant and asked her to come to the School because the Student XX-redacted-XX. The School responded by telling the Complainant that the aide should not have called her, and any future calls would come from the School's psychologist, if necessary. The Complainant reported that she did not receive any future calls from the aide. Again, the facts do not support that a complaint of disability harassment was made, and the incident itself is certainly not harassment based on disability.

The third and final incident occurred on January 20, 2017. The Complainant alleged that the aide kicked the Student while the Student was under a table. The Complainant stated that she learned of the incident when she received a call from the School's principal informing her that the aide had been observed kicking or assaulting the Student and that the School had called the local sheriff's office. The Complainant further reported that she received another call later in the day informing her that the sheriff's office had concluded their investigation and found that the aide had not kicked the Student but instead kicked a table that the Student was under and had not made contact with the Student. The Complainant further alleged that she tried to find out whether the aide had been disciplined but the School told her that it could not provide her with any information about possible discipline because of the aide's privacy rights.

The incident was witnessed by an Instructional Specialist at the School. We reviewed a letter where she documented what she saw. That letter was shared with a supervisor who notified the School's administration. The Instructional Specialist wrote that while the Student was playing under a table she witnessed the aide kick underneath the table in the direction of the Student's head. The aide's kick did not make contact with the Student but instead hit a metal barrier underneath the table. The aide then proceeded to stomp his feet on the items the Student was playing with and came close to stepping on the Student's fingers several times. The Instructional Specialist reported that this all happened in a manner of seconds and that she and the classroom teacher quickly moved to separate the aide from the Student.

We also reviewed a Pima County Sheriff's Department's incident report. It indicates that the reporting officer was called by the School's assistant principal at approximately 9:30 a.m. on January 20, 2017. Upon his arrival at the School the officer met with the assistant principal who by then had interviewed the classroom teacher about the incident. The assistant principal reported to the officer that the classroom teacher stated that the aide had not made contact with the Student. The aide was upset and kicked the desk in an apparent effort to get the Student to come out from under the desk. The officer reported that since the aide had not made contact with the Student the incident would be not treated as a crime but rather a school issue. The report mentioned that the Student had not been injured. The officer concluded his report by adding that the School administration mentioned they would handle the incident administratively.

In an email dated January 31, 2017, the District's Director of Middle Schools acknowledged that the Complainant was upset that the aide was still in the classroom. He informed her, however, that the School's principal was doing additional work to reduce or eliminate any contact between the Student and aide. He also attached the District's policies on employee discipline practices to the email. This is the only documented response we have from the District or School to the Complainant about the incident.

Our review of the documents the District provided indicates that the School's principal met with the aide on February 2, 2017. At the meeting the principal provided the aide with a written reprimand for unprofessional conduct. The aide was further advised that any future incidents would lead to increasing discipline, including termination. The written reprimand appeared to be a result of the School's investigation into the incident which included speaking to staff members about the aide's behavior towards the Student. During the course of our investigation the District shared that as of the end of the 2016-17 school year the aide was no longer an employee of the District. None of this information was shared with the Complainant.

Regarding the alleged failure to promptly and equitably respond to complaints of disability harassment, prior to the completion of OCR's investigation and before interviews were conducted with School personnel, the District agreed to resolve this issue by entering into a resolution agreement. The District agreed to develop training on promptly and equitably responding to complaints of disability harassment, including the requirement to timely inform complainants of investigative findings, and to provide that training to the staff and administrators at the School. The District also agreed to inform the Complainant of its findings regarding her complaint of disability harassment.

Alleged Retaliation

The Complainant alleged that the District retaliated against the Student, because she complained that the aide had subjected the Student to disability harassment. Specifically, the Complainant stated that the aide's mistreatment of the Student escalated with each complaint of disability harassment she made to the School.

Under the implementing regulation, recipients are prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504. In analyzing a retaliation claim, we determine whether: the individual engaged in an activity protected by Section 504 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-pretexual reason for its action.

We are unable to find that the District took adverse action against the Complainant or Student. We are unable to determine that the Complainant made a complaint of disability harassment regarding the first incident because neither the Complainant nor the District were able to provide any information about what took place. The second incident did not involve any action taken against the Complainant or Student. These actions were not adverse and therefore there can be no finding that retaliation occurred.

The third incident involved potential physical injury to the Student but is also the first incident where the Complainant had a protected activity, raising a complaint of disability harassment. Since the adverse action, if any, occurred prior to the protected activity, there can be no finding of retaliation. Moreover, as discussed above, upon becoming aware of the incident the District responded by notifying the local sheriff's office and the Complainant. Additionally, the District took actions to ensure that a similar incident did not occur again by providing the aide with a written reprimand and taking steps to ensure that there was little to no future interactions between the aide and Student. There were reportedly no subsequent incidents between the aide and Student or Complainant, and thus no concerns of retaliation. For these reasons we find that the District did not engage in retaliation.

Conclusion

We find insufficient evidence that the District engaged in retaliation. Regarding the alleged failure to promptly and equitably respond to complaints of disability harassment, prior to the completion of OCR's investigation, the District agreed to resolve this issue pursuant to Section 302 of OCR's Case Processing Manual.

A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, this allegation will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR's investigation of this 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. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and

send a letter to the District stating that this case is closed.

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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

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

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

If you have any questions, please contact XX, at XX. I can be reached at (303) 844-6083.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Copy of Resolution Agreement

cc: Denise Bainton, DeConcini McDonald Yetwin & Lacy, P.C., attorney for the District (via email); Diane Douglas, Arizona State Superintendent of Public Instruction