



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

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December 22, 2017

Superintendent Christopher E. Gdowski
Adams County School District 12
1500 East 128th Avenue
Thornton, Colorado 80241-2602

Re: Adams County School District 12
Case Number: 08-17-1361

Dear Superintendent Gdowski:

We write to advise you of the resolution of a complaint that was filed with our office against Adams County School District 12 (District) and Stargate School (School), collectively the Recipients. The Complainant alleged that the School retaliated against her by constructively discharging her from employment after she engaged in activity protected by Section 504, Title II, and Title IX.

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) is responsible for enforcing:

- Title IX of the Education Amendments of 1972 and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 106 (Title IX), which prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the Department;
- Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104 (Section 504), 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 (Title II), which prohibit discrimination on the basis of disability by public entities.

In addition, individuals filing a complaint, participating in an investigation, or asserting a right under these statutes are protected from intimidation or retaliation under Title IX by 34 C.F.R. § 106.71, under Section 504 by 34 C.F.R. § 104.61, and under Title II by 28 C.F.R. § 35.134.

As recipients of Federal financial assistance from the Department, the Recipients are subject to these laws and regulations.

During the course of our investigation, the Recipients indicated their desire to voluntarily enter into an agreement to resolve the allegation pursuant to Section 302 of our *Case Processing Manual*. We reviewed this request and determined that it was appropriate to enter into an agreement without completing a full investigation. This letter details our factual findings, the

status of our investigation prior to receiving the Recipients' request to enter into an agreement to resolve the allegation in this case, and the reasons for our determinations that an agreement pursuant to Section 302 of our *Case Processing Manual* was appropriate in this case.

I. Legal Standards

The Title IX regulations, at 34 C.F.R. § 106.71, and the Section 504 regulations, at 34 C.F.R. § 104.61, incorporate 34 C.F.R. § 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit school districts from intimidating, threatening, coercing, or discriminating (including retaliating)¹ against individuals because they engage in activities protected by Title IX or Section 504. The Title II regulations, at 28 C.F.R. § 35.134, similarly prohibit intimidation, threatening, coercion, discriminating (including retaliating), or interfering against individuals engaging in activities protected by Title II. For brevity, OCR refers to claims arising under these regulations as “retaliation” claims.

In analyzing retaliation claims under Title IX, Section 504, and Title II, we first determine whether: the individual experienced an adverse action caused by the school; the school knew an individual engaged in activity protected by Title IX, Section 504, or Title II or believed the individual might engage in such activity in the future; and a causal connection existed between the adverse action and the protected activity. If OCR determines that a causal link exists between any adverse action and any protected activity, we next determine whether the school has a legitimate, non-retaliatory reason for its action; and whether such reason is a pretext for retaliation.

A. Adverse Action

An act of intimidation, threat, coercion, or discrimination constitutes adverse action if it is likely to dissuade a reasonable person in the complainant's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (interpreting Title VII²'s anti-retaliation provision). “The action must be materially adverse ‘to separate significant from trivial harms,’ such as ‘petty slights, minor annoyances, and simple lack of good manners’” *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316 (10th Cir. 2017) (quoting *White*, 548 U.S. at 68).

¹ Retaliation is a form of discrimination. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). Additionally, the Title IX regulations, at 34 C.F.R. § 106.51, prohibit discrimination in employment on the basis of sex; the Section 504 and Title II regulations, at 34 C.F.R. § 104.11 and 28 C.F.R. § 35.140, respectively, prohibit discrimination in employment based on disability. The Title II regulations, at 28 C.F.R. § 35.140 further provide that the requirements of Title I of the Americans with Disabilities Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 C.F.R. part 1630, apply to public entities subject to the jurisdiction of Title II. 29 C.F.R. § 1630.12 prohibits retaliation and coercion similarly to 28 C.F.R. § 35.134.

² OCR is mandated to consider Title VII in this investigation. 28 C.F.R. § 42.604 (“In any investigation . . . agencies shall consider title VII case law and EEOC Guidelines, 29 CFR parts 1604 through 1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.”).

[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

White, 548 U.S. at 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)).

An employee’s constructive discharge is a materially adverse employment action. *Cf. Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (“We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.”); *Barone v. United Airlines, Inc.*, 355 F. App’x 169, 185 (10th Cir. 2009) (citation omitted) (“... [C]onstructive discharge is a cognizable employment action.”). “Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” *Suders*, 542 U.S. at 141 (citations omitted). Whether an employee was constructively discharged is evaluated “under an objective, totality of the circumstances standard.” *Barone*, 355 F. App’x at 185.

B. Protected Activity

Title IX, Section 504, and Title II protect the expression of opposition to any practice made unlawful by a statute or regulation that OCR enforces. Such expression can come in the form of speaking out against discrimination, including discrimination against others. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179-80 (2005). School staff members “are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversar[ies] of discrimination in schools.” *Id.* at 181 (citation and internal quotation marks omitted, alteration in original).

II. OCR’s Investigation

The School is a charter school serving students in kindergarten through twelfth grade. It is physically located in and authorized by the District.³ The School comprises an elementary and a secondary school. The 2016-2017 school year was the Complainant’s XXX year employed at the School, having served as a XXX for the XXX school years, and the XXX for the XXX school years. Additionally, for the XXX school years, the Complainant served as the team lead for the School’s Student Intervention Team (akin to RtI) and as the School’s 504 Coordinator.

³ If a charter school authorizer is a recipient (e.g., a traditional local education agency), it is subject to the requirements of the laws and regulations that OCR enforces in all of its operations, including carrying out activities to authorize charter schools. During the 2016-2017 school year, the School served students in grades six through 11; twelfth grade was added for the 2017-2018 school year.

The Complainant alleged that she repeatedly engaged in activity protected by Title IX, Section 504, and Title II.⁴ In particular, she alleged that she:

- protested when the School's Executive Director (ED) cut short a training that she was to give at the start of the 2016-2017 school year to School staff pursuant an early complaint resolution agreement in another OCR case, OCR Case No. 08-16-1256;
- raised concerns throughout the 2016-2017 school year to the ED as to the School's decisions not to place students on individualized education programs (IEPs) and one learning specialist's failures to do so in particular;
- encouraged in August 2016 a XXX who alleged a coach was harassing her to document and report the harassment to the School, about which the ED and the School's Elementary Principal later learned;
- expressed reservations to the ED, Elementary Principal, and others in September through December 2016 about the School's response, including subsequent evaluation for eligibility under the Individuals with Disabilities Education Act (IDEA), to a behavioral incident involving a XXX student on a Section 504 Plan⁵ during a XXX;
- provided legal referrals to the family involved in the field trip incident;
- advocated in October 2016 and March 2017 to the ED, Elementary Principal, and others for a stronger, swifter response to a report of sexual assault by XXX when both students, and XXX, were enrolled at the School;⁶
- reached out to her colleagues at the School over winter break 2016 to discuss how to handle her concerns relating to the ED's handling of, at a minimum, the above incidents.

The Complainant alleged that the School's response, in particular the ED's, to her protected activity was indifferent at best and verbally and emotionally abusive at worst. For example, the Complainant detailed an October 6, 2016 meeting relating to the report of sexual assault in which the ED allegedly screamed and cursed at her for pressing for an internal meeting of School staff to discuss the School's response. She reported similar abuse at a March 8, 2017 meeting of several staff, including her and the ED, relating to the report of sexual assault, and alleged that the ED had singled her out at that meeting because he had just found – and become enraged by – her email providing legal referrals to the family involved in the field trip incident. The Complainant alleged that, ultimately, the verbal and emotional abuse from the ED in particular became so intolerable that she had no other choice but to resign. She did so in late March 2017, effective after the end of the school year.

In response, the School denied that it had taken any adverse actions against the Complainant and denied that it constructively discharged her. The School pointed to several actions to accommodate the Complainant in 2015 and 2016, none of which were expressly tied to protected activity, including promoting her from teacher to counselor, reorganizing her job duties as school counselor in response to concerns that she raised, and moving the location of her office after she requested it. Though the School acknowledged the Complainant had engaged in protected

⁴ The Complainant's allegations included that the School was on notice of her protected activity, because the ED was either directly involved in the incidents or learned of them (as with the sexual harassment concern).

⁵ The School's treatment of this student is the subject of OCR Case No. 08-17-1155.

⁶ The School's response to this incident is the subject of OCR Case No. 08-17-1353.

activities, including in response to the field trip incident and the report of sexual assault, the School contended that it responded appropriately each time. For example, the School asserted that, when the ED learned that the Complainant had spoken with her colleagues about how to handle her concerns relating to the ED, the Complainant was offered an opportunity to explain her actions. (The Complainant disputed that this “opportunity” was a good-faith effort to air concerns.) The School argued that because none of the interactions between the Complainant and ED (or other staff) were inappropriate, the Complainant’s working conditions had not ultimately become so objectively intolerable as to compel her to resign in March 2017.

OCR’s investigation comprised reviewing documents and interviewing a number of witnesses, including former and current staff who witnessed some or all of the Complainant’s protected activity and the School’s response. That said, at this stage, OCR has determined that it is appropriate to resolve the allegation through a Resolution Agreement.

III. Conclusion

We thank the Recipients for being willing to voluntarily address the issues raised by the Complainant. A copy of the signed Resolution Agreement is enclosed for your records.

OCR is closing the investigative phase of this case effective the date of this letter. The case is now in the monitoring phase. OCR will monitor implementation of this Agreement through periodic reports from the Recipients demonstrating that the terms of the Agreement have been fulfilled. We will provide the Recipients with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The monitoring phase will be completed when OCR determines that the Recipients have fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Title IX, Section 504, Title II and their implementing regulations. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the Recipients, copied to the Complainant, stating that this case is closed. If the Recipients fail to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues listed previously and should not be interpreted as a determination of the Recipients’ compliance or noncompliance with Title IX, Section 504, Title II or any other federal law in any other respect.

This letter is a letter of finding(s) 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.

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

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. Please be advised that the Recipients may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint investigation. If this happens, the individual 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, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation you and your staff and counsel extended to us during the investigation of this case. If you have any questions, please contact the attorneys assigned to the case, XXX.

Sincerely,

/s/

XXX
Supervisory General Attorney

Enclosure: Resolution Agreement

cc: XXX