



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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June 20, 2018

Mr. Steve Hopkins, Superintendent
Natrona County Schools
970 North Glenn Road
Casper, Wyoming 82601

Via email only to XXXX

Re: **Natrona County Schools**
OCR Case Number: 08-18-1133

Dear Superintendent Hopkins:

We have completed our investigation stemming from the complaint against Natrona County School (“District”) alleging retaliation. Specifically, the Complainant alleged that the District, at XXXX (“School”), put two letters of disciplinary action in her personnel file after she questioned the treatment of students with a disability.

Our investigation established, by a preponderance of the evidence, that the District retaliated as alleged. The reasons for our conclusion are set forth in this letter. Upon being advised of this finding, the District voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed copy of the agreement is enclosed with this letter.

I. Legal Standard

The regulations implementing Section 504 of the Rehabilitation Act of 1973 (“Section 504”), at 34 Code of Federal Regulations (C.F.R.) Section 104.61, incorporate 34 C.F.R. Section 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964, and prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. Additionally, the regulations implementing Title II of the Americans with Disabilities Act of 1990 (“Title II”) regulations, at 28 C.F.R. Section 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II.

In analyzing a retaliation claim, we first determine whether a prima facie case of retaliation exists – that is whether: (a) the individual experienced an adverse action caused by the district; (b) the district knew the individual engaged in an activity protected by Section 504 or Title II or believed the individual might engage in an activity protected by Section 504 or Title II in the future; and (c) 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: (a) the district has a legitimate, non-retaliatory, reason for its action; and (b) whether such reason is a pretext for retaliation, intimidation, or coercion.

II. Evidentiary Standard

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 evidence supports the conclusion as alleged.

III. Investigation

Our investigation focused on obtaining the evidence necessary to determine whether the District retaliated in violation of Section 504 and Title II. Specifically, our investigation consisted of reviewing extensive documents and information provided by the Complainant and District. Additionally, we interviewed the Complainant, the District's Director of Student Support Services ("Director"), the School's principal ("Principal"), the School's assistant principal (AP), the School's at-risk coordinator ("At-Risk Coordinator"), the School's administrative manager ("Administrative Manager"), the School's in-school suspension (ISS) teacher ("ISS Teacher"), and an educational support personnel (ESP) staff member who is also the parent of a student at the School. We also allowed the Complainant an opportunity to rebut information provided by the District to OCR.

IV. Facts

a. Background

In XXXX, the Complainant began working for the District as a XXXX. In XXXX, she moved into a XXXX position. In XXXX, she transferred into an ESP role at the School, and to date, has remained in that position. The Complainant's assigned job duties during the 2017-2018 school year include:

- working in the office performing education support services such as making copies for teachers and others; entering data into student records, including discipline records in the "Infinite Campus" database; running messages, documents, and packages to classrooms; writing student passes; covering for office personnel when required; and assisting with answering the phone and helping visitors (approximately five hours per day);
- supervising student passing periods in the hallways and sixth grade lunch;
- supervising morning traffic outside (approximately one hour per day); and
- overseeing students in the in-school suspension (ISS)/academic refocus room when the ISS teacher or ESP goes to lunch (approximately one hour a day).

Her immediate supervisor is the Administrative Manager. Her next level supervisors are the AP and Principal.

According to the District, the Complainant "has never been disciplined," and the Complainant's "evaluations have been satisfactory." The Administrative Manager shared, during an interview with OCR, that the Complainant is "great," "cheerful," "very professional," and "a good asset to the School," and she has a "positive attitude" and a "positive effect" on school activities.

The Complainant's evaluation for the 2016-2017 school year reads, "[The Complainant] has built great relationship with other adults. She models how to be joyful yet productive throughout the day. Adults are drawn to her for an upbeat conversation. Her attitude is always bright and cheery, with a great sense of humor. [The Complainant] has a group of students that always want to be around her because her presence just makes them happy." The Complainant received a "proficient" or "accomplished" on all of her goals and was deemed to meet all professional responsibilities.

b. "Incident 1" (XXXX, 2017 to XXXX, 2017)

Student A is a XXXX grade student at the School. She has a Section 504 plan. Her mother ("Mother A") works at the School as an ESP. During the 2016-2017 school year, Mother A asked the Complainant to be a lay advocate/support system for Student A – specifically with respect to Student A's Section 504 plan.¹ The Complainant agreed and informed the Principal. The Principal told the Complainant to notify the School's Section 504 coordinator ("504 Coordinator") and instructed the Complainant that, if she attended meetings, to let Mother A be the spokesperson.

On XXXX, the School issued a five-day ISS to Student A for an incident that occurred X – [rest of sentence redacted] – X. The School also banned Student A from X – [rest of sentence redacted] – X. As part of her regular job duties, the Complainant entered information related to the incident into Infinite Campus – *i.e.*, the student information system used by the District.

On XXXX, 2017, the Complainant and At-Risk Coordinator both happened to be at a convenience store near the School. While the At-Risk Coordinator was in line for the register, the Complainant approached her and said she wanted her opinion about something. The Complainant and At-Risk Coordinator walked outside together. The Complainant asked if banning a student with a Section 504 plan from XXXX for a year, in addition to five days of ISS, was excessive and a form of denying a student with a disability access to extracurricular activities. The At-Risk Coordinator responded that she was not aware of the situation, suggested that the Complainant inquire with the School's At-Risk Coordinator, and committed to getting back to the Complainant about her question.

The Complainant asserted to OCR that she never mentioned Student A by name, that no one was within earshot, and that she was merely attempting to protect the School and Student A. She also explained that she asked the At-Risk Coordinator in particular because the Coordinator was the Complainant's supervisor when the Complainant previously supervised the ISS room, she knew the Coordinator had access to students' Section 504 plans, and the Coordinator had shown her Student A's Section 504 plan (on the Coordinator's own computer) during the previous school year. According to the At-Risk Coordinator, the Complainant mentioned Student A by name, but she could not remember if anyone was within earshot.

When the At-Risk Coordinator returned to the School, she spoke with the School's Section 504 coordinator ("Section 504 Coordinator") about the conversation with the Complainant. The

¹ Mother A knew that the Complainant was X – [rest of sentence redacted] – X.

Section 504 Coordinator responded that the Complainant had violated confidentiality and that they must report the conversation to the Principal. The Section 504 Coordinator and At-Risk Coordinator went to the Principal's office and reported the conversation that took place at the convenience store. The Principal shared the report with the Administrative Manager.

On or about XXXX, 2017, Mother A approached the Complainant in a School hallway after school hours. There were no students or other staff within earshot. Mother A believed that Student A's behavior record relating to the previous day's incident was misleading. Mother A asked the Complainant if the record could be revised. The Complainant agreed that the portrayal of the incident did not sound good, but said she could not change the record and recommended that Mother A speak with the Principal or Manager. The conversation lasted no more than a few minutes. The Complainant did not give Mother A any paperwork. No other students were mentioned. The Complainant and Mother A did not discuss the matter again.

On the evening of XXXX, 2017, the Administrative Manager called the Complainant into his office. According to the Complainant, she asked, "Am I in trouble or something," to which the Administrative Manager responded "Yup." She also said that the tone of the meeting was unusually unfriendly. The Administrative Manager read to the Complainant a memo that was prepared for the meeting, talked to her about the two conversations, and gave her the memo to sign. The memo read:

I was made aware on XXXX, 2017, that you were involved in a breach of confidentiality. One of your required tasks is entering school discipline in the Infinite Campus Program. The office was informed that you discussed the discipline entry to [Student A] with her mother and with another staff member. It is critical that you understand the importance of confidentiality regarding student records. You should not have discussed the entry with [Student A]'s mother or with any other school employee. You mentioned to another school employee that you didn't think the school actions were legal because of the student's 504. These conversations are violations of FERPA and could lead to a "No" on Standard Six of the Classified Employee Evaluation.

This breach of confidentiality negatively impacts you as an employee, the [School] office, and our school. You placed another school employee in an uncomfortable situation by sharing confidential student information. You have been trained in FERPA and confidentiality.

Effective XXXX, 2017, you will no longer enter discipline data in Infinite Campus. You no longer have rights to the system or paper copies of discipline referrals. If you have already completed the FERPA compliance training module, it will be re-opened for you to take again. Please print out your completion certification for the FERPA online training within one week. Please plan to meet with me to review expectations on XXXX, 2017, at 1:30. You are welcome to respond to this letter verbally or in writing.

The memo did not indicate how the Administrative Manager knew of the conversation between the Complainant and Mother A. According to the Complainant, the Administrative Manager did not reveal his basis of knowledge during the meeting.

The “Signature/Recipient of Letter” line of the memo read, “Employee Refused to Sign.” The memo was added to the Complainant’s building personnel file.² The District maintains formal personnel files at its Central Service Facility, and informal building personnel files at the school where the employee performs his or her duties. According to the District, Employee building files “may serve as a reference when the supervisor is preparing evaluations, re-visiting a concern or noting progress in employee performance,” and “as documentation and reminders of what has been discussed with the employee, when and by whom.”

The Complainant provided a written rebuttal to the District’s Human Resources Department (“HR Department”). The letter was added to her building file. The HR Department did not respond. The letter read, in part:

I only wanted clarification in order to protect the school and student. ... I then asked if she would check to make sure we were in compliance with Federal Civil Rights. ... After my morning traffic duties I came into the office and logged into IC to start my office duties and was unable to access student summaries or schedules. (Summaries are for checking to see if and when a parent calls or comes to get a child that they have legal access or permission, schedules are for deliveries, etc.) It was very humiliating when I could not do any of it and the ladies that I work with are asking me why and what had happened. ... This entire event has caused me extreme humiliation and anxiety.

On XXXX, 2017, the Principal emailed the District’s special education coordinator (“Special Education Coordinator”) and director of special services (“Director”). The email was primarily about Mother A, but regarding the Complainant, it read:

[The Complainant], [School] ESP, who advised [Mother A] to request the 504, advised [Mother A] that the school was not following 504 law or her plan. [The Complainant] happened to be the employee who input discipline into IC at the time so she used her knowledge of the referral to have a discussion with [Mother A] and another employee who had nothing to do with the situation at all. ... [The Complainant] is no longer the discipline data entry person. Attached to a letter to the office, [the Complainant], provided the office with 504 legal language that she feels validates that the school has violated the 504. ...

I doubt that this is over, so I wanted you to have all of the information. [The Complainant] is still advising [Mother A] and as you are aware she tells everyone

² The District maintains formal personnel files at its Central Service Facility, and informal building personnel files at the school where the employee performs his or her duties. Notably, the District also admits that employee building files “may serve as a reference when the supervisor is preparing evaluations, re-visiting a concern or noting progress in employee performance,” and “as documentation and reminders of what has been discussed with the employee, when and by whom.”

that she filed a complaint and received monetary compensation from the District when her son's IEP wasn't followed.

On or about XXXX, 2017, the Complainant re-completed the FERPA training and submitted documentation to the Principal.

c. "Incident 2" (XXXX, 2017 to XXXX, 2017)

On XXXX, 2017, the Complainant was assigned, as she is most school days, to oversee students in the School's ISS room while the ISS Teacher was at lunch. "Student B," who has an individualized education program (IEP), was in the ISS room at the time. Two other students – "Student C" and "Student D" – were also present. No other adults were in the room at the time. The facts of what occurred in the ISS room are in dispute.

According to the Complainant, when she arrived to the ISS room, Student B was agitated and texting his mother. The Complainant told him to put his phone away and asked him why he was upset. Student B said that he was upset with his teacher ("Teacher B") because she was mean and unfair. The Complainant told Student B that she could not discuss his teachers and suggested to Student B that he talk with his parent later and then his parent could speak with Teacher B. Next, another student asked Student B why he was having work brought to him and receiving extra assistance from teachers. Student B explained that he had an IEP. The Complainant asserts that she did not say anything related to Student B's IEP.

According to the District, the Complainant asked Student B if his mother knew that he was in the ISS room, told Student B that he did not have to be in the ISS room if his parent was not notified, and discussed Student B's IEP with him while other students were present. To support this version of events, the District points to five pieces of information.

The first is a statement from the ISS Teacher. According to the ISS Teacher, when she returned to the ISS room from lunch, Student B shared the information in her statement below.³ Then, the At-Risk Coordinator came into the ISS room. The ISS Teacher told the At-Risk Coordinator what Student B had said. In response, the At-Risk Coordinator told the ISS Teacher that she should report Student B's account to the Principal. The ISS Teacher then orally relayed Student B's account to the Principal. The Principal asked her to supply a written statement. The ISS Teacher emailed the following statement to the Principal on XXXX, 2017 at 11:00 a.m.:

I came back from lunch break and [the Complainant] had left. While I started working with [Student B], he was bouncing a ball and said, "that teacher that was in here while you were gone asked if my mom knew that I was in here. She told me that my mom had to know that I was here. She said that I didn't have to be in here if my mom didn't know. So I called and asked her and she said no she didn't know and that she would call [the Principal] later and talk to her about it." Within 30 minutes, he brought it up again. He repeated what he said the first time.

³ Notably, the ISS Teacher was talking to Student B about his IEP and another School staff member – i.e., the Complainant – which led to the Complainant being subject to discipline for the same alleged conduct.

Second, the Principal and AP interviewed Student C on XXXX, 2017 at 12:45 p.m. They completed a “Statement Form,” which read, “[Student C] heard [Student B and the Complainant] talking about [Student B]’s Academic Refocus. He heard them talking about his mom not being notified. [Student B] was telling the teacher about [Teacher B/case manager]. There was a conversation about an IEP. He didn’t really hear much else.”

Third, the Principal and AP interviewed Student B on XXXX at 12:50 p.m. They completed a “Documentation Form,” which read:

[Student B] reported that ‘a lady,’ [the Complainant], asked [Student B] if his mom knew he was working in ISS. They discussed that [Student B] is on an IEP. [Teacher B] is bringing the work and checking on him. That was discussed. [Teacher B] is [Student B]’s case manager for his IEP. [Teacher B] came in a lot to help him and provide work. ‘The lady’ – [the Complainant], she kept asking if someone had gotten an ok from mom for him to be in there and said he didn’t have to be if she hadn’t been talked to. [Student B] contacted his mom.

Fourth, the Principal and AP interviewed Student D on XXXX, 2017 at 1:00 p.m. They completed a “Statement Form,” which read, “[Student D] remembers the [Complainant] came in to replace [the ISS teacher (“Teacher A”)] when she went to lunch. The [Complainant] talked to [Student B] about something. He didn’t really pay attention – they were talking about his case manager that comes with work to the ISS room.”

Fifth, on XXXX, 2017, the Administrative Manager and AP met with the Complainant in the AP’s office. The Administrative Manager sent the AP a memo that summarized the meeting. The memo read, in part:

[The Complainant] said that she had talked to the student because he was really mad at [Teacher B]. [The Complainant] explained that [Student B] said that [Teacher B] is really mean, unfair, and he doesn’t like her. [Student B] complained about how [Teacher B] treats him. [The Complainant] also said that [Student B] texted his Mom. ... [The Complainant] explained that another student in the room asked [Student B] why he had someone bringing him work and helping him. [The Complainant] said that [Student B] told the other student that he has an IEP.

[The AP] asked [the Complainant] a clarifying question. “So, you did not suggest that [Student B] call his Mom?” [The Complainant] said that [Student B] had already texted his Mom. She said that the IEP discussions came up when another student asked [Student B] why he got extra help. [The AP] asked [the Complainant] if there was a conversation about whether or not [Student B] was supposed to be in Academic Refocus. [The Complainant] said [Student B] brought up the topic of his IEP.

On XXXX, 2017, the Administrative Manager and AP again met with the Complainant in the AP's office. The AP presented the Complainant with a memo, which summarized the XXXX meeting and read, in part:

It is an expectation that you not participate in any student discussion about other staff members. If students raise concerns about other staff members, refer them to a principal. It is also an expectation that you not engage in any discussion about a student's IEP or any other educational program, regardless of who brings up the topic. Such information is confidential and is not within your job performance expectations. Please bring any concerns regarding IEP's or other educational issues to one of the building principals.

The "Signature" line of the memo read, "[The Complainant] didn't want to sign." The memo was added to the Complainant's building personnel file.

Finally, on XXXX, 2017, the Complainant submitted a written response to the AP, with information about retaliation in an OCR publication attached. The response read, in relevant part:

First and foremost, I did not engage in an IEP conversation nor did I engage the identified student in a conversation about staff members.

Secondly, the student was highly agitated and I simply was intent on getting this student to comply to the expectations of the Academic focus and get him/her to accept the assignments presented by the teacher (with whom he/s was upset). I did not allow the student access to his/her cell phone-he/s had the phone on his/her person when I entered the room for a short supervisory duration of 30 minutes. The student was in the process of texting his parent upon my entry and continued to be vocal as he completed his text. Next, I then instructed the student to put his phone away as it was not protocol and the student complied immediately.

The ensuing conversation was entirely led by the student and he/s continued to complain and maintain his/her displeasure toward the teacher mentioned in the file letter. I simply stated to the student that if she/h had problems with this staff member that it would be important to share the information with his/her parent, and that the parent could then contact the teacher, as appropriate.

The student informed the other peer occupant that there was an IEP and explained to the peer that is why the extra help was allowable. I did not add any other personal information, make comments, or discuss individual aspects that would lead the other occupant(s) to the belief that there had been breach in confidentiality.

Furthermore, I did not participate in any other conversation(s) to or with any staff member or student regarding complaints about staff members, contacting parents to complain or any other alleged acts that would place me in violation of

confidentiality or protocol in the “chain of command” or administrative procedure.

V. Prima Facie Case of Retaliation

A prima facie case of retaliation exists if: (1) an individual experienced an adverse action caused by the recipient; (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. Each prong of the prima facie test is analyzed in turn below.

a. Adverse Action

An act of intimidation, threat, coercion, or discrimination constitutes adverse action for purposes of the anti-retaliation regulations 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. Whether an action is adverse is judged from the perspective of a reasonable person in the complainant’s position. OCR interprets the adverse action standard broadly to provide protection from unlawful discrimination, to preserve freedom to exercise rights and privileges secured under the laws enforced by OCR, and to ensure the cooperation from employees, students, and other witnesses that is essential to OCR’s enforcement process. An individual does not actually have to be dissuaded in order for the action to violate the regulations. The adverse actions standard extends to subtle as well as overt single instances of untoward conduct.

The District argued that the Complainant was not disciplined or otherwise subject to adverse action. Specifically, the District asserted to OCR that: (a) the meetings School administrators had with the Complainant did not constitute employee discipline; rather, the meetings were conversations and professional counseling; (b) the letters were merely “supervisory discussion notes;” and (c) the letters were not disciplinary because they were not placed in the Complainant’s formal personnel file in the human resources offices, but rather they were added to her informal building personnel file.

Nevertheless, we find the District’s actions toward the Complainant, considered in their totality, to be adverse. The Complainant was effectively reprimanded in the memos, for the first time in nine years of employment, which were read to her in-person and placed in her building personnel file. Additionally, she had existing job duties taken away – *i.e.*, she was banned from entering discipline data into Infinite Campus, banned from accessing Infinite Campus or paper copies of discipline referrals, and required to take or retake training about FERPA. According to the Complainant, she felt humiliated because some of her colleagues were aware that she no longer has access to Infinite Campus.⁴ Notably, the District also admits that employee building files “may serve as a reference when the supervisor is preparing evaluations, re-visiting a concern or

⁴ During interviews with OCR, School staff offered different answers to the question of who knew that the Complainant could no longer access discipline information in Infinite Campus. The Principal said the Administrative Manager, the AP, and whoever took over the responsibility for the Complainant; the AP said just the Complainant; the Administrative Manager said himself, the Principal, the AP, and the Complainant.

noting progress in employee performance,” and “as documentation and reminders of what has been discussed with the employee, when and by whom.” The District wrote to OCR, “Discussion notes are not discipline and do not become part of the employee's HR Personnel File unless there are on-going problems that result in formal employee discipline; in that case, the discussion notes may be attached to a formal notice of discipline as proof of prior attempts to correct a concern.” In sum, the disciplinary actions taken by the District against the Complainant were adverse.

b. Protected Activity

The retaliation regulations enforced by OCR include an interference clause that prohibits actions for the purpose of interfering with any right or privilege secured by the statutes or regulations enforced by OCR. The interference clause protects any actions taken in furtherance of a substantive or procedural right guaranteed by the statutes and regulations enforced by OCR, including Section 504 and Title II. The interference clause also protects the expression of opposition to any practice made unlawful by a statute or regulation that OCR enforces. When an individual communicates, formally or informally, a belief that a recipient's act or policy is discriminatory on a basis covered by one of these laws, OCR will generally find that the opposition is protected.

In this case, the Complainant clearly engaged in protected activities. In the first incident, she questioned disciplinary action taken against a student, at least in part, because the student had a Section 504 plan. The Complainant even wrote in her response to the first memo, “I then asked if she would check to make sure we were in compliance with Federal Civil Rights.” The District's Director of Student Support Services himself said that the Complainant discussed with Student A's mother how the School “violated her child's rights under her 504 plan.” In the second incident, the District alleged that the Complainant questioned the placement of a student in the ISS room, at least in part, because the student had an IEP. The Complainant disputes the District's accusation; however, the District believed that she had engaged in a protected activity when talking with Student B. Thus, the Complainant may assert retaliation, regardless of whether the conversation, as alleged by the District, took place. Discipline and placement of students with disabilities are both issues addressed in Section 504 and Title II.

The District argued to OCR that “[the Complainant]’s concern about [Student A]’s 504 plan was reviewed,” and that “[the School]’s discipline did not violate [Student A]’s 504 plan.” The District further argues that “[the Complainant]’s concern [about Student B] was reviewed,” and that “[Student B's mother] expressed no concern about this plan and temporary placement, to which she had already agreed.” The District, therefore, implied that the Complainant did not engage in protected activities because her concerns and conclusions were not legally sound.

Again, we are unpersuaded by the District's argument. Whether the Complainant was correct in her assessment of legal issues related to Section 504 and Title II is not determinative to OCR's retaliation analysis. Because individuals often may not know the specific requirements of the anti-discrimination laws enforced by OCR, they may make broad or ambiguous statements of unfair treatment. Such communication is protected opposition if it would reasonably have been interpreted as opposition or resistance to a perceived civil rights violation. The communication

need not include the words “harassment,” “discrimination,” or any other legal terminology. Common forms of protected opposition include: informally complaining to the recipient’s employees about alleged discrimination against oneself or others; talking to employees, parents, and students to gather information or evidence in support of a potential claim; or writing a critical letter. The Complainant took all of these measures.

Additionally, to constitute protected activity under the interference clause, a complainant must have had a good faith and objectively reasonable belief, at the time that the complainant engaged in the activity, that the complainant was exercising a right or opposing unlawful discrimination. However, it is not necessary that illegal discrimination actually occur – a complainant can be mistaken both about what the facts actually were and what is actually prohibited by the law and still be protected. In this case, we presume that the Complainant acted in good faith and had a reasonable belief that Student A’s and Student B’s rights might have been violated.

c. Causal Connection

Next, we must determine whether the District took the adverse actions against the Complainant because she engaged in protected activities or for the purpose of interfering with protected activities. For purposes of the prima facie case, OCR looks at the facts as a whole and broadly construes whether there is some evidence of a causal connection. Causal connection may be established through either direct or circumstantial evidence. Direct evidence consists of a recipient’s written statement, oral statement, or action demonstrating unambiguously that the recipient took the adverse action because the complainant engaged in a protected activity or for the purpose of interfering with protected activities. If OCR determines that direct evidence of a retaliatory motive exists, a causal connection is established. Circumstantial evidence is evidence that allows OCR to infer a retaliatory motive based on the facts and circumstances of the investigation.

Here, there is direct evidence of a causal connection. The letters from the Administrative Manager (dated XXXX, 2017 and XXXX, 2017) and the letter from the AP (dated XXXX, 2017) were adverse actions (see Section V(a)) that directly address the Complainant’s protected activities (see Section V(b)).

There is also circumstantial evidence of a causal connection. First, the District’s treatment of the Complainant changed after her protected activities. Prior to the protected activities, the Complainant had no prior negative memoranda or letters in her employee files (see Section IV(a)). Second, the adverse actions occurred within mere days of the protected activities. Third, there is evidence that the District intended to interfere with future protected activities. For example, the second letter to the Complainant read, “It is also an expectation that you not engage in any discussion about a student’s IEP or any other educational program, regardless of who brings up the topic.”

VI. Legitimate, Non-Retaliatory Reason for the Adverse Action

Having found a prima facie case of retaliation (see Section V), we must next determine whether: (a) the District has a legitimate, non-retaliatory, reason for its action; and, if so, (b) whether such reason is a pretext for retaliation, intimidation, or coercion.

a. Facially Legitimate, Non-retaliatory Reason

The recipient's facially legitimate, non-retaliatory reason must be clear, reasonably specific, and of such a character to justify the recipient's action. In this case, though the District asserted that the Complainant was not disciplined, and therefore, not subjected to an adverse action, the District explained that it responded to the Complainant because she violated District policies and expectations for staff. OCR construes the District's position as a proffer of a legitimate nondiscriminatory reason for its actions.

First, the District asserted to OCR that the Complainant improperly revealed confidential information. Specifically, the District argues that the Complainant: (a) discussed Student A's confidential student discipline information with Mother A in the School; (b) discussed Student A's confidential student discipline information with the At-Risk Coordinator at a convenience store; and (c) discussed Student B's IEP in the ISS room. The District claims that these actions violate the School's "Principals' Expectations" about confidentiality;⁵ the Family Educational Rights and Privacy Act (FERPA);⁶ and the "Ethics" portion of the Staff Handbook, which reads (p. 48):

Please remember that conversations regarding students or fellow staff members must be conducted professionally. Indiscriminate discussions of students or other staff members are strongly discouraged. ... Conversations regarding students should be limited to personnel with legitimate educational need and/or parents. If you have concerns about student, please channel them through the proper individuals in private settings, not in the open office, hallway, or teacher's lounge. Likewise, if you have concerns about [the School] or the District, please work with appropriate individuals in appropriate settings.

The District wrote to OCR, "The confidential student information [the Complainant] learned from her data entry duties is not to be used or shared with other staff or third parties with the exception of supervisory personnel who have a legitimate educational interest in the student information." Additionally, the District wrote to OCR that the At-Risk Coordinator "is not an individual with a legitimate educational interest in the student's confidential information on this topic. Thus, [the Complainant]'s conversation with [the At-Risk Coordinator] about this topic was a breach of student confidentiality."

Second, and related to the first reason, the District asserted that the Complainant failed to follow appropriate communication channels. Specifically, the District argues that the Complainant inappropriately sought clarification from and expressed concerns to Mother A, the At-Risk

⁵ The document reads, in relevant part, "I will: ... Maintain confidentiality."

⁶ FERPA is covered on pp. 74-75 of the Faculty Handbook.

Coordinator, and Student B, including about matters involving IEPs and Section 504 plans; instead, the Complainant should have only spoken to a building administrator or the Superintendent. The District claims that these actions violate a “Note of Understanding,”⁷ which reads, “I will seek clarification from a building administrator if I am unclear at any time regarding any issue.”

Third, and similar to the first two reasons, the District asserts that the Complainant overstepped her role as an ESP by contacting Mother A about a Section 504-related matter and speaking with Student B about IEP-related matters. The District wrote, “She is not to advise students or parents with whom she works at school about 504 or IEP ‘rights;’ that is not part of her job description, and as well intentioned as she may be, she may not have correct information.” The District also wrote, “She may not substitute her beliefs or opinions for those of teachers and administrators in communicating with students, parents and other staff.” The District claims that this action violates the School’s Staff Workbook, which reads (p. 36), “Assistants are not in charge of discipline referrals to the office or communicating with parents. This is a role of the classroom teacher.”

In sum, the District wrote to OCR:

[The Complainant]’s expression of concern or questions – even those related to applications of 504 and IEP plans – must be done in a manner that does not compromise student confidentiality; that does not “advise” students and parents in areas that are not her job responsibility (and about which she may be incorrect); and that fails to follow appropriate pathways for identifying and reporting concerns.

Finally, the District argued to OCR that the Complainant’s actions, on the whole, violate the School’s ethical standards, which read:

Please remember that conversations regarding students or fellow staff members must be conducted professionally. Indiscriminate discussions of students or other staff members are strongly discouraged. ... Conversations regarding students should be limited to personnel with legitimate educational need and/or parents. If you have concerns about students, please channel them through the proper individuals in private settings, not in the open office, hallway or teacher’s lounge. Likewise, if you have concerns about [the School] or the District, please work with appropriate individuals in appropriate settings. Conversations occurring shall be conducted in the following professional manner:

- [School] staff will not critically discuss fellow staff members with any student.
- [School] staff will discuss only those things that are pertinent to the wellbeing of their own students.

⁷ The “Note of Understanding” is a page that employees sign to attest that they have read and agree to follow the procedures in the Staff Handbook.

- [School] staff will avoid discussion of reactions, behavior and etc. of situations involving students, parents, fellow staff members, and etc.⁸

The District wrote, “[The Complainant] was privy to [Student A]’s discipline information for data entry reasons, only; she was not authorized to take the student’s name and discipline information she learned from her data entry duties and share it with any person other than her supervisor or administrator if she had questions about the information.” In other words, the Complainant may only engage in protected activities if they are directed to her supervisors, the District argues. OCR has concerns about how such narrow limitations on protected activities may create a chilling effect.

b. Genuine Reason or Pretext for Retaliation

Because we have determined that a prima facie case of retaliation exists and the District has provided facially legitimate, non-retaliatory reasons for its actions, we next conduct a pretext inquiry to determine whether its reasons are genuine or a cover for retaliation. OCR examines all available evidence to determine whether the recipient’s proffered reasons are credible. The ultimate question at this step is why the District acted the way it did, not whether the action could have been done for a non-retaliatory reason. Evidence of pretext may include: a complainant being treated differently from how she was treated prior to the protected activity; a complainant being treated differently from similarly situated individuals; a recipient increasing scrutiny or surveillance of a complainant after learning of protected activity; a recipient changing its identified reason for the challenged adverse action over time or in different settings; a recipient treating a complainant in a manner that deviates from the recipients established policies or procedures; or a recipient applying a rarely enforced policy.

Based on the preponderance of all available evidence, we conclude that the District’s adverse actions against the Complainant were taken for retaliatory reasons. The District’s stated reasons for its adverse actions are not legitimate and are pretextual.

First, the District’s “evidence” supporting its allegations against the Complainant is weak, incomplete, and contradictory. With regard to the conversation between the Complainant and Mother A, in its initial data response, the District portrayed the Complainant’s conversation with Mother A as exceptionally nefarious. The District claimed that the Complainant “retained,” “lifted,” “took,” and “extracted” confidential information from Infinite Campus, and then “contacted” Mother A to “discuss” the confidential information. When pressed by OCR to clarify the District’s allegation against the Complainant, the District admitted that it did not even know where or how Mother A and the Complainant spoke. Mother A and the Complainant both reported to OCR that Mother A initiated the conversation. The District also admitted that it was “unable to pin-point the exact source of the information about [the Complainant] contacting [Mother A] concerning the XXXX, 2017 incident[.]” Additionally, OCR learned, during the course of its investigation, that the District never interviewed Mother A about her conversation with the Complainant.

⁸ *Staff Friendly Workbook*, p. 48.

The Complainant learned of Student A's confidential student information while completing a task squarely within her assigned job duties. Additionally, even if, arguendo, the Complainant discussed the discipline record with Mother A, we fail to see how sharing information about Student A with her mother and guardian, who was entitled to and already in possession of the information, was a breach of confidentiality. In fact, it appears the only actual evidence related to the content of the conversation between the Complainant and Mother A was a statement provided by the Director indicating that Mother A told him that the Complainant said that the suspension violated Student A's Section 504 rights. The Director stated that he could not recall the date of the meeting. Mother A, during an interview with OCR, indicated that she never mentioned the Complainant to the Director (or even implied that the Complainant had said anything about Student A's rights being violated) and that the meeting with the Director occurred *after* the adverse actions against the Complainant for Incident 1. In a subsequent email, Mother A wrote to OCR:

First, I want to describe to you how truly disappointed and honestly disgusted I am on such a bold lie. ... I even stated to [the Director] when he asked for names that we would not state any names of staff we felt we were feeling discriminated against and/or that we would not disclose any staff that felt comfortable either. We explained we wanted to avoid any more discomfort for or from anyone. ... We had gone to him for help and then he turned around lied, did not help, make [sic] it worse, and tried to use us to go against a CY staff member.

With regard to the Complainant's conversation with the At-Risk Coordinator, the District claims that the Complainant violated FERPA and confidentiality policies because the conversation occurred at the public location and the At-Risk Coordinator "is not an individual with a legitimate educational interest in the student's confidential information on this topic." A breach of confidentiality, at least under FERPA, logically implies that a third party without a right to the information learned of the information. The location of a conversation alone does not per se amount to a breach of confidentiality. The District did not assert to OCR – nor did it apparently even ask the Complainant or At-Risk Coordinator – if anyone was within earshot when they were discussing the information. The Complainant reported to OCR that no one was within earshot and the At-Risk Coordinator reported that she could not recall.⁹

If, arguendo, the Complainant used Student A's name in the discussion with the At-Risk Coordinator, we question the District's assertion that the notion that the At-Risk Coordinator does not have an educational interest in students' Section 504 and discipline records. The School's *Student/Parent Guide* describes "at-risk students" as "students who appear likely to fail academically," and indicates that "at risk students" may "need specialized interventions."¹⁰ The At-Risk Coordinator's primary duty is to "provide structure and implement the At Risk

⁹ Notably, during an interview with OCR, the At-Risk Coordinator was asked when she was asked to write a statement regarding the conversation. She answered, XXXX, 2018 – less than six full days and less than two full school days after the District received OCR's notification letter. When the At-Risk Coordinator was asked by OCR, "Who asked you to write the statement?" the At-Risk Coordinator then said, after the School's phone was muted and there was a silent pause, that she was not necessarily asked to write a statement, but rather, was "given an opportunity to put her thoughts down." The District's attorney "objected," asserting attorney-client privilege.

¹⁰ *Student/Parent Guide 2017-2018*, p. 11.

program.” Her responsibilities include: “meeting monthly with At Risk Staff (guidance counselor, a building administrator, at risk teachers, the school nurse and other support staff, and parents) as needed;” “compile and monitor At Risk files per grade level and maintain documentation;” “assist teaching teams with the design and implementation of intervention plans;” and “schedule and facilitate At Risk meetings.” The School’s “At Risk Committee” “develop[s] and review[s] [the School]’s RTI Pyramid of Interventions to address students at risk of failing academically or not meeting behavior expectations.”¹¹ The District’s regulation for “Students Academically and Behaviorally At Risk” includes mention of students with disabilities. During her interview with OCR, the At-Risk Coordinator reported that her work day is spent working with students who are academically and behaviorally at-risk, that she helps design and implement behavior plans and individual learning plans, that she attends some Section 504 and IEP team meetings, and that she has access to students’ Section 504 plans, IEPs, and Infinite Campus. Additionally, Mother A told OCR that the At-Risk Coordinator had weighed in during the previous school year about whether Student A needed a Section 504 plan. Notably, the ISS Teacher explained, during an interview with OCR, that she discussed with the At-Risk Coordinator what Student B had said about his conversation with the Complainant, including discussion of his IEP.

With regard to Incident 2, the District alleges that the Complainant failed to bring concerns to administrators, violated confidentiality, improperly advised a student, and inappropriately discussed another staff member with a student. This allegation and the adverse action taken by the District were based solely on the statement from Student B, a middle school student. The ISS teacher had no first-hand knowledge of what was said between Student B and the Complainant; her report to the Principal was merely a recitation of what Student B had told her. Student C merely said, assuming the “Statement Form” is accurate, that Student B and the Complainant were talking about notification to Student B’s mother, Teacher B, and an IEP. All of this could be construed as consistent with the Complainant’s account of the facts. Student D said even less – simply that the Complainant and Student B were talking about Teacher B, which is consistent with the Complainant’s version of events. In short, the School’s administration gave more credence to Student B’s version of the facts than to the Complainant’s.

Second, the School’s treatment of the Complainant changed after she raised concerns with the At-Risk Coordinator about Student A’s Section 504 rights. Prior to the protected activities, the Complainant had no prior negative memoranda or letters in her employee files. In fact, she had good evaluations and the Administrative Manager praised the Complainant during his interview with OCR.

Third, it appears that the School increased scrutiny and surveillance of the Complainant after she engaged in protected activities. During their investigation of Incident 2, the Principal and AP interviewed three students, requested a written statement from the ISS Teacher, and questioned the Complainant.

Fourth, it appears that the Complainant was subjected to adverse action pursuant to rarely enforced policies. The District reported to OCR, and School staff confirmed during interviews with OCR, that no staff, at least in the last year, have received consequences for sharing

¹¹ *Faculty Handbook*, p. 30.

confidential information, not following the chain of command, discussing other staff with students, or the Complainant's other alleged wrongdoings. Notably, as described above, the ISS Teacher talked to Student B, while in the ISS room, about his IEP and another School staff member (*i.e.*, the Complainant), which was what the Complainant was alleged to have done wrong; yet, there is no indication that the ISS Teacher was similarly subjected to a meeting and memo.

Fifth, the District has offered shifting and increasingly more detailed explanations for taking adverse actions against the Complainant. The memo about Incident 1 indicates that the Complainant violated FERPA by breaching confidentiality. It does not mention other specific laws, regulations, or policies. The XXXX memo about Incident 2 reads, in part, "It is an expectation that you not participate in any student discussion about other staff members. ... It is also an expectation that you not engage in any discussion about a student's IEP or any other educational program, regardless of who brings up the topic." It does not specify a special law, regulation, or policy; nor does the XXXX memo. Once the complaint was filed, the District asserted to OCR, in a narrative response from its attorney, that the Complainant had violated: (a) FERPA; (b) a provision in the School's *Staff Friendly Workbook* ("*Workbook*") about reporting perceived discrimination; (c) a provision in the School's Staff and Faculty Handbook ("*Handbook*") about seeking clarification from a building administrator; (d) a provision in the *Workbook* about the role of assistants as it relates to discipline referrals and communicating with parents; (e) a provision in the *Workbook* about maintaining confidentiality; (f) provisions of the "Professional Responsibilities" section of the Classified Employee Evaluation criteria; (g) a provision in the Handbook about confidentiality; (h) provisions in the Handbook about ethics and proper channels for concerns and discussing situations; (i) a Board Policy and Administrative Regulation about reporting discrimination; and (j) a "Note of Understanding" signed by the Complainant that addresses seeking clarification and answers. During an interview with OCR, the Principal was asked what policy the Complainant violated in Incident 2. The Principal simply said that the Complainant was discussing with a student his IEP while other students were around; she did not articulate a policy. OCR asked the AP what policy the Complainant violated talking with Mother A. The AP responded that the Complainant did not have a reason to be talking to Mother A about Student A's discipline information and doing so was not her role and responsibility; he did not articulate a policy. The Administrative Manager was asked the same question as the AP. He replied that discussing such information is not in the Complainant's job description. In short, once a complaint was filed, the District offered a more specific reasons to justify the adverse actions.

During OCR's interviews with staff, they returned to broad accusations against the Complainant. During an interview with the Principal, we asked her what policy the Complainant violated in her alleged discussions with Mother A and the At-Risk Coordinator. The Principal only broadly mentioned violation of confidentiality. We also asked her what policy the Complainant allegedly violated in the ISS room; she simply said that the Complainant should not have been discussing Student B's IEP and "IEP protocols" with him. We asked the AP the same questions. Regarding the conversation with Mother A, he responded that it was simply not the Complainant's role or responsibility to be talking with Mother A about the information (even though the Principal had approved the Complainant working with Mother A on Student A's Section 504 plan during the previous school year). The AP explained that the conversation with the At-Risk Coordinator

violated “confidentiality” and that her conduct in the ISS room was a “confidentiality breach.” The Administrative Manager gave similar answers when asked what policy the Complainant violated in Incident 1.

VII. Conclusion

After reviewing the documentation, information, and facts uncovered in our investigation, OCR determined that the weight of the evidence shows the District retaliated against the Complainant in response to protected activities.

We thank the District for voluntarily entering into an agreement with OCR to resolve this issue. 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 District demonstrating that the terms of the Agreement have been fulfilled. We will provide the District with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. We will provide the Complainant with a copy of OCR’s monitoring letters. The monitoring phase will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and 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 District, copied to the Complainant, stating that this case is closed. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issue listed previously and should not be interpreted as a determination of the District’s compliance or noncompliance with Section 504 or 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 District 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 your attention to this matter, the District's cooperation, and counsel's assistance. If you have any questions, please contact Jason Langberg, the attorney assigned to the case, at (XXX) XXX-XXXX or XXXX@XX.XXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

cc: Kathleen Dixon, Dixon & Dixon, LLP, attorney for the District (via email)
Jillian Balow, Wyoming Superintendent of Public Instruction (via email)