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March 8, 2019

Dr. John Kriekard, Superintendent
Scottsdale Unified School District
7575 E. Main St.
Scottsdale, AZ 85251

Sent via email to jkriekard@susd.org

Re: Scottsdale Unified School District
OCR Case Numbers: 08-18-1573 and 08-19-1150

Dear Superintendent Kriekard:

On September 6, 2018, we received a complaint which alleged that Scottsdale Unified School District (District) at Laguna Elementary School (School) discriminated on the basis of disability and engaged in retaliation. We accepted the following allegations for investigation:

1. Whether the District failed to provide the Student with transportation for extended school year during the summer of 2018;
2. Whether the District failed to respond to a complaint of disability discrimination when the Complainant raised concerns that the District was not implementing the Student's IEP; and
3. Whether the District engaged in retaliation when it limited the Complainant's access to the School.

On January 9, 2019, we received another complaint from the same Complainant which alleged that the District and School discriminated on the basis of disability. Specifically, the complaint alleged that the District failed to implement the Student's IEP when it did not provide the Student with all of the specialized instruction minutes contained in his IEP. We assigned this second complaint a case number of 08-19-1150.

We are 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 Department; 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. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

During our investigation we reviewed documents provided by the District and Complainant, including emails between the Complainant and various District staff. We also conducted preliminary and rebuttal interviews with the Complainant. Below is a discussion of our review of the complaint allegations, the relevant facts, the legal requirements, and our determinations.

Background

The Student was enrolled in preschool at the School during the 2017-2018 and 2018-2019 school years. During the relevant time period the Student had an IEP that was drafted on XX. An IEP Amendment was drafted on XX. The eligibility category listed in each IEP document was “XX.” The XX IEP indicated that the Student was eligible for extended school year services (ESY) during the summer of 2018. The first day of ESY 2018 was July 9, 2018.

The Complainant raised concerns with the District and School during the 2017-2018 school year that the School was not providing the Student with all of his related services. The Student’s IEP included XX minutes per month of physical therapy, XX minutes per month of occupational therapy, and XX minutes per month of speech/language therapy. Due to the Complainant’s concerns, the IEP team included language in the August 28, 2018 IEP amendment that would allow the Complainant to observe any of the Student’s therapy sessions.

Alleged Failure to Provide the Student with Transportation Services for Extended School Year Services in the Summer Of 2018, Thereby Failing to Implement the Student’s IEP and Resulting in a Denial of FAPE.

Legal Standard

The Section 504 regulations at 34 C.F.R. § 104.33(b) states that the provision of a free and appropriate public education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities.

Analysis

There is no dispute that the District was required to provide the Student with transportation services for extended school year services (ESY) during the summer of 2018. The Student’s XX IEP included the need for ESY and curb to curb transportation, twice per day. Curb to curb transportation services were also included in the Student’s XX IEP. There is also no dispute that the District failed to provide the Student with transportation services for the first day of ESY 2018.

The parties’ assertions diverge after the first day of ESY 2018. The District asserted that it was prepared to provide transportation services on the second day of ESY but that the Complainant did not make the Student available and later informed the District that she would no longer send the Student to ESY. The Complainant asserted that the District did not provide transportation on the second day of ESY. As a result, she did not believe that reliable transportation services would be provided and she informed the District that she would not send the Student to ESY.

We reviewed emails between the District and Complainant regarding the issue of whether the District provided transportation services for ESY 2018. On July 9, 2018 at 8:25 AM the Complainant sent an email to several District staff informing them that a school bus had not

arrived. The District sent a reply at 4:10 PM, which confirmed that a school bus would arrive on July 10, 2018 between 7:30 and 7:50 AM.

The Complainant sent another email to the District on July 10, 2018 at 8:05 AM, informing the District that she and the Student had waited for the school bus from 7:30 to 7:50 AM but that at the time of the email, a school bus had still not arrived. In the same email the Complainant informed the District that due to its failure to provide transportation she had decided to withdraw the Student from ESY. She also referenced phone calls she had with District staff the previous day that left her with the impression that the ESY staff did not care about the Student.

The District's Superintendent responded to the Complainant via email on July 10th at 8:47 AM. He explained that it was his understanding that a bus had arrived late and without a code to access the Complainant's gate. The driver had called dispatch, who in turn called the Complainant, but was unable to obtain the code. The Superintendent wrote that if the Complainant provided the code, the Student could still be picked up that day, and certainly on the next day (the third day of ESY).

The District's Director XX responded to the Complaint on July 10th at 9:03 AM. The Director explained that when the bus had arrived the driver did not have the gate code, and was unable to access the pickup location. The Director went on to explain that the Complainant had been contacted via telephone but the Complainant did not want to provide the gate code. The Director asked the Complainant to provide the gate code, encouraged the Complainant to send the Student to ESY, and invited the Complainant to visit the program and meet with the teacher and related service providers.

The Complainant responded to the District on July 10 at 11:43 AM. The Complainant wrote that her security company informed her that no bus had arrived at her gate between the hours of 7:00 AM and 8:15 AM. She acknowledged receiving a call from the District's transportation department at 8:15 AM, where she was asked for the gate code. The individual she spoke to explained that the driver had arrived on time but when he saw the closed gate, kept going. The Complainant stated that she was then told that the driver was no longer available to pick the Student up that morning but if she could provide the gate code, a bus would arrive the following day. The Complainant went on to explain in her email that by July 10, 2018 the Student had received transportation services for an entire school year and the School already had the gate code on file.

We provided the District with opportunities to support its assertion that a bus had arrived on the second day of ESY 2018 and that a bus route was assigned to the Student for the remainder of ESY. The District provided a Word document with data that appears to have been taken from a bus tracking program. We asked the District if it could provide a screenshot from the program where the data was derived, in order to provide some context for the information in the Word document. We also asked the District to define the data and terminology that appeared in the Word document. The District did not respond to our request. It appears that the document intends to communicate that a bus stopped in an area identified as the Complainant's "zone" on July 10, 2018 at 7:51 AM, left at 7:53 AM, traveled for 0.2 miles before indicating that it stopped in the Complainant's zone again 18 seconds later, then left again at 7:55 AM. The document does not

indicate where exactly the bus stopped, why it stopped at two locations, and what steps were taken to access the pickup location.

We engaged in follow up conversations with the Complainant regarding the information we reviewed. In those conversations the Complainant confirmed that her address and gate code remained unchanged during the 2017-2018 school year and ESY 2018. The Complainant reported that she had not experienced any issues with transportation services prior to ESY 2018. She explained that the District's transportation department had her gate code and phone number on file and previous bus drivers had called her directly when needed. The Complainant provided a copy of a District document from the 2017-2018 school year entitled "Special Education Transportation Request Form." The form included the Complainant's address, gate code, home phone number, and an emergency contact number.

The information reviewed above supports a finding that the District failed to implement the Student's IEP when it failed to provide him with transportation services for ESY 2018. The Student's IEPs from October 2017 and April 2018 each required curb to curb transportation. The District had provided the Student with curb to curb transportation without issue during the 2017-2018 school year, which included accessing the Student's pickup location with the Complainant's gate code. The District had the Complainant's gate code on file along with the Complainant's phone number and an emergency contact number, and the Complainant's home address and gate code did not change from the end of the 2017-2018 school year to the start of the ESY 2018.

We find that the District's failure to provide the Student with curb to curb transportation during the first two days of ESY 2018 was a failure to implement the Student's IEP, and denied the Student a FAPE.

Alleged Failure to Respond to the Complainant's Complaint Of Disability Discrimination When She Raised Concerns that the District Was Not Implementing the Student's IEP.

Legal Standard

The Section 504 regulation at 34 C.F.R. § 104.36 requires that public school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need specialized instruction or related services, a system of procedural safeguards that included notice, an opportunity for the parents/guardians of the student to examine relevant records, an impartial hearing with opportunity for participation by the student's parents/guardians and representation by counsel, and a review procedure.

Analysis

The Complainant alleged that during the 2017-2018 school year the District failed to provide the Student with the full amount of speech therapy minutes that were included in his October 2017 IEP. The Complainant reported that she raised those concerns with the District in April of 2018,

when she learned of the failure. The Complainant further reported that the District terminated the speech therapist's employment and held an IEP meeting on April 18, 2018.

The Complainant then alleged that early in the 2018-2019 school year she had a conversation with the XX who told her that the Student did not need services from an occupational therapist because a paraprofessional was assigned to assist him. The XX allegedly told the Complainant that she was in the classroom to observe the students that needed occupational therapy and that the Student's paraprofessional helps him obtain all the things he needs. Additionally, the XX allegedly told the Complainant that XX does not do pull-out services, which were the type of services included in the Student's IEP. The Complainant reported that she raised her concern with the School, who in turn held a meeting on August XX 2018. At the meeting the School allegedly told the Complainant that it would provide the occupational therapist with overtime so that the Student could receive the minutes listed in his IEP. The Complainant then took part in an IEP meeting on August XX 2018.

In order to make to make final findings regarding the Complainant's allegation that the District failed to respond to complaints of disability discrimination, we needed to interview the individuals present during the April XX 2018 IEP meeting, August XX 2018 meeting, and August XX 2018 IEP meeting. However, those interviews were not conducted because during our investigation, the District expressed a willingness to resolve the complaint and enter into a Resolution Agreement with OCR.

Alleged Retaliation When the District Limited the Complainant's Access to the School.

Legal Standard

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. an individual experienced an adverse action caused by the recipient; and
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.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

If all of the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

Analysis

On August XX 2018, the District held an IEP meeting to amend the Student's April XX 2018 IEP. The District provided OCR with a copy of a 12-page document entitled "Individualized Education Program AMENDMENT." After a follow-up interview with the Complainant, she provided OCR with two additional pages that were also created at the August XX 2018 IEP meeting, which were entitled "Prior Written Notice FAPE and Placement." The Complainant explained that the prior written notice was attached to the 12-page IEP amendment as a single document.

The prior written notice summarized the changes that were taken in the IEP amendment along with other changes that the IEP team considered but rejected. Under a heading of "description of other factors relevant to the actions proposed or refused are" the IEP team wrote that "the district agreed to allow [the Student's] parent [to] observe any therapy sessions for the remainder of the 2018-2019 school year to help build trust between the school and home."

The Complainant stated that she observed the Student's therapy sessions without issue until September 6, 2018. On September 6, 2018, the District informed the Complainant via email that future observations would require that a District representative be present. The Complainant reported that she was told it was a District policy. We reviewed the District's Code of Conduct and found no requirement that a district representative be present when a parent is conducting a school observation.

In a subsequent email from the School's Principal to the Complainant on November 17, 2018 the Principal further limited the Complainant's access to observe therapy sessions to one observation per month. The Principal's reason for the limitation was that the Complainant had interfered with staff during the provision of services to the Student and the limitation would decrease disruptions to the operations of the school day. By November 17, 2018, the Complainant had filed a complaint with OCR (September 6, 2018) and a State complaint with the Arizona Department of Education (ADE) (XX 2018).

In an email to the Complainant on November 19, 2018, the Principal acknowledged that the August XX 2018 IEP amendment included an agreement to allow the Complainant to observe any therapy session. The Principal wrote that the agreement written into the IEP was done to build trust among the parties but was not considered a service, was not necessary for FAPE, and was not an IEP issue.

To determine whether the District engaged in retaliation we first determine whether the Complainant experienced an adverse action by the District. As reviewed above, the District limited the Complainant's ability to observe the Student's therapy sessions on September 6, 2018 when it informed the Complainant that she could only observe therapy sessions if a District representative was present. On November 17, 2018, the District further limited the Complainant's observations to once per month. These limitations to the Complainant's ability to exercise an accommodation written in the August XX 2018 IEP amendment constituted adverse actions and satisfies the first element of our analysis.

We next determined whether the Complainant engaged in an activity protected by Section 504 and Title II of which the District was aware. We find that the Complainant engaged in a protected activity when she attempted to exercise an accommodation that was included in the Student's IEP – to observe the Student's therapy sessions. Additionally, the Complainant filed a complaint with OCR on September 6, 2018 and a State complaint with ADE on October 25, 2018. These protected activities, of which the District was aware, satisfy the second element of our analysis.

The third element of our analysis is whether there was a causal connection between the protected activities and the alleged adverse actions. The first adverse action took place on September 6, 2018, when the District sent the Complainant an email that limited her observations by requiring a district representative to be present. The email was in direct response to the Complainant's attempt to observe the Student's therapy sessions that same day. On November 17, 2018, the District further limited observations to once per month. By November 17, 2018, the Complainant had filed an OCR complaint and State complaint. We find a causal connection, due to the relative short periods of time between the Complainant's protected activities and the alleged adverse actions, satisfying the third element of our analysis.

Since all three elements of our analysis were satisfied, we next determine whether the District presented a facially legitimate, non-retaliatory reason for taking the adverse action. The District presented two reasons for limiting the Complainant's observations. The first is that although the August XX 2018 IEP amendment allowed the Complainant to observe any therapy sessions for the remainder of the 2018-2019 school year, that language was not considered a service, was not necessary for FAPE, and was not an IEP issue. We do not find that reason to be facially legitimate. An IEP team includes services and accommodations in an IEP because it believes they are necessary for a student to receive a FAPE. The District did not provide a compelling reason for why we should read the clear language in the IEP that allows the Complainant to "observe any therapy sessions for the 2018-2019 school year" as not necessary for FAPE and not an IEP issue. If the District no longer believed that allowing the Complainant to observe therapy sessions was necessary to provide the Student with a FAPE it should have convened the IEP team to discuss the issue and make any necessary changes, rather than unilaterally altering the Student's IEP outside of an IEP meeting.

The next reason presented by the District was that the Complainant interfered with the District's ability to provide the Student with related services and disrupted the operations of the school day. We find that this is a legitimate reason. As such, we must then consider whether the reason was genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action. In order to make this determination we needed to interview the related service providers that were present during the Complainant's observations. However, those interviews were not conducted, because during our investigation the District expressed a willingness to resolve the complaint and enter into a Resolution Agreement with OCR.

Although we did not have sufficient evidence to make final findings regarding the Complainant's allegation of retaliation, we did review sufficient evidence to find that the District failed to implement the Student's IEP when it limited the Complainant's observations. The failure to implement the Student's IEP is a denial of FAPE.

Alleged Failure to Provide the Student with All of the Specialized Instruction Minutes Contained in His IEP, Resulting in a Denial of FAPE

Legal Standard

The Section 504 regulations at 34 C.F.R. § 104.33(b) states that the provision of a free and appropriate public education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities.

Analysis

Upon notifying the District that we had accepted this allegation for investigation, the District expressed a willingness to resolve the complaint and enter into a Resolution Agreement with OCR.

Conclusion

We find that the District did violate Section 504 of the Rehabilitation Act of 1973 when it failed to implement the Student's IEP by not providing transportation services for extended school year services in 2018 and limited the parent's observations of related services. Further information was needed in order to make final determinations regarding the remaining allegations: whether the District failed to respond to a complaint of disability discrimination when the Complainant raised concerns that the District was not implementing her son's IEP; whether the District engaged in retaliation when it limited the Complainant's access to the School; and whether the District failed to provide the Student with all of the specialized instruction minutes contained in his IEP.

Further information was not obtained and further interviews were not conducted because during our investigation and before we made final findings regarding all complaint allegations, the District expressed a willingness to resolve the complaint. The District agreed to train the School staff on the provision of regular or special education and related aids and services, grievance procedures for complaints of disability discrimination, and the prohibition against retaliation. The District also agreed to provide the Student with 6 hours of compensatory education outside of the regular school day in the form of physical therapy, occupational therapy, speech and language therapy, or some combination of the three. Finally, the District agreed to reimburse the Complainant the tuition cost for the Student's attendance in the District's regular education preschool program for the 2018-2019 school year and fund the remaining tuition cost through the end of the school year.

A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, these allegations will be resolved consistent with the requirements of Section 504 of the Rehabilitation Act of 1973, 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. We will provide the Complainant with copies of our monitoring letters.

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, with a copy to the Complainant, 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. The Complainant 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.

Thank you for your cooperation and attention to this matter, and the assistance of XX (District counsel). 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: XX (via email);

Kathy Hoffman, Superintendent, Arizona Department of Education (via email)