



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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NEW MEXICO
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April 14, 2020

Dr. Thomas S. Tucker
Superintendent
Douglas County School District RE-1
620 Wilcox Street
Castle Rock, CO 80104

By Email only to XX

Re: Douglas County School District
OCR Reference No.: 08-20-1005

Dear Dr. Tucker:

On October 7, 2019, the U.S. Department of Education (Department), Office for Civil Rights (OCR) received a complaint alleging the Douglas County School District (District) discriminated against a student (Student) on the basis of disability. Specifically, the Complainant alleged that the District retaliated against the Student in the application of the attendance policy, grading policy, and retroactive denial of participation points.

Because OCR has jurisdiction and the complaint was filed timely, OCR initiated an investigation of this complaint pursuant to 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; 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; and, Title VI of the Civil Rights Act of 1964 and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities that receive Federal financial assistance from the Department. Additionally, individuals filing a complaint, participating in an investigation, or asserting a right under the statute cited are protected from retaliation, intimidation, or coercion by recipients of Department funds. As a recipient of Federal financial assistance from the Department, the District is subject to these laws and regulations. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

Investigation Summary

OCR notified the District and the Complainant on February 3, 2020, that OCR opened the allegation for investigation. OCR's investigation focused on obtaining the evidence necessary to determine whether the District complied with the legal standard stated below, or whether the

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

District engaged in discrimination as alleged. Specifically, the investigation consisted of requesting and reviewing records and information from the Complainant and the District, including the:

- Student’s health records, including doctor’s notes and letters,
- Student’s Section 504 Plan, dated XX, 2019, and related documents,
- Student’s attendance and grade records beginning in school year 2016-17 through school year 2019-20,
- Draft version of an attendance contract for the Student, dated XX, 2019,
- Student’s XX course syllabus for Spring 2020,
- Text communications between the Complainant and the Student, and,
- Email communications between the Complainant and the District.

OCR applies a preponderance of the evidence standard to determine whether 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 or is insufficient to support the conclusion.

Legal Standard

Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. 35.134, incorporate the Title VI prohibition on retaliation. Title VI, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

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:

- a) The individual or someone on behalf of the individual engaged in a protected activity or the recipient believed the individual or someone on behalf of the individual might engage in a protected activity in the future;
- b) An individual experienced an adverse action caused by the recipient; and
- c) There is some evidence of a causal connection between the protected activity and the adverse action.

A protected activity is any action taken to further a right guaranteed by the statutes and regulations enforced by OCR or to express opposition to any practice made unlawful by the statutes and regulations enforced by OCR. 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. Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.

In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, or the recipient's deviation from established policies or practices.

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.

Background

The Student is a student with a disability. The Student was attending XX High School (School) in the District during the 2018-19 school year. In October 2018, the Student was diagnosed with XX, which resulted in multiple absences throughout the 2018-19 school year. Attendance records provided by the District indicate that the Student was absent between 5 and 19 times each semester, depending on the class period. The Student was enrolled in a XX course during the 2018-19 school year and received 14 excused absences during the semester-long course. The Student ultimately achieved an A in the course.

Documents demonstrate that the Complainant sent, or intended to send, letters to the School from the Student's physician (Physician) on at least two occasions, including October 24, 2018, and March 12, 2019. The letters request that the School consider developing a Section 504 plan to support the Student. By email to the School counselor (Counselor) in March 2019, the Complainant clarified that the Student was diagnosed with XX in October 2018, but that she did not request accommodations for the Student until March 2019.

In response to the March 2019 communication, the School convened a Section 504 meeting on April 16, 2019, which the Complainant attended. The Complainant provided a copy of the Section 504 Family Feedback form she completed and also confirmed by email to OCR that she received a copy of the District's procedural safeguards prior to the meeting. It was determined by the team at this meeting that a Section 504 plan was not needed. The Complainant did not appeal this determination through a due process hearing.

On August 16, 2019, the School convened another Section 504 meeting, which the Complainant attended, and the team determined that a Section 504 plan was appropriate for the Student. Documentation demonstrates that the Complainant indicated receipt of the District's procedural safeguards during this meeting. The Complainant did not appeal the substance of the Section 504 plan through a due process hearing.

Emails provided by the Complainant and the District demonstrate that both parties were concerned about the Student's frequent absences during the 2017-18 and 2018-19 school years. Communications regarding the Student's absences and the impact on her education began to escalate in September 2019. The School indicated that certain absences would not be excused due to a lack of documentation, while the Complainant inquired about whether this treatment applied across the board for all students. As a result of the ongoing absences, email demonstrates that the School considered putting the Student on an attendance contract during this time.

In a series of emails from September 13-18, 2019, the Complainant and the Counselor discussed the Student's attendance and how the absences intersected with the Student's Section 504 plan. The Counselor addressed the need for the Student to attend school as often as possible, but if not, she suggested the Complainant consider other flexible options, including online learning or homeschooling. On September 17, 2019, the Complainant emailed the Student's XX teacher (Teacher) and inquired about whether the Student would be allowed to make up participation points she missed due to a medically excused absence. On the same date, the Student's Assistant Principal (Assistant Principal) sent an internal email to the Student's teachers inquiring about her grades in light of her absences and noted it was "interesting" that the Student made As and Bs in light of the frequency with which she was absent.

On the morning of September 26, 2019, the Complainant emailed all of the Student's teachers and requested individual feedback from each of them. Shortly thereafter, the Assistant Principal emailed all of the Student's teachers regarding her decision to put the Student on an attendance contract. The email further noted the Assistant Principal's concern about the Student's absences contrasted against her current grades, wherein she stated, "I am having a really hard time understanding how she could possibly have some of the marks she does at the 6-week grading period given her large amount of absences."

On September 27, 2019, the Complainant and the Student met with the Assistant Principal, Nurse, Counselor, and the School's Section 504 coordinator (Coordinator). During the meeting, the Complainant addressed detailed concerns regarding the Student's attendance, presented an outline of the Student's medical appointments, discussed the application of the School's attendance policy, proposed changes to the Student's Section 504 plan, and inquired about evaluating the Student for an individualized education program (IEP).

By email on October 8, 2019, the Assistant Principal summarized the meeting on September 27, 2019, and noted points of resolution, including the documentation required with regard to proof of absence per the School's attendance policy. The Assistant Principal stated that "[t]he standard being requested is the same as other students who have a chronic illness or condition and require an atypical amount of time out of school attending medical related appointments." She further noted that the Student's Section 504 plan was amended as a result of the meeting and requested the Complainant review the Section 504 plan and correct inaccuracies, if necessary. While it is not noted in the email, after the meeting on September 27, 2019, the School determined that the Student would not be placed on an attendance contract.

By email to OCR, the Complainant stated that the School determined, after the meeting on September 27, 2019, that the Student's previously unexcused absences should be excused. The Complainant also indicated that no additional unexcused absences had been issued; though, she also stated that the requirements for obtaining an excused absence were onerous and retaliatory. Documentation provided by the District confirms that no absences prior to September 27, 2019, were considered unexcused and that only two absences since that time were listed as unexcused, pending receipt of a doctor's note.

On November 6, 2019, the Complainant emailed the Teacher and inquired about the Teacher's policies for make-up work, specifically with regard to the Student's receipt of participation points and the retroactive denial thereof. In additional exchanges on the same day, the Teacher confirmed that she had retroactively withdrawn the participation points after reconsidering the Student's grade (i.e., A) and explained that the inability to make-up participation points extended to all students, not just the Student.

The District proffered an explanation regarding the application of the attendance policy and grading policy, including the retroactive denial of participation points. The District relied on the need to comply with the Colorado Compulsory Attendance laws¹, as well as the District's internal understanding of the standard held by the truancy court judge in the local jurisdiction. Further, the District stated that the application of the grading policy in the Student's XX course aligned with the expectation maintained for all students. The District also emphasized that the Student ultimately achieved an A in the XX course. On March 2, 2020, before OCR had the opportunity to fully investigate the District's explanation and determine whether the District retaliated against the Student, the District notified OCR that it was interested in resolving this allegation.

Analysis

Pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), allegations under investigation may be resolved at any time when, prior to issuing a final determination under CPM Section 303, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. The provisions of the resolution agreement must be tied to the allegations and the evidence obtained during the investigation, and will be consistent with applicable regulations. Based on the allegations and the evidence provided, OCR determined that this allegation may be appropriately resolved through an agreement under Section 302 of the CPM. On April 14, 2020, OCR received the District's signed resolution agreement (Agreement) (enclosed). Accordingly, this allegation is closed of the date of this letter and OCR will monitor the Agreement to ensure compliance.

¹ Colo. Rev. Stat. Ann. § 22-33-104(2)(a).

Conclusion

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 closely monitor the recipient's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively and that the recipient's policies and practices are administered in a nondiscriminatory manner. When the Agreement is fully implemented, the allegations will have been resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. If the District fails to implement the Agreement, OCR will take appropriate action, which may include enforcement actions, as described in the Agreement.

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 complainants 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.

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, it will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact XXX, the Attorney assigned to this complaint, at XXX or by email at XXX. You also may contact me at XXX or by email at XXX.

Sincerely,

/s/

Michael D. Todd
Supervisory Attorney

Enclosures – Resolution Agreement

cc: Dr. Katy Anthes
Commissioner of Education
Via email only to XXX

Ms. Wendy Jacobs, Esq.
Deputy General Counsel
Via email only to XXX