



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 2, 2023

Erin Kane, Superintendent
Douglas County School District
620 Wilcox Street
Castle Rock, CO 80104

By email only to: erin.kane@dcsdk12.org

Re: OCR Complaint No. 08-22-1053
Douglas County School District

Dear Superintendent Kane:

This letter is to notify you of the disposition of the above-referenced complaint that the U.S. Department of Education (“Department”), Office for Civil Rights (“OCR”), received on November 8, 2021. The Complainant alleges that Douglas County School District (“District”) and [redacted content] (“School”) discriminated against her son (“Student”) on the basis of disability and retaliated against her and the Student.

Specifically, the Complainant alleges:

1. The School/District denied the Student a Free and Appropriate Public Education (“FAPE”) by failing to implement the Student’s 504 Plan during the 2021-2022 school year;
2. The School/District failed to follow appropriate standards and procedures for re-evaluation and placement under Section 504;
3. The School/District failed to provide the parents with procedural safeguards;
4. The School/District retaliated against the Complainant and the Student by restricting communication with the School and by marking the Student tardy.

OCR Jurisdiction

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (“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. Individuals filing a complaint, participating in an investigation, or

asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134. Because the School receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II

Summary of Investigation

OCR's investigation included the following:

- An intake interview of the Complainant.
- Review of documents provided by the Complainant including but not limited to: email correspondence with the School and the School's attorney; the Student's 504 Plan, 504 Plan Snapshot, 504 Meeting notes, and 504 Plan Review Report.
- Review of documents that were produced by the School in response to OCR's Data Request including but not limited to: the Student's School records, including attendance and tardy records; tardy records of other students; video screen shots of the Student drop-off; relevant internal and external email correspondence; the Student's 504 Plan; the School's grievance policy; emails relating to the District's and the School's masking policies due to the COVID pandemic; a copy of the School's Section 504 training; a record of personnel training on Section 504; and the School's narrative response.
- Interviews of the School's Principal, Assistant Principal, the 504 Coordinator, and the Dean of Student Culture/504 Administrator.

Prior to the conclusion of OCR's investigation of the Complainant's allegations and prior to completing additional interviews and seeking additional documents that came to light during the interviews, the District and School expressed a willingness to resolve the allegations in this complaint. As a result, OCR suspended its investigation of these claims.

Factual Background

A. The School

[redacted content] is a publicly chartered school in the Douglas County School District. The School is governed by a Board of Directors which enacts school policies regarding tardiness and general grievances but follows the Douglas County School District policies, procedures, and due process requirements that are adopted pursuant to Section 504.

B. The Student's Section 504 Plan

The Student has a 504 Plan for [redacted content]. The 504 Team met and revised the Student's 504 Plan on August 24, 2021. The Douglas County School District Section 504 due process rights are contained in the 504 Plan itself. The Plan includes the following accommodations:

- Designated place in the classroom for snack that is wiped down before and after he eats. He may choose to sit at this table during class time;
- Encourage classmates to wash their hands as they enter the class after lunch;
- Store lunch box in separate location;
- Use of separate school supplies which are not for common use;
- Ziplock bag of snacks and wipes in event of emergency;
- Allow him to use a wipe as appropriate;
- Extended time for assessments (up to 1.5X);
- Allow the Student to wash his hands when he requests, inform parents if this becomes excessive;
- Teachers check-in with parents when noticing the Student is having a hard time sitting still, excessive hand washing, or any behavior struggles; and
- Please allow 72 hours prior notice to parents if there will be any use of sensory items that contain the allergens, so they can provide a safe alternative for the Student (ex. dried pasta, beans, etc.).

Several proposals were suggested by the Complainant but rejected by the 504 Team. The proposals and reason for rejection are included in the 504 Plan. The relevant ones are as follows:

- *Proposal:* Instruct all students to wash their hands before and after eating/lunch recess.
Not adopted by 504 Team for the following reason(s): 504 Plans cannot limit or instruct other children to change behavior, movement, placement, and/or learning. Therefore, the teacher will encourage students to wash and/or wipe their hands before and after eating based on best hygiene practice.
- *Proposal:* Ask a student to join the Student during lunch. He sits at the “nut-free” table.
Not adopted by 504 Team for the following reason(s): the Student is allowed to move freely throughout the lunchroom, and is permitted to choose where he would like to sit each day. He may also invite another student(s) to join him at the nut-free table. There is no assigned seating in the lunchroom. 504 plans cannot limit or instruct other children to change behavior, movement, placement, and/or learning,
- *Proposal:* Provide a lunch aide to sit with the Student during lunch so he does not feel alone and isolated.
Not adopted by 504 Team for the following reason(s): [redacted content] is a [redacted content] school and does not have the personnel to provide a one-on-one aide. Additionally, 504 Plans do not include special services, instead, the plan provides accommodations in order for the student to successfully access the curriculum.

The Principal stated that, as an administrator, she balances the burden that accommodations place on other students and staff with the student with a disability's needs. Contrary to what the Student's 504 Plan stated as a reason for rejecting two proposals, some staff agreed that Section

504 does allow modifications to behavior and placement of others. Some staff stated that services cannot be provided pursuant to Section 504 plans, while other staff stated that it depends on the definition of “services.”

After the August 24, 2021 504 Plan was in place, the Complainant began communicating with the School about her concerns with, among other things: 1) the implementation of the 504 Plan; 2) the effectiveness of some of the accommodations; 3) the Student’s least restrictive placement (e.g., he was being placed in the back of the classroom, isolated at a table in the classroom, eating alone at lunch); 4) the School’s alleged failure to follow appropriate procedures when re-evaluating, amending, or rejecting accommodations; and 5) the School’s position that Section 504 prohibits the School from making modifications to the behavior of staff and/or other students in order to provide the Student a FAPE. The Complainant also asked the School to discuss the wearing of masks due to COVID-19 by other students and/or staff as an accommodation for the Student’s [redacted content]. Specifically, in an email dated October 27, 2021, to the 504 Administrator, the Complainant wrote:

Masking and [redacted content]: I was hoping the vaccine for little kids would be out soon so I would not have to request this. Because it is not, I am requesting that the staff and children within [redacted content] grade (or at least the kids that are with [redacted content] in the classrooms, specials and Spanish), are masked and following the appropriate Covid-19 protocols to ensure that he has a safe learning environment.

In the interviews, School personnel expressed conflicting interpretations about the Complainant’s request: the 504 Administrator stated it was indeed a request for an accommodation pursuant to Section 504, which she deferred to the Principal to handle, while the Principal said she did not view the request as relating to Section 504, but rather viewed it as a general inquiry about mandating masks. On November 4, 2021, the Principal replied to the Complainant, “Unfortunately, we cannot control public health orders. We will abide by all public health orders that are in effect with regard to masking.”

OCR learned through interviews that the August 24, 2021 504 Plan was amended several times in the fall of 2021 due to some of the concerns raised by the Complainant. However, the date of the Plan was not changed to reflect these modifications and/or rejections, and there is no indication the School treated these modifications as re-evaluations. Witnesses stated that the Complainant was not apprised of her due process rights after these modifications and/or rejections to the 504 Plan after the original August 24, 2021 Plan.

During the course of the investigation, OCR learned that the Student is currently undergoing an evaluation for eligibility and services under an Individualized Education Program (“IEP”) pursuant to the Individuals with Disabilities Education Act (“IDEA”).

C. School's Section 504 Training

The School provides Section 504 training annually to its staff at a pre-service professional development day prior to the beginning of the academic school year. The School's 504 Coordinator conducts the training. The 504 Coordinator stated that the training is conducted in small grade-based teams. She and the Principal stated that the training includes a general overview of Section 504 and then the 504 Coordinator reviews with each team the 504 Plans that are in place for each student within their grade.

The interviews revealed that the staff did not have a good understanding of Section 504 child find requirements, evaluation/re-evaluation procedural requirements, due process procedures, or what constitutes retaliation. It was unclear whether the District's Power Point presentation on Section 504 actually is used at the School training or whether the 504 Coordinator just has access to it. The Data Response did not include evidence that general 504 training is provided. Although the witnesses stated that employees hired after the pre-service development day are trained regarding the individual 504 Plans the new teacher must implement, it is unclear whether the employees receive full Section 504 training.

D. Communication Restrictions Imposed Upon the Complainant

The Complainant was directed to communicate only through the Principal during the fall/early winter of 2021. The Principal stated this was done in order to streamline communications with the Complainant, to make sure the responses to the Complainant were consistent, to direct communications to the appropriate staff, and because some teachers felt intimidated or harassed by the volume and content of the Complainant's emails. Because the investigation was not completed, OCR was unable to verify the volume and content of the Complainant's emails or to interview the teachers. The witnesses stated that the Principal is not typically part of a 504 Team or involved in Section 504 Plan evaluations, re-evaluations, or negotiations.

The Complainant alleges she was told in the fall of 2021 to communicate with teachers and staff only through a Google doc, and that they would meet periodically to discuss whatever concerns she put in it. One of the School staff confirmed there was discussion about using a Google doc and stated she thought the Complainant liked the idea, but regardless, it was only used for about a month because they stopped using it when the Complainant expressed that she did not like it.

On December 8, 2021, the Student was marked tardy. The Complainant emailed the school and stated:

I have let him out of my car at 7:58 a million times and NOW he is considered tardy. I am happy to accept when he is late but this is not a case of him being tardy. This is a case of mere retaliation and example number 7 for my OCR/Ed complaint as I'm sure that none of the other parents who also let their kids out of their car at 7:58 have a child marked as tardy especially when they don't have the signed tardy sheet to match. It won't happen again.

The Complainant told OCR that the phrase “it won’t happen again” meant that the Student would not be tardy again. OCR notes that its interpretation of the phrase is consistent with the Complainant’s.

On December 9, 2021, the private attorney for the School emailed the Complainant and stated in relevant part:

Hi, I am the lawyer for [redacted content]. Thank you for your email to the school inquiring about student attendance concerns. Because you have involved the USDOE and because you stated that your concerns involve a potential OCR complaint, I will be your point of contact going forward.

When the Complainant asked if she needed to direct all communications to the attorney, he responded:

You may engage with staff pursuant to normal protocols, with the exception that any concerns or issues regarding your child’s attendance and/or your concerns regarding Covid protocols should start with me. While I may direct you to administration depending upon the issue, you have indicated that these are issues you may pursue via legal channels so I am asking that you or your representative work with me on those topics.

When the Complainant asked if all Section 504 requests regarding COVID-19 protocols are escalated to the School attorney, he responded:

[I]t is appropriate for schools to involve counsel when legal threats are made.

The Complainant said in response that she was unaware that she had made a legal threat. The attorney replied, in part:

Words mean things. It is disappointing to hear that you are unaware that you made a threat. Here is the language you used: "This is a case of mere retaliation and example number 7 for my OCR/Ed complaint...". Your last statement, “[I]t won’t happen again,” is properly construed as a threat as well.

When you make such statements, it costs the school time and real money that is better utilized for educating students. It is disruptive of the educational environment and it distracts teachers and administrators from their core duties. I find your words to have been irresponsible under the circumstances and am hopeful you will move ahead with greater decorum and respect for the very good work being done at [redacted content] on behalf of students.

In interviews, School personnel stated that they viewed the Complainant’s December 8, 2022, email as a “legal threat” and contacted their attorney to take over. School personnel also stated

they were not aware of any policy that COVID-19 related questions were to be directed to the attorney.

Legal Standards

A. Section 504

Section 504 prohibits discrimination based on disability in programs or activities receiving Federal financial assistance. It provides:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794. Section 504 regulations require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. *See* 34 C.F.R. § 104.33. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii)-(iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Students who are identified as having a disability and needing special education and/or related aids and services are entitled to special education and a broad range of supplemental and related aids and services, as needed, such as tutors, note-takers, or one-on-one aides; assistive technology, psychological and counseling services; or speech or occupational therapy. *See* 34 § C.F.R. 104.33.

Students with disabilities must be provided different or separate aid, benefits, or services, however, only when it is necessary so that the aid, benefits, or services are as effective as those provided to others. *See* 34 C.F.R. § 104.4(b)(1)(iv). For aid, benefits, or services to be equally effective, public school students with disabilities must be afforded an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to a particular student's needs. *See* 34 C.F.R. § 104.4(b)(2).

B. Retaliation

Section 504 and Title II prohibit 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 (participation clause) or “for the purpose of interfering with any right or privilege secured by” the statute and regulations (interference clause).

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 establish a *prima facie* case of retaliation, OCR must find the following:

1. The complainant engaged in a protected activity;
2. The recipient took a materially adverse action against the complainant; and
3. Some evidence of a causal connection exists between the protected activity and the materially adverse action.

If a *prima facie* case has been established, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its materially adverse action. If a non-retaliatory reason for the materially adverse action exists, OCR must determine whether the recipient’s reason is genuine or a pretext for retaliation.

Concerns Identified by OCR

Based upon the documentation provided by the School and the Complainant and based upon the interviews conducted of the Complainant and School personnel to date, OCR has concerns about the Section 504 processes and procedures followed by the School. It is not clear the School personnel have an understanding of its child find obligations, the proper evaluation and placement procedures, re-evaluation procedures, appropriate educational setting requirements, and procedural safeguards. School personnel did not evidence an understanding of what constitutes retaliation under Section 504.

Additionally, the reasons articulated by the School for rejecting the Student’s Section 504 Plan proposals raised concerns for OCR. For example, there is no prohibition in Section 504 on modifying the behavior or placement of staff or other students in order for the School to provide a FAPE to a student with a disability. OCR is concerned that School administration employs a balancing test, weighing the burdens on other students and staff, when deciding whether an accommodation for a student with a disability is necessary to provide FAPE. Moreover, contrary to the stated reason for rejecting a proposal under the Student’s 504 Plan, services are provided in Section 504 plans. *See, e.g.*, 34 C.F.R. § 104.33(b) (“[T]he provision of an appropriate education is the provision of regular or special education and related aid and services...”).

OCR has concerns that the Complainant’s request for masking was not properly handled as a request for an additional accommodation under Section 504. OCR has issued a letter to help Schools and parents on this topic.

See <https://www2.ed.gov/documents/coronavirus/letter-to-educators-and-parents-regarding-new-cdc-recommendations-03-24-2022.pdf.pdf>

OCR also has concerns about the Section 504 training. It is unclear whether all staff, including personnel hired after the pre-service professional training day, are trained in the general

requirements of the statute. It is also unclear why some staff appear to be exempt from receiving the training. For example, the training log indicates several aides were exempt.

Lastly, OCR has concerns that the School may have engaged in retaliation against the Complainant. Based upon the documentation provided by the School and the Complainant, and based upon the interviews conducted of School personnel and Complainant, it appears the Complainant's communication was restricted in response to her advocating for her and the Student's rights under Section 504.

First, after the Complainant expressed various concerns about the Student's 504 Plan, she was directed to communicate only with the Principal, who is not typically involved in the 504 process. The Principal stated that the rationale for restricting the communication was because some teachers expressed feeling intimidated and uncomfortable with the Complainant. Because the investigation ceased, OCR was unable to further investigate this statement. Second, the Complainant was directed to communicate through the School's private attorney after she mentioned her OCR complaint and concern that the School was retaliating against the Student. OCR obviously is not concerned whatsoever with the School's consulting with an attorney. It is concerned that the School asked the attorney to respond to the Complainant and then the private attorney directed the Complainant to communicate only with him. Even though the attorney narrowed the scope of that restriction after the Complainant asked for clarification, OCR is concerned it may have constituted intimidation, at a minimum. Additionally, the School attorney directed the Complainant to talk with him regarding all COVID-related concerns, but the School personnel stated in interviews that they were not aware of any such policy to direct COVID-related inquiries to the private attorney. OCR is particularly concerned about the tone of the private attorney's emails with the Complainant.

However, after reviewing the documentation provided by the Complainant and the School, OCR determined that there is insufficient evidence to support a finding that the School retaliated against the Student by marking him tardy. The documents and video still-screen shots confirm the student was marked tardy in accordance with the school policy, which is published in the School Handbook and readily available to families online. Records show other students were marked tardy that day. The Student's records show that this was not the only time he was marked tardy during the school year. Accordingly, OCR finds there is insufficient evidence to support a finding of non-compliance pursuant to Section 303(a) of the CPM for this allegation.

Conclusion

As discussed above, during OCR's investigation, the School agreed to voluntarily address the allegations in this Complaint. Thus, pursuant to Section 302 of the CPM, OCR has not made any legal determinations regarding the Complainant's allegations.

The District and School signed the enclosed Resolution Agreement. The Agreement requires the School to draft for OCR's review and approval Section 504/Title II training materials that address, at a minimum: the prohibitions on discrimination against people with disabilities; the School's obligations to provide FAPE and education in the least restrictive environment;

appropriate evaluation, re-evaluation, and placement procedures; procedural safeguard requirements; the prohibitions against retaliation; and the consideration of wearing masks as an appropriate accommodation under Section 504 for COVID. Once the training materials are approved by OCR, the training must be provided to all staff of the School.

The Agreement, when fully implemented, will fully resolve the compliance concerns in this case. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information that was obtained during OCR's investigation and are consistent with applicable law and regulation. OCR will monitor the District's and School's implementation of the Agreement until the School is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's and School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

Please be advised that the District and School may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the District's and School's cooperation in the resolution of this complaint. If you have any questions, please contact [redacted content], the OCR attorney assigned to this complaint, at [redacted content].

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

Enclosure: Resolution Agreement
cc: [redacted content]