



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

March 6, 2014

Craig Baker, Ed.D.
Superintendent
San Carlos School District
1200 Industrial Road, Unit 9
San Carlos, CA 94070

(In reply, please refer to case no. 09-13-1151)

Dear Dr. Baker:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the San Carlos School District (District). The complaint alleged that the District retaliated against the parents of a student based on disability.¹ Specifically, OCR investigated whether the District retaliated against the parents (complainants) in response to their advocacy for, and protection of, the legal rights of the student to obtain a free appropriate public education (FAPE) when it reported to law enforcement that the complainants engaged in illegal activity by recording the student's individualized education program (IEP) team meeting without providing 24-hour advance notice to the District of their intent to record the meeting.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (ADA), as amended by the Americans with Disabilities Act Amendments Act of 2008, and their implementing regulations. Section 504 and Title II prohibit discrimination based on disability in programs and activities operated by recipients of federal financial assistance and by public entities, respectively. The District receives Department funds, is a public entity, and is, therefore, subject to the requirements of Section 504, Title II, and their implementing regulations.

As part of its investigation, OCR spoke with the complainants, the District staff involved with the report to law enforcement, and counsel for the District. It also received and considered documents and records submitted by the complainants and the District.

Based on its investigation, OCR concluded that there was sufficient evidence to establish a violation of Section 504, Title II, and their implementing regulations with

¹The names of the parents and the student were stated in OCR's notification letter to the District and they are not being restated here in the interest of privacy.

respect to the allegation. The facts determined by OCR, the applicable legal standards, and the reasons for OCR's conclusions are summarized below.

The regulations implementing Section 504, specifically 34 C.F.R. § 104.61, incorporate the anti-retaliation regulation of Title VI of the Civil Rights Act of 1964, found at 34 C.F.R. § 100.7(e), and prohibit the intimidation of, coercion of, or retaliation against individuals because they have engaged in activities protected by Section 504. The Title II regulations similarly prohibit the intimidation of, coercion of, or retaliation against individuals engaging in activities protected by Title II. See 28 C.F.R. § 35.134.

When OCR investigates an allegation of retaliation, it examines whether the individual engaged in a protected activity and was subsequently subjected to adverse action by the recipient under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR determines whether the recipient provided a nondiscriminatory reason for the adverse action and, if so, whether the reason provided is merely a pretext and the preponderance of the evidence establishes that the adverse action was retaliation.

Factual Determinations

The student was enrolled in the second grade in one of the District's elementary schools during the 2012-13 school year. She was eligible for special education services based on a primary diagnosis of other health impairment (OHI) and a secondary diagnosis of speech or language impairment (SLI) and was receiving the services through an IEP.

The complainants² have actively participated in the student's education and have, at various times, been proactive in their actions by requesting additional services from the District, questioning determinations made by the District, or otherwise advocating for what they believe is in the best interests of the student and her education.

From near the end of the 2011-12 school year through the beginning of the 2012-13 school year, the complainants took numerous actions on behalf of the student including: sending to school staff letters and e-mail messages questioning the services being provided to the student; meeting with school and District staff about the student's education; and, advocating at IEP team meetings.

At the end of September and beginning of October 2012, the level of the complainants' advocacy for the student increased and included several e-mail messages to school staff about the student's education and behavior, an addendum to an IEP, meetings with school staff to discuss services for the student and other issues concerning her education, and vocal advocacy at IEP team meetings.

²Unless otherwise noted, all references to the complainants' actions may be for the actions of the mother, the father, or both.

The District has a policy that requires parents to provide 24-hour advance notice if they intend to audio record their children's IEP team meeting. The requirement was stated in the District's August XX, 2012 notice to the complainants for a September XX IEP team meeting.

California Penal Code § 632 prohibits any person from recording a confidential communication with any recording device without the consent of all the parties to the communication. Communications during an IEP team meeting that involve the health, education, and welfare information of a student are confidential. However, California Education Code § 56341.1(g)(1) expressly provides that Penal Code § 632 does not apply to IEP team meetings and it also expressly provides parents with the right to record a meeting. Although it has a provision requiring giving 24-hour advance notice of an intent to record a meeting, it does not provide for any penalty or consequence for a failure to provide the notice and does not make a failure to provide it a criminal act.

Further, California Education Code § 56321.5 mandates that "[t]he copy of the notice of parent rights shall include the right to electronically record the proceedings of [IEP] team meetings as specified in subdivision (g) of Section 56341.1."

At the conclusion of the September XX IEP team meeting, the RSP teacher informed the school principal, who had not attended the meeting, that she believed the student's father recorded the meeting. She did not provide any details or specifics about why she believed he had done so. The principal then asked the father if he recorded the meeting and he responded that he had not.

Thereafter, the RSP teacher informed the principal that she believed the meeting was recorded because she observed that the father's notebook computer was lying in a V-shape on the floor next to him during the meeting. She did not state that she saw that it was on, that she saw the activity light blinking, or that she saw anything on the screen (including anything that showed a recording device was in operation).

Later during the morning of September XX, 2012, the principal sent an e-mail message to the Director of Student Services that informed her of the suspected recording of the meeting and that also stated, in pertinent part:

[The RSP teacher] reminded me [the father] has done this before on his iPhone. The first time he did this, it was not addressed, but the 2nd time he put the phone on the table and we explained the policy as stated on the Meeting Notice and he turned it off. So this is the 3rd time and I would like for it to be addressed.

The Director responded a few hours later to the principal's e-mail message by writing, in pertinent part:

Okay – I need the date (if you can remember) when he did on his iPhone. I know he was told today that he is not able to do it.

I will seek guidance from counsel but it may be prudent for me to write an email reiterating the rules for tape recording others without permission and that he has been told this before and there is concern that this may have been violated (along with a legal citation).

In an October X, 2012 e-mail message to the Director and principal, the RSP teacher wrote:

[The school counselor] attended the 11/XX/2011 meeting. That is the first time we suspected [the father] was taping the meeting with his iphone without informing the team. The next meeting we held for [the student] was on 1/XX/2012. I believe it was at this meeting that [the father] again tried to record the meeting with his cell phone without informing the team, but he got caught and was reminded of our policy as stated on the Notice of Meeting. On 9/XX/12 I observed [the father's] computer to be opened in a V shaped, on its side, on the floor, between [the mother] and [him]. I immediately informed [the principal] and [she] addressed the issue with [the complainants].

Also in an October X, 2012 e-mail message to the Director, the principal added the following to the RSP teacher's previous e-mail message:

And to reiterate, I asked [the father] if he was taping and he said "no." I didn't realize until after they left that [the RSP teacher] has seen it "opened, in a v-shape, on its side, under the table, on."³

At various times from about September XX, 2012 through October X, 2012, the Director communicated with counsel for the District about the recording of the meeting.⁴ In a September XX, 2012 e-mail message to the Director, counsel stated that "[i]ntentional recording without consent of a confidential communication violates penal code section 632. First time Violator subject to \$2500 fine or [sic] up to one year in prison or both."

On October X, 2012, the student had significant behavioral issues while at school and the complainants characterized her behavior as a meltdown. Early that afternoon, the complainants sent an e-mail message to the principal and RSP teacher regarding the situation and requested consultation from the school psychologist. Later the same afternoon, the Director made a report to the San Mateo County Sheriff's Office that the father had illegally recorded the September XX, 2012 meeting and, on October XX, 2012, a deputy sheriff went to the family's home and spoke with the student's mother about recording the meeting. She informed the deputy that no one recorded the meeting. The deputy closed the investigation the same day, completed his report, and

³The principal's description of what the RSP teacher observed is not consistent with what the RSP teacher stated in her e-mail message or what she informed OCR that she had observed. The RSP teacher did not state that the notebook computer was under the table or that it was powered on.

⁴For brevity purposes, the alleged recording of the meeting is simply referred to as recording rather than alleged recording. Doing so does not mean that the father did, in fact, record the meeting.

stated that the report was “for informational purposes only” and there was “no proof a crime was committed.”

The complainants denied to OCR that they previously recorded any IEP team meeting and the District was not able to provide to OCR any details or specifics about the alleged recording of a meeting in November 2011, other than the teacher’s statement one year later that staff “suspected” the father was recording the meeting. No District employee has ever stated to the complainants that they were suspected of recording a meeting in November 2011 and there was never any investigation or other action taken in response to any belief that a recording was made of a meeting in November 2011.

Additionally, the complainants denied to OCR that they were “caught” attempting to record the January 2012 meeting; they stated that the father placed his iPhone in plain view on top of a table in order to record the meeting and informed everyone in attendance that he was recording the meeting. He was then told that he was required to provide 24-hour advance notice of his intent to record the meeting and he ceased recording.

The complainants also explained their actions at the September XX, 2012 meeting. They explained that the father was using the computer to type notes as the meeting progressed and he placed the notebook on the floor when the student wanted to sit in his lap. Because he could not type notes while the student was on his lap, and to prevent the student from playing with the notebook, the father placed the notebook on the floor next to him as the most convenient location to place it and did not close the lid completely.

The RSP teacher told OCR that at the end of the September XX meeting, when she walked by the area in which the complainants were seated, she noticed that a notebook computer was on the floor, on its side, and open in a V-shape. She acknowledged that she could not determine if the notebook was powered on, could not see anything on the screen, and that it was not plugged into any outlet or other power source. She believed it may have been used to record the meeting based on what she believed was an unusual placement and because the complainants had previously attempted to record meetings.

The principal stated to OCR that, at the conclusion of the September XX meeting, the RSP teacher told her that the complainants recorded the meeting and she asked the student’s father if he had recorded the meeting and he responded that he had not. Later that day, the teacher provided the additional details about the notebook computer.

The Director told OCR that she did not attend any of the meetings and all of the information she had about them was provided by other District employees. Her investigation of the alleged recording of the September XX meeting prior to determining to make the law enforcement referral consisted of obtaining information from other District staff (primarily the principal and the RSP teacher), speaking with counsel about the law prohibiting the unconsented recording, and advising the superintendent and

board of education about the situation and her plan to make the referral. She never met or spoke with the complainants about the allegation or attempted to obtain their version of events.

The Director's conclusion that the parent had illegally recorded the meeting was based on the statements of others describing the placement of the computer on the floor and because, according to other employees, the complainants had recorded or attempted to record meetings in the past.

The Director acknowledged that she initially responded to the report of the suspected recording by suggesting that an e-mail message be sent to the complainants. She told OCR that she later determined to refer the matter to law enforcement because she learned that the complainants recorded and attempted to record meetings in the past. However, OCR noted that the information regarding prior recordings or attempts to record was given to the Director before she considered sending an e-mail message to the complainants (in the principal's first e-mail message notifying the Director of the September XX meeting), not after.

The Director told OCR that she was not aware that Education Code § 56341.1(g)(1) expressly provides that Penal Code § 632 does not apply to IEP team meetings. She stated that she obtained the advice of counsel before making the law enforcement referral and that counsel advised that it was illegal to record without the prior knowledge and consent of everyone else.

OCR requested that the District provide details of any other incidents during the past three years when a parent has been suspected of committing a criminal act while on District property or at a District event and the District provided only one other incident. In August 2012, at the same school, a parent attended a back to school night event while subject to and in violation of a restraining order obtained by his former spouse. The principal was aware of the restraining order and asked the parent to leave. The parent complied with the request and no referral to law enforcement was made by the District. The District identified no other incident where a parent was referred to the police.

Analysis

A prima facie case of retaliation consists of: (1) an individual engaged in protected activity; (2) adverse action was taken against the individual; and (3) there is causal relationship between the protected activity and the adverse action.

If the prima facie case is established, the District must then provide legitimate and non-retaliatory justifications for its actions. If such justifications are provided, it must then be shown that it was more likely than not that the adverse actions were the result of the protected activity. Refuting or otherwise disproving the stated justifications accomplishes this.

I. The Prima Facie Case

As explained below, the facts in this matter establish a prima facie case of retaliation against the complainants.

(A) Protected Activity

Advocacy on behalf of the rights of oneself or another individual under the federal civil rights laws enforced by OCR is protected activity. In this matter, there is evidence of significant protected activity. During the most recent pertinent two semesters of the student's enrollment at the school, the complainants continually advocated for special education services and the provision of a FAPE on her behalf by questioning actions, inactions, and determinations made by the District and requesting additional services not being provided by the District. Notably, the complainants increased the level of their advocacy during the month of September 2012.

The complainants' advocacy on behalf of the student was protected activity under Section 504 and Title II.

(B) Adverse Action

For an action to be considered adverse, OCR generally determines whether the adverse action significantly disadvantaged the complainant as to his or her role as a parent or as to his or her ability to participate in district programs, or would be reasonably likely to have a deterrent effect on the exercise of civil rights. Mere unpleasant or transient incidents usually are not considered adverse.

In this matter, the District alleged that the complainants unlawfully made a recording of an IEP team meeting and then made a report to law enforcement that they committed a violation of the Penal Code. Law enforcement, in response, initiated a criminal investigation and questioned the student's mother. Although no criminal prosecution ultimately resulted from the report, the allegation of criminal behavior, the report itself, the resulting involvement of law enforcement in the affairs of the complainants, the questioning of the mother by law enforcement, and the possibility that arrest and criminal prosecution may occur because of the report are all sufficiently adverse since one or all of them would be reasonably likely to deter a parent from advocating on behalf of a child.

(C) Causation

An adverse action can be considered retaliatory only if it was motivated by an individual's protected activity. OCR infers a causal connection in most cases in which the adverse action occurs in close proximity in time with the protected activity. There is sufficient evidence to infer causation in this matter due to the close proximity in time between the adverse action and the protected activity.

As noted above, the complainants engaged in protected activity in the spring and fall of 2012 with significant advocacy occurring on September XX, XX, and XX, 2012.⁵ The complainants were subjected to adverse action as early as September XX, 2012 with the allegation of criminal conduct being made against them and as late as October X, 2012 with the District's report to law enforcement of its belief that the complainants violated the law by recording the IEP team meeting. Thus, adverse action against the complainants followed on the heels of their protected activity anywhere from, at the least, the day of protected activity to, at the most, 20 days following protected activity. The proximity between the protected activity and the adverse action, therefore, is significantly close and warrants an inference that the adverse action was caused by the protected activity.

II. Non-Retaliatory Justifications

The District provided a non-retaliatory justification for its actions against the complainants -- that they recorded the September XX meeting without providing 24-hour advance notice. However, as explained below, OCR concluded that the stated justification by the District was not reasonable.

III. Reasonableness/Legitimacy of Stated Justification

Non-retaliatory justifications may be refuted by a showing that they are pretext – that is, they are unworthy of credence, untrue, or did not actually motivate the actions at the time that they were taken.

The information provided to OCR does not establish a reasonable basis for the District to conclude that the complainants improperly recorded the September XX meeting. The only established facts upon which the District based its determination were that the notebook was on its side, on the floor, and open in a V-shape. Nothing known to the District indicated that it was on, much less recording anything. No one observed what was on the screen, saw any activity indicated by the activity light, heard any noise being made by it, or saw or heard anything else that would reasonably lead one to believe that it was being used to record the meeting.

In addition, the District was aware that the father denied recording the meeting when asked by the principal. However, District administrators did not, thereafter, question either of the complainants as part of its investigation or attempt to obtain an explanation from them for why the computer was placed on the floor and based their actions solely on second and third hand information. An adequate investigation would have provided the complainants with an opportunity to deny the allegation and provide the reason for the father's actions.

⁵Because the advocacy on September XX, XX, and XX is itself significantly proximate to the adverse action, it is not necessary for OCR to determine if the earlier advocacy is sufficiently proximate or too remote to be considered in the causation analysis and it includes the advocacy for background purposes without making a determination.

The District's reliance on its belief that the complainants had recorded or attempted to record other meetings in the past is likewise problematic. The District did not provide any information to support its contention that the complainants secretly recorded the November 2011 meeting. Additionally, if the District believed the complainants had unlawfully recorded the November 2011 meeting, it did nothing in response at the time including notifying the complainants of their unlawful action or questioning them about it. The first time the District stated its belief was after the September XX, 2012 meeting.

The District's reliance on the complainants' attempt to record the January XX, 2012 meeting is equally unhelpful to its position since the District acknowledged that it was done openly and conspicuously and the complainants ceased the attempt when the District objected to it because of the lack of 24-hour advance notice.

Even assuming that the District had a reasonable basis to believe the father was recording the September 2012 meeting, OCR concludes that its response in reporting him to law enforcement, with the possibility that he would be charged with a felony, was significantly disproportionate to the nature of his action especially given that, under Education Code § 56341.1(g)(1), his recording would not have been subject to Penal Code § 632. Although § 56341.1(g)(1) has a provision requiring 24-hour notice of an intent to record a meeting, it does not provide for any penalty or consequence for a failure to provide notice and does not make a failure to provide the notice a violation of Penal Code § 632 or any other criminal statute. There were several other actions the District could have taken such as sending a letter reminding the complainants of the notice requirement. Moreover, in the one other instance that the District knew of a true violation of the law by a different parent – violating the terms of a restraining order – it did not make a referral of the matter to law enforcement and simply permitted the other parent to leave.

Any report to law enforcement of possible criminal conduct by parents undoubtedly has a deterrent and chilling effect on parents and their willingness to actively participate in their children's education and advocate on their behalf. As such, involving law enforcement in school matters should be reserved for those instances when the misconduct or harm is sufficient enough to warrant such involvement.

Conclusion

Based on the above, OCR concluded that the preponderance of the evidence established that the District's action constituted unlawful retaliation under Section 504, Title II, and their regulations.

The District, through its counsel, has agreed to the enclosed Resolution Agreement to resolve the compliance issues in this case. The Agreement provides that the District will revise and distribute its policy and regulation governing the uniform complaint procedure,⁶ develop and distribute a memorandum regarding unlawful retaliation and,

⁶The deficiencies in the District's UCP was not an allegation made by the complainants but was something noted by OCR during its investigation in this matter.

thereafter, provide training on the topic, and compose and send a letter to the complainants about this matter.

OCR concludes that the actions agreed to by the District in the enclosed Agreement will resolve the compliance issues in this case and OCR will monitor its implementation.

While OCR believes that the District's completion of the requirements of the Resolution Agreement will result in its return to compliance with the applicable federal law, OCR also recognizes that the events in this matter have understandably strained the relationship between the complainants and the District. Although OCR cannot create a resolution that will repair the relationship, it urges the complainants and the District to again work constructively together with the best interests of the student in mind. It is important to remember that the IDEA (and its procedures) was developed with the overriding belief that parents and school districts would work in good faith with one another and it is only through such mutual cooperation that the objectives of a FAPE can be achieved. Without cooperation and compromise by both parties, the process cannot work and the ultimate resulting casualty will be the student and her education.

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

This letter sets forth OCR's determination in an individual OCR case, 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.

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 resolution process. If this happens, the complainants 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, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The complainants may file a private suit in federal court whether or not OCR found a violation.

OCR thanks you and your staff, specifically XXXX XXXX XXXXXXXXXXXXX and Deputy County Counsel XXX XXXXXX, for your assistance and cooperation in resolving this matter. If you have any questions about this letter, please contact Alan Konig, Civil Rights Attorney, at (415) 486-5527 or Alan.Konig@ed.gov.

Sincerely,

/s/

James M. Wood
Team Leader

Enclosure

cc: XXX XXXXXX, Esq.