



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

December 28, 2017

VIA ELECTRONIC EMAIL

Mr. Eric Dill
Superintendent
San Dieguito Union High School District
710 Encinitas Blvd.
Encinitas, California 92024

(In reply, please refer to case no. 09-16-1073.)

Dear Mr. Dill:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the San Dieguito Union High School (District). The Complainant alleged discrimination against the Student on the basis of disability.¹ Specifically, OCR investigated whether the Complainant was subjected to retaliation by the District after she advocated on behalf of her son when the District sent the Complainant a civility letter.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After a careful review of the information gathered in its investigation, OCR concluded that the District violated Section 504, Title II, and their implementing regulations. Without admitting to any violation of federal law, the District has entered into the attached resolution agreement to resolve the noncompliance OCR found during its investigation. The legal standards, findings of fact, and the reasons for OCR's determinations are summarized below.

Legal Standard

¹ OCR notified the District of the identities of the Complainant and the Student when the investigation began. We are withholding their names from this letter to protect their privacy.

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

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to materially adverse action by the District, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the District can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Factual Findings

Background

During the 2015-2016 school year, the Student was enrolled at a middle school (School) in the District. The District recognizes the Student as an individual with a disability, and the Student has an Individualized Education Program (IEP) plan. The Student's most recent IEP at the time the OCR complaint was filed, was dated September XX, 2015, and stated, among other things, that the Student would receive "teacher support in maintaining calendar/agenda", 50% extended time on tests, and use of a calculator for math.

Interactions between the Complainant and School

On August XX, 2015, the Complainant emailed the Student's Education Specialist asking to "please help us by finding a clear second and even third alternative way for" the Student and her "to know what he has due." The Education Specialist responded the same day that the Student should use the calendar/syllabus posted on the blackboard or on the teacher's website.

On September XX, 2015, the Complainant emailed the Student's Math Teacher (Math Teacher) and included the Education Specialist and Case Manager, requesting additional support related to helping the Student study. The Complainant also requested that the Student's math exam be postponed, until he received a copy of someone's notes and until the Complainant could "get more information on how to support him." The Case Manager responded on September XX, 2015 that the Student could use the answer keys, and he could make up his test the following Thursday.

Between September XX and September XX, 2015, Complainant and Case Manager exchanged emails regarding the Student's triennial IEP. The Complainant identified that the Student had some language deficits, and the Case Manager responded that an assessment could be provided prior to the scheduled June XX, 2016 triennial.

Between October X and X, 2015, the Complainant and the Case Manager exchanged several emails regarding the Complainant's concern that the Student was not receiving an appropriate level of assistance with his calendar and organizing materials. In response to the Case Manager's suggestion that the Student should review his planner with his content teachers, because they were in a better position than the resource teacher to ensure the accuracy of the information for each class, the Complainant stated:

[w]hat I hear you saying is that you are not willing to support [Student] by getting him the materials he needs, though he has clearly exhibited an inability to get this material himself I do not have access to a computer and no time to write and submit a full complaint to the district, but unless I have misunderstood your email, then I will be pursuing all avenues to make sure [Student] is not discriminated against. I am very concerned about your methods of providing [the Student] with an 'appropriate' education.

On October X, 2015, the Case Manager responded to the Complainant stating that they were working to support the Student and offered to discuss the issue at the upcoming IEP meeting. The Complainant then inquired into whether the Case Manager had obtained the previous IEP documents and stated that she left the last meeting feeling "that it was unattainable." The Case Manager responded stating that she would accept previous IEP documents from the Complainant and noted that she had the Student's previous assessments.

That same day, the Case Manager forwarded the Complainant's email to the Assistant Principal, stating "[i]n light of the aggressiveness" of the Complainant's emails, she was requesting "[a]dmin to contact/notify" the Complainant in writing "regarding appropriate contact and parent civility." The Case Manager explained she had not requested this before but felt "a boundary" was crossed by the Complainant; she noted that the Complainant was an "advocate" by profession.

District records indicate that, on October XX, 2015, while on campus for a scheduled meeting with the Math Teacher (Teacher), the Complainant made an unscheduled visit to the Case Manager. In an email on October XX, 2015, the Complainant thanked the Teacher for taking the time to meet with her and the Student. The Complainant stated until that meeting, she had been very frustrated about the Student's failing math but the Teacher's willingness to look at where the Student's issues were coming from had given her hope. The Complainant informed OCR she visited the School, verbally checked in for her scheduled meeting with the Teacher with a parent volunteer, but she did not sign the visitor log. The District stated the Complainant's unscheduled visit to the Case Manager violated the District's requirement that visitors, including parents, are required to schedule appointments in advance and must first check in at the front office to obtain authorization from the administrative office to enter the campus.

Other email correspondence between the Complainant, Case Manager, and other School staff during October 2015 shows that the Complainant frequently emailed staff members regarding the Student's test scores, her perception that steps were not being taken to ensure the Student was not confused about his assignments, and requests for IEP documents from the Student's previous schools. The content of these numerous emails did not involve the Complainant making any

threats, using obscenities, other using demeaning language, or language that might be a disruption to the learning environment.

On October XX, 2015, the Complainant emailed the Case Manager that the Student informed her that he did not receive the accommodations that he needed for a math test because he did not receive his full 50% extended time and the calculator he received was “unfamiliar”. The Case Manager responded less than an hour later that the Student was provided 50% extended time per his IEP and explained that students were given 30 minutes to test and the Student was allowed an additional 15 minutes. She further explained that the Student had not finished the test, but was asked to turn it in, and the teacher proctoring the test contacted her on the Student’s behalf, and the School gave him “100% extended time to finish the quiz-meaning another 15 minutes.”

On October XX, 2015, the Assistant Principal spoke with the Complainant by phone and relayed the School’s concerns regarding the “demanding tone” of the Complainant’s emails. The District informed OCR that the Complainant disagreed that her emails were inappropriate and requested the School provide its communication expectations in writing.

On October XX, 2015, the Complainant emailed the Case Manager again regarding her concern that all teachers were not signing the Student’s planner. The Case Manager acknowledged that the Student’s planner had not been signed by one substitute, but that the Student’s resource teacher had been reviewing and signing the planner throughout the week. The Complainant responded, “I don’t know where you have been getting your information but no one has signed [the Student’s] planner, ever.” The Complainant stated in her email that she felt she had no other choice but to file a formal complaint with the District.

On October XX, 2015, the Case Manager emailed the Assistant Principal and others stating that this was the second time that the Complainant “threatened” filing with the District Office. The Case Manager noted that maybe the Complainant feels it is a means to an end but she should “keep that to herself and do what she feels necessary without lording it over us each time she’s unhappy with our performance/service.”

Civility Letter

On October XX, 2015, the Principal sent the Complainant a letter, which stated that he wished to review appropriate communication expectations with School staff and to reinforce the visitor’s policy. The letter stated the tone of the Complainant’s emails with the Student’s teachers was “not conducive to a collaborative effort” and stated that the Complainant’s October XX, 2016 email to the Student’s Case Manager was “accusatory in tone, and not true, as the [the Student’s] support class teacher has been signing his one page teacher provided planner.” The letter instructed the Complainant to direct future communication about the Student’s progress to the Assistant Principal. The letter also incorrectly stated that the Complainant had made an unscheduled visit to the Teacher. It reminded the Complainant, that visitors are required to schedule appointments with School staff, and receive a visitor’s badge before going onto the campus. The letter also stated that the District’s Board Policy (BP) 1314, “Learning Environment and Disruptions,” discourages “volatile, hostile, or aggressive actions that could have a negative impact on the learning environments.” In the future, the Complainant would be

required to contact the Principal's office to obtain permission before visiting the School. Further, the letter notified the Complainant that the School filed an incident report within the scope of BP 1314 and informed her that failure to adhere to the above directives may result in further corrective action, including misdemeanor criminal penalties, under the California Education Code and Penal Code.

The District informed OCR that the Complainant had previously failed to check-in at the administrative office to obtain a visitor's pass, and in response to the prior failures to check-in and the Complainant's October XX, 2015 unscheduled visit to the Case Manager, the letter directed the Complainant to communicate with the Principal's office to get permission prior to visiting the campus. Although the civility letter stated the School filed an incident report, the District informed OCR a specific incident report could not be located and that the letter may have served as an incident report. OCR received evidence that showed that the Complainant did not always sign-in on the visitor's sign-in sheet but she did verbally check-in with a teacher or a School administrator.

The Complainant told OCR that she perceived this letter to be in retaliation for her advocacy on behalf of the Student. The Complainant subsequently cancelled the Student's November XX, 2015 IEP meeting. District records indicate that the Complainant withdrew the Student from the School as of November XX, 2015.

District's Policies

OCR reviewed the District's BP 1314 which states that parents:

may contact teachers at a school site by telephone or by appointments. The Board of Trustees encourages positive communication and discourages volatile, hostile, or aggressive actions that could have a negative impact on the learning environment for both teachers and students.

OCR also reviewed the District's Administrative Regulations (AR) 1314 which corresponds to BP 1314. AR 1314 states, in relevant part, that any individual who disrupts or threatens to disrupt school/office operations will be directed to leave the school and, among other consequences, "shall be informed that he/she will be guilty of a misdemeanor" if they reenter District premises after having been directed to leave in accordance with specified sections of the California Education Code and Penal Code. AR 1314 also states that an incident report "should be completed". Neither document requires prior permission from the Principal's office for a visit to the School.

With regard to the Complainant's October XX, 2015 visit or any other visit to the School, there is no evidence that the Complainant was directed to leave under the circumstances described above. Although the Complainant's unscheduled visit to the Case Manager did not fall within the District's AR 1314 because she was not ever directed to leave the premises, the District stated to OCR that it created an incident report citing to BP 1314 as the reason for doing so.

Analysis and Conclusions of Law:

To constitute protected activity, OCR must find that: 1) an individual communicated, formally or informally, a belief that a recipient's act or policy was discriminatory on the basis of disability; 2) the manner of the opposition was reasonable; and 3) the complainant had a good faith and objectively reasonable, though perhaps mistaken, belief that he or she was opposing unlawful discrimination.

Here, OCR found that the Complainant communicated her belief that the District's actions were discriminatory against the Student on the basis of his disability, when she emailed School staff between August and October 2015 to advocate for the implementation of the Student's IEP and stated that she may file a disability discrimination complaint on two occasions due to an alleged failure to implement the IEP. All correspondence to date indicates that School staff responded to the Complainant's inquiries promptly, however, the Complainant continued to express that the Student was not being appropriately supported, even after School staff responded to specific requests from the Complainant. Although the Complainant's emails may have been received by the Case Manager as demanding, OCR found that the Complainant's manner of opposition to what she believed was discrimination was reasonable because while her communications were insistent at times, they were not abusive, demeaning, threatening disruption, or in any other way disruptive to the learning environment.

Moreover, OCR found that the Complainant had a good faith and objectively reasonable belief that she was opposing unlawful discrimination against her son on the basis of his disability. The Complainant engaged in frequent communication with the Teacher and the Case Manager regarding the Student's IEP and requests for support based on the Student's grade and misunderstandings in the Student's planner. The Complainant believed that the terms of the IEP required School staff to provide more support with respect to organization and planning. OCR did not find any evidence that the Complainant's belief was unreasonable or that her advocacy was in bad faith.

Next OCR assesses whether the District engaged in an adverse action that could dissuade a reasonable person from engaging in future advocacy, and whether there was a causal connection between that adverse action and the protected activity. In this regard, OCR found that the Assistant Principal sent a civility letter to the Complainant on October XX, 2015, in which the School stated that the tone of Complainant's emails were not conducive to collaboration with the Student's teachers, described the Complainant's statements as "accusatory and untrue," and directed the Complainant to communicate with the Assistant Principal regarding any concerns with the Student's progress. The letter also stated the School had filed an incident report, pursuant to BP and AR 1314 and instructed the Complainant to contact the Principal's office to receive permission to visit the campus, and that failure to follow the directive in the letter could result in further action, including a criminal penalty, under the California Education Code and Penal Code. The Complainant told OCR she perceived the letter to be in retaliation for her advocacy for her son. As a result, she felt the Student would not receive appropriate support from School staff, and that she would be subjected to further negative action if she continued to advocate for services and supports that she believed he needed. She subsequently withdrew the student from the District.

Based on the above, OCR finds that, as written, the civility letter could dissuade a reasonable person in the Complainant's position from engaging in protected activity, such as making a

charge of discrimination. The letter stated that the Complainant could face criminal consequences for failing to abide by the directives in the letter, by including and referencing BP and AR 1314. It also stated that an incident report had been filed and required that she request permission in advance from the Principal's office prior to coming on campus, something not required of other parents. Thus, OCR finds that the District subjected the Complainant to a material adverse action when it sent her the civility letter.

OCR finds that there was a causal connection between the Complainant's protected activity, which occurred as early as August 2015 and continued through October XX, 2015, and the letter, which was sent to the Complainant on October XX, 2015. The civility letter refers to the Complainant's communication with School staff regarding the Student's IEP. Specifically, the email correspondence shows that the civility letter was drafted in response to the Case Manager's requests to the Assistant Principal in October wherein she discussed her frustration with the Complainant's advocacy on behalf of the Student, including the Complainant's threats to file a complaint of discrimination with the District regarding the Complainant's concerns about implementation of the IEP for the Student.

When a preponderance of the evidence establishes that the Complainant engaged in a protected activity, the District subjected the Complainant to a material adverse action and there was a causal connection between the protected activity and the adverse action, the burden shifts to the District to demonstrate it had a legitimate, nonretaliatory reason for its actions. OCR then determines whether the reason is genuine or is a pretext for retaliation. The District's asserted legitimate, nonretaliatory reasons for sending the Complainant a civility letter with a threat of criminal sanctions and preapproval for coming on campus are: 1) the Case Manager's concerns that the Complainant's communications towards her were unreasonably aggressive and inappropriate, 2) the Complainant's unscheduled visit to the Case Manager, 3) the Case Manager's request that the Complainant be contacted regarding her conduct; and 4) the Complainant's previous failure to check-in at the administrative office to obtain a visitor's pass. The District also stated that the Complainant violated BP 1314, which discourages disruptions to the learning environment.

OCR found that the District's reasons did not support all of the actions taken in the October XX, 2015 letter and were a pretext for retaliation. The evidence showed that the District's actions with respect to filing an incident report and threatening criminal sanctions were inconsistent with preexisting policy. While the Case Manager may not have agreed with the Complainant's communicated belief that the Student was being discriminated against and may have been offended by her statements that she intended to file complaints, these communications did not rise to a level that would trigger a threat of criminal sanctions under the District's policies. Nevertheless, the letter issued threatened misdemeanor sanctions. The letter also stated that the District had filed an incident report; however, the policies identified that such reports would be issued only if an individual's behavior was so disruptive that he or she had to be directed to leave campus. Here, there was no evidence that the Complainant was directed to leave campus or that she was disrupting the learning environment while on campus; rather, the complaint was that she did not schedule a meeting with the Case Manager when she was on campus for a different scheduled visit with a teacher. The evidence showed that the District only raised concerns about the visit 12 days later on the same day that the Complainant sent an email communicating further concerns to the Case Manager about disability discrimination and threatened to file disability

discrimination and the Case Manager reported the email communication to the School administration. Although such communications alleging that a complaint of discrimination may be filed may not be pleasant, here, they were protected activities and a preponderance of the evidence showed that the District took the specific adverse actions here in response to these communications in violation of Section 504, Title II, and their implementing regulations.

Conclusion

For all of the reasons explained above, OCR found that the District violated Section 504 and Title II and their implementing regulations by retaliating against the Complainant based on her advocacy on behalf of her son when the District sent the Complainant the October XX, 2015 letter threatening her with a misdemeanor if she engaged in further communications inconsistent with the letter or visited the School without prior permission.

To resolve the non-compliance finding, the District committed to take the actions in the enclosed Agreement. When fully implemented, the Agreement signed by the District on December 21, 2017, is intended to address OCR's compliance concerns in this investigation. It requires the District to: 1). send a letter to the Complainant acknowledging that its October XX, 2015 letter should have affirmed the District's goals of civility and campus security without referencing an incident report or potential criminal sanctions; 2). issue a written guidance memorandum to District special education administrators and school administrators explaining steps School employees should follow if they receive notice of discrimination based on disability, including retaliation for protected activity on behalf of students with disabilities; and 3). provide training to School staff regarding the District's obligations under Section 504 and Title II.

This concludes OCR's investigation of the 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. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

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

When fully implemented, the Resolution Agreement is intended to address the compliance findings in this investigation. OCR will monitor the implementation of this Agreement until the District is in compliance with Title II, Section 504 and their implementing regulations, at 34 C.F.R. §104.61, and 28 C.F.R. §35.134, which were at issue in the case. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Thank you for your cooperation in resolving this matter. If you have any questions regarding this letter, please contact Nezhia Burkes at (415) 486-5592 or Nezhia.Burkes@ed.gov.

Sincerely,

/s/

Laura Faer
Regional Director

Enclosure

cc: XXXX XXXXXXXX, Currier & Hudson