



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

August 22, 2017

VIA ELECTRONIC MAIL

Ed Manansala, Ed.D.
Superintendent
El Dorado County Office of Education
6767 Green Valley Road
Placerville, California 95667-8984

(In reply, please refer to case no. 09-16-1995.)

Dear Superintendent Manansala:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the El Dorado County Office of Education (EDCOE or Recipient). The Complainant alleged discrimination on the basis of disability.¹ Specifically, OCR investigated whether the Recipient failed to respond adequately to the Complainant's internal complaint in August 2016, stating that the Student's 2016-2017 teacher was retaliating against her for her advocacy on behalf of the Student and other students with disabilities.

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 education system, EDCOE 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 Recipient. After careful review of the information gathered in the investigation, OCR concluded that the Recipient violated Section 504 and Title II with regard to the issue OCR investigated. The applicable legal standards, the relevant facts gathered, and the reasons for our determinations are summarized below.

Legal Standards

¹ OCR previously provided the Recipient with the identity of the Complainant and Student. We are withholding their names from this letter to protect their privacy.

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

OCR evaluates the appropriateness of the responsive action to alleged discrimination on the basis of disability or alleged retaliation for engaging in protected activity under Section 504 and Title II by assessing whether it was prompt, adequate, and effective. What constitutes a reasonable response to retaliation or discrimination will differ depending upon the circumstances. However, in all cases the recipient must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination or retaliation, and remedy the effects of the discrimination on the student who was discriminated against. The recipient must also take steps reasonably calculated to prevent the discrimination or retaliation from recurring.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the recipient does not tolerate discrimination or retaliation and will be responsive to any student reports of discrimination or retaliation. The recipient also should take steps to prevent any retaliation against the person who made the complaint or those who provided information.

Furthermore, the Section 504 regulations, at 34 C.F.R. §104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Issue: Whether the Recipient failed to respond adequately to the Complainant's internal complaint in August 2016 stating that the Student's 2016-2017 teacher was retaliating against her for her advocacy on behalf of the Student and other students with disabilities.

Findings of Fact

The following facts are relevant to OCR's analysis.

Background

The Student qualified for special education services and related services under the primary disability category of Orthopedic Impairment and secondary disability category of Multiple Disability. She is diagnosed with XXXXXX XXXXXXXXXX XXXXXXXX XXXX X.

Based on the Student's April XX, 2016 individualized education program (IEP), the Student would receive health and nursing services daily during her 6 hour school day from August X, 2016 to April XX, 2017. The Student also required door-to-door transportation services with a credentialed Licensed Vocational Nurse (LVN) accompanying her on the bus to monitor her health.

The Complainant is a LVN nurse hired by EDCOE. She was first assigned to work with the Student on October X, 2012. The Complainant worked with the Student in the 2014-2015 school year, when the Student was placed at an EDCOE special education preschool program. During the 2014-2015 school year, the Complainant reported to school and EDCOE administrators that the teacher and instructional aide mistreated students with disabilities. The Complainant and EDCOE had multiple meetings and exchanged written letters about the alleged mistreatment of students and the Complainant's role in the classroom. The Complainant told OCR that the 2014-2015 teacher yelled at her and humiliated her.

During the 2015-2016 school year, the Student and Complainant were placed at an elementary school (School). The Complainant expressed no issues or concerns with the Student's 2015-2016 teacher.

During the 2016-17 school year, the Student and Complainant continued at the School. The Complainant told OCR that the 2016-2017 teacher (Teacher) had mentored the 2014-15 teacher, and that the Teacher was aware of the conflicts, complaints, and issues that the Complainant had with the 2014-2015 teacher.

Complainant's Complaint to EDCOE

The Complainant told OCR that due to the Student's disability, the Student is unable to regulate her body temperature in hot weather and needs to be in an air conditioned school bus on those days or she is at medical risk. Between August XX, 2016 and August XX, 2016, the weather was very hot, and the Complainant learned that the school bus did not have a working air conditioner. On or about August XX, 2016, she told the Teacher about the non-functioning air conditioner. According to the Complainant, the Teacher responded that it was not her concern, since the Student would not be placed on that bus.

On August XX, 2016, the Complainant sent an email to the EDCOE Executive Director of Special Services and EDCOE Director of Student Programs to complain about "distressing bullying" perpetrated against her by the Teacher. She stated that the bullying started after the Student's mother spoke to the Teacher during Back to School Night on August XX, 2016. During Back to School Night, the Student's mother allegedly expressed concern to the Teacher regarding the Teacher's request to have the Complainant act as an instructional aide, since it was beyond her capacity as a LVN nurse. The Complainant stated that she was also being subjected to hateful and abusive treatment by the Teacher because the Teacher was the mentor to the Student's 2014-2015 teacher and was aware of the conflicts the Complainant had with the 2014-2015 teacher. The Complainant reported incidents that occurred on August XX, 2016 where she felt threatened by the Teacher who did not give her enough time to prepare the Student to leave the classroom, slammed the door on her to prevent her from coming into the classroom, and told her the contract relief nurse was afraid of upsetting her in relation to his work with the Student.

On August XX, 2016, the Complainant sent another email to the EDCOE Executive Director of Special Services and EDCOE Director of Student Programs to complain about an incident that occurred that day. The Complainant explained that she was talking to the Student's classmate when the Teacher yelled at the classmate to leave the Complainant and the Student. She stated that it upset her so much that she cried, and she requested that the "retaliation" stop.

On the same day, the Complainant met with the EDCOE Executive Director of Special Services to discuss a number of concerns about the Teacher and issues at the School and in the classroom affecting the Student, including: the lack of air conditioning on the bus, which was a medical risk for the Student; the Teacher's candy reward system, which the Student could not participate in; the Teacher's refusal to allow the Student to have lunch with her classmate; the Teacher's bullying of the Complainant; the Teacher slamming the door on the Complainant and refusing to let the Complainant in the classroom on August XX, 2016; and, the Teacher's statement that the contract relief nurse was afraid of upsetting the Complainant in relation to his work with the Student.

EDCOE's Grievance Procedures

Superintendent Policy 4100 (SP 4100) and Board Policy 1010 (BP 1010) both describe the Uniform Complaint Procedures (UCP), one EDCOE's grievance procedures. The UCP is used by students, employees, parents/guardians, school and district advisory committee members, appropriate private school officials, and other interested parties to report allegations of unlawful discrimination, harassment, intimidation, and bullying based on race, color, sex, disability, age, and other characteristics. The UCP prohibits retaliation against UCP complainants. SP 4100 and BP 1010 use nearly identical language to describe the filing, investigation, and resolution of a UCP complaint, including timeframes and the appeals process.

At the time the Complainant made her complaints to EDCOE, Superintendent Policy 4120 (SP 4120) outlined EDCOE's harassment prevention policy available to each EDCOE employee. SP 4120 prohibited discrimination and harassment based on race, color, sex, disability, age, and other characteristics. SP 4120 stated that "[e]radicating workplace harassment [was] the responsibility of every employee, not just supervisors."

SP 4120 also prohibited retaliation against any employee or contractor for opposing unlawful practices prohibited by discrimination laws, for using the SP 4120 complaint procedure, or participating in any investigation by federal or state enforcement agencies. SP 4120 described the complaint and investigation procedures for EDCOE employees and contractors if they believed that they had been subjected to discrimination or harassment, or retaliation. The procedures included, for example, a description of where the complaint should be submitted and what it should include; a statement that the investigation would be effective, thorough, and objective; that the determination would be communicated to the complainant and accused harasser(s); that if harassment is found to have occurred, EDCOE would take immediate and effective remedial action; and that the complainant could have his or her complaint addressed through the UCP. While SP 4120 described the responsibilities of supervisors, managers, and other Personnel Services staff who receive reports of harassment, it did not specify the responsibilities of employees who observe harassment, discrimination, or retaliation. Also, SP 4120 did not contain timeframes for the grievance process.

EDCOE Investigation of Complainant's Complaint

The EDCOE Executive Director of Personnel Services utilized SP 4120 to conduct an investigation of the Complainant's August XX and XX, 2016 emails to the EDCOE Executive Director of Special Services and EDCOE Director of Student Programs. She investigated five incidents, which took place at the end of August 2016. She interviewed the Complainant, the Teacher, the contract relief nurse, another teacher, the special services driver, lead driver, driver, and three instructional assistants.

On November X, 2016, the Executive Director of Personnel Services issued her written findings to the Complainant. She determined that no workplace bullying, harassment, or hostile work environment occurred because the Complainant did not claim she was bullied or harassed due to membership in a protected class and because the incidents were not severe or pervasive enough to alter the conditions of employment. The Executive Director of Personnel Services made the following findings:

1. The contract relief nurse did say the Complainant might "get upset" if he prepared the Student for recess because the Complainant had just "put down" the Student.
2. The Teacher did not yell and shake her finger at the Complainant.
3. The Teacher did hold the door shut to try to talk with the Complainant before she returned to the classroom in an upset state but did not slam the classroom door on the Complainant to prevent her from coming back into the classroom because the door could not be slammed due to the hinge mechanism.
4. The classroom was following a schedule and allocating five minutes to prepare the Student before moving her.
5. The Teacher did yell when telling a student to get back in the classroom and would not allow that student to accompany the Student and Complainant to lunch because the Teacher was concerned about being able to monitor the other student.

EDCOE concluded that, based on Superintendent's Policy 4120, the allegations of workplace bullying, harassment, and hostile work environment were not substantiated.

EDCOE did not investigate the Complainant's allegation of retaliation, including any nexus between the Teacher's alleged harassment of her and her advocacy for students with disabilities in the 2014-2015 school year and for the Student in the 2016-2017 school year.

Analysis

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. Protected activity includes advocacy by an individual on behalf of others, even though the individual may not fall within the group of individuals experiencing the prohibited discrimination. In this regard, the United States Supreme Court has explained that "teachers are often in the best position to vindicate the rights of their students because they are better able to

identify discrimination and bring it to the attention of administrators” and sometimes such adult employees are “the only effective adversar[ies] of discrimination in schools.”²

In this case, the Complainant complained twice to EDCOE about the Teacher’s alleged treatment of her after her advocacy on behalf of the Student, who has a disability. First, in an August XX, 2016 email to the EDCOE Director of Student Programs and EDCOE Executive Director of Special Services, the Complainant stated the Teacher began harassing and bullying her after the Student’s mother spoke to the Teacher during Back to School Night about the Teacher allegedly asking the Complainant to work beyond her capacity as a LVN nurse by being an instructional aide to the Student. The Complainant also identified the relationship between the Student’s 2014-15 teacher and the Teacher, who was aware of the Complainant’s prior advocacy on behalf of students with disabilities, as a reason for the Teacher’s alleged bullying of her. She also advised the Teacher of her concerns regarding the lack of air conditioning on the school bus. On August XX, 2016, the Complainant emailed EDCOE administrators and specifically requested that the “retaliation” by the Teacher stop. Accordingly, OCR found that the Complainant’s allegations to EDCOE included an allegation that the Teacher was retaliating against her based on her advocacy for students with disabilities.

OCR found that the Complainant’s communications to EDCOE administrators constituted notice of alleged retaliation under Title II and Section 504 and, therefore, triggered EDCOE’s obligation to investigate whether the Complainant was subjected to retaliation. However, OCR found that the investigation report did not contain an analysis related to whether the Complainant had engaged in protected activity and been subjected to an adverse action(s) on account of that activity. Instead, the report solely focused on whether the Complainant claimed to be harassed or bullied due to membership in a protected class, and whether the evidence supported a harassment determination. EDCOE did not conduct an investigation regarding retaliation under SP 4120 or any other process that would satisfy the requirements of Section 504 and Title II and thus, failed to respond promptly and equitably to Complainant’s retaliation allegation.

As part of this investigation, OCR also reviewed SP 4120 and found the procedure did not meet the requirements of Section 504 and Title II. Specifically, OCR found that SP 4120 failed to include designated and reasonably prompt timeframes for major stages of the complaint process and the responsibilities of employees or contractors who observe discrimination to report discrimination and retaliation.³

Accordingly, based on a preponderance of the evidence, OCR finds that EDCOE failed to respond promptly and equitably to an internal complaint by the Complainant in August 2016, stating that the Student’s 2016-2017 teacher was retaliating against her for her advocacy on behalf of the Student and other students with disabilities. OCR also found that EDCOE’s procedure in place at that time to address the Complainant’s retaliation complaint did not meet the requirements of Section 504 and Title II and their implementing regulations.

² *Jackson v. Birmingham Bd. Of Education*, 544 U.S. 167, 181 (2005) (internal citations and quotations omitted).

³ OCR learned that on January 17, 2017, EDCOE amended SP 4120 to address only unlawful sexual harassment complaints and it is, therefore, no longer the process to use for allegations of disability discrimination or retaliation related to disability advocacy. As such the resolution agreement in this case does not address SP 4120 and only addresses the remaining grievance procedures.

Conclusion

This concludes the investigation of this complaint.

To address the issues alleged in the complaint, EDCOE entered into the enclosed resolution agreement, which is aligned with the complaint allegations and the findings and information obtained by OCR during its investigation. Pursuant to the resolution agreement, EDCOE will develop grievance policies and procedures that incorporate appropriate due process standards and provide a prompt and equitable response to complaints of discrimination, including retaliation and harassment. EDCOE will provide training on retaliation to all EDCOE employees responsible for investigating complaints and complete its investigation of the Complainant's August 2016 complaint that the Teacher subjected her to workplace bullying and harassment in retaliation for her advocacy on behalf of students with disabilities. If EDCOE's investigation determines that the Complainant was subjected to retaliation, then EDCOE will provide appropriate remedies.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the Recipient is in compliance with Section 504 and Title II and their implementing regulations, which were at issue in the case.

OCR's determination in this matter should not be interpreted to address EDCOE's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 EDCOE 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 Complainant 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 the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Annie Lee, Civil Rights Attorney, at 415-486-5594 or Annie.Lee@ed.gov, or Danette Ng, Investigator, at 415-486-5539 or Danette.Ng@ed.gov.

Sincerely,

/s/

Zachary Pelchat
Team Leader

cc: Mike Tucker, Counsel (via email only)

Enclosure (1): Resolution Agreement