



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 28, 2018

Mr. Jorge Aguilar
Superintendent
Sacramento City Unified School District
5735 47th Avenue
Sacramento California 95824

(In reply, please refer to case no. 09-18-1029.)

Dear Superintendent Aguilar:

The U.S. Department of Education, Office for Civil Rights (OCR) has resolved the above-referenced complaint against the Sacramento City Unified School District (District). The Complainant¹ alleged that the District discriminated against the Student on the basis of disability. Specifically, OCR investigated the following allegations:

- (1) Whether the District retaliated against the Complainant, an employee of XXXXXXXXXXXX XXXX XXXXXXXX (College), after she advocated on the Student's behalf by (a) changing her school work site, (b) eliminating her College counseling responsibilities, and (c) refusing to communicate with her about the Student's educational program.
- (2) Whether the District failed to provide the Student a free, appropriate, public education (FAPE) by failing to timely evaluate the Student.

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.

OCR began its investigation by gathering and reviewing documents and correspondence provided by the Complainant and the District, and by conducting interviews. After careful review of the information gathered in the investigation, we concluded that the District did

¹ OCR previously provided the District with the identity of the Complainant and Student, and we are withholding their names from this letter to protect personal privacy.

not violate Section 504 and Title II with regard to the first issue OCR investigated. Prior to OCR completing its full investigation, the District voluntarily agreed to address OCR's areas of concern regarding the second allegation while it was under investigation. This letter summarizes the applicable legal standards, the facts gathered to date during the investigation, and the terms of the resolution reached with the District.

Issue 1: Whether the District retaliated against the Complainant, an employee of the College, after she advocated on the Student's behalf by (a) changing her school work site, (b) eliminating her College counseling responsibilities, and (c) refusing to communicate with her about the Student's educational program.

Legal Standards - Retaliation

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. When OCR investigates an allegation of retaliation, it examines whether an individual experienced an adverse action caused by the recipient, and the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future, and there is some evidence of a causal connection between the adverse action and the protected activity so that OCR is able to conclude an inference of unlawful retaliation is raised. OCR will then determine if a school district has identified a facially legitimate, non-retaliatory reason for the adverse action. If a school district identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation. OCR examines all available evidence to determine whether the recipient's proffered reasons are credible and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Issue 2: Whether the District failed to provide the Student a free, appropriate, public education (FAPE) by failing to timely evaluate the Student.

Legal Standards - FAPE

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. 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. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c), placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement. In determining whether a district or school has conducted an evaluation in a reasonable period of time, OCR takes into consideration the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures.

Facts and Information Gathered to Date

- The Complainant, an employee of the College, was assigned to work as a teacher and counselor at a District high school (the School) from approximately 2008 through the end of the 2016-17 school year, as part of a partnership program between the School and the College. During the 2016-17 school year, her son, the Student, was enrolled in XXXXX grade at the School.
- The School's former Principal (former Principal) worked at the School from August, 2013, until his last day at the School, June XX, 2017. The School's new Principal (Principal) started at the School around October X, 2017.
- According to the School website, each student at the School is assigned a teacher/advisor, who is responsible to get to know the student and his/her family and manage a personalized learning plan for him/her.
- On or before January XX, 2017, the Complainant emailed an inquiry to the Student's XXX grade advisor, Teacher/Advisor One. The Complainant's inquiry asked Teacher/Advisor One to identify and discuss the Student's weaknesses, strengths, interests, behavior, grades, stage of development, goals, etc., and asked about the possibility of the need for "behavior modifications or testing." Teacher/Advisor One replied, noting that behavior modifications or testing was something that the Complainant could talk to the former Principal or the RSP Teacher about, and that if she wanted, he could initiate the conversation. He asked her to let him know if she wanted him to contact the RSP Teacher to get the paperwork going, and he noted that it was the Complainant's right as a parent to ask for testing for the Student.

Soon thereafter, he set a meeting with the Complainant, the Student's father, and the former principal for the following Friday (Next Friday meeting).

- The Complainant informed OCR that after she received Teacher/Advisor One's January XX, 2017 email, she did not contact the RSP Teacher; however she stated during the Next Friday meeting, she made a request for the Student to be tested.
- Teacher/Advisor One stated that neither the Complainant nor the Student's father requested special education testing or testing of any kind for the Student during the Next Friday meeting, and that when he raised it, they accused him of saying that he thought the Student was dumb and needed help.
- Neither the Complainant nor the District provided information showing that either of them discussed the possibility that the Student had a disability or needed special education or related services after the Next Friday meeting until after the spring 2017 semester ended. Teacher/Advisor One informed OCR that, although the Student sometimes failed to complete assignments, nothing in his performance at the School during this period suggested to him that the Student had a disability.
- The District has adopted Section 504 policies that address referral, identification, evaluation, 504 team process, and procedural safeguards. Referral of any student may be made to the school site principal by a parent/guardian, teacher, other certificated school employee or community agency for consideration of eligibility as a disabled student under Section 504.
- In a June X, 2017 email to the former Principal, the Complainant raised concerns about what she described as unethical grading because she had seen other students turn in low quality work and receive credits and graduate but the Student completed assigned work but his grades were low.
- In a June X, 2017 email to the District's Instructional Assistant Superintendent, the Complainant raised concerns about the operation of the educational program at the School, and provided her observation that "students of color" were not afforded the same opportunities or provisions as "Caucasian" students and their families. The Complainant's email contained no reference to testing for the Student.
- The Complainant informed OCR she attended a July X, 2017 meeting with the former Principal, a second advisor, Teacher/Advisor Two, and the Instructional Assistant Superintendent. According to the Complainant, at the meeting, the former Principal "...acknowledged [her] concerns as long-standing problems with the lack of fair and consistent policies and procedures," but became irate and berated her because of her complaints about the treatment of the Student, a lack of special education testing for the student, and unfair and unethical policies and procedures. She stated to OCR that she repeated her request for special education testing, or a 504, for the Student, during the July X, 2017 meeting.

- The Instructional Assistant Superintendent informed OCR that during the July X, 2017 meeting, the Complainant never mentioned or requested testing of any kind for the Student. Teacher/Advisor Two informed OCR that he attended the entire July X, 2017 meeting, and did not hear the Complainant request special education or any other kind of testing for the Student during the meeting.
- The Complainant informed OCR that at the July X, 2017 meeting, the former Principal said to her in the presence of others that “I made sure that you won’t be returning to the [School] as a counselor or teacher, yes I spoke to your Dean directly to make sure of that.”
- The Instructional Assistant Superintendent informed OCR that during the July X, 2017 meeting, she never heard the former Principal say that he had ensured that the Complainant would not be returning to the School, and would not be working at the School as a counselor or as a Professor teaching, or that he had already spoken to the Complainant’s supervisor. She stated that the Complainant told the former Principal and Teacher Advisor Two that she did not trust either of them or value what they had to say, after which the Instructional Assistant Superintendent heard the former Principal remark that in light of her lack of trust, it was probably a good thing that the Complainant’s assignment would not be at the School the next school year.
- Teacher Advisor Two informed OCR that during the July X, 2017 meeting, he never heard the former Principal say that he had ensured that the Complainant would not be returning to the School, and would not be working at the School as a counselor or as a Professor teaching, or that he had already spoken to the College Dean. He stated that he heard the Complainant make a disparaging remark about the former Principal. He stated that the former Principal told the Complainant in response that he had talked supportively of the Complainant to her superiors and told them good things about her, and that he had done everything for the Student and the Complainant such that making a disparaging remark was irresponsible, and that he was glad the Complainant would not be coming back the next year.
- Teacher Advisor Two informed OCR that the former Principal never said anything to him or that he overheard about trying to get rid of the Complainant, and, prior to the July X meeting, he never got an impression that the former Principal did not want the Complainant working at the School.
- The Complainant alleged that as of the beginning of the 2017-18 school year, the College removed her from the School as her work site after her College supervisor reprimanded her. She alleged that her supervisor was influenced by negative comments made about her to him by the former Principal, and that he told her she was being removed from the School because her son attended the School, and that because of this, she should have known better that the School was not the best School assignment for her.

- The Complainant informed OCR that after leaving the School work site, her hours worked per week while employed by the College decreased.
- The Complainant, citing concerns about her ongoing employment relationship with the College, requested that OCR not interview any College employees.
- The Complainant sent an email to the Instructional Assistant Superintendent after the July X, 2017 meeting, raising her concerns about what she considered was the hostile environment at the meeting. The email did not mention testing for the Student.
- The Principal informed OCR that she received a voicemail message September XX, 2017 from the Complainant asking, generally, about the Section 504 process. She stated that she returned the Complainant's call to schedule a meeting to discuss the Section 504 process, as well as address some other concerns that the Complainant stated she had about the School and its prior administration. The Principal informed OCR that the Complainant did not specifically request in her voicemail, or during the Principal's return phone call to the Complainant, special education testing, or any other kind of testing, for the Student.
- On October XX, 2017, the Complainant and an education advocate she invited met, at the Complainant's request, with the Principal. The Complainant's written agenda for this meeting started with the topic, Section 504 process and accommodations.
- The Complainant informed OCR that at the October XX, 2017 meeting, she gave her view of the Student's history at the School. She stated that she described testing of the Student done over the summer by a doctor who provided a diagnosis of "borderline ADHD." She stated that the Principal informed her at the October XX, 2017 meeting that the School would also conduct its own assessment of the Student, as well.
- On October XX, 2017, the Principal emailed the District Director of Student Support and Health Services Director (Director), explaining that the Complainant had requested a Section 504 process for the Student, and requested the Director's assistance in planning and attendance at a Section 504 meeting. The Principal informed OCR that she and the Director met or talked informally on several occasions between this likely first contact with the Director about the Student on October XX, 2017, and through the period when the October XX, 2017 meeting at which a Student Success Team (SST) plan was developed took place and ultimately the Student's Section 504 plan was developed and signed November XX, 2017.
- On October XX, 2017 the Principal sent the Complainant copies of a *Notice to Parents/Guardians Rights Afforded by Section 504 of the Rehabilitation Act of 1973*, a *Consent for Section 504 Evaluation, Authorization for Use and/or Disclosure of Information*, and the parent forms for the Vanderbilt Assessment.

- The Complainant and four teachers completed Vanderbilt Assessments for the Student between October XX and XX, 2017.
- On October XX, 2017, the Principal emailed the Complainant that she had scheduled "...the 504 meeting," and had invited the Director, and the Student's teacher/10th grade Teacher/Advisor Three, but that the School's Psychologist was unable to attend.
- In a written statement to OCR, the Principal described the meeting, which occurred on October XX, 2017, as an SST meeting, and provided a written summary of the meeting which also described it as an SST meeting. The participants in the meeting created and signed an "SST Action Plan".
- According to the Principal, at the end of the meeting the Complainant stated that she had thought the meeting was convened to develop a Section 504 plan, and that she wanted such a plan. In a subsequent email to the Principal dated November X, 2017, the Complainant described the October XXXX meeting as a "504 planning meeting" and requested as a follow-up to that meeting that the accommodations that were discussed be put into a Section 504 plan.
- The SST meeting summary document signatures suggested that the Complainant, the Principal, the Director, and Teacher/Advisor Three attended the October XX, 2017 meeting; the Principal informed OCR that the School Counselor may also have attended. In her statement to OCR, the Principal wrote that accommodations in the SST Action Plan were for the Student's processing of information, anxiety, and frustration.
- The Principal informed OCR that she could not be certain exactly what information was considered at the October XX, 2017 meeting, but thought that it included the Student's doctor's note from the summer "borderline ADHD" diagnosis, the Vanderbilt Assessments, possibly a summary of those Vanderbilt Assessments provided to her orally by the School Psychologist, and a review of the Student's high school transcript to date.
- The Principal, in her OCR interview, also stated that the purpose of the October XX meeting was to gather information about the Student for a Section 504 plan, and to initiate the initial process to decide if the Student was qualified for a Section 504 plan, but not to complete the Section 504 plan. The Principal stated that the SST form was completed with interventions to be put into place for long enough time to see if they were adequate for the Student. She explained that because the Complainant repeated in an email after the meeting that she wanted a formal Section 504 plan, she proceeded with a Section 504 plan, rather than waiting to see if the interventions were effective.
- To OCR's knowledge, there was no subsequent meeting with a team and the parent to determine whether the Student had a disability and needed special education or

related services, despite a suggestion by the School Psychologist that such a meeting be convened. The Principal informed OCR that the School Psychologist attended no meeting with any other team members about the Student.

- The Principal informed OCR that she and the Director—who did not attend all of the October XX, 2017 meeting—made the determination of whether the Student was eligible as a student with a disability after several informal discussions about SST and interventions, sometime after the October XX, 2017 meeting. With regard to the determination that because of a disability, the Student needed special education or related services and what those might be, the Principal informed OCR that she made that determination by looking over the SST process and its information about what was there that would be appropriate for a Section 504 plan, and by telephone or drop-in consultations with the Director.
- On November XX, 2017, the Principal emailed the Complainant, attaching the Student’s Section 504 plan she described as being completed, asking the Complainant to sign the front and last page and return them to the Principal. The Complainant requested in her reply email to the Principal that the Section 504 plan be modified to include three accommodations previously discussed but not included in the Section 504 plan.
- The Principal informed OCR that she communicated with no one after receiving the Complainant’s request to add accommodations to the Section 504 plan before she changed the draft Section 504 plan to include some, but not all, of the Complainant’s requested accommodations.
- Several School staff interviewed by OCR who participated in the relevant meetings regarding the Student reported having received little or no recent Section 504 training. Some also told OCR that “disabled” means a student only needs special education services.

Analysis and Resolution

Issue 1: Whether the District retaliated against the Complainant, an employee of the College, after she advocated on the Student’s behalf by (a) changing her school work site by removing her from the School, (b) eliminating her College counseling responsibilities at the School, and (c) refusing to communicate with her about the Student’s educational program.

Regarding the issue of retaliation, OCR’s initial focus for the investigation was on whether the Complainant experienced an adverse action caused by the District, and the District knew that the Complainant engaged in a protected activity or believed she might engage in a protected activity in the future. The evidence showed that the Complainant’s June X, 2017 email to the Instructional Assistant Superintendent with a nonspecific claim of different treatment of students of color was a protected activity.

The Complainant informed OCR that communication from staff at the School about the Student and his educational program became sparse and responses to her slowed down after she raised testing for the Student. Emails provided by the Complainant and the District, however, showed ample communication took place between the Complainant and School and District employees both before and after the June X email. OCR concluded that the evidence did not establish that the Complainant was subjected to an adverse action in this regard.

The decision not to return the Complainant to the School was adverse to the Complainant, since it resulted in a substantial reduction in the Complainant's hours of employment. However, the evidence showed that the Complainant is not, nor was she ever, an employee of the District, and that the decision to reassign her was made by the College rather than the District. OCR therefore investigated whether the District acted adversely to the Complainant by requesting or influencing the College's decision.

The Complainant claimed that the former Principal said to her and others at the July X, 2017 meeting that he had made sure she would not return to work for the College at the School. Two witnesses at that meeting interviewed by OCR denied hearing the former Principal make the alleged comment. The former Principal is no longer an employee of the District and the Complainant, citing concerns about her ongoing employment relationship with the College, asked that OCR not interview any College employees. According to the current Principal, the Complainant's College supervisor informed her that the College removed the Complainant from the School for reasons unrelated to the School. OCR concluded that the preponderance of the evidence did not support the Complainant's claim that the former Principal caused or contributed to the College's decision to no longer place the Complainant at the School. Consequently, OCR concluded that there was insufficient evidence of retaliation by the District under Title VI, Section 504, Title II, and their implementing regulations.

Issue 2: Whether the District failed to provide the Student a FAPE by failing to timely evaluate the Student.

Regarding the FAPE issue, a school district must evaluate a student if it has reason to believe the student has a disability and the student needs special education or related services as a result of that disability, even if the student only exhibits behavioral (and not academic) challenges. In determining whether a district or school has timely conducted an evaluation of a student, OCR takes into consideration information such as the 60-day timeframe provided by the IDEA regulations and the district or school's own procedures. The District's policy's requires for the completion of the 504 identification, evaluation, and placement process "within a reasonable period".

OCR found that the evidence did not support the Complainant's contention that she requested special education testing for the Student in late January or early February, 2017, or at the July X, 2017 meeting with a District Administrator and School staff. The evidence also showed that Teacher/Advisor One promptly responded to the

Complainant's January, 2017 email, informing the Complainant of the procedures for requesting testing and services, should she wish to do so.

The Complainant informed OCR that, at the July X, 2017 meeting, the former principal became irate at complaints she had raised, including the School's failure to provide special education testing to the Student. Two other participants in this meeting stated that the Complainant did not mention or request an assessment, or testing, at this meeting. OCR reviewed emails that the Complainant sent before and immediately after this meeting and determined that they included allegations that the Student had been graded unfairly, that other students had been given unfair advantages, and that students of color had been subjected to unfair and unethical practices, but did not mention or request evaluation of the Student. OCR concluded that the preponderance of the evidence did not establish that the Complainant requested an evaluation during the summer of 2017.

The evidence supported a conclusion that the Complainant first requested in a voicemail message left on September XX, 2017 that she be given information about the Section 504 process. OCR found that after this voicemail, the District staff involved responded timely with information about the Section 504 process, with a request for consent for Section 504 evaluation, and with assessment forms to be completed by the Complainant and four of the Student's teachers. Because OCR considered these responsive activities to have been taken within a reasonable period of time after the Complainant's request, OCR determined that there was insufficient evidence to support a conclusion that the District failed to conduct a timely evaluation of the Student.

However, the District's obligation to provide FAPE under Section 504 also requires the District to follow evaluation and placement procedural requirements, chief among which are placement procedures that ensure that 1) when interpreting evaluation data and in making placement decisions, decision makers draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; 2) the placement process ensures that information obtained from all such sources is documented and carefully considered; and 3) that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

Based on the information gathered to date, OCR is concerned that the process used by the Principal and other School employees may not have adequately conformed to the Section 504 FAPE requirements. While arguably a meeting of knowledgeable persons was held on October XX, 2017, the purpose of this meeting was unclear because it was described, on the one hand, as an SST meeting, and on the other, as a meeting at which the Student's disability status was determined. Moreover, individuals involved in the meeting appear not to have documented all of the information about the Student that was considered. The evidence suggests that the Principal may subsequently have made unilateral decisions about placement, without including other knowledgeable persons at the appropriate times, during her initial 504 plan drafting and when she

edited and revised the 504 plan in unilateral response to the Complainant's request for additional services.

Several School staff interviewed by OCR who participated in the relevant meetings regarding the Student reported having received little or no recent Section 504 training. Some also told OCR that "disabled" means a student only needs special education services, even where the Section 504 regulations provide as follows: "...the provision of an appropriate education is the provision of regular *or* special education and related aids and services...[emphasis added]"

Prior to the conclusion of OCR's investigation, the District indicated its interest in voluntary resolution regarding this issue and OCR agreed that such a resolution would be appropriate to resolve the issue.

On August 17, 2018, the District entered into the attached resolution agreement (Agreement), which when implemented, is intended to resolve the concerns identified by OCR regarding the second issue that was under investigation. Pursuant to the Agreement, the District agrees to hold a Section 504 team meeting to consider the appropriateness of the Student's existing Section 504 plan, and to conduct training on Section 504 and Title II of the ADA for all School staff and administrators.

Based on the above referenced agreement, OCR is closing the investigation phase of this case. This concludes OCR's investigation of this 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. Based on the commitments made in the Agreement, OCR is closing 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. 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 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 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, we will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation in resolving this case. If you have any questions about this letter, please contact the case resolution team.

Sincerely,

/s/

Ava DeAlmeida-Law
Acting Team Leader

cc: Raoul Bozio
In-House Counsel (*via electronic copy only*)

Enclosure