



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

March 14 , 2019

VIA ELECTRONIC MAIL

Dr. Amy Slavensky
Superintendent
Amador County Unified School District
217 Rex Avenue
Jackson, CA 95642

(In reply, please refer to case no. 09-18-1120)

Dear Dr. Slavensky:

This letter is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Amador County School District (District). Specifically, OCR investigated the following issues:

1. The District discriminated against Complainants' son (the Student), on the basis of disability (Autism) when he was cut from the junior varsity basketball team;
2. After Complainant expressed disagreement to District administrators about the decision to not select the Student for the team, and indicated that she believed that this decision violated his civil rights, the District retaliated against the Complainant (the husband) by informing him that he could no longer serve as a volunteer coach; and,
3. The District subjected the Student to different treatment on the basis of disability by requiring that he be restricted to serving as a basketball team manager only for home games because of the need for "administrative supervision."

OCR investigated the complaint under the authority of 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. The District receives funds from the Department and as a public education system, the District is subject to Section 504, Title II, and their implementing

regulations. During its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant.

Factual Findings – Allegation 1

The Student was a XXXXXXXXXX in the 2017-18 school year and receives services through an IEP for his disability. The Student played recreational league basketball from first through XXX grades, played basketball for two years of XXXXXX XXXX school and played on his XXXXXXXXXX XXXX school basketball team. Basketball is the Student's favorite sport.

In Fall 2017, the Student tried out for the Junior Varsity basketball team (JV team). On November XX, 2017 (XXXXXX), the Student was informed that he did not make the team. At that time, the District offered the Student a team manager position, which he understood would include traveling with the team and assisting with equipment and practices.

The Student's father attended the tryout sessions. The tryouts ran from XXXXXX, November X, 2017 to XXXXXX, November XXXX. The Student's father stated that from his observation, the Student was doing about as well as half the boys at the tryouts and was in the middle of the pack, generally, in terms of his skills.

On November X, 2017, the day before the District's decision not to select the Student for the team, the Student's father asked the Athletic Director (AD) whether the Student would be on the team. The AD responded yes, but said that he might not receive much playing time. During that conversation, the AD asked the Student's father if he would again agree to be an Assistant Coach for the XXXXXXXXXX team again that year, and the Student's father agreed.

The Student's father advised OCR that the Athletic Director was aware of the Student's disability, as he had been his teacher for a XXXXXX class, and the other coaches all knew of the Student's disability.

On November XX, 2017, each boy who tried out for the JV team was advised as to whether he was selected for the team. When it came the Student's turn, the Coach asked the Student's father to also come into the office. In the office, the Athletic Director and the XXXXXXXXXX Coach were present. At that time, the Student was told that he was not going to get a jersey (meaning that he did not make the team), but was being offered the opportunity to be the team manager, which they explained would entail the Student practicing and traveling to games with the team.

The Student told the coaches he would have to think about the offer. Following the announcement, the Student told his father that he did not understand why he did not make the team, and that another student did make the team, even though the Student believed he was a better player.

Later that same day, the Student's father met with the AD. When the Student's father asked why the Student had not been selected for the team, the AD told him that there was no room on the team. The Student's father advised OCR that, typically, there are 12 or 13 players on a team, and as of November XXXX, there were 12 students selected, so there was room for the Student. The

AD told the Student's father that there were no more jerseys left. Upon leaving, the father expressed concern that his son may have been discriminated against based on disability and gave the AD a folder with several articles about disability discrimination and inclusion in extra-curricular athletics.

On XXXXXXXX, November XX, 2017, the Student's mother sent an email to the School Principal, the AD, and other District officials, complaining that the Student's non-selection was illegal and discriminatory on the basis of disability. She asked for a meeting with the AD and Principal to discuss the matter and attached several articles about inclusion of students with disabilities in extra-curricular activities in schools. She threatened to file a complaint with OCR if the matter was not resolved.

On November XX, 2017, the Complainants received an email from the AD stating that the Student's father could no longer coach basketball and the offer of the Team Manager position for the Student was limited to attending home games only, and that he could not practice or travel with the team.

On November XX, 2017, Complainants met with the Principal, the Vice-Principal and the Supervisor of Special Education. The Complainants also had an Advocate present at the meeting. However, the AD, who is also the coach of the JV team, did not attend. Although the Student's father asked several times for the Student to be able to participate on the team, travel with and or just practice with the team, the Principal denied these requests. Further, the Principal said because of the need for "administrative supervision" the Student could not travel with the team. According to the Complainants, the Student needed no special accommodations for travel or otherwise and stated that the coach of the XXXXXXXX team could verify this fact.

During the November XX meeting, Complainants were assured by the District that the scores of all students trying out were evaluated at length, that the criteria were directly related to the skill demonstrated on the court, and that the Student scored below the cut line, along with two other students. Complainants were provided with the evaluation score the Student earned. Complainant confirmed to OCR that two students who were cut at the same time did not appear to be students with disabilities. According to the Student's father, the Student's skills were at least as good or better than another non-disabled student who was selected for the team.

On November XX, 2017, the Student asked the AD at school why he could not be on the team; the AD said there was no room. The Student was also told by the AD that a freshman made the team because he played more summer league games than the Student. However, the Student said at least five students on the basketball team played no summer league games.

The Student's father also learned that the freshman was moved up from the freshman team to the JV team, despite him still being a freshman and could not try out because he had an injury. The Complainants stated to OCR that the Student recalled that at least five students who made the JV team played no summer league games. The Complainants reported to OCR that the Student played in all summer league games, except for two and a half weeks when the family went on vacation.

The Complainants stated that the reason the Student was not selected for the team is because of his disability.

The Complainants alleged that the Student's father was denied the opportunity to coach basketball as an Assistant Coach for the XXXXXXXXX team in retaliation for his and his wife's advocacy on behalf of the Student, a student with a disability. Moreover, when asked why the Student could not practice with or travel with the team as originally offered because he needed "administrative supervision", the District did not explain why such supervision was needed. The Student's father stated that while there had been student team managers in the past, these team managers were not limited to helping at home games only and they often practiced with the team for drills.

A review of the District's documentation concerning the JV tryouts shows that there were a number of criteria used to evaluate the students who tried out for the team: passing skills, shooting skills, dribbling skills, defensive technique, athleticism, and attitude/effort. The District explained these criteria as follows:

Passing Technique and Skill Drills: execution of drills and live play, and drills that increase in complexity each day of tryouts.

Defensive technique: Ability to stay in front of others and team defensive concepts.

Attitude and Effort: the ability to listen and accomplish what the coaches laid out each day of tryouts, compliance and positivity with teammates and continued diligence.

Intangibles: Distinct qualities and leadership ability.

Each student was rated on a scale of 1-4, on a GPA type scale, in each area. The Student was rated a D on Defensive Technique and a D on Athleticism. It appears from the chart of handwritten scores that the Student's initial rating for Athleticism was changed from a C to a D. The overall average of the Student's scores was a 2.00.

The District stated to OCR that participation in summer league games was not a factor in the decision making process. However, the Student told the Complainants that the AD told him several other students made the team because they played more summer league games than he did.

While it appears that the Student scored lower than a number of other students who tried out for the JV team, several of the criteria listed as "intangibles" are of a subjective nature. While OCR does not typically substitute its judgment for those of educators or coaches in evaluating student performance, the shifting of reasons for not selecting the Student for the JV team is problematic. OCR has compliance concerns about the District's reasons for his non-selection.

Allegation 1

The District discriminated against Complainants' son (the Student), on the basis of disability (Autism) when he was cut from the junior varsity basketball team.

Legal Standard

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 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, the District is subject to Section 504, Title II, and their implementing regulations.

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR first examines whether there is direct evidence of discriminatory treatment on the basis of disability. Absent that, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

OCR notes that in the context of extra-curricular activities, disabled students must be given an equal opportunity to participate, as opposed to automatic inclusion in an activity. If there are specific criteria that students must meet to participate in a particular program, a recipient must apply the evaluation criteria equally for each student, regardless of disability

Analysis – Allegation 1

The District shifted its reasons several times for the Student's non-selection and used several subjective factors in evaluating the qualifications of the Students who tried out for the JV basketball team. OCR has compliance concerns regarding the shifting of reasons for the Student's non-selection. On March 11, 2019, the District signed a resolution agreement addressing OCR's compliance concern and to remedy the District's actions.

Allegation 2: After Complainant expressed disagreement to District administrators about the decision to not select the Student for the team, and indicated that she believed that this decision violated his civil rights, the District retaliated against the Complainant (the husband) by informing him that he could no longer serve as a volunteer coach.

Legal Standard

Retaliation (Section 504):

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 an individual experienced an adverse action caused by the school district, 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 establish an inference of unlawful retaliation. 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.

To constitute protected activity, OCR must find that: 1) an individual communicated, formally or informally, a belief that a recipient's act or policy is discriminatory on the basis of disability; 2) the manner of the opposition is reasonable; and 3) the complainant has a good faith and objectively reasonable, though perhaps mistaken, belief that he or she was opposing unlawful discrimination. It is irrelevant whether the individual in fact erred, as a matter of fact or a matter of law, in his or her belief that illegal discrimination occurred. An individual who advocates on behalf of others, even though the individual may not fall within the group of individuals experiencing the prohibited discrimination, is protected.

A materially adverse action is an action that could well dissuade a reasonable person from making or supporting a charge of discrimination.¹ Whether an action is materially adverse is judged from the perspective of a reasonable person in the complainant's position. Proof of a causal connection may be established based on the time span between when the protected activity occurred and the materially adverse action.

¹ *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 57 (2006) (Title VII).

Pretext can be established in several ways, directly by establishing that an impermissible reason more likely motivated the school district; or indirectly, by, for example establishing that the stated reason has no basis in fact, was not the true reason, or was insufficient to explain the action, or where the complainant was treated differently from how he or she was treated prior to the activity.

Students must be given an equal opportunity to participate as opposed to automatic inclusion in an activity. If there are specific criteria that students must meet to participate in a particular program, a recipient must apply the evaluation criteria equally for each student, regardless of disability.

Analysis – Allegation 2

OCR has concerns about the stated reasons for the removal of the coaching offer to the Student's father, given that the only intervening action was the protected activity of both parents. Moreover, there is a very close temporal connection between the protected activity and the District's removal of its request that the Complainant help coach the Freshman boys basketball team that coming season. Accordingly, OCR has compliance concerns about the rationale for the withdrawal of the coaching opportunity by the District. On March 11, 2019, the District signed a resolution agreement addressing OCR's compliance concern and to remedy the District's actions.

Allegation 3: The District subjected the Student to different treatment on the basis of disability by requiring that he be restricted to serving as a basketball team manager only for home games because of the need for “administrative supervision.”

Legal Standard

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

- deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.
- afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others.
- provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the

same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

- provide different or separate aids, benefits, or services unless necessary to provide qualified disabled individuals with aids, benefits, or services that are as effective as those provided to others.
- deny a qualified disabled individual the opportunity to participate as a member of planning or advisory boards.
- limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. (Emphasis added.)

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR first examines whether there is direct evidence of discriminatory treatment on the basis of disability. Absent that, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the district's actions were based on the individual's disability.

Analysis- Allegation 3

The Student was initially offered a team manager position, which would include practicing and traveling with the JV team. Thereafter, the District told the Student's parents that he could not practice or travel with the team, because he needed "administrative supervision."

According to the Student's father, in the past, non-disabled students served as team managers, practicing with the team and traveling to away games, assisting with the team. However, the Student had travelled for away games as a team member on the XXXXXXXXX boys basketball team and needed no "administrative supervision."

OCR would be required to obtain comparative evidence to support the Student's father's contention. However, OCR has compliance concerns about the reasons for the change in the duties of the team manager position. Further, the District was unable to give any non-discriminatory reason for its decision to limit the participation of the Student as a team manager, other than it was "in his best interest." Accordingly, on March 11, 2019, the District signed a Resolution Agreement to remedy this concern.

Conclusion

Prior to OCR making a final determination regarding the allegations, the District expressed an interest in voluntarily resolving it pursuant to Section 302 of OCR's Case Processing Manual², and OCR agreed it was appropriate to do so.

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. OCR will monitor the implementation of the Resolution Agreement until the District is in compliance with its terms. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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.

The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

Thank you for your cooperation in resolving this case. If you have any questions, please contact Judith O'Boyle, Senior Attorney, at (415) 486-XXXX by email at Judith.Oboye@ed.gov.

Sincerely,

/s/

James Wood
Team Leader

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>