



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

February 28, 2019

VIA ELECTRONIC MAIL

Mr. Bryon Schaefer, Ed.D.
Superintendent
Kern High School District
5801 Sundale Avenue
Bakersfield, California 93309

(In reply, please refer to case no. 09-18-1541.)

Dear Superintendent Schaefer:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against Kern High School District (District). OCR began an investigation of whether the District:

1. Failed to respond to the complainant's¹ notice of disability discrimination by the employer (Employer)² with which the District had placed the complainant for work experience and on-the-job training; and
2. Provided significant assistance to the Employer, which allegedly discriminated against the complainant on the basis of disability by failing to provide reasonable accommodations for her disabilities and discontinuing her employment.

OCR began an investigation of the complaint pursuant to Section 504 of the Rehabilitation Act of 1973, and its implementing regulation. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Federal financial assistance, is a public entity, and is subject to the requirements of Section 504, Title II, and the regulations. Therefore, OCR has jurisdiction over this complaint.

Under Section 302 of OCR's Complaint Processing Manual, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, the District informed OCR that it

¹ OCR notified the District of the complainant's name at the beginning of the investigation. We are withholding the complainant's name from this letter for privacy reasons.

² OCR notified the District of the name of the employer at the beginning of the investigation.

was amenable to resolving the complaint in this manner. OCR and the District entered into the attached resolution agreement (agreement) to resolve the complaint. Accordingly, OCR did not complete its investigation of the complaint or reach conclusions regarding the District's compliance with Section 504 and Title II.

The applicable legal standards, the facts OCR gathered during its preliminary investigation, and the disposition of the allegations are summarized below.

Legal Standards

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.

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.

Under 34 C.F.R. §104.4(b)(1)(v), a recipient may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit or service to beneficiaries of the recipient's program or activity. The Title II regulations, which apply to public entities, contain a similar requirement at 28 C.F.R. §35.130(b)(i)(v). Under these provisions, if a public school provides significant assistance to an outside entity and the entity is shown to have discriminated on the basis of disability, the school must take steps to obtain compliance from the organization or terminate its assistance.

Relevant Facts

At the time of the OCR complaint, the complainant was a Department of Rehabilitation (DOR) client, enrolled in a local community college and in search of employment. DOR referred her to a resource that serves job seekers in Kern County (County), which in turn referred her to the District. The District's Career Resource Department (CRD), based at one of its schools (School), identifies part-time employment opportunities at outside agencies for adults referred to the District.

On March XX, 2018, the complainant completed a CRD client information form, on which she disclosed that she had learning and hearing disabilities and specified, in response to a question about any limitations in standing or lifting, that she could only lift ten pounds. Shortly thereafter, the CRD placed her in a position for 250 program hours with the Employer to obtain work experience and on-the-job training.

The complainant told OCR that she was required to stand for three hours and fifty minutes at a time and notified her manager (Manager) of her difficulties. She stated that the Manager advised her to wear comfortable shoes and return to the floor. The District reported to OCR that while it had no

information as to whether the complainant had requested accommodations related to standing from the Employer or from the County, she did not make such a request of the District.

On May X, 2018, pursuant to the complainant's request, the Employer requested a phone flasher for the complainant so she could see the phone ring. The County purchased the phone flasher on May XX, 2018.

While working part-time for the Employer, the complainant completed her associate degree. She told OCR that she met with her new manager (Manager 2) to adjust her work schedule, and that she and Manager 2 had come to an agreement as to her new schedule. The complainant provided OCR a copy of Manager 2's business card on which she had noted her new schedule, and informed OCR that Manager 2 had marked the information in a folder.

The District reported to OCR that on May XX, 2018, Manager 2 removed the complainant from her position due to a series of threatening and inappropriate remarks allegedly made by the complainant at work. According to the District, Manager 2 left a voicemail for the District which notified the District that the complainant had been determined not to be the "right fit" and was discontinued from her position.

On May XX, 2018, the complainant e-mailed her contacts at DOR, the County and the District regarding what had transpired at work that day. In the e-mail, whose subject line read "Disenfranchisement, harassment, defamation, hate, bullying," the complainant alleged that Manager 2 had questioned her new schedule, disputed her having requested a phone flasher and told a customer to stay away. When security arrived, the complainant alleged that Manager 2 had informed them that she was not an employee, denied her accommodations for her hearing and ultimately told her to leave the premises.

On May XX, 2018, the complainant's contact at the County responded in an e-mail that included the following: "Until further notice, please do not return to your work site at [the Employer]. I am trying to reach [the District] to see what the next step is. I will get back to you when I hear back from them."

On May XX, 2018, the complainant's contact at the DOR responded in an e-mail that included the following: "I have reached out to [the County contact] and attempted to reach [the District contact] since you are currently under [the District]. [The District contact] would need to coordinate between you and the [E]mployer. I suggest that you hold on until further notice until [District Contact] comes forward to coordinate a meeting [...]."

On June XX, 2018, a District administrator (Administrator) e-mailed the complainant to direct her back to the County. The e-mail stated, in part: "[...] because of your termination from your worksite, the CRD will no longer be able to provide services for you." The District reported no further contact with the complainant to resolve the issues raised in her May XX, 2018 e-mail.

The complainant reported to OCR that she had not made threatening or inappropriate remarks to Manager 2, and that she had never received any voicemails, calls or written notice of termination from the Employer or communication from the District with respect to her employment apart from the June XX, 2018 e-mail from the Administrator.

Policies and Procedures

The District provided copies of documents governing its agreements with worksites such as the Employer. These included the Employment Program Training Agreement (EPT Agreement), a two-page agreement between the Employer and the District regarding on-the-job training for individuals referred to the Employer by the District. The EPT agreement states in part that individuals shall be provided: “[...] overall desirable training conditions that meet requirements of law and not endanger health, safety, or welfare of students.” The EPT agreement also requires that the Employer consult “the instructor-supervisor assigned to each student by [the School] regarding problems, which may arise pertaining to student’s on-the-job performance and behavior” and “advise [the District] prior to [terminating students].” In addition, the EPT Agreement affirms that no student shall be denied participation in any program of the School or the Employer based on protected class.

The District also provided a Worksite Supervisor Memorandum of Understanding (Worksite Supervisor MOU), which supervisors sign to certify that they have reviewed the Worksite Supervisor Orientation Packet and previewed, among other things, relevant grievance procedures and worksite safety guidelines. Manager 2 signed the Worksite Supervisor MOU on May XX, 2018.

Analysis

Significant assistance is evaluated on a case-by-case basis and is tested by a number of factors indicating whether a substantial relationship exists between the school district and private entity such that the activity can be fairly considered the school district’s activity, or that the private entity’s activities relate so closely to the school district’s program or activity that they should be considered activities of the school district.

The evidence gathered in OCR’s investigation to date shows that the District entered into a MOU with the Employer which governed the terms of the on-the-job training provided to individuals referred by the District to the Employer for work experience. Specifically, the MOU between the District and the Employer includes an assurance that individuals will be provided with desirable training conditions and that supervisors will notify the District of performance or behavior concerns prior to exercising an adverse action, such as termination. OCR is concerned that the Employer did not follow these guidelines during its interactions with the complainant, especially given the fact that Manager 2 had not yet signed the Worksite Supervisor MOU at the time of the May XX, 2018 incident, may not have been aware of the applicable procedures, and may have engaged in discriminatory conduct in the course of dismissing the complainant.

OCR is also concerned that although the District received notice of the complainant’s allegations of disability discrimination at her worksite, it offered no documentation indicating that it had taken action to resolve them. Finally, OCR is concerned that the CRD discontinued its services to the complainant without resolving the complainant’s allegations of disability discrimination or engaging in the interactive process with her regarding her accommodations for her disabilities.

With respect to the District’s policies and procedures, OCR notes that while the EPT Agreement affirms that individuals may not be denied participation in any School or Employer programs based on protected class, it includes no language explicitly prohibiting discrimination of such individuals in School or Employer programs.

Resolution and Conclusion

In January 2019, OCR contacted the District to discuss the complaint, and the District indicated its interest in voluntary resolution. As noted above, under OCR's procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint. Prior to the completion of OCR's investigation, the District entered into the attached agreement, signed February 13, 2019, to resolve the complaint. The agreement requires the District to (1) revise its EPT agreement with the Employer to include language that prohibits discrimination against District employees by the Employer in its programs and activities; (2) provide individual remedies for the complainant, including an investigation of her allegations of disability discrimination, and a referral to the CRD to begin the process of securing a new placement for her; and (3) draft and circulate written guidance to select District staff on the process for responding to allegations of discrimination made by District employees, including those referred by the CRD and employed by agencies with which the District has an agreement or memorandum of understanding.

Since the District agreed to voluntarily resolve the complaint, OCR did not complete its investigation or reach conclusions regarding the District's compliance with Section 504 and Title II with respect to this complaint. OCR will monitor the District's implementation of the agreement.

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 this complaint as of the date of this letter and notifying the complainant by concurrent 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

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

OCR thanks the District for its cooperation in resolving this case. If you have any questions, please contact the case resolution team.

Sincerely,

/s/

Zachary Pelchat
Team Leader

cc: Tenielle Tensley, General Counsel