



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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May 23, 2019

Honorable Christina Kishimoto  
Superintendent of Education  
Hawaii State Department of Education  
P.O. Box 2360  
Honolulu, Hawaii 96804-2360

Re: Hawaii State Department of Education  
OCR Reference No. 10171331

Dear Superintendent Kishimoto:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against the Hawaii State Department of Education (HIDOE). The complaint contained the allegations that the HIDOE:

1. discriminated against a student with a disability (hereinafter, "the student"), by failing to implement the student's Individual Education Program at the beginning of the 2017-2018 school year; and,
2. retaliated against the student by delaying the student's Individual Education Program meeting and services after the student's parent raised concerns about the treatment of the student's brother, a student with a disability, in the spring of 2017.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). These federal civil rights laws prohibit discrimination and retaliation on the basis of disability in programs and activities that receive federal financial assistance and by public entities, respectively. The HIDOE receives federal financial assistance from this Department and is a public entity. Therefore, it is required to comply with these laws.

In reaching its determinations, OCR reviewed information provided by the complainant (referred to below as "the parent") and the HIDOE and conducted interviews with the complainant and relevant HIDOE employees. Regarding allegation no. 1, OCR determined that the findings support a conclusion that the HIDOE failed to comply with Section 504 and Title II. Regarding allegation no. 2, OCR found insufficient evidence to support a finding that HIDOE failed to comply with Section 504 or Title II. OCR's findings and conclusions are set forth below.

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

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Findings of Fact

The student attended XXXXXXXXX (high school) as a freshman during the 2017-2018 school year, which began on August 9, 2017. During the 2016-2017 school year, the student attended XXXXXXXXXXXXXXXX (intermediate school).

The student has a disability and receives special education and related aids and services pursuant to an Individual Education Program (IEP). The student had an IEP, dated November 10, 2016, that was in effect for the student when she transitioned from the intermediate school to the high school during the 2017-2018 school year. The IEP required the HIDEOE to provide the student with several special education services, including a requirement that the student's placement would include "812 minutes [per week] of special education services for English, math, social studies and science in a special education setting." The IEP distinguished between a general education location and a special education location, and stated that the 812 minutes of special education will be in a special education location.

The parent's position is that the student did not receive her English, math, social studies and science classes (core classes) in a special education setting at the high school.

The school principal (principal) stated that the high school uses a full inclusion model for 9<sup>th</sup> graders and that students with disabilities who do not require a medically fragile or self-contained placement are automatically placed into co-taught classes for English and math. The co-taught classes were described as a class for both general and special education students with one general education teacher and one special education teacher who share instructional duties. The principal reported that roughly 20-30 students with both general and special education placements are in each co-taught class and that disabled students would be placed into this sort of classroom instead of getting pull-out services for special education. The principal also reported that if a student from the co-taught classes needed additional instruction or support that they would be placed into a math lab and/or reading workshop, which are separate classes comprised of only special education students that are taught by the special education teachers from the co-taught classrooms. The student in this case was placed in the co-taught classes and the math lab and reading workshop at the beginning of the school year.

The student's July 27, 2017, schedule also showed that the student was in a social studies class, U.S. History/Government, with just one classroom teacher and a science class, Integrated Science, also with just one classroom teacher. The 10<sup>th</sup> grade vice principal (10<sup>th</sup> grade VP) and the student's first Special Education Coordinator (SPED Coordinator A) stated that these were regular education classrooms but that one Education Assistant (EA) was assigned to each class to help the regular education teacher and students as needed.

The parent e-mailed SPED Coordinator A and 9<sup>th</sup> grade vice principal (9<sup>th</sup> grade VP) on August 23, 2017, stating that the student's IEP was not being implemented and that the student should be in a special education setting for all four core classes. The parent wrote that the student comes home from school every day crying and struggling with her classes.

After receiving the parent's e-mail, SPED Coordinator A held an IEP meeting on August 31, 2017, which accommodated the schedule of the parent, but the only school administrator who could attend on that date was the 10<sup>th</sup> grade VP.

SPED Coordinator A stated that at the IEP meeting the parent shared her concerns about the student's current placement. The IEP team decided to place the student in self-contained special education classes for her core classes, specifying 812 minutes in special education per week, consistent with the student's previous IEP. The team determined she would be placed in the self-contained diploma (FSC-D) track for her core classes which would require that the student change SPED coordinators so that she could be on the case load of the FSC-D case manager (SPED Coordinator B). SPED Coordinator A stated that she did not change the student's schedule after the IEP meeting, but she thought that SPED Coordinator B made the schedule changes. SPED Coordinator B stated that he did not make the changes to the student's schedule after the meeting. The principal stated that the SPED Coordinator responsible for the IEP meeting should have made the changes to the student's schedule after the IEP meeting.

SPED Coordinator A also stated that she could not immediately make changes to the student's IEP or create the IEP documents, because she was waiting for the 10<sup>th</sup> grade VP to provide the placement information for her to write into the IEP. The principal, however, told OCR that VPs do not complete IEP paperwork or provide information about the paperwork to the SPED coordinators, as the SPED coordinators should complete the documents based on the decisions of the IEP team.

On September 6, 2017, the parent wrote an e-mail to the 10<sup>th</sup> grade VP, and copied the school's principal, SPED Coordinator A, and 9<sup>th</sup> grade VP, stating that she had been told the student's schedule change would occur by September 5, and that the change had not yet occurred.

On September 6, 2017, the 10<sup>th</sup> grade VP wrote the parent to let her know that the schedule change would be completed by the following day.

On September 7, 2017, the parent wrote the principal an e-mail, stating that she believed that the 10<sup>th</sup> grade VP was denying her daughter a free appropriate public education (FAPE) in retaliation for a complaint that the parent had made the previous school year alleging that the 10<sup>th</sup> grade VP grabbed her son by the arm, and that her son's IEP was not being implemented.

On the same day, the principal wrote back to the parent and told her the student's schedule had been finalized and that the student would start the new schedule the following day. She also wrote that SPED Coordinator B would contact the parent soon regarding the student's transition plan. The parent responded to the principal the same day thanking her for her assistance.

The student's revised schedule was dated September 7, 2017. This schedule showed the student was removed from the co-teacher and regular education classrooms and placed into self-contained special education classes for her core academic subjects.

The parent's position is that the 10<sup>th</sup> grade VP did not create the student's schedule on September 5, as originally planned, in retaliation for a complaint the parent made against the 10<sup>th</sup> grade VP the previous spring. The parent provided OCR with an e-mail she sent to the principal dated March 10, 2017, that contained concerns about the 10<sup>th</sup> grade VP grabbing her son, and also raised concerns about the implementation of her son's IEP. In the e-mail, the parent requested an investigation into her concerns.

The 10<sup>th</sup> grade VP denied that she took any actions in retaliation for the parent's previous complaint regarding the student's brother, and denied knowing about the complaint. The principal told OCR that she notified the 10<sup>th</sup> grade VP about the parent's complaint about her son during the previous school year.

None of the HIDOE staff who were interviewed were able to identify any similarly-situated students who had IEPs with special education placements that were placed in general education classes at the school at the start of the 2017-2018 school year. SPED Coordinator A stated that the school had to amend three students' IEP's early in the school year to make sure the IEP's correctly matched the student's placement.

### Analysis and Conclusions

#### Allegation No. 1-Free Appropriate Public Education (FAPE)

The issue OCR investigated was whether the HIDOE denied the student a FAPE, when it failed to implement the student's IEP at the beginning of the 2017-2018 school year.

The Section 504 regulation at 34 C.F.R § 104.33 requires a recipient to provide a FAPE to each qualified disabled person, regardless of the nature or severity of the disability. The regulation states that an appropriate education includes regular or special education and related aids and services that are: (i) designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met; and (ii) are based upon adherence to procedures that satisfy the requirements of the Section 504 regulations. Evidence of implementing an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the standards of an appropriate education under Section 504. Title II is interpreted consistently with Section 504.

The evidence established that the HIDOE placed the student in regular education classrooms for history and science from August 9, 2017, to September 7, 2017.<sup>1</sup> The student's IEP, however, required the student to receive a special education setting, not a general education setting, for those classes. The evidence further showed that, on September 7, 2017, the HIDOE placed the student in a schedule consistent with her IEP. OCR found that by placing the student in regular education classrooms for history and science for approximately one month, the HIDOE failed to implement the student's IEP during that time period, which denied the student a FAPE.

OCR notes that in its supplemental written response to OCR's request for information, the HIDOE opined that the student's schedule at the beginning of the 2017-2018 school year was appropriate for the student. However, in this case, there is no evidence that the HIDOE took the procedural steps contained in Section 504 to change the student's educational placement to reflect their asserted belief that the student's placement at the beginning of the 2017-2018 school year was appropriate, and, as described above, did not implement the student's IEP as it was written at the beginning of the 2017-2018 school year.

OCR has determined, therefore, that the HIDOE failed to comply with Section 504 and Title II regarding this issue.

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<sup>1</sup> OCR notes that the student was placed in both a hybrid classroom, and a math lab and reading workshop for special education students, for English and math. While this required the student to take two English classes and two math classes, rather than one self-contained English and math class, the placement did appear to provide the student with a special education setting for those subjects and, therefore, complies with the student's IEP.

Allegation No. 2-Retaliation

The issue OCR investigated was whether the HIDOE retaliated against the parent by delaying her daughter's IEP meeting and services (*i.e.*, schedule change), because the parent raised concerns about her disabled son in spring 2017.

The Section 504 regulation at 34 C.F.R. § 104.61, incorporating by reference 34 C.F.R. § 100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964, prohibits recipients from intimidating, threatening, coercing, or discriminating against individuals for the purpose of interfering with any right or privilege secured by Section 504, or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504. Title II contains similar prohibitions against retaliation at 28 C.F.R. §35.134.

To establish whether a recipient committed retaliation under Section 504 and Title II, the evidence must show that: (1) the individual experienced an adverse action by the recipient; (2) the individual engaged in a protected activity; (3) there is some evidence to infer a causal connection between the protected activity and the adverse action; and (4) there is no legitimate, non-discriminatory reason for taking the adverse action, or the identified legitimate, non-discriminatory reason is pretext for retaliation.

OCR did not find sufficient evidence of an adverse action in this case. The student's IEP team determined that the student would receive a new schedule during the August 31, 2017, IEP meeting, and indicated to the parent that the new schedule would be in place by September 5, 2017. While there was evidence of some confusion regarding the employee responsible for creating the new schedule, the new schedule was in place on September 7, 2017. OCR does not find that the 2-day delay in creating the new schedule resulted in an adverse action and, therefore, the evidence is insufficient to establish retaliation.

Therefore, OCR determined that the evidence did not support a conclusion that the HIDOE failed to comply with Section 504 or Title II with regard to this issue.

The HIDOE has agreed to resolve the Section 504 and Title II compliance concern regarding allegation no. 1 by implementing the enclosed agreement. OCR will monitor the HIDOE's implementation of the agreement and will close the case after OCR determines that the recipient has fully implemented the agreement provisions.

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the HIDOE's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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.

This concludes OCR's investigation of the complaint. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

The complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete, inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how

correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the HODOE 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, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR looks forward to working with you during the monitoring of this agreement. The first monitoring report under the agreement is due on June 1, 2019.

Thank you and your staff for your cooperation during the investigation of this complaint. If you have any questions, please contact Claudette Rushing, Attorney, by telephone at (206) 607-1606 or by e-mail at [claudette.rushing@ed.gov](mailto:claudette.rushing@ed.gov).

Sincerely,

Paul Goodwin  
Supervisory Attorney

Enclosure: Resolution Agreement

cc: Deputy Attorney General  
Via E-Mail Only: [ryan.w.roylo@hawaii.gov](mailto:ryan.w.roylo@hawaii.gov)