



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
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WASHINGTON, DC

August 16, 2016

Dr. James Lane
Superintendent
Chesterfield County Public Schools
P.O. Box 10
School Administration Building
9900 Krause Road
Chesterfield, VA 23832

RE: OCR Complaint No. 11-16-1082
Resolution Letter

Dear Dr. Lane:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on December 2, 2015 against Chesterfield County Public Schools (the Division). The Complainant alleges that the Division retaliated against her. Specifically, the complaint alleges that:

1. The Division retaliated against the Complainant for her advocacy on behalf of students with disabilities when, in November 2015, it caused emails sent by the Complainant to the Division to be blocked and go undelivered in order to prevent her from advocating for students and families in the Division.
2. The Division retaliated against the Complainant for her advocacy on behalf of students with disabilities when, in August 2015, a Division administrator drafted a memorandum accusing her of violating a ban notice and subjecting her to corrective action based on the alleged violation.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding.

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

In reaching a determination about the above allegations, OCR reviewed data submitted by the Division and the Complainant. After careful review of the information gathered, OCR identified potential concerns about allegation 1. The Division resolved allegation 1 by signing a voluntary resolution agreement. OCR finds insufficient evidence of a violation of Section 504 and Title II with respect to allegation 2. The basis for our findings is set forth below.

Factual Background

The Complainant asserts she is a special education advocate in the Division. During her tenure, she has attended Individual Education Program (IEP) meetings, school board meetings, and otherwise participated in educational matters on behalf of parents and students with disabilities in the Division.

In a letter dated March 7, 2011, the Superintendent notified the Complainant that the Division prohibited her from participating in meetings pertaining to any specific student's progress, special education process, behavioral assessment or discipline/conduct. The letter also stated that the Complainant is precluded from communicating with staff in person, by telephone or by electronic means for the outlined purposes. Furthermore, the letter indicated that should the Complainant appear on Division property for purposes expressly prohibited, the Division would consider her to be trespassing.

According to the letter, the prohibition arose from the Complainant's "pattern of conduct" observed from 2009 to 2011. During that time frame, the Division cited several incidents in which the Complainant engaged in conduct that violated Division policies and regulations. Specifically, the Division reported that the Complainant misrepresented herself when she indicated she was with the Commonwealth Attorney's office, conducted and recorded classroom visits without prior permission, failed to appropriately notify staff and parents of audio-recording during meetings, failed to respond to the Division's request for a copy of the audio-recordings, and mishandled a confidential student record.

Since the Complainant received notice of the March 2011 prohibition, the Complainant and the Division reported that she has appeared on Division property, attended IEP and school board meetings, and communicated with Division staff. Specifically, on February 12, 2015 and March 4, 2015, the Complainant attended IEP meetings at XXXX (High School). As a result of her participation, the Division's Safety and Security Manager, in a March 26, 2015 letter, informed the Complainant that her actions violated the terms of the March 2011 prohibition. The Safety and Security Manager also included a formal no-trespass notice and a copy of the State statute related to no trespassing in his correspondence with the Complainant. On April 29, 2015, the Complainant was arrested after returning to the High School. On August 25, 2015, the Complainant reported that she attended a school board meeting to advocate for students with disabilities. The Complainant and the Division told OCR that the Complainant communicated with the Director of Exceptional Education (Director) at the August 25 school board meeting. The Director memorialized his interaction with the Complainant in a memorandum to the School Board Attorney. On November 12, 2015, the Division filed a criminal complaint against the Complainant for trespassing following an allegation that the Complainant appeared at XXXX

(Middle School). The Complainant further reported that on November 13, 2015, she forwarded a FOIA request to the Superintendent, requesting security footage for the November 12 incident. She asserted that following her request, the Division blocked her email address. The Complainant believed that the Division's actions of blocking her email address and drafting a September 1, 2015 memorandum were in retaliation for her advocacy on behalf of students with disabilities.

Legal Standards and Analysis

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, or participates in an OCR proceeding.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the district took a materially adverse action against the Complainant; and 3) whether there is some evidence that the district took the adverse action as a result of the Complainant's protected activity. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the district has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the district's reason for its action is a pretext, or excuse, for unlawful retaliation.

Allegation 1

The Complainant and the Division agree that the Complainant has served as an advocate for students with disabilities in the Division. In addition to attending IEP meetings on February 12, 2015 and March 4, 2015, the Complainant reported that she organized several "local and national advocates" to speak "out against the civil rights violations of...students with disabilities" during an August 25, 2015 school board meeting. It is not disputed that during the August 25, 2015 school board meeting she discussed special education matters involving students with disabilities with the Director.

Moreover, a prior OCR investigation cited that on November 6, 2015, the Complainant emailed the Director of Special Education for the State of Virginia, copying the Director and other Division staff and alleged that the Division discriminated against a student based on race and disability. Further, in an email dated November 12, 2015, the Complainant emailed the Principal of the Middle School and stated she was advocating on a student's behalf for the Division's alleged discriminatory acts based on the student's disability. Accordingly, OCR found that the Complainant engaged in protected activities by advocating for students with disabilities at IEP and public meetings (with Division staff present) and through correspondence with Division staff.

OCR next considered whether the District took a materially adverse action against the Complainant. In order for an action to be considered adverse, the action must be sufficient to deter or chill a reasonable person from engaging in further protected activity. Here, the

Complainant reported that following her November 2015 emails to the Division pertaining to a FOIA request and her advocacy on a student's behalf, she received notice that subsequent emails sent to the Division were undeliverable. Email communications can allow an advocate (or any person) to communicate with districts or divisions in a manner that is expedient and readily documented. Because the inability to communicate electronically with a school district or division could impede an advocate's ability to represent the interests of their client, OCR found that the Division's action would deter a reasonable person from engaging in further protected activity and, therefore, constituted a materially adverse action.

OCR also examined whether there is some evidence that the District took the adverse action as a result of the Complainant's protected activities. During the August 25, 2015 school board meeting, the Complainant discussed special education matters involving students with disabilities with the Director. On September 1, 2015, the Director documented his interaction with the Complainant in a memorandum to the School Board Attorney. In the memorandum, the Director stated the Complainant, in her role as an advocate, inquired about scheduling an IEP meeting with a parent and questioned whether the Division would convene an IEP team to consider an educational placement for another student. Additionally, the Director received carbon copies of the Complainant's November 6, 2015 and November 12, 2015, in which she further advocated on behalf of students. OCR found that the Director's direct knowledge of the Complainant's protected activities may raise the inference of retaliation. Moreover, the Complainant reported that after emailing the Division in November 2015, she received notice of her blocked email address shortly thereafter. Therefore, the close proximity in time between the Complainant's series of emails sent in November 2015 and the Division's adverse action taken during the same month could suggest that the Division took the adverse action as a result of the Complainant's protected activities. Because all three elements of an initial claim of retaliation were met, OCR evaluated whether the District had a legitimate non-retaliatory reason for the adverse action.

The Division denied that the Complainant's email address block was a form of retaliation. Instead, the Division offered its March 7, 2011 letter, in particular the provision prohibiting the Complainant from communicating with Division staff electronically, as the legitimate, non-retaliatory reason for its November 2015 email block. According to the Division, this recent block was an extension of the March 2011 email prohibition: the Complainant's email address was initially blocked at the time of the 2011 prohibition; subsequent enforcement of the email prohibition was complicated by the Complainant frequently emailing from different accounts; and any November 2015 block was intended to reinforce the existing prohibition. As such, the Division acted in accordance with the March 2011 prohibitions when it blocked the Complainant's email address. Thus, the Division articulated a legitimate, non-retaliatory reason for imposing the email block.

Because OCR found that the Division's email block was based on a legitimate, non-retaliatory reason, OCR then considered whether this reason was a pretext for retaliation. To determine whether the Division's reason was a pretext, or an excuse, for unlawful retaliation, OCR examined evidence as to the rationale offered and treatment of similarly situated individuals.

The Superintendent and the Director both told OCR that the Division issued the 2011 ban against the Complainant because of her refusal to follow requests by staff or comply with regulations. The Superintendent stated the intent of the ban was not to limit the Complainant's advocacy or communication with parents, but to prevent the Complainant from communicating with Division staff given her behavior outlined in the March 7, 2011 letter. While generally corroborating the Superintendent's rationale, the Director noted that the ban was imposed to prevent further communications from the Complainant to Division staff because she was not viewed as an "appropriate advocate" for Division families and expressed some uncertainty as to the specific circumstances surrounding the recent email block. The Director also confirmed the Complainant has routinely emailed Division staff since the 2011 letter. He told OCR that, between June 2015 and November 2015, he documented the Complainant's emails sent to him and Division staff and forwarded the documentation to the Division's Administration for appropriate action.

The Complainant confirmed the Division's statements as to the Complainant routinely emailing various Division staff members *after* the March 7, 2011 ban, seemingly without incident. The Division attributes the Complainant's continued capabilities to email Division staff to the Complainant using different email accounts. OCR requires further information to confirm the date the Division initially blocked the Complainant's email address. The information would resolve whether the Division's November 2015 email block was a continued action stemming from an initial email block in 2011 or a discrete act, taken five years after the ban was introduced. The Complainant's apparent ability to email Division staff after the 2011 email ban was prescribed causes some concern that the 2011 ban was a pretext for the Division's November 2015 decision to block the Complainant's email address.

In relying upon the March 7, 2011 letter as the basis for the email block, the Division explained that the behaviors outlined in the letter were the cause of the ban on communication from the Complainant to Division staff, including the ban on email communications. According to the March 7, 2011 letter, the Complainant misrepresented herself when she indicated she was with the Commonwealth Attorney's office, conducted and recorded classroom visits without prior permission, failed to appropriately notify staff and parents of audio-recording during meetings, failed to respond to the Division's request for a copy of the audio-recordings, and mishandled a confidential student record. When asked to explain how the email ban addressed these specified behaviors, the Superintendent said that he only thought about communications from the Complainant as a broad category and did not specifically consider which behaviors would be addressed by banning the Complainant's emails. Similarly, the Director, who advised the Superintendent in deciding on the prohibitions, offered that the Complainant had confirmed at least one of those behaviors via email (by writing that she would not provide a recording alleged to have been done without notice), but he did not identify how preventing email communications would address the behaviors leading to the prohibitions. The outlined behaviors occurred when the Complainant was physically on Division grounds – and were not carried out or furthered through electronic means. Though impersonation could potentially occur in emails, neither the Superintendent nor the Director indicated that their decision to block the Complainant's email was based on this concern.

OCR is further concerned about the timing of the Division blocking the Complainant's email address and whether the Division's reliance on the March 7, 2011 ban is pretext, or an excuse for

retaliation. The Division in its narrative response asserted that the Complainant's email account was initially blocked at the time of the March 7, 2011 letter. Conversely, the Complainant contended that she received notice that the Division blocked her email in November 2015. The Division attributes the Complainant's continued capabilities to email Division staff to the Complainant using different email accounts. OCR requires further information to confirm the date the Division initially blocked the Complainant's email address. The information would resolve whether the Division's November 2015 email block was part of a series of actions stemming from an initial email block in 2011 or a discrete act that was not taken until five years after the ban. OCR is concerned that the Division's non-retaliatory reasoning could be considered pretextual if the Division took a discrete act of blocking the Complainant's email in November 2015, given the time that has elapsed since the Division imposed the ban on March 7, 2011. Absent evidence that the recent block was part of a string of actions to enforce the March 2011 prohibitions, OCR could require information that the Division would have blocked the Complainant's email address absent her protected activities.

During the course of OCR's investigation, the Division expressed an interest in establishing protocol and policy governing individuals representing families for Division proceedings and resolving the matter pursuant to Section 302.

Allegation 2

OCR applied the same legal standard for determining if retaliation occurred as discussed and applied above with regard to Allegation 1.

As with Allegation 1, the Complainant engaged in protected activities by advocating on behalf of students with disabilities in IEP meetings with Division staff and in public meetings attended by Division staff.

OCR next considered whether the September 1, 2015 memorandum constituted an adverse action. The memorandum documented the Complainant's alleged violation of the March 2011 prohibitions. Since the record of an alleged violation of a Division order, particularly one threatening pursuit of legal consequences if violated, could deter a reasonable person from engaging in future protected activity, OCR found the memorandum to constitute an adverse action. The September 1, 2015 memorandum was submitted only one week after the August 25, 2015 meeting during which the Complainant advocated for the disability rights of students. Because of the close proximity in time to the drafting of the memorandum, OCR found that there is at least some evidence of a causal connection.

Since the Complainant established an initial claim of retaliation, OCR next considered whether the Division offered a legitimate, non-retaliatory reason for the September 1, 2015 memorandum.

The Division offered the March 7, 2011 letter as the basis for drafting and sharing the memorandum with School Board Counsel. The Director indicated that he memorialized the interaction based on his understanding that the March 7, 2011 letter prohibited the Complainant from communicating with him directly at the board meeting regarding special education matters

in her role as an advocate. The Director added that he was concerned that the Complainant was sharing private student information in a public forum thus violating the confidentiality of the information. By relying upon enforcement of the March 2011 prohibitions and the alleged violation of confidentiality, the Division offered a legitimate, non-retaliatory reason for the memorandum.

The Director clarified his reasoning for memorializing the interaction by stating that the interaction was a culmination of actions taken by the Complainant. He explained that this was the first interaction he noted in a formal memorandum because it was the first face-to-face interaction he had with the Complainant. Because of the nature of the interaction, he found it necessary to alert the School Board Attorney of the matter. Additionally, he expressed concern that the Complainant potentially violated confidentiality requirements by naming a student and asking about disability-related information in front of other meeting attendees.

Some of the same concerns outlined above as to the possibility of pretext in enforcing the email ban seem to apply to the memorandum. Specifically, the timing of the memorandum occurred five years after the initial ban and prohibiting communication with Division staff appears unnecessary to addressing the concerns outlined in the March 2011 letter. But, unlike the email ban, there is no evidence that this prohibition has been inconsistently applied and the Director provided an additional basis (confidentiality concerns) for the memorandum and reasoning to explain his consistent enforcement of the March 2011 ban, along with a reason (the direct nature of the interaction) why this particular interaction warranted a formal memorandum. While the timing and scope issues offer some limited support for a finding of pretext, the overall evidence, including the credible reasoning offered by the Director, suggests that the legitimate, non-retaliatory reason offered by the District was not pretextual.

Because the Division's March 2011 prohibition enforcement and confidentiality concerns are legitimate, non-retaliatory reasons, and the evidence reviewed by OCR did not reveal that the reason was pretextual, OCR finds that there is insufficient evidence to support a claim of retaliation based on the September 1, 2015 memorandum.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on August 9, 2016 which, when fully implemented, will resolve the allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division'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. 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 Division must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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

We appreciate the Division’s cooperation in the resolution of this complaint. If you have any questions, please contact please contact Marcelo Quiñones or Erika Westry, the OCR attorneys assigned to this complaint, at 202-453-6567 or Marcelo.Quinones@ed.gov, or 202-453-7025 or Erika.Westry@ed.gov, respectively.

Sincerely,

| _____ /S/

Alessandro Terenzoni
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District of Columbia Office
Office for Civil Rights