



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

August 18, 2017

Dr. Brian Austin, Superintendent
Lee County Public Schools
153 School Board Place
Jonesville, Virginia 24263

RE: OCR Complaint No. 11-17-1184
Resolution Letter

Dear Dr. Austin:

This letter advises 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 XXXX against Lee County Public Schools (the Division). The complaint alleged that the Division discriminated against the Student on the basis of disability and retaliated against the Complainant because of his previous OCR complaints. Specifically, the complaint alleged that:

1. The Division discriminated against the Student by failing to adequately respond to the report that he had been harassed and assaulted by another student because of his disability; and
2. The Division retaliated against the Complainant by failing to adequately respond to his report that the Student was harassed and assaulted by another student because of his disability.

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. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II. The laws enforced by OCR also 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.

Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

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

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

A school division's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the school division's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a school division must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a school division must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires school divisions that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public entities that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR examines a number of factors in evaluating whether a school division's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties;

adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

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, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

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 school division took an adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the school division has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the school division's reason for its action is a pretext, or excuse, for unlawful retaliation.

Factual Background

The Student was a XXXX student at XXXX (the School) during the XXXX school year. The Student has had a Section 504 plan since XXXX. In XXXX, the Student's parents reported to the School that another student XXXX, injuring the Student to the point where he needed medical care. The School principal instructed the parents to fill out an accident report for insurance purposes, which they did. The parents also reported the incident to some Division administrators XXXX. XXXX 2 SENTENCES REDACTED XXXX.

After the Division received OCR's XXXX notification letter about the current complaint investigation, the Division initiated a formal investigation of the parents' report pursuant to its student harassment policy and procedure. The Division notified the Student's parents about the outcome of the investigation on XXXX. The parents appealed the decision, and the school board upheld the decision on XXXX.

Analysis and Conclusion

The Complainant contended that the Division did not recognize the XXXX incident as disability harassment because the School did not maintain adequate records of the Student's disability or prior reports of the other student bullying the Student. In the investigation, OCR learned that the Student's Section 504 plan had not been transferred to the School from his previous Division school when the Student started at the School in XXXX. After it discovered this fact, the School held a Section 504 meeting at the beginning of XXXX and developed an update Section 504 plan for the Student. The Complainant also asserted that the Division did not investigate the XXXX incident in a timely manner, issued an inaccurate report, and failed to fully address the Student's needs during the investigation.

Prior to the completion of OCR's investigation, the Division expressed interest in resolving the complaint pursuant to Section 302 of OCR's *Case Processing Manual* and then signed the enclosed Resolution Agreement on August 14, 2017, which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Resolution Agreement are aligned with the allegations and issues raised by the Complainant and the information that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Resolution Agreement until the Division is in compliance with the statutes and regulations at issue in the case. Failure to implement the Resolution 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, assists, or participates in a proceeding under a law enforced by OCR. 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 Kristi Bleyer, the OCR attorney assigned to this complaint, at 202-453-5901 or kristi.bleyer@ed.gov.

Sincerely,

/s/

Michael Hing
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Anne Witt, Esquire (via email)