



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

December 22, 2020

Via Email: john.kirby@lattavikings.com

Dr. John M. Kirby
Superintendent
Dillon School District 3
Latta Schools
205 King Street
Latta, SC 29565

Re: OCR Complaint No. 11-18-1042
Letter of Findings

Dear Dr. Kirby:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on XXXXX against Dillon School District 3/Latta Schools (the District). The Complainant filed the complaint on behalf of XXXXX (the Student), who formerly attended XXXXX School (the School). The Complainant alleged that the District discriminated against the Student on the basis of his disability, and retaliated against the Complainant and the Student, during the XXXXX school year. Specifically, the Complainant alleged the following:

1. The District discriminated against the Student on the basis of his disability on XXXXX, by attempting to coerce the Complainant into forfeiting her and the Student's rights to procedural safeguards, in violation of Section 504 of the Rehabilitation Act of 1973; and,
2. The District retaliated against the Complainant and the Student for the Complainant's refusal to withdraw and forego pursuit of a complaint asserting the Student's rights under Section 504, when it denied the Complainant's request that the Student be allowed to participate in the School's XXXXX on XXXXX.

OCR enforces 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, 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), 42 U.S.C. §§ 12131 et seq., 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

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

these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Summary of Investigation

In reaching a determination, OCR reviewed documents provided by the Complainant and the District. OCR also interviewed the Complainant, witnesses identified by the Complainant, and District administrators and staff.

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence of a violation of Section 504 and Title II regarding Allegation 1, pursuant to Section 303(a) of OCR's *Case Processing Manual*. However, OCR found sufficient evidence of a violation of Section 504 and Title II regarding Allegation 2, pursuant to Section 303(b) of OCR's *Case Processing Manual*, which the District agreed to resolve through the enclosed Resolution Agreement. OCR's findings of fact and conclusions are discussed below.

Facts

The Student was a student with a disability who attended the School until XXXXX, XXXXX, and XXXXX (the Incident).¹ At the time of the Incident, the District had identified the Student as a student with a XXXXX, for which it had developed an Individualized Education Program (IEP).²

On XXXXX, the Student's IEP team held a manifestation determination review (MDR) and determined that the Student's misconduct during the Incident on XXXXX was not related to his disability. The District immediately held a disciplinary hearing to address the XXXXX of the Student for the Incident. Under the District's Student Code of Conduct (the Code), the Student's behavior constituted a Level XXXXX.

In a letter to the Complainant, dated XXXXX, the Superintendent memorialized what he indicated was an agreement XXXXX reached by him, the Complainant, the XXXXX, and the Director of XXXXX (the XXXXX Director) during the hearing. The Superintendent's letter characterized the XXXXX Agreement as a "reasonable compromise that focuses on [the Student's] future growth with his XXXXX rather than a punitive approach for consequences for his actions." The letter specifically stated that XXXXX for the Incident.

The Superintendent informed OCR that the Student had not met the condition of the XXXXX Agreement pertaining to XXXXX; namely, the Student had not XXXXX, and therefore had not demonstrated XXXXX. According to the Complainant, XXXXX.

The Complainant's XXXXX Complaint

On XXXXX, the Complainant filed a complaint with XXXXX alleging that the District had denied the Student's right to a free appropriate public education (FAPE), in violation of the Individuals with Disabilities Education Act (IDEA). By letter dated XXXXX, the XXXXX formally notified the

¹ During the Incident, the XXXXX. XXXXX.

² In XXXXX, the District determined that the Student's primary category of eligibility would be XXXXX.

District of the complaint. On XXXXX, the XXXXX issued its investigative findings, which stated that the District had XXXXX.

The Student's IEP Meeting on XXXXX

While the Complainant's XXXXX complaint was pending, the District convened an IEP meeting for the Student on XXXXX, wherein the Student's IEP team determined that District staff would provide services to the Student XXXXX, and would XXXXX of the Student. Notes from the meeting reflect that the XXXXX initiated discussion of the Student XXXXX and XXXXX.

The Superintendent's Meeting with the Student's Parents on XXXXX

On XXXXX, when the XXXXX the Student's Parents XXXXX were at the School for XXXXX, the Superintendent requested to meet with them. During the course of the meeting, the Superintendent discussed XXXXX the Incident on XXXXX, as well as the Student's XXXXX. The Superintendent then drafted a Memorandum of Agreement (the MOA), to reflect the respective commitments of the Student's Parents and/or the Student, as well as of the District, that he understood to have been verbally agreed upon. The commitments included XXXXX in exchange for XXXXX. The Student's Parents first received a hard copy of the MOA when the XXXXX Director presented XXXX it to the Complainant at XXXXX the Student's next IEP meeting on XXXXX.

Although their recall of the exact conversation somewhat differs, participants agree that during their meeting on XXXXX, the Superintendent reiterated to the Student's Parents that he could XXXXX related to the Incident on XXXXX, and that he had the authority to determine whether the Student would XXXXX. The Superintendent viewed the discussion as an attempt to settle matters of concern to the family, including the Student's Parents' interest in the XXXXX and XXXXX regarding the Incident XXXXX. The Superintendent told OCR that he had discussed with the Student's Parents that the XXXXX. He further acknowledged XXXXX.

Although the Superintendent perceived the Student to have failed to adhere to the provision of the XXXXX, the Superintendent acknowledged to OCR that he had not incorporated a similar provision into the MOA, such that it would have continued to be a requirement for the Student XXXXX. Rather, the Superintendent stated that if the Student's Parents had signed the MOA, then the Student would have been able to XXXXX.

The Superintendent asserted that the Student's Parents had verbally agreed to the provisions of the MOA. However, the Complainant and the Student's father independently told OCR that they never intended to sign the MOA, and, to their recollection had not indicated otherwise during the meeting.

The Student's IEP Meeting on XXXXX/Presentation of the MOA

During the IEP meeting on XXXXX, the Complainant was present along with her XXXXX Mentor XXXXX; the XXXXX and the XXXXX Director were also present. The Complainant informed OCR that the XXXXX brought XXXXX.³ During the IEP meeting, the team reviewed the results of XXXXX of the Student and agreed to change his primary disability classification to XXXXX. The Complainant advised staff that the Student had developed XXXXX.

³ In an interview with OCR, the XXXXX XXXXX.

The Student's XXXXX During the IEP Meeting

XXXXX

XXXXX

XXXXX

The MOA

At the conclusion of the IEP meeting on XXXXX, the Complainant and Mentor reviewed the MOA, which was presented by the XXXXX Director and listed commitments for the Complainant/Student and for the District, respectively. Pursuant to the MOA, the Complainant and Student specifically would have agreed that XXXXX. Pursuant to the MOA, the District agreed that the Student XXXXX. After conferring with the Mentor, the Complainant stated that she would not be signing the MOA. Following the meeting, the XXXXX Director notified the Superintendent that the Complainant had declined to sign the MOA.

XXXXX.

District Administrator's Meeting on XXXXX

On XXXXX, the Superintendent, XXXXX, and the XXXXX Director met to discuss XXXXX.

Based on his discussion with the XXXXX and the XXXXX Director, including concerns raised during the meeting, the Superintendent issued a letter that same day on XXXXX, notifying the Complainant that her request XXXXX had been denied; that XXXXX; and, that XXXXX. The letter did not specify to the Complainant why her request had been denied.

In a follow-up interview with OCR, the Superintendent denied that the decision XXXXX was in retaliation for the Complainant's XXXXX complaint.⁴ Rather, he stated that XXXXX.

Allegation 1

With respect to Allegation 1, the Complainant alleged that the District discriminated against her and the Student on the basis of disability on XXXXX, by attempting to coerce her into forfeiting her and the Student's rights to procedural safeguards, in violation of Section 504.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by

⁴ XXXXX.

parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

Analysis

OCR considered whether the attempt by the Superintendent to negotiate the Complainant's withdrawal of her XXXXX complaint and secure her XXXXX on XXXXX, would constitute a violation of the right to procedural safeguards under Section 504. OCR concludes that the Superintendent's action, even if successful, did not constitute a violation of the Complainant's and/or Student's right to procedural safeguards as expressly stated in the regulation implementing Section 504, at 34 C.F.R. § 104.36. Specifically, there is no indication that the Superintendent's action did, or would, result in denying the Complainant and/or the Student their right to procedural safeguards, including notice, an opportunity to examine relevant records, an impartial hearing or a review procedure, as required by Section 504. Therefore, with regard to Allegation 1, OCR found insufficient evidence of a violation of Section 504.

Allegation 2

Regarding Allegation 2, the Complainant alleged that due to her refusal to withdraw and forego pursuit of a complaint asserting rights enforceable under Section 504, the District retaliated against her and the Student when it denied the Complainant's request XXXXX.

Legal Standards

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.

The following three elements must be satisfied to establish an initial, or prima facie, case of retaliation: 1) an individual engaged in a protected activity (e.g., filed a complaint or asserted a right under a law enforced by OCR)⁵; 2) an individual experienced an adverse action⁶ caused by the recipient; and, 3) there is some evidence of a causal connection between the protected activity and the adverse action. When these elements have been established, OCR then determines whether there is a legitimate, non-retaliatory reason for the adverse action; and if so, whether the reason is a pretext, or excuse, for retaliation.

Analysis

⁵ An individual engages in a protected activity if he/she asserts a right or privilege or opposes an act or policy that he/she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under one of the laws OCR enforces.

⁶ An adverse action is something that could deter a reasonable person from engaging in protected activity. Petty slights, minor annoyances, and lack of good manners do not normally constitute adverse actions.

OCR determined that the Complainant engaged in a protected activity by filing a disability discrimination complaint on the Student's behalf XXXXX, and that the District's denial of the Complainant's/Student's request XXXXX constitutes an adverse action. OCR also determined that the close proximity between the Complainant's protected activity and the District's adverse action supports that there is evidence of a causal connection. Consequently, OCR determined that the circumstances establish an initial, or prima facie, case of retaliation.

OCR next considered the District's legitimate, non-retaliatory reasons for denying the Student's participation in XXXXX. The District maintained that XXXXX.

OCR considered whether the reasons given by the District were a pretext for retaliation. OCR reviewed the Code and information provided by the District regarding the disciplinary consequences involving another School student (Student A) during the XXXXX school year. It is undisputed that the Student XXXXX.

However, OCR notes that at the time of the Incident, on XXXXX (a little under one year prior to the Complainant's filing of her XXXXX complaint), and in the XXXXX Agreement, the Superintendent agreed in part that XXXXX. In fact, the XXXXX Agreement appears to comprise the full extent of the discipline placed on the Student for the Incident, and does not indicate that further punishment, XXXXX.

OCR further notes that between the XXXXX Agreement, and the date of the rescission of XXXXX, there is no further evidence of misconduct by the Student. Although the Superintendent and the Complainant disputed whether the Student could participate in XXXXX; and, even though the Student had not met that provision of the XXXXX Agreement, if the Student's Parents had signed the MOA, then the Student would have been permitted to XXXXX.

The District also provided OCR with records demonstrating that disciplinary action had jeopardized Student A's⁷ participation in the School's XXXXX during a previous (the XXXXX) school year. Specifically, those records reflect that a former XXXXX XXXXX (the Former XXXXX) recommended Student A for XXXXX. XXXXX. In an interview with OCR, the Superintendent stated that Student A had met the agreed upon stipulations and, therefore, was allowed to participate XXXXX.

The District's treatment of Student A indicates that disciplinary incidents can impact whether a student participates XXXXX; however, the circumstances of Student A and the Student are distinguishable. First, the potential consequence of non-participation XXXXX would have occurred within three months of Student A's disciplinary infraction, thereby supporting a nexus between the two. In contrast, over a year elapsed between the Student's misconduct and the District's resulting decision XXXXX, and, critically, at the time of the Incident, the Superintendent did not indicate that participation XXXXX would be prohibited because of the Student's misconduct. The significant passage of time, and the fact that this punishment was not initially called for, renders the District's reliance on the former to support the latter further attenuated, especially given that there was a lack of any indication that the Student's specific misconduct continued or otherwise was indicative of a pattern of behavior. In interviews with OCR, both the XXXXX Director and the XXXXX

⁷ The District reported that neither Student A nor his family had filed a complaint of discrimination or otherwise engaged in a protected activity.

acknowledged, and Division records similarly reflect, that the specific misconduct engaged in by the Student during the Incident on XXXXX was a one-time occurrence, as the Student had not exhibited any similarly XXXXX before or after the Incident. Moreover, the written record, interviews of District personnel, and the provisions of the MOA, do not reflect that the Incident itself posed any obstacle to the Student's participation XXXXX.

Given the XXXXX Agreement and the lack of evidence indicating that the Student had subsequent behavioral concerns, OCR must next examine whether anything else changed subsequent to the XXXXX Agreement, aside from the Complainant's filing of the XXXXX complaint, that would have justified the rescission of XXXXX. The District raises the fact that they considered and had concerns related to XXXXX exhibited by the Student during the IEP meeting on XXXXX; and, that the Student's Parents were untrustworthy because they had verbally agreed to the MOA on XXXXX, but refused to sign it on XXXXX. OCR thus sought to determine the impact these factors may have had on the District's decision regarding the Student's participation in XXXXX.

First, with respect to the Student's purported behavior, and particularly with respect to the XXXXX during the Incident on XXXXX, notes from meetings regarding the Student in XXXX, reflect that the XXXXX. OCR notes that XXXXX. The Complainant acknowledged that the Student XXXXX.

Moreover, OCR finds, and the Superintendent acknowledged, that the Complainant's refusal to sign the MOA resulted in the District prohibiting the Student's participation XXXXX. Notwithstanding the XXXXX concerns asserted by District staff, the MOA on its face suggests that the District would have allowed the Student to participate XXXXX had the MOA been signed. Notably, the MOA itself did not specify how the Student and his family would XXXXX. In addition, both the XXXXX and XXXXX Director conceded that any XXXXX exhibited by the Student during the IEP meeting on XXXXX meeting had been effectively managed by the Complainant. Although the XXXXX nonetheless expressed uncertainty as to how the Student would react XXXXX, the record reflects that consideration had already been given XXXXX and that the Complainant had readily agreed to do so. Additionally, the Superintendent acknowledged that they would have come up with a plan to XXXXX if that were cause for concern. Thus, a preponderance of the evidence indicates that the District did not perceive the Student to XXXXX, that it precluded his XXXXX.

Second, to the extent that the Superintendent asserted to OCR that the Student's Parents were untrustworthy because they had verbally agreed to the MOA on XXXXX but refused to sign it on XXXXX, OCR found insufficient evidence that the Complainant or her husband had verbally agreed to the MOA during the meeting on XXXXX. OCR also notes that even if the Complainant or her husband had changed their minds, that alone would not have been a reasonable basis for the District to deny the Student the opportunity XXXXX.

Finally, the fact that the provision of the MOA requiring the Complainant's withdrawal of the XXXXX complaint was in no way germane to the concerns expressed regarding the Student's participation XXXXX, is further support that the Complainant's relinquishing the XXXXX complaint was of critical interest to the Superintendent, and that the Complainant's refusal to forfeit her complaint was a pivotal factor in the Superintendent's decision-making. XXXXX.

Therefore, based on the preponderance of the evidence, OCR finds that the reasons provided by the District were pretextual, and that the District retaliated against the Complainant and Student in

response to the Complainant's refusal to withdraw her XXXXX complaint and thereby forfeit the discrimination claims she had raised, in violation of Section 504 and Title II.

Conclusion

On December 21, 2020, the District agreed to implement the enclosed Resolution Agreement (the Agreement), which commits the District to take specific steps to address the identified areas of noncompliance with Section 504 and Title II, as stated in Allegation 2, pursuant to Section 303(b) of OCR's *Case Processing Manual*.

Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the recipient deemed compliant when the recipient enters into and fulfills the terms of a resolution agreement. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct visits and may request information as necessary to determine whether the District has fulfilled the terms of the Agreement. If the District fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR will give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint. This letter 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. 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. Complainants 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 regarding Allegation 1 within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>) or a written statement of no more than ten (10) pages (double-spaced, if typed) by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; by email to OCR@ed.gov; or by fax to 202-453-6012. The filing date of an appeal is the date that the appeal is submitted online, postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why she believes the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome; failure to do so may result in dismissal of the appeal. OCR will forward a copy of the appeal to the District. The District has the option to submit a response to the appeal to OCR within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

Please be advised that the District 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 cooperation of the District and its counsel, XXXXX, in the resolution of this complaint. If you have any questions regarding this letter, please contact Betsy Trice, the OCR attorney assigned to this complaint, at 202-453-5931 or betsy.trice@ed.gov.

Sincerely,

Letisha Morgan-Cosic
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc (Via Email): XXXXX
XXXXX