



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 23, 2019

Kyle Pierce
Head of Lower School
Union Day School
3000 Tilley Morris Road
Weddington, North Carolina 28104

RE: OCR Complaint No. 11-19-1427
Resolution Letter

Dear Mr. Pierce:

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 July 8, 2019 against Union Day School (the School). The Complainant alleged that the School retaliated against her for her disability-related advocacy XXXX, 2019 when, on January XXXX, 2019, School administrators XXXX.¹

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

During the investigation, OCR reviewed documents provided by the Complainant and the School, and interviewed the Complainant. Before OCR completed its investigation, the School expressed a willingness to resolve the complaint on December 3, 2019. OCR determined that it is appropriate to resolve the complaint pursuant to Section 302 of the *Case Processing Manual* because the investigation has identified issues that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

¹ The allegation in the August 6, 2019 notification letters incorrectly stated August 2017 rather than August 2018.

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

Facts

XXXX [THREE PARAGRAPHS REDACTED] XXXX

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, 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.

OCR finds that the Complainant engaged in a protected activity under Section 504 when she participated in special education advocacy XXXX, and that the School took an adverse action against the Complainant when it XXXX, as this could deter a reasonable person from engaging in future protected activities. Given the proximity in time, OCR also found sufficient evidence of a causal connection between the adverse action and the protected activity.

In its response, the School asserts that XXXX. As an initial matter, OCR has some concerns about whether the last rationale constitutes a legitimate, non-retaliatory reason for the School's actions. The School's response to this Complaint suggests that School administration may have XXXX in part because the Complainant persistently advocated for a particular educational methodology XXXX.

OCR finds that unprofessional behavior and disparaging comments could constitute legitimate, non-retaliatory reasons. Nonetheless, even assuming that the School's rationale was legitimate, OCR has some concerns about whether these justifications are pretextual. In its investigation thus far, OCR has not discovered evidence to support the fact that the Complainant demeaned others, disparaged faculty members, and dominated the IEP process in a manner that reasonably warranted XXXX. For example, OCR reviewed XXXX and OCR could not conclude that the Complainant's behavior was demeaning or disruptive as the School describes. While the EC Director wrote in a subsequent email that the Complainant asked her at an IEP meeting if she "needed to go get [] mama bear," the transcript of the meeting indicates that the statement was made by XXXX, not the Complainant. An EC teaching assistant subsequently wrote an email describing the Complainant and XXXX as having "highly disrespectful" behavior, but the conduct that he attributes to the Complainant is that she said, "'Can we just stop . . . Just stop talking about XXXX!' She did not want to hear how our curriculum supports students who struggle with XXXX. She was insistent that only XXXX instruction was suitable . . ." Such a remark, albeit tense, does not reflect the demeaning and disruptive behavior that the School alleges. Nor do the meeting transcripts (or other contemporaneous documentation, including internal correspondence produced by the School and the Complainant) support the School's assertion that the Complainant was, as the School maintains, "warned several times to stop demeaning UDS faculty."²

² In its review of the transcript, OCR could find only one instance where the Complainant was warned. Specifically, OCR found that the Assistant Head told the Complainant that she and the School Head feel that the Complainant is

The School did not provide, nor could OCR find, any evidence of a policy or procedure related to XXXX, or about the School's authority to XXXX. Additionally, despite OCR's request, the School was unable to provide OCR with any examples of similarly situated individuals who had also been XXXX.

On December 19, 2019, the School signed the enclosed Resolution Agreement which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the School to train administrators and staff at the School on retaliation, and to send a letter to the Complainant XXXX. Please review the enclosed Agreement for further details. OCR will monitor the School's implementation of the Agreement until the School has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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 School 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 School's cooperation in the resolution of this complaint. If you have any questions, please contact Kathryn Love, the OCR attorney assigned to this complaint, at 202-453-6948 or kathryne.love@ed.gov.

Sincerely,

David Hensel
Team Leader, Team III

being too "heavy handed" and "making demands," and if she can't work with the team members, she will be asked to leave. The transcript indicates that the Complainant responded: "Great, thank you," and that a substantive conversation proceeded from that point forward.

District of Columbia Office
Office for Civil Rights

Enclosure

cc: XXXX, Esq.