

The District provided OCR with documentation regarding the Student's enrollment at the District during the XXXXX and XXXXX school years. During those years, the District provided the Student with interventions, despite the Student's average grades and assessment scores (proficient to accelerated), due to the parents' concerns about his ability to focus. XXX.

XXXXXXXX, the Student's mother met with the XXXXXXXXXXXXXXX to discuss her concerns about the Student. The XXXX told OCR that the Student's mother advised her that the Student had been diagnosed with some learning disabilities, but the Student's mother was unsure of what action, if any, the family wanted to take. The Student's parents provided a neurobehavioral report which indicated that the Student had been diagnosed with a XXXX. The Student's mother told OCR that she was surprised when the XXXX stated that a meeting was required before any action would be taken by the District, despite the diagnosis in the report. The Student's mother confirmed telling the XXXX that she was unsure if she wanted the Student to be evaluated to determine if he was eligible as a student with a disability.

In response to the neurobehavioral report and the parents' concerns, the XXX convened an intervention assistance team (IAT) meeting in XXXX, which included some of the Student's teachers, the Student's parents, a psychologist, the supervisor, and a District counselor. At the meeting, the IAT decided to draft an intervention plan for the Student, and agreed to reconvene six weeks later to determine if the interventions were effective. The intervention plan provided for: a daily planner sheet, notes, breaks, follow-up on concerns about the legibility of writing, and extended time.

The XXX stated that the IAT did not suspect that the Student was a student with a disability and as a result, did not initiate an evaluation of the Student. Following the XXXX meeting, the XXXX issued a Prior Written Notice to the parents notifying them that the District was not going to evaluate the Student. The XXXX stated that she does not typically issue a Prior Written Notice when there has not been a request to evaluate and there is no suspicion that a student may have a disability. However, she wanted to clarify for the parents that the District did not consider the Student to be a student with a disability. In response, the Student's parent sent the XXXX a letter indicating that he had not requested an evaluation of the Student.

On XXXX, the IAT, along with the occupational therapist, and the principal met to discuss the effectiveness of the intervention plan. The Student's teachers stated that the Student's academic performance and behavior were not a concern. With regard to the interventions, the XXXX teacher stated that she moved the Student's seat, provided notes, and tutored him regularly. The Student's mother confirmed that the Student stayed after school to work on XXXX assignments with the teacher on a few occasions.

OCR that he was unfamiliar with the term XXXX but believed that the supervisor responded to the parent's request. The XXXX, while familiar with the XXXXXX process, stated that she was unaware of the request and did not respond.

The District provided OCR with its current Section 504 Policy and Procedures that were approved by the Board of Education in April 2014. The Policy includes the Section 504 procedural safeguards entitled, "Policy 2260.01B *Section 504/ADA Parents' Procedural Rights, Including Due Process Hearing.*" The Policy requires the District to notify parents of their Section 504 rights:

- when evaluations are conducted;
- when consent for an evaluation is withheld;
- when eligibility is determined;
- when a Section 504 Plan is developed; and
- before there is a significant change in the Section 504 Plan.

In addition, the procedural safeguards indicate that parents have the right to request mediation or an impartial due process hearing related to decision or actions concerning their child's identification, evaluation, educational program, or placement. The procedural safeguards do not identify the District's Section 504 Coordinator(s) or include the Coordinator(s) contact information.

- **Applicable Legal Standards and OCR Policy**

As the Title II implementing regulation offers no greater protection than the Section 504 implementing regulation with respect to this allegation, OCR analyzed this allegation using Section 504 standards. The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires school districts operating a public elementary and secondary education program or activity to provide a free and appropriate public education to each qualified student with a disability in their jurisdictions. The regulation defines a free and appropriate public education as the provision of regular or special education and related aids and services that are: 1) designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met, and, 2) are based upon adherence to procedures that satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36.

The Section 504 implementing regulation also provides, at 34 C.F.R. § 104.35(a), that school districts evaluate any person who, because of a disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. Compliance with IDEA regarding the group of persons

present when an evaluation or placement decision is made is satisfactory under Section 504.

The Section 504 implementing regulation, at 34 C.F.R. § 104.36, requires districts to establish, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, the right to examine relevant records, and an impartial hearing. The regulations also indicate that compliance with IDEA is one means of meeting the requirements of Section 504. If parents request a disability evaluation the district may: (1) evaluate the student within a reasonable period of time; or (2) decline to evaluate the student because the district does not believe that the student has a disability. If the district refuses to evaluate, it must explain to the parents the reason, and inform them that they have the right to challenge the refusal to evaluate the student by requesting an impartial hearing by a person knowledgeable about the requirements of Section 504.

Here, the District asserts that it disagreed with the neurobehavioral report and did not suspect that the Student was a student with a disability. However, due to the parents' concerns, the District convened an IAT in October and drafted an intervention plan. The evidence established that at another IAT meeting in January, the IAT discussed that the Student was performing well academically and determined that it did not suspect that the Student was a student with a disability. On XXXX and XXXX, the Student's parent requested that the District evaluate the Student to determine if he was eligible as a student with a disability under IDEA or Section 504. In response, the District issued Prior Written Notices on XXXX and XXXXX, indicating that it was refusing to initiate an evaluation of the Student under IDEA and Section 504. Since the District considered the parent's requests to evaluate the Student and timely notified the parent that it was declining to evaluate him, OCR finds that there is insufficient evidence that the District failed to appropriately and timely evaluate the Student in violation of Section 504 as alleged.

While the District provided the parent with IDEA's procedural safeguards, it is undisputed that the District failed to provide the parent with its Section 504 procedural safeguards during the XXXXXXXX school year, despite the District's refusal to evaluate the Student under Section 504. While the District provided Whose IDEA on XXXX, the District did not respond to the parent's request for an XXXX under IDEA. Section 504 permits districts to utilize IDEA's procedural safeguards in order to meet the requirements of Section 504, however the District failed to comply with IDEA's procedural safeguards when the parent requested an XXXX.

OCR finds that the District failed to effectively establish and implement a system of procedural safeguards in violation of Section 504. As result, the Resolution Agreement requires the District to revise its Section 504 procedural safeguards to include: information on who an individual may contact to request mediation or file a due process complaint, and the contact information for the District's Section 504 Coordinator(s). In this regard, the Resolution Agreement requires the District to provide training to its

Section 504/Title II coordinator(s) and other staff about the revised procedural safeguards as well as any other dispute resolution procedures the District uses to comply with Section 504 requirements. Further, the Agreement requires the District to issue a letter to the Student's parent committing to respond to the parent's request for an administrative review upon the Student's reenrollment in the District.

Section 504/ Title II Coordinator

Section 504's implementing regulation requires recipients that employ 15 or more people to designate at least one person to coordinate its efforts to comply with Section 504 (typically referred to as the "Section 504 Coordinator"). The regulation also requires recipients to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, of the identity of the Section 504 coordinator. 34 C.F.R. §§ 104.7(a) and 104.8(a). Title II contains a similar requirement at 28 C.F.R. § 35.107(a), which specifies that a public entity that employs 50 or more persons shall make available to all interested individuals the name, office address, and telephone number of the designated individual(s).

On July 3, 2014, the District provided OCR with its current Section 504 policies and procedures (2014 Policy) that were revised on April 28, 2014. The 2014 Policy contains Policy 2260: *Nondiscrimination and Access to Equal Educational Opportunity* which identifies the supervisor and the superintendent as the District's Compliance Officers and provides their contact information. The 2014 Policy states that the Compliance Officers coordinate the District's efforts to comply with: Title II of the ADA, Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendment Act of 1972, Section 504, and the Age Discrimination Act. While OCR has confirmed that the District's current policy is published on the District website, the District's 2010 Policy, identifying the Director of Educational Services as the District's Section 504 Coordinator, was also published on the website as of July 2, 2014.

The Student's parent alleged that on multiple occasions he asked the District staff to identify the District's Section 504 coordinator and never received a response, but later another parent advised him that the supervisor was the Section 504 coordinator. The superintendent asserted that staff advised the parent that the supervisor was the Section 504 coordinator. The District provided OCR with a XXXX e-mail from the Student's parent asking the XXXX for the District's Section 504 Coordinator's contact information. The XXXX told OCR that he believes that he responded to the parent's e-mail but did not provide the email response to OCR.

There is no evidence that the District identified the District's Section 504 coordinators during the XXXX school year. Further, the parent would have been unable to ascertain the identity of the coordinator on the District's website, as the published policy was incorrect. As a result, OCR finds that the that the District failed to take appropriate steps to notify interested parties of its Section 504 and Title II coordinators in violation of the Section 504 and Title II. The Agreement requires the District to notify parents/guardians of the name(s) of the District's Section 504 Coordinator(s) along with the Coordinator(s)

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

To find a *prima facie* case of retaliation, OCR must find: (1) the individual engaged in protected activity; (2) the individual experienced a materially adverse action by the recipient; and (3) there is a causal connection between the protected activity and the materially adverse action. To determine whether a "materially adverse action" has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination. Normally, petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. The significance of any given act of retaliation will often depend upon the particular circumstances. Depending on context, an act that would be immaterial in some situations may be material in other situations. Whether an action is materially adverse is judged from the perspective of a reasonable person in the individual's position.

If any of the elements of a *prima facie* case cannot be established, OCR will find insufficient evidence of a violation. If the evidence demonstrates a *prima facie* case of retaliation, a presumption or inference of unlawful retaliation is raised. OCR must then determine whether the recipient had a facially legitimate reason for the materially adverse action. If OCR finds that the recipient did have a facially legitimate reason for the materially adverse action, OCR must conduct a "pretext" inquiry to determine whether the recipient's reason is a cover-up for retaliation. Evidence of pretext may involve factual scenarios in which the individual was treated differently from how he or she was treated prior to the protected activity or was treated differently from similarly situated individuals. Evidence of pretext may also include situations in which the individual was treated in a manner that deviated from the recipient's established policies or practices.

With respect to protected activity, OCR determined that the parent's disagreement with the District's decision not to evaluate the Student, and his continued requests that the District evaluate the Student, constituted activities protected by Section 504 and Title II.

Thus, OCR sought to examine whether the District took an adverse action against the parent because of the protected activity or after the protected activity occurred. Regarding the allegation that the District's failure to respond to the parent's phone calls was retaliatory, there is no evidence that the Student was adversely affected. Moreover, although the parent asserts that the District limited his ability to discuss his concerns with the teachers, the evidence indicates that after the parent sent letters to the Student's teachers on XXXXX, requesting a meeting, the District arranged for the parent to meet with the Student's teachers on XXXXX. Additionally, the evidence does not support that

Conclusion

This concludes OCR's investigation of this matter. OCR will monitor the implementation of the Agreement. The District's first monitoring report is due by February 27, 2015. If the District does not fully implement the agreement, OCR will reopen the investigation and take appropriate action. In addition, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of 60 calendar days to cure the alleged breach.

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.

OCR would like to thank you and the District for your cooperation in the investigation and resolution of this matter. The OCR contact person for the monitoring of the agreement is XXXXXX, who may be reached at (216) 522-XXX, or XXXXXX@ed.gov. We look forward to receiving the District's first monitoring report by February 27, 2015 and the report should be directed to Ms. Sample. If you have any questions about this letter or OCR's resolution of this case, please contact XXXXXX, at (216) 522-XXX or at XXXXXX@ed.gov.

Sincerely,

/s/

Meena M. Chandra
Director

Enclosure