



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

Jeffrey J. Butler, Esq.
LaPointe & Butler, P.C.
6639 Centurion Drive, Suite 140
Lansing, Michigan 48917

Re: OCR Docket #15-15-1278

Dear Mr. Butler:

This letter is to inform you of the disposition of the above-referenced complaint filed against Traverse City Area Public Schools (the District) with the U.S. Department of Education (Department), Office for Civil Rights (OCR), on May 8, 2015, alleging discrimination on the basis of disability. Specifically, the complaint alleged that the following occurred during the 2014-2015 school year:

- 1) The District discriminated against a student (the Student) based on disability by (a) removing the one-on-one aide provided for the Student in the Student's Individualized Education Program (IEP); (b) inappropriately using the Student's XXXXXXXXXXXX during a field trip on March 17, 2015; (c) failing to appropriately implement the provision in the Student's IEP addressing the use of XXXXXXXXXXXX during a field trip on May 29, 2015; and (d) failing to provide the Student with appropriate assistance with XXXXXXXXXXXX.
- 2) The District retaliated against the Student's guardian for calling meetings regarding the Student by not allowing her to pick up the Student in her classroom, having a staff member near her when she is in the school, and by generally making her feel unwelcome.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104 (Section 504). Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws.

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

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Based on the complaint allegations, OCR opened an investigation of the following issues:

- whether the District failed to provide a qualified student with a disability with a free appropriate public education (FAPE) as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33;
- whether the District, on the basis of disability, excluded a qualified person with a disability from participation in, denied her the benefits of, or otherwise subjected her to discrimination under any of its programs or activities in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130; and
- whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because the individual made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Section 504 or Title II in violation of Section 504's implementing regulation at 34 C.F.R. § 104.61, and Title II's implementing regulation at 28 C.F.R. § 35.134.

Summary of OCR's Investigation to Date

To date, OCR has investigated this complaint by interviewing the Complainant and reviewing documentation provided by the Complainant and the District.

The Student was on an IEP during the relevant time period, with one IEP dated May 22, 2014 (amended June 11, 2014) (2014 IEP), and another dated March 9, 2015 (2015 IEP). She also had an IEP for the 2015-2016 school year dated September 24, 2015. The Student had an Individualized Health Plan, dated August 26, 2014 (2014 health plan) and a 2015-2016 Individualized Health Plan (2015 health plan). According to the Student's IEPs, she has multiple diagnoses, including but not limited to
XXXXXXXXXXXXXXXXXXXXXXX.

Allegation #1(a) – The District removed the one-on-one aide provided for the Student in the Student's IEP.

The 2014 IEP provided: "A transition Aide[sp] . . . for the beginning of the '14-'15 school year until a Matrix¹ is held by the end of October." In a XXXXXXXXXXXXXXXX, e-mail from a District administrator to the Complainant, the administrator told the Complainant that an aide was in place for the Student and stated: "I believe [the Student's] IEP calls for a transitional aide for six weeks of school to get her used to the

¹ In the 2014 IEP, "matrix meetings" were provided for under the section "Supplementary Aids and Services" and were described as follows: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

The Complainant said the Student had another field trip on May 29, 2015. She alleged XXXXXXXXXXXXXXXXXXXXXXXX. The Complainant was not present for the trip, but noted that the trip was in the morning, so the Student was not tired.

The District provided OCR with a copy of e-mails dated June 1 and June 2, 2015, concerning the Student's field trip. On June 1, the District told the Complainant that the Student's mother XXXXXXXXXXXXXXXXXXXXXXXX. The e-mail stated that the Student XXXXXXXXXXXXXXXXXXXXXXXX. In the June 2 e-mail, the District confirmed with the Complainant that the Student XXXXXXXXXXXXXXXXXXXXXXXX. The District explained:

“XX.”

Allegation #1(d) – The District failed to provide the Student with appropriate assistance with XXXXXXXXXXXXXXXXXXXXXXXX.

The Complainant alleged that the District failed to provide the Student with appropriate assistance with regard to XXXXXXXXXXXXXXXXXXXXXXXX. As of August 5, 2016, Complainant told OCR that XXXXXXXXX is an ongoing issue. She stated that the District tells her that staff members cannot physically help the Student XXXXXXXXX. The Complainant also told OCR that the XXXXXXXXX is spelled out in the Student's nursing care plan, which she said was to be finalized on August 31, 2016.

The 2015 IEP provided for “prompting” for “self care,” and adult supervision at “all times throughout the school day.” In the baseline data section of the 2015 IEP, it stated that the Student had a nursing plan in place and the Student requests XXXXXXXXXXXXXXXXXXXXXXXX. The Student's 2014 health plan did not discuss XXXXXXXXX. The 2015 health plan, however, specifically addressed XXXXXXXXXXXXXXXXXXXXXXXX. The plan noted that XXXXXXXXXXXXXXX for the Student should be supervised, with encouragement for certain actions and the use of specific terminology. It also noted that XXXXXXXXXXXXXXX should be documented to help with medication adjustments at home.

Allegation #2 – The District retaliated against the Student's guardian for calling meetings regarding the Student by not allowing her to pick up the Student in her classroom, having a staff member near her when she is in the school, and by generally making her feel unwelcome.

The evidence OCR obtained to date with regard to allegation #2 did not include any documentation to support or refute the Complainant's allegation that the District retaliated against her by requiring a staff member to be near her when she was in the school building, or that the District was otherwise making her feel unwelcome.

The District did provide OCR with information relevant to its classroom visitation policies. It provided OCR with a copy of its School Visitors Policy 9150 and the related administrative guidelines, which state: “Non-staff access to students and classes must be

limited and only in accordance with a schedule which has been determined by the principal or designee after consultation with the teacher whose classroom is being visited. Classroom visitations must be nonobtrusive to the educative process and learning environment and should not occur on an excessive basis.” The District also provided OCR with a copy of a page from what appears to be the District’s Student Handbook. The page states:

SIGNING STUDENTS OUT

For the safety of all students, all visitors must first report to the office. All students deserve to learn in an educational environment where there are as few interruptions as possible. The staff recognizes that there are many situations that arise in a family’s life that require students to be picked up early or have a message or item delivered to them. First, report to the office where someone will page your student and ask him/her to meet you in the office.

Parents who wish to take their child from school are asked to sign him/her out in the office. Doing this will help us know exactly where and with whom your child leaves school. Please send a note if you have made arrangements for someone to pick up your child who is not identified on the emergency card on file in the office. If there is any doubt, you will be contacted to verify the plan.

The District provided OCR with a copy of an e-mail sent to the Complainant dated March 11, 2015. The e-mail was sent in response to the Complainant’s e-mail to a teacher indicating that she was picking up the Student at 1 p.m. The e-mail stated: “I am requesting that all parents pick up their children in the office early for appointments. I have some students who get upset if other students leave early and they become worried about whether their parents will be picking them up.”

During the investigation, the Complainant stated to OCR that, ever since the District learned she filed this OCR complaint, District employees have tried more to assist her. She said the school is being much more “open” now. She said she has been to the Student’s classroom and picks her up, usually at the end of the day.

On August 4, 2016, prior to the completion of OCR’s investigation, the District asked to resolve this complaint pursuant to Section 302 of OCR’s *Case Processing Manual* (CPM). OCR determined that it is appropriate to resolve this complaint, with exception of allegation #1(a), with an agreement. As explained further below, OCR is administratively closing allegation #1(a).

Applicable Regulatory Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts to provide a FAPE to each qualified individual with a disability who is in the recipient’s

jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education for purposes of FAPE is defined as the provision of 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 nondisabled students are met, and that are developed in accordance with procedural requirements of 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under a recipient's program or activity. The Section 504 regulation, at 34 C.F.R. § 104.4(b), specifically prohibits recipients from subjecting individuals to different treatment based on disability unless such action is necessary to provide qualified persons with disabilities with aid, benefits, or services that are as effective as those provided to others.

The regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of 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. This requirement is incorporated by reference in the Section 504 implementing regulation at 34 C.F.R. § 104.61. Title II 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) an 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. If these elements of a *prima facie* case of retaliation are established, OCR examines whether the recipient has articulated a legitimate, non-retaliatory justification for its actions. If the recipient has proffered a legitimate, non-retaliatory reason for the adverse action, OCR next analyzes whether the recipient's stated reason is pretext for retaliation.

Resolution and Conclusion

With respect to allegation #1(a), under Section 110(e) of OCR's CPM, OCR will close a complaint allegation when OCR obtains credible information indicating that the allegation raised by the complaint has been resolved, and there are no systemic allegations. In such a case, OCR will attempt to ascertain the apparent resolution. When OCR determines that there are no current allegations appropriate for further resolution, the complaint will be closed.

Based on the information provided by the Complainant and the District, OCR finds that the Student was entitled to a one-on-one aide, pursuant to her IEP, until September 29, 2014, when a matrix meeting was held. OCR has further determined that the Student

received the one-on-one aide for the required time period and that any confusion or disagreement among the parties with respect to whether the Student was to be provided a one-on-one aide was clarified when the 2015 IEP meeting was held. Accordingly, OCR has determined that allegation #1(a) has been resolved, and there are no systemic allegations for further investigation. OCR has determined that it can provide no further resolution for the Complainant with regard the allegation. To the extent the Complainant wishes to challenge the individual placement and/or other educational decisions of the District, the appropriate mechanism to do so is through an impartial due process hearing, which she can request through the District. Absent extraordinary circumstances, it is OCR's policy to refrain from assessing the appropriateness of individual eligibility or other educational decisions so long as the recipient complies with the procedural requirements of the disability laws that OCR enforces.

As noted above, prior to the completion of OCR's investigation, the District expressed interest in resolving the remaining allegations in the complaint pursuant to Section 302 of OCR's CPM, which provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient expresses an interest in resolving the complaint and signs a resolution agreement that addresses the complaint allegations. Such a request does not constitute an admission of liability on the part of the District, nor does it constitute a determination by OCR that the District has violated any of the laws that OCR enforces. On November 21, 2016, the District submitted the enclosed signed resolution agreement (the Agreement) to OCR. The provisions of the Agreement are aligned with complaint allegations #1(b)-(d) and #2 and the information obtained to date during the investigation, and are consistent with applicable regulations. When fully implemented, the Agreement will resolve the allegations in the complaint.

In light of the Agreement, OCR finds that the complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement. Should the District fail to fully implement the Agreement, OCR will reopen the complaint and take appropriate action to ensure the District's compliance with the Section 504 and Title II regulations.

This concludes OCR's investigation of the complaint and 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file a complaint alleging such treatment.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR looks forward to receiving the District's first monitoring report by January 13, 2017. For questions about implementation of the Agreement, please contact Julianne Gran, who will be monitoring the District's implementation, by e-mail at Julianne.Gran@ed.gov or by telephone at (216) 522-2684. For questions about this letter, please contact Sacara Martin, Supervisory Attorney/Team Leader, at (216) 522-7640.

Sincerely,

/s/

Meena Morey Chandra
Regional Director

Enclosure