



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

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REGION XV  
MICHIGAN  
OHIO

December 22, 2015

Kara T. Rozin, Esq.  
Kluczynski, Girtz & Vogelzang  
5005 Cascade Road SE, Suite A  
Grand Rapids, Michigan 49546

Re: OCR Docket #15-15-1327

Dear Ms. Rozin:

This letter is to inform you of the disposition of the above-referenced complaint, which was filed with the U.S. Department of Education's Office for Civil Rights (OCR) on June 15, 2015 against St. Johns Public Schools (the District). The complaint alleged that the District discriminated against a student (the Student) based on her disability and engaged in retaliation. Specifically, the complaint alleged the following:

1. During the 2014-2015 school year, the District suspended the Student for more than ten days without conducting a manifestation determination to assess whether the underlying conduct was the result of a disability.
2. In response to the parent's advocacy at the Student's XXXXXXXX, and XXXXXXXX, team meetings, the District retaliated against the parent by excluding her from a XXXXXXXX, meeting to review a Functional Behavioral Analysis and to craft a Positive Behavior Support Plan for the Student.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 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 U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35 (Title II). Title II prohibits discrimination on the basis of disability by public entities. Additionally, the regulations implementing Section 504 and Title II prohibit retaliation against individuals engaging in activities protected by these statutes. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws. Therefore, OCR had jurisdiction to investigate this complaint.

Because the regulation implementing Title II provides no greater protection than the Section 504 implementing regulation with respect to this case, OCR applied Section 504 standards. Based on the complaint allegations, OCR opened an investigation into the following legal issues:

- Whether the District failed to conduct an evaluation of the Student prior to significantly changing her placement, in violation of 34 C.F.R. § 104.35(a).
- 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 he/she 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**

During the 2014-2015 school year, the Student was enrolled in XXXXXX grade at St. Johns Middle School. The Student was found to be eligible for special education services as a student with an XXXXXXXX XXXXXXXXXXXX pursuant an individualized educational program (IEP) team meeting held on XXXXXXXX. The IEP as further revised on XXXXXXXX, provided the Student with modified assignments and instruction, cues, breaks, resource room support, and services with the school social worker.

To investigate this complaint, to date, OCR interviewed the Complainant and the District's special education supervisor (the supervisor) and social worker, and reviewed documentation provided by the Complainant and the District. After a careful review of the information obtained during the investigation, OCR determined that the evidence is insufficient to conclude that the District retaliated as alleged in allegation #2. With respect to allegation #1, before OCR completed its investigation of this allegation, the District asked to voluntarily resolve any possible compliance concerns pursuant to Section 302 of OCR's Case Processing Manual (CPM). On December 21, 2015, the District signed an agreement, that, when fully implemented, will resolve any compliance concerns regarding its alleged failure to re-evaluate the student (a student with a disability) before significantly changing her placement. OCR explains the bases for its decisions below.

- **Allegation #1: Failure to Re-Evaluate a Student With a Disability**

The Complainant alleged that during the 2014-2015 school year the District never provided the Student with a manifestation determination even though the Student received eleven (11) days of out-of-school suspension (OSS) and twelve (12) full days and one (1) partial day of in-school suspension (ISS). The Complainant further alleged that the Student tried to get class assignments to work on during ISS but some teachers would not provide them.

OCR reviewed the Student's discipline and attendance records for the 2014-2015 school year. The records showed that the Student received full or partial days of OSS on the following dates: XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX and XXXXXXXX. The total time spent in OSS was 7 days and 3 periods, or almost

half a day. The record further showed that the Student received at least ten (10) full days of ISS on the following dates: XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX; XXXXXXXX and XXXXXXXX.

The District did not provide any documents or information to indicate that the Student was given a manifestation determination during the 2014-2015 school year. However, the District provided documents showing that the District re-evaluated the Student in the spring of 2015 when it conducted a functional behavior assessment and then held an IEP team meeting for the Student on XXXXXXXX to add a behavioral intervention plan (BIP) to the Student's IEP. According to the Notice of Provision of Program and Services, which is page 7 of the District's IEP Team Report dated XXXXXXXX, the Student's new behavior intervention plan was to be implemented effective XXXXXXXX.

As stated above, prior to the completion of OCR's investigation of this allegation, the District requested to resolve any compliance concerns with a voluntary Resolution Agreement.

- **Allegation #2: Retaliation**

The Complainant alleged that after she advocated for the Student's rights at XXXXXXXX and XXXXXXXX, team meetings, the District excluded her from a meeting on XXXXXXXX, during which the team reviewed the Student's FBA and crafted a positive behavior support plan (PBSP) for the Student. The Complainant stated that after the XXXXXX meeting that she attended, the social worker told her that she would be part of the meetings to develop the BIP. She said that on XXXXXXXX, the social worker sent an e-mail telling her that the meeting was only for staff members.

OCR reviewed notes provided by the District that documented meetings of the Student's instructional support team on XXXXXXXX and XXXXXXXX. The meeting notes document that the purpose of both meetings was to address concerns about the Student's XXXX, XXXXX and suspensions. The meeting notes further document that the Complainant was in attendance at both meetings and provided information about the Student. The XXXXXXXX notes concluded with an action plan that required the District to complete a Review of Existing Educational Data (REED) by XXXXXXXX, and to complete an FBA by XXXXXXXX.

OCR reviewed the REED used by the District at the FBA. The REED was signed by the Complainant on XXXXXXXX. OCR reviewed the FBA dated XXXXXXXX and the PBIP which was also dated XXXXXXXX. The documents reflect that the participants for the FBA and PBIP were the social worker, supervisor, assistant principal, and a behavior consultant and not the entire IEP team.

OCR reviewed several documents provided by the District regarding its process for assessing the Student and developing a behavior plan for her. XX PARAGRAPH REDACTED XX

OCR reviewed correspondence sent by the District to the Complainant inviting her to attend an IEP team meeting on XXXXXXXX to add a behavioral intervention plan (BIP) to the Student's IEP. According to the Notice of Provision of Program and Services, which is page 7 of the

District’s IEP Team Report, dated XXXXXXXX, the Student’s new BIP was to be implemented effective XXXXXXXX.

OCR interviewed the District’s XXXXXXXXXXXXXXXXXXXX supervisor who denied that the Complainant was excluded from the XXXXXXXX meeting in retaliation for her advocacy. The supervisor also provided information to OCR about the District’s regular process for conducting FBAs and developing BIPs. The supervisor stated that the District does not normally invite parents to meetings to discuss the District’s drafting of an FBA. The supervisor stated that the FBA is a diagnostic document that is completed by the person or persons (such as a social worker or teacher) who complete the observation of a student or collect the data on a student. The supervisor stated that the behavioral consultant and assistant principal had collected the data necessary for the Student’s FBA. The supervisor further stated that typically, these two individuals would have inputted the data into a blank FBA template without a meeting. However, in this case, others were present because the regional educational services agency (RESA) had developed a new template form and others wanted to learn how it would be used.

The supervisor further stated that parents are typically not involved in the initial drafting of BIPs, but that an initial draft is presented to the parent at a team meeting. She stated that parents are then given the opportunity to provide their input at a team meeting when the BIP is finalized.

The supervisor stated that because the interventions in place for the Student were not working, the team decided they needed an FBA for the Student. She stated the team wrote the REED in order to get permission from the Complainant to do the FBA. The supervisor stated that the District used all of this information to draft the FBA and BIP on XXXXXXXX. The supervisor said that this BIP was a draft version of the BIP that was finalized at the XXXXXXXX meeting that the Complainant attended.

The supervisor identified several items in the FBA that reflect input from the Complainant. XX PARAGRAPH REDACTED XX

OCR contacted the Complainant to provide her with an opportunity to provide further clarification regarding her allegation that the District retaliated against her. XX PARAGRAPH REDACTED XX

XX PARAGRAPH REDACTED XX

The social worker confirmed the supervisor’s statement that parents are generally not involved in the initial drafting of BIPs. XX PARAGRAPH REDACTED XX

### **Applicable Legal Standards**

The Section 504 regulation states, at 34 C.F.R. § 104.35(a), that a recipient school district shall conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any action regarding the person’s initial placement or any subsequent significant change in placement. School districts must reevaluate a student with disabilities periodically and before any significant change in placement. The Section 504 regulation at 34 C.F.R. § 104.35(c) further provides that in making placement

decisions, the recipient shall draw upon information from a variety of sources, including aptitude and achievement tests and teacher recommendations. Additionally, a recipient must ensure that placement decisions are made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

Under OCR policy, any suspension, exclusion, or expulsion that exceeds 10 days or any series of shorter suspensions or exclusions that in the aggregate totals more than 10 days and creates a pattern of exclusions constitutes a significant change of placement that would trigger the district's duty to reevaluate a student under 34 C.F.R. § 104.35(a). OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

The student's educational team should re-evaluate the student to determine, using appropriate evaluation procedures that conform to the requirements of the Section 504 regulation, whether the misconduct was caused by the student's disability. If the team determines that the student's misconduct is a manifestation of the student's disabling condition, the group must continue the evaluation, following the requirements of 34 C.F.R. § 104.35 regarding evaluation and placement, to determine whether the student's educational placement is appropriate and what, if any, modifications to that placement are necessary. If, on the other hand, the group determines that the conduct is not a manifestation of the student's disability, the student may be excluded from school in the same manner as similarly situated students without disabilities are excluded. The manifestation determination should be made as soon as possible after the disciplinary action is administered and, in any event, before the eleventh day of the suspension or removal.

The regulation implementing Title VI, 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. Section 504's implementing regulation, at 34 C.F.R. § 104.61, incorporates by reference Title VI's anti-retaliation provision.

In analyzing retaliation claims under Section 504, OCR first examines whether: 1) the individual has engaged in a protected activity; 2) the recipient knew about the individual's protected activity; 3) the recipient took an action adverse to the individual contemporaneous with or subsequent to the protected activity; and 4) there is evidence of a causal connection between the protected activity and the adverse action. If these elements of a *prima facie* case of retaliation are established, OCR examines whether the recipient has a legitimate, non-retaliatory justification for its actions that is not a pretext for retaliation. To be an adverse action, the recipient's action must significantly disadvantage the individual as to his or her status as a student or employee, or his or her ability to gain the benefits of the program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims.



The information provided by the Complainant to support her allegation of retaliation — that the XXXXXXXX told her she would be part of the meeting where the BIP was developed — does not contradict information from District personnel that it is standard practice to include parents in finalizing the BIP at the IEP team meeting. There is no dispute that the Complainant was invited to participate in the IEP meeting where the BIP was finalized and adopted, and that she had an opportunity to provide input at that meeting.

Finally, neither the Complainant nor District personnel provided an example of when a parent was included at a meeting to complete an FBA and draft an initial BIP. Therefore, the evidence obtained by OCR supports a conclusion that the District's XXXXXXXX meeting was in keeping with standard practice; thus, the District did not take an adverse action against the Complainant. The District's actions did not objectively or substantially restrict the Student's educational opportunities. Furthermore, because the District's actions were consistent with its normal practice, it could not reasonably be considered a deterrent to further protected activity.

Therefore, pursuant to Section 303(a) of OCR's CPM, OCR has determined that the preponderance of the evidence does not support a conclusion that the District took retaliatory action against the Complainant and there is insufficient evidence to support a finding of a violation under Section 504, as alleged. OCR is closing this allegation effective the date of this letter.

## **Conclusion**

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.

We look forward to receiving the District's first monitoring report by **February 5, 2016**. For questions about implementation of the Agreement, please contact Mr. Jacob Oetama-Paul, who will be monitoring the District's implementation, by e-mail at [Jacob.Oetama-Paul@ed.gov](mailto:Jacob.Oetama-Paul@ed.gov) or by telephone at (216) 522-7624. For questions about this letter, please contact Sacara M. Martin, Supervisory Attorney/Team Leader, at (216) 522-7640.

Sincerely,

/s/

Sacara M. Martin  
Supervisory Attorney/Team Leader

Enclosure