



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

September 15, 2020

Via E-mail Only to lusk@milljohnson.com

Robert A. Lusk, Esq.
Miller Johnson
409 East Jefferson Avenue
Fifth Floor
Detroit, Michigan 48226

Re: OCR Docket No. 15-17-1019

Dear Mr. Lusk:

This letter is to notify you of the disposition of the above-referenced complaint filed on October 6, 2016, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Walled Lake Consolidated Schools (the District). The complaint alleged that the District retaliated against a student with a disability (the Student), who attended the District through Michigan's Schools of Choice program. Specifically, the complaint alleged that after the Student's parent filed a complaint with the Michigan Department of Education (MDE) against the District on the Student's behalf in the xxxx xx xxxx, and xxxxxxxx xxxxxxxx for the District to implement the Student's individualized education program (IEP) on xxxxxxxx xx, xxxx, the District retaliated by disenrolling the Student from the District on xxxxxxxx xx, xxxx.

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 by recipients of federal financial assistance. 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 on the basis of disability by public entities. Persons who seek to enforce their rights under these laws are also protected from retaliation. As a recipient of federal financial assistance from the Department and as a public entity, the District is subject to Section 504 and Title II. Therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following legal issue: 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/or Title II's implementing regulation at 28 C.F.R. § 35.134.

To conduct its investigation, OCR reviewed documentation provided by the Complainant and the District and interviewed the Complainant and the District's Deputy Superintendent. After a careful review and analysis of the information obtained during its investigation, OCR has determined that the evidence is sufficient to support a finding that the District violated the regulations implementing Section 504 and Title II as alleged. The bases for OCR's determination are explained below.

Summary of OCR's Investigation

The Student enrolled in the District at the start of the xxxx-xxxx school year through the state of Michigan's Schools of Choice program (the Program). The Student enrolled in a regular xxxxxxxxxxxx xxxxxxxxxxxx class in a District xxxxxxxxxxxx school (School A).

x---multiple paragraphs removed---x

In the letter, the District's attorney cited to Michigan state law, at MCL 388.1705(11), which states as follows:

(11) A district shall continue to allow a pupil who was enrolled in and attended the district under this section in the school year or semester or trimester immediately preceding the school year or semester or trimester in question to enroll in the district until the pupil graduates from high school. This subsection does not prohibit a district from expelling a pupil described in this subsection for disciplinary reasons.

OCR noted that the language the District cited requires a district to continue a student's district enrollment through high school graduation when a student is enrolled in and attending the District during the prior trimester, semester or school year. However, the District interpreted the law to prohibit a district from continuing a student's district enrollment through the Program when a student did not attend the trimester immediately preceding the school year in question.

x---multiple sentences removed---x The application window for the xxxx-xxxx school year closed on xxxxxxxx xx, xxxx. The District's "Q and A" document on the Program indicates that, by law, the District may not accept applications once the application window has closed.

The Student's xxxxxxxx xxxxxxxx asserted that Michigan state law prohibited the District from disenrolling the Student from the District, referring to an MDE Student Accounting Manual provision which states, "Once a student has been enrolled through school of choice, the pupil may only be exited if the pupil is enrolled in another district, or if the pupil is expelled under the same policy established for resident pupils." OCR noted that the District's own "Q and A" document on open enrollment posted to its website, dated Xxxxxxxx xxxx, also states that once a student is enrolled through open enrollment they are entitled to remain through graduation. The Q and As state that the only way a student can be removed is if they are expelled.

x---multiple paragraphs removed---x

The Deputy Superintendent also explained to OCR that a student with an extended absence is likely to remain active in the District's systems through the summer, as District personnel do not typically update the student database systems until late August/early September.

x---multiple paragraphs removed---x

Applicable Regulatory Standards

The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates by reference the prohibition against retaliation contained in the implementing regulation for Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, at 34 C.F.R. § 100.7(e). That regulation provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the regulation or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation. The Title II implementing regulation contains a similar prohibition against retaliation at 28 C.F.R. § 35.134.

In analyzing retaliation claims, OCR examines whether: 1) an individual engaged in a protected activity; and 2) an individual experienced an adverse action caused by the recipient; and 3) there is some evidence of a causal connection between the adverse action and the protected activity.

Although all three elements must exist to establish a *prima facie* case, OCR need not address all three elements if it determines one is missing.

Protected activity includes participation in an investigation, proceeding, or hearing under OCR's regulations; actions taken in furtherance of a substantive or procedural right guaranteed by the statutes and regulations enforced by OCR; or expression of opposition to any practice made unlawful by a statute or regulation that OCR enforces. An act of intimidation, threat, coercion, or discrimination constitutes adverse action for purposes of the anti-retaliation regulations if it is likely to dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination or from otherwise exercising a right or privilege secured under the statutes or regulations enforced by OCR.

A causal connection between a protected activity and an adverse action may be established through either direct or circumstantial evidence. Direct evidence consists of a recipient's written statement, oral statement, or action demonstrating unambiguously that the recipient took the adverse action because the individual engaged in a protected activity or for the purpose of interfering with protected activities. Circumstantial evidence of a retaliatory motive can include (but is not limited to): changes to how the individual is treated after a protected activity; the proximity in time between the protected activity and the adverse action; the recipient's treatment of the individual compared to others; or the recipient's deviation from its established policies or practices with respect to its treatment of the individual.

If the above elements of a *prima facie* case of retaliation are established, OCR examines whether the recipient has identified a facially legitimate, non-retaliatory reason for the adverse action. If the recipient identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR

next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation. The evidentiary factors for causal connection discussed above are equally applicable for determining pretext.

Analysis and Conclusion

OCR has determined that the Student's parents engaged in protected activity when they filed a complaint with MDE in the xxxx of xxxx and xxxxxxxx xxxxxxxx xxx xxxxxxxx xxxxxxxx xxxxxxxx and requested a Section 504 plan for the Student in Xxxxxxx xxxx¹. The evidence also supports that the Student was subjected to an adverse action when the District prohibited the Student from enrolling in the District for the xxxx-xxxx school year following the parents' protected activities. The closeness in time between the parent's protected activities and the adverse action is sufficient for OCR to infer a causal connection between them.

OCR therefore examined whether the District articulated a legitimate, non-retaliatory reason for the adverse action and, if so, whether the weight of the evidence supported that the articulated reason was a pretext for retaliation.

The District asserts that it denied the Student enrollment for the xxxx-xxxx school year because, under its interpretation of Michigan law, it was prohibited from enrolling a student who failed to attend school for the final trimester of a preceding school year and did not reapply for the Program. Xx xx xxxxxxxxxx that the Student did not xxxxxx xxxxxx at the District xxxxxx xxx xxxxxxxxxx xxxxxx to the start of the xxxx-xxxx school year, and xxx xxxxxxxxxx xxx xxx xxxxxx x xxx xxxxxxxxxx xxx xxx xx xxxxxx during the xxxx-xxxx school year. OCR noted, however, that the Michigan law the District cited prohibits a district from *excluding* a student from open enrollment if the student was enrolled in and attended the District in the school year or semester or trimester immediately preceding the school year or semester or trimester in question. It is undisputed that the Student was xxxxxxxxxx xx xxx xxxxxxxxxx the District xxxxxx xxx xxxxxxxxxx xxxxxxxxxx xxxxxxxxxx the xxxx-xxxx school year. In addition, the District's own open enrollment Q and As document from Xxxxxxxx xxxx states that, once a student is admitted through open enrollment, the student is entitled to remain in the District through graduation without submitting a new application and the only way the student can be removed is if he or she is expelled.

In light of the foregoing, the District's assertion that it was *prohibited* from enrolling the Student through open enrollment due to state law is not credible and does not constitute a legitimate, nondiscriminatory reason for denying her enrollment.

The District also asserted that the Student's xxxxxxxxxx xx xxxxxx school beginning in Xxxxxxxx 2016 caused it to believe that the Student's parents had xxxxxxxxxx xxx from the District, and they did not xxxxxxxxxx xxx xxx Xxxxxxxx for the xxxx-xxxx school year. While this could be a legitimate, non-discriminatory reason for denying a student enrollment, OCR finds that this stated reason here was a pretext for discrimination, as the evidence shows that the District x--- multiple sentences removed---

¹ x---paragraph removed---x

x---multiple paragraphs removed---x

As the District failed to provide a legitimate, nondiscriminatory, non-pretextual reason for its adverse action, i.e., denying the Student enrollment, OCR finds that the District retaliated against the Student, in violation of the regulations implementing Section 504 at 34 C.F.R § 104.61, and Title II at 28 C.F.R. § 35.134.

On September 9, 2020, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address OCR's non-compliance finding. OCR will monitor the implementation of the Resolution Agreement.

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 individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, OCR will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR looks forward to receiving the District's first monitoring report by October 15, 2020. For questions about implementation of the Resolution Agreement, please contact Xxx XXXXXXXXX. Xx. XXXXXXXXX will be overseeing the monitoring of the Resolution Agreement and can be reached by telephone at (216) 522-xxxx or by e-mail at XXXXXXXXX.XXXXXXXX@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-2667, or by e-mail at Brenda.Redmond@ed.gov.

Sincerely,

Brenda Redmond
Supervisory Attorney/Team Leader

Enclosure