



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

July 2, 2021

Via E-mail Only to XXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXX

Roetzel & Andress

1375 East Ninth Street

Cleveland, Ohio 44114

Re: OCR Docket #15-17-1156

Dear XX XXXXX:

This letter is to notify you of the disposition of the above-referenced complaint filed on XXXXXXXXXXXX XX XXXX with the U.S. Department of Education (the Department), Office for Civil Rights (OCR) against the Akron City School District (the District) alleging that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleges the following:

1. During the 2016-2017 school year, the District denied the Student the benefits of, or otherwise discriminated against her in its program by failing to appropriately address XXX XXXXXXXXXXXX XXXX;
2. during the 2016-2017 school year, the District failed to timely evaluate the Student for a disability XXXXXX XXXXXXXXXXXX and provide her with appropriate disability-related services; and
3. the District retaliated against the Student's parent for her disability-related advocacy on behalf of the Student by XXXXXXXXXXXX XXX XX XXXXX XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX XX, XXXX, XXXXXXXXXXXX XXX XXXX XXX XXXXXXX on XXXXXXXXXXXX XX, XXXX, and XXXXXXXXXXXX XXX XX XXX XXXXXXXXXXXX XXXX XXXXXXX in XXXXXXXXXXXX XXXX.

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, which prohibit discrimination on the basis of disability by recipients of federal financial assistance from 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, which prohibit discrimination on the basis of disability by public entities. Persons who seek to enforce their rights under Section 504 and Title II are also protected from retaliation by these laws. 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.

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

- 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;
- whether the District failed to timely conduct an evaluation of a student who, because of a disability, needs or is believed to need special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35(a)-(c);
- 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 those laws 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; and
- whether the District denied a qualified student with a disability a free appropriate public education (FAPE) in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33.

During its investigation to date, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant. Based on this information, OCR determined that there is a cause for concern that the District violated Section 504 and Title II with respect to allegations #1 and #2 above. However, prior to the completion of OCR's investigation, the District signed the attached resolution agreement, which once implemented, will address the compliance concerns OCR identified. OCR found insufficient evidence that the District retaliated against the Complainant in violation of Section 504 or Title II as alleged in allegation #3 and is closing that allegation effective the date of this letter. A summary of OCR's investigation to date and the bases for its determinations are provided below.

Summary of OCR's Investigation to date

Allegation #1 - Disability Discrimination

During the 2016-2017 school year, the time period relevant to this complaint, the Student attended XXXXXX XXXXX in the District. However, the Student's family XXXXX XXX XX XXXXX at the end of the 2016-2017 school year and the Student is not currently enrolled in the District.

The Student has a medical condition which causes XXX XX XX XXXXXXXXXXXXX. During the fall of the 2016-2017 school year, the District determined that the Student had a disability related to this condition and placed her on a Section 504 plan. The Section 504 plan dated XXXXXXXX X, XXXX, provided that the Student be allowed to XXX XXX XXXXXXXXXXX XX XXX XXXX and XXXX X XXXXXXX XX XXXXXXX XX XXXX XX XXXXXX.

The Complainant does not dispute that these services were provided. However, the Complainant stated that more services were necessary to meet the Student's XXXXXXXXXXX XXXX. The Complainant stated that the Student, who was XXXXX XXXXX XXX when the complaint was filed, regularly had XXXXXXXXXXX XX XXXXXXX XXX XXXX XXXX XXXXXXXXXXX XX XXXXX. She stated that while the Student could XXXX XXXXXXX XXX XXX XXXXXXX to some extent, she could not XXXXX XX XXX XXXXXXX. The Complainant stated that she believed the Student needed an XXX but the District did not believe the Student was eligible for an XXX. The Complainant stated that the school nurse would not XXXX XXXXXXX the Student, and that the District asked the Complainant to XXX XXXX XXX XXXX XXXX XXX XXXX when she had XX XXXXXXXXXXX or would ask the Complainant's XXXXX XXXX XXXX XXXX XXXXXXX the Student.

Additionally, the Complainant stated that the District removed the Student from class when she XXX XX XXXXXXXXXXX and that it should not have been the Student's responsibility to XXX XXXX XXX XXX XX XXX XXX XXXXXXX because she is XXXXXXXXXXX and XXXXX.

The District provided OCR with a copy of an email from the District's student coordinator to other District staff dated XXXXXXXX XX, XXXX, weeks after the Section 504 plan was put in place. In the email, the student coordinator stated in part:

[XX paragraph XX]

While based on this email, the District itself concluded that the Student required additional disability-related services beyond those in her Section 504 plan, based on the documentation the District provided, it does not appear that the District amended the Student's Section 504 plan to include the XXXXXXXXXXX XXXXXXX or the requirement that an XXX XXXX XXXXX the Student in XXX XXXXX XX XX XXXXXXX. Further, it is unclear whether these additional services were ever provided, as according to the Complainant, the District did not provide the Student with staff assistance in XXXXXXXX XX XXXXX XXXXXXX.

OCR obtained a copy of an email the Complainant sent the District superintendent on XXXXXXXX X, XXXX, wherein she complained that the Student had XXXX XXXX XXXX XXXXX XX XXXXX,

Allegation #2 – Failure to Evaluate

The Complainant stated that the Student also has XXXXX XXXXXXX but that the District did not evaluate the Student for a disability related to this XXXXXXXX and that the

XXXXXXXXXX was not addressed in the Student’s 504 plan. The Complainant stated that she never asked the District for an evaluation but that the District has known of the Student’s XXXXX XXXXXXXXXXXX since XXXX, when the Student was XX XXXXXXXXXXXX. The Complainant stated that the District knew about the Student’s XXXXX XXXXXXXX because she put this information in a school form. The Complainant stated that the Student complained of XXXXX XXXXX during XXX class and that the XXX teacher and nurse did nothing about it. The Complainant provided OCR with a copy of an email she sent to the superintendent on XXXXXXXXXXX X, XXXX, wherein she stated in part “the XXX XXXXX XXXX at [the Student’s school] XXXXX XXXXX XXX XXXX XXX that my daughter has XXXXX XXXXXXXX because when she informed her that she was XXXXX she told her that XXXX XXXX XXXX.”

The District’s data response includes a District “Opening School Information Form” dated XXXXXXX XX, XXXX, which states that the Student has XXXX XXXXX XX XXXXX X XXXXXXX XXXXXXX. That same form states that the Student XXXXX a XXXXXXXXXXXXX for XXXXX XXXXXXX.

The District provided OCR with two additional “Opening School Information Forms” one dated XXXXXXXXXXX XX, XXXX and one dated XXXXXXXXXXX XX, XXXX, wherein the Student’s parent checked a box indicating that the Student had XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXX. In the XXXXX XXXXX form, the parent wrote that the Student has XXXXX XXXXXXX.

Based on the documentation provided by the District, at no point did it evaluate the Student for a disability related to her XXXXX XXXXXXXXXXX.

Allegation #3 - Retaliation

The Complaint stated that she was retaliated against after she sent a letter to XXX XXXXXXXXXXXXXXXXXXXX after the Student came home XXXXXXXXXXX XX XXXXX. During one interview with OCR staff, the Complainant stated that she sent the letter in XXX XXXX; however, she later stated that she wrote a letter to XXX XXXXXXXXXXXXXXXXXXXX on XXXXXXXXXXX X, XXXX. On XXXXX XX XXXX, the Complainant provided OCR with an email she wrote to XXX XXXXXXXXXXXXXXXXXXXX dated XXXXXXXXXXX X, XXXX, in which she expressed concern about the Student XXXXXXXXXXX XXXX XXXX XXXXX XX XXX and also expressed concern about the XXX XXXXX XXX XXXX XXXX about the Student’s XXXXX XXXXXXX.

The Complainant alleged that the District retaliated against her for her communication to XXX XXXXXXXXXXXXXXXXXXXX by (1) XX on XXXXXXXXXXX XX, XXXX, (2) XXXXXXXXXXXXXXXXXXXXXXXXXXXX on XXXXXXXXXXX XX, XXXX, (3) and XXXXXXXXXXXXXXXXXXXX in XXXXXXXXXXX XXXX.

X-- Paragraph Redacted--X

X--Paragraph Redacted--X

Applicable Legal and Regulatory Standards – Allegations #1 and #2

The Section 504 implementing regulation, at 34 C.F.R. § 104.33, requires recipient institutions that operate public elementary or secondary education programs to provide a free and appropriate public education (FAPE) to each qualified person 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 students without disabilities are met and that are developed in accordance with the procedural requirements set forth in 34 C.F.R. §§ 104.34-104.36 regarding educational setting, evaluation, placement, and procedural safeguards, including notice.

The Section 504 implementing regulation, at 34 C.F.R. § 104.35(a), requires school districts to evaluate any child who, because of disability, needs or is believed to need special education or related aids and services. The regulation at 34 C.F.R. § 104.35(b) requires recipients to establish standards and procedures for the evaluation and placement of persons who, because of disability, need or are believed to need special education or related services. The regulation at 34 C.F.R. § 104.35(d) also requires the District to establish procedures for the reevaluation of students with disabilities. Reevaluations must be done periodically, and prior to a significant change in a student's placement. Reevaluations are also required in certain other circumstances, for example, where a parent or teacher requests a reevaluation based on concerns that a student's existing disability related aids and services are not meeting the student's needs, or where a new disability is suspected.

Voluntary Resolution – Allegations #1 and #2

Under Section 302 of OCR’s Case Processing Manual, allegations under investigation may be resolved at any time when, prior to the issuance of a final investigative determination, the recipient expresses an interest in resolving the allegations, and OCR determines that it is appropriate to resolve them because OCR’s investigation has identified concerns that can be

addressed through a resolution agreement. In this case, on February 16, 2021, the District expressed an interest in resolving allegations #1 and #2 prior to the conclusion of OCR's investigation, and OCR determined resolution was appropriate as information obtained to date indicated compliance concerns under Section 504 and Title II regarding these allegations.

With respect to allegation #1, while the Complainant does not dispute that the District complied with the provisions of the Student's 504 plan which allowed XXX XX XXX XXX XXXXXXXXXXX XXXXXXXXXXX XXXXXX XXX XXXXXXXXXXX XXX X XXXXXX XX XXXXXXX, she also stated that the Section 504 plan was insufficient to address the Student's XXXXXXXXXXX XXXXX XXXXXXXXXXX XXX XXXXXXX XX XXXXXXXXXXXX, XXXXX XXX XXXXXXXXXXX XXXX XXX XXXXXXX XX XX XXXXXXXXXXX XX XXX XXX XXXXXXXXXXX XXX XXXXX XXX XXXXXXXXXXXXXXXXXXX XXXXX XX XXXXX XXXXXXX . The Complainant also stated that the District did not provide an XXXX to assist the Student when XXX XXX XX XXXXXXXXXXX, XXXX XXX XXXXX XXXX XXXXXXXXXXXX XXXX XXX XXX XX XXXXXXXXXXX, XXX XXXX XXX XXXXXXXXXXX XXXXXXXXXXX XXXX XXXXXXXXXXX XX XXXXX.

Information provided by the District supports that the District also had concerns that the Student's Section 504 plan was not meeting her needs. In particular, an email from the District's coordinator, dated XXXXXXXXXXX XX, XXXX, after the Section 504 plan was already in effect, indicated that the school had put a plan in place whereby the Student was placed on a XXXXXXXXXXX XXXXXXXXXXX XXXXXXX XXX XXX XXXXX XX XXX XXXXXXX XXXXXXXXXXX XXXXX XXXXXXX XXX XXXXXXX XXXXX XXXXXXXXXXX XX XXXXX XXXXXXXXXXX. However, the District's documents do not reflect that the Student's Section 504 team ever convened to discuss the need for additional services, or that the Student's Section 504 plan was ever amended to include the additional services listed in the XXXXXXXXXXX XX, XXXX email. Further, the Complainant denies that the Student was provided with XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX.

Based on the above, OCR has determined that there is cause for concern that the District may have failed to reevaluate the Student to ensure her Section 504 services adequately addressed XXX XXXXXXXXXXX XXXXXXX, and that this failure may have excluded the Student from participation in the District's educational program based on her disability and denied her FAPE.

With respect to allegation #2, the evidence OCR has reviewed to date also raises a concern that the District had reason to suspect that the Student had a disability related to XXXXXXXXXXXX but failed to evaluate her to determine her need for disability-related services. Specifically, the evidence indicates that the Complainant informed the District via a District form in XXXX that the Student suffers from XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX and that she XXXXX XXXXXXXXXXXX for the XXXXXXXXXXX. Additional District forms the Complainant completed in subsequent school years also notified the District that the Student suffered from XXXXXXX XXXXXXX. Further, in her XXXXXXX X, XXXX email to the superintendent, the Complainant mentioned the Student's XXXXX XXXXXXXXXXX and noted the affect it was having on her in XXX class. The District does not dispute that it did not evaluate the Student for a disability related to XXXXXXXXXXXX.

Based on the above, OCR has determined that there is a cause for concern regarding whether the District failed to evaluate the Student for a disability related to XXXXXXXXXXXX despite having reason to suspect that the XXXXXXXXXXXX constituted a disability.

To complete its investigation regarding allegations #1 and #2, OCR would need to obtain and review additional information, and interview relevant District staff.

On June 28, 2021, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address allegations #1 and #2 in the complaint. OCR will monitor the implementation of the Resolution Agreement.

Applicable Legal and Regulatory Standards and Analysis - Allegation #3

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

The following three elements must be satisfied to establish a prima facie case of retaliation: 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 an 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.

In the instant case, the Complainant’s XXXXXXXXX X, XXXX, letter to the XXXXXXXXXXXXXXXX, in which she raised concerns about the District’s handling of the Student’s disability-related needs, constitutes a protected activity pursuant to Section 504 and Title II. However, two of the three adverse actions the Complainant alleged the District took against her and her family to retaliate for that protected activity—specifically, XXXXXXXX XXX XX XXXXXXXX XX, XXXX, XXX XXXXXXXX XXX XXXX XXXXXXXX XX XXXXXXXX XX, XXXX—occurred prior to the Complainant’s protected activity. Thus, the preponderance of the evidence does not support that there was a causal connection between these adverse actions and the Complainant’s protected activity. As such, the evidence is insufficient to support that the District engaged in retaliation with respect to XXX XXX XXXXXXXX XXX XXX XXXXXXXX XXXXXXXX XXX XXXXXXXXXXXXXXX XXXX XXXXXXXX.

The Complainant also alleged that the District retaliated against her for XXX XXXXX XX XXX XXXXXXXXXXXXXXXX by XXXXXXXXXXXX XXX XXXXXXXX in XXXXXXXX XXXX. Documents provided by the District show that only XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX during the 2016-2017 school year, and that they XXXX XXXXXXXXXXXX on XXXXXXXX XX, XXXX, for XXXXX XXXXXXXXXXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXX XX XXXXX XXXXXXXXXXXXXXXX XX XXXXXXXXXXXX XXXXXXXX. The District provided OCR with witness statements describing the incidents.

When asked during a rebuttal interview for additional facts surrounding XXXX XXX that she alleged constituted retaliation, the Complainant initially did not remember XXX XXX XXXX XXXX XXXX XXXXXXXXXXXX. The Complainant later recalled that XXX XXXXXXXX XXXX XXXXXXXXXXXX XXXXX XXXX “XXXXXX” XXXXXXXX XXXXXXXX. As noted above, the District has no record of XXXXXXXXXXXX XXX XXXXXXXXXXXX’X XXXXXXXX XXX XXXXXXXX XXXXXXXX XXXXXXXX.

Based on the above, OCR has determined that the preponderance of the evidence is insufficient to support that the District engaged in retaliation when it XXXXXXXXXXXX XXX XX XXX XXXXXXXXXXXX’X XXXXXXXXXXXX XX XXXXXXXXXXXX XXXX XXX XXXXX XXXXXXXXXXXXXXXX XXX XXXXXXXX. While X XXXXXXXXXXXX could be an adverse action for purposes of a retaliation claim, here the District denied that XXX XXXXXXXXXXXX were related to the Complainant’s advocacy for disability-related services for the Student, and asserted a facially legitimate, non-retaliatory reason for XXX XXXXXXXXXXXX. Specifically, the District asserted that XXX XXXXXXXXXXX XXXX XXXXXXXXXXX XXXXXXXX XXXX XXXXXXXXXXXXXXXXXXXX XXX XXXXXXXX. The District provided documentation, including witness statements, to support

that XXX XXXXXXXXXXX XXXXXXXX XX XXX XXXXXXXXXXXXXXX XXX OCR found insufficient evidence to support that the District's stated reason for XXXXXXXXXXXX XXX XXXXXXXXXXX was pretext for discrimination.

In light of the foregoing, OCR found insufficient evidence to support that the District engaged in retaliation in violation of Section 504 and Title II as the Complainant alleged. OCR is therefore closing allegation #3 effective the date of this letter.

The Complainant has a right to appeal OCR's determination regarding allegation #3 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the District. The District has the option to submit to OCR a response to the appeal. The District must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the District.

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 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.

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 **July 19, 2021**. For questions about implementation of the Resolution Agreement, please contact XXXXX XXXXXXXX, the OCR staff attorney assigned to monitor the Resolution Agreement. XXXXX XXXXXXXX can be reached by telephone at (XXX) XXX-XXXX or by e-mail at XXXXXXXXXXXXXXX@ed.gov. If you have questions about this letter, you may contact me at Brenda.Redmond@ed.gov or at (216) 522-2667.

Sincerely,

/s/

Brenda Redmond
Supervisory Attorney/Team Leader

Enclosure