



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XV
MICHIGAN
OHIO

September 30, 2021

Via E-mail Only to steaford@dickinsonwright.com

Stephanie L. Teaford, Esq.
150 E. Gay Street, Suite 2400
Columbus, Ohio 43215

Re: OCR Docket No. 15-18-2076

Dear Ms. Teaford:

This letter is to notify you of the disposition of the above-referenced complaint filed on January 25, 2018, with the U.S. Department of Education, Office for Civil Rights (OCR), against the Laurus Academy (the Academy) alleging that the Academy discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleges that:

1. The Academy did not properly and timely evaluate the Student for disability during the XXXX XXXX semester and instead XXXXXX XXX XX X XXXXXX XXXX XXXXX X XXXXXXXX XXXX XXXXXX XXX XXXXXXXX XX XXX XXXXXXXX XX XXX XXXX XXXXXXXX XX XX XXXXXXXX XXXXX XX XXXX XXXXXX.
2. The Academy threatened XX XXXXX XXX XXXXXXXX XX XXX XXXXXXXX XXXXXXX XXX XXX XXXXXXXX XXXXXXXX XXX XXXX XXX XXXXXXXX in retaliation for XXXXX XXXXXXXX XX XXXXXXXX XX XXXX XX XXXX XX XXXXXXXX XXXXXXXX XXX XXXXXXXX XXXXX XXXXXXXX XXX.

OCR enforces 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. 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 by these laws. As a recipient of Federal financial assistance from the Department of Education and as a public entity the Academy is subject to these laws.

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

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

- Whether the Academy failed to conduct an evaluation of a student who, because of 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.
- Whether the Academy, on the basis of disability, excluded a qualified person with a disability from participation in, denied him the benefits of, or otherwise subjected him 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 Academy intimidated, threatened, coerced, or discriminated against individuals for the purpose of interfering with any right or privilege secured by Section 504 and Title II, in violation of 34 C.F.R. § 104.61 and Title II’s implementing regulation at 28 C.F.R. § 35.134.

During its investigation to date, OCR reviewed information provided by the Complainant and the Academy and interviewed the Complainant and Academy staff. Before OCR completed its investigation of allegation #1, the Academy expressed an interest in resolving the complaint pursuant to Section 302 of OCR’s *Case Processing Manual*. OCR determined the allegation to be appropriate for resolution and the Academy has submitted an agreement to resolve allegation #1. With respect to allegation #2, OCR determined that the preponderance of the evidence does not support a conclusion that the Academy failed to comply with Section 504 and Title II. The bases for these determinations are explained below.

Summary of OCR’s Investigation

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During the 2017-2018 school year, the Academy had a policy of developing behavior support plans (BSPs) for students who engaged in repeated misconduct. The Academy’s handbook for school-wide behavior (the handbook) defines a BSP as a written plan to support a student in changing their chronic minor to moderate classroom misbehavior. The Academy creates a BSP when a student has 10 “level 2 or 3” infractions¹ within a 20-day period.

According to the Academy’s documentation, if, after the Academy creates a BSP and the student demonstrates ongoing misbehavior, the student will receive a level 5 consequence such as a suspension and be placed on an amended BSP. Students that demonstrate ongoing misbehavior more than 3 times—i.e., students that have their BSP amended three times—may receive additional level 5 consequences or may be moved to a level 6 infraction including long-term suspension or expulsion.

While the language in the handbook permits discretion regarding the consequences for ongoing misbehavior, the Complainant alleged that XXXXX – SENTENCE REMOVED – XXXXX.

¹ A level 2 infraction is a “[r]epeated minor to moderate impulsive misbehavior after [. . .] disciplinary action or a minor to moderate intentional misbehavior.” A level 3 infraction involves “[r]epeated minor or moderate misbehaviors (either impulsive or intentional)” after receiving level 2 intervention and disciplinary action.

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XXX XXXX XXXXXXXX XX XXX XXXX, in evaluating whether a student at the Academy has a disability, the Academy takes a tiered approach. For example, if a teacher suspects that a student has a disability, the teacher will do a “child study,” where the teacher tries various interventions and documents the responses. If the child study is unsuccessful, the student will then be referred for testing. XX XXXX XXXX XXXX, in the event that a parent requests that a student be tested to evaluate whether or not he or she has a qualifying disability, the Academy has 30 days to conduct an evaluation.

With respect to the Academy’s disciplinary process, the handbook requires the principal to recommend disciplinary action to the director of school quality in order for the Academy to impose a long-term suspension or expulsion. The director then gathers information about the student and forms a response team. According to the Academy, a response team is an internal workgroup to review significant behavioral incidents and discuss possible next steps to improve a student’s behavior. The Academy described the formation of a response team as a routine practice at the Academy to review significant behavioral issues and not indicative that a student will be referred for long-term suspension or expulsion but, rather, intended to act as a “speed bump” to ensure that the Academy does not act hastily to suspend or expel a student.

If discipline continues beyond this “speed bump,” the student is entitled to a hearing before the board of directors which will determine if the facts merit either a long-term suspension or expulsion.

Legal Standards, Analysis, and Resolution/Conclusion

- **Alleged Failure to Evaluate**

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), requires recipients of federal financial assistance that operate a public elementary or secondary program to conduct an evaluation of any student who, because of a disability, needs or is believed to need special education or related services.

The Section 504 regulation, at 34 C.F.R. § 104.3(j), defines a person with a disability, in relevant part, as one who has a mental or physical impairment that substantially limits one or more major life activities. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulator, endocrine, and reproductive functions. An impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting.

Under Section 504, schools must conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability. When a school is aware of a student’s disability, or has reason to suspect a student has a disability, and the student needs or is believed to need special education or related services, it would be a violation of Section 504 if the school delays or denies the evaluation. A student may have a disability and be eligible for Section 504 services, including modifications, even if the student earns good grades. This is because the student’s impairment may substantially limit a major life activity regardless of whether the student performs well academically, and the student may need special education or related aids and services because of this disability. Rather than considering only how an impairment affects a student’s ability to learn, school staff must also consider how the impairment affects any major life activity of the student and, if necessary, assess what is needed to ensure that students have an equal opportunity to participate in the school’s programs.

Schools violate Section 504 when they deny or delay conducting an evaluation of a student when it would have been reasonable for a staff member to have suspected that a student has a disability and needs special education or related services because of that disability.

If the school suspects that a student has a disability and because of the disability needs special education or related aids and services, it would be a violation of Section 504 to delay the evaluation in order to first implement an intervention that is unrelated to the evaluation, or to determining the need for special education or related aids and services. Schools run afoul of the Section 504 obligation to evaluate for disability and need for special education or related services when they: 1) rigidly insist on first implementing interventions before conducting an evaluation, or that each tier of a multi-tiered model of intervention must be implemented first, regardless of whether or not a disability is suspected and there are needs based on the disability; or 2) categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.

It is important that schools appropriately train their teachers and staff to identify academic and behavioral challenges that may be due to a disability so a student is referred for an evaluation under Section 504, if needed.

Once a school believes a student has a disability and needs special education or related services because of that disability, it must evaluate the existence of a disability by considering whether the student is substantially limited in his or her unmitigated state. This means, for example, that the school cannot consider the ameliorative effects of any mitigating measures, for instance the ameliorative effects of the school's intervention strategies, in determining whether the student has a disability but could consider them in determining the individual educational needs.

A medical diagnosis alone does not necessarily trigger a school's obligation to conduct an evaluation to determine the need for special education or related services or the proper educational placement of a student who does have such need. If a school determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary to conduct a Section 504 individual evaluation in order to determine whether a child has a disability under Section 504 and needs special education or related services because of a disability, the school must ensure that the student receives this assessment at no cost to the student's parents.

The Section 504 regulation, at 34 C.F.R. § 104.35(c), provides that in interpreting evaluation data and in making placement decisions, the recipient must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that the placement decision is made in conformity with the educational setting requirements of 34 C.F.R. § 104.34.

OCR interprets Section 504 to require informed parental consent for the initial evaluation. If a parent refuses consent for an initial evaluation and a school suspects a student has a disability,

because that individual 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 regulation at 34 C.F.R. § 104.61. The Title II 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. Petty slights, minor annoyances, and lack of good manners will not normally constitute adverse actions. Under some factual circumstances, the promise of a benefit can be just as coercive as the threat of harm.

Causal connection between protected activity and 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 retaliatory motive can include (but is not limited to): changes to treatment of the individual after protected activity; the proximity in time between protected activity and the adverse action; the recipient's treatment of the individual compared to others; or the recipient's deviation from established policies or practices.

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.

If OCR determines that a recipient took an adverse action for an illegitimate retaliatory reason and a legitimate non-retaliatory reason, OCR analyzes, based on the evidence, if the recipient would have made the same decision but for the retaliatory motivation.

With respect to the first element of the prima facie case, it is undisputed that XXX XXXXXXXX
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XXXXXXXX XXX XXXX constitutes an action taken in furtherance of a substantive or
procedural right guaranteed by the statutes and regulations that OCR enforces. Thus, XXX
XXXXXXXX XXXXXXXX satisfies the first element of a prima facie case for retaliation.

With respect to the second element of a prima facie case, the Student experienced an adverse
action by the Academy. XXXXX – SENTENCE REMOVED – XXXXX. A reasonable person
in the Student’s position would be dissuaded from making or supporting a charge of
discrimination by X XXXXXXXX XXXX XXX XXXXXXXX XX XXXXXXXX XXXX XXXXX.
Accordingly, the Student experienced an adverse act as to establish the second element of a
prima facie case.

With respect to the third element, there is evidence of a causal connection between the adverse
act and the protected activity as to establish a prima facie case. While OCR did not obtain direct
evidence of a causal connection, there is circumstantial evidence of a retaliatory motive.
Specifically, there were changes to the treatment of the Student after the protected activity.
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XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. As a result, sufficient evidence
exists to establish a prima facie case of retaliation.

Since sufficient evidence exists to establish a prima facie case of retaliation, OCR must examine
whether the recipient has identified a facially legitimate, non-retaliatory reason for the adverse
action. Here, the Academy has identified a facially legitimate, non-retaliatory reason for the
adverse action. Namely, the Academy has a progressive discipline policy which provides for
persistent behavioral concerns to give rise to additional disciplinary actions, including long-term
suspensions or expulsion, if behaviors did not improve. XXXXX – SENTENCE REMOVED –
XXXXX XXXXX – SENTENCE REMOVED – XXXXX. Accordingly, the Academy has
identified a facially legitimate, non-retaliatory reason for the adverse action—i.e., the Academy’s
progressive discipline policy.

Because the Academy identified 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. In conducting this pretext inquiry, the evidentiary factors discussed above
regarding the causal connection are equally applicable—i.e., changes in treatment, proximity in
time, comparable individuals, and deviation from established policies or practices.

Based on these factors, there is insufficient evidence to establish pretext. XXXXX –
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XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. As a result, there is insufficient
evidence to establish pretext.

For these reasons, OCR concludes that the Academy articulated a facially legitimate, non-
retaliatory reason for the adverse action and the evidence did not demonstrate that this reason
was a pretext for retaliation. Accordingly, OCR finds insufficient evidence of retaliation in
violation of Section 504 and Title II as alleged with respect to allegation #2.

The Complainant has a right to appeal OCR's determination regarding allegation #2 within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information in this letter 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 Academy. The Academy has the option to submit to OCR a response to the appeal. The Academy must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Academy.

Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address the Academy'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 Academy 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 Academy's first monitoring report by October 15, 2021. For questions about implementation of the Resolution Agreement, please contact Patrick Vrobel. Mr. Vrobel will be overseeing the monitoring and can be reached by telephone at (216) 522-7641 or by e-mail at Patrick.Vrobel@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-2672, or by e-mail at Nathaniel.McDonald@ed.gov.

Sincerely,

/s/

Nathaniel J. McDonald
Supervisory Attorney/Team Leader

Enclosure