



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

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REGION XV
MICHIGAN
OHIO

July 30, 2019

Diana M. Feitl, Esq.
Interim General Counsel
Akron Public Schools Board of Education
70 North Broadway
Akron, Ohio 44308

Re: OCR Docket No. 15-19-1183

Dear Ms. Feitl:

This letter is to notify you of the disposition of the above-referenced complaint filed on January 31, 2019, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Akron Public Schools (the District) alleging that the District discriminated against a student (the Student) based on disability and retaliated against her. Specifically, the complaint alleged that:

1. From XXXXX, through the present, the District has failed to provide the Student with a Section 504 plan.
2. XXXX PARAGRAPH REMOVED XXXXX

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 this law 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 this law.

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

- whether the District failed to conduct an evaluation of a student who, because of disability, needed or was believed to have needed special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35(a); and
- whether the District intimidated, threatened, coerced, or discriminated against any individual for the purpose of interfering with any right or privilege secured by Section 504 and/or Title II, in violation of the Section 504 implementing regulation at 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 Parent and the District and interviewed the parent and District witnesses.

Allegation #1 – Failure to Provide the Student with a Section 504 Plan

Facts

XXXX PARAGRAPH REMOVED XXXXX

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulation, at 28 C.F.R. § 35.130, states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient school districts to provide a free appropriate public education (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 Section 504 regulation, at 34 C.F.R. § 104.35, provides that a recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and before any subsequent significant change in placement. The Section 504

regulation, at 34 C.F.R. § 104.3(j), and the Title II regulation, at 28 C.F.R. § 35.104, define a person with a disability as one who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

The Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that in interpreting evaluation data and in making placement decisions, the recipient shall (1) draw upon information from a variety of sources; (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 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 34 C.F.R. § 104.34.

If a recipient suspects that a student has a disability that would necessitate the provision of special education and related aids and services, the recipient may not require a parent or guardian to provide a medical diagnosis before conducting an evaluation of the student under the Section 504 regulation at 34 C.F.R. § 104.35. If a recipient determines, based on the facts and circumstances of the individual case, that that a medical assessment is necessary to make an appropriate evaluation consistent with 34 C.F.R. § 104.35, the recipient must ensure that the student receives this assessment at no cost to the parent(s) or guardian(s).

Analysis

The information provided by the parent and the District raises a concern that the District failed to timely evaluate the Student under Section 504. The District was aware of the Student’s disability from the beginning of the school year but did not finalize a Section 504 plan until XXXXX. Further, correspondence among District staff suggests that the District XXXXX before proceeding with an evaluation under Section 504. The documentation also raises a concern that the District did not evaluate and place the Student pursuant to Section 504’s requirements at 34 C.F.R. § 104.35. For example, 34 C.F.R. § 104.35(c) requires that placement decisions under Section 504 be made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; in the Student’s case, the evaluation team consisted XXXXX.

To complete the investigation of this allegation, OCR would need to interview District witnesses including the principal and the counselor regarding when and how the District evaluated the Student under Section 504 and the reasons for the delay in providing her with a Section 504 plan.

Allegation #2 – XXXXX

Facts

The parent identified XXXXX. XXXXX SETENCE REMOVED XXXXX.

XXXX PARAGRAPH REMOVED XXXXX

XXXX PARAGRAPH REMOVED XXXXX

Legal Standard

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 any individual for the purpose of interfering with any right or privilege secured by the regulation or 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 experienced an adverse action caused by the recipient; 2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; 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.

Analysis

The information gathered in OCR's investigation shows that the parent XXXXX. Correspondence among District staff shows that XXXXX SENTENCE REMOVED XXXXX. XXXXX SENTENCE REMOVED XXXXX

The District's documentation contains no information about XXXXX which the parent alleged was XXXXX.

To complete the investigation of this allegation, OCR would need to interview District witnesses including the principal and the counselor regarding XXXXX, including the parent's allegation that XXXXX SENTENCE REMOVED XXXXX. OCR would also need to ask District witnesses for details of the XXXXX.

Resolution

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 issues that can be addressed through a resolution agreement. In this case, the District expressed an interest in resolving the allegations prior to the conclusion of OCR's investigation and OCR determined resolution was appropriate.

On June 20, 2019, the District provided documentation of a training session presented to School staff in May 2019 by the District's Section 504 Compliance Officer. The District's counsel said the District wanted to complete the training before the school year ended. OCR reviewed the training materials which included almost all of the relevant information regarding Section 504 that would be necessary in a training to resolve this complaint, including the district's evaluation, reevaluation, and placement obligations, and Section 504's prohibition on retaliation. However, the training did not include information regarding the district's obligation under Section 504, when it suspects that a student has a disability requiring special education or related aids and services, to evaluate that student regardless of whether the student or parent provides a diagnosis or medical documentation. In providing the parent with a meaningful opportunity to provide input into the evaluation and placement decision, the District may request that the parent provide medical or other information, however the District may not require that the information be provided as a condition of evaluation under Section 504.

On July 30, 2019, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address all of the allegations in the complaint. 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.

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 September 3, 2019. For questions about implementation of the Agreement, please contact XXXXX. She will be overseeing the monitoring and can be reached by telephone at XXXXX or by e-mail at XXXXX. If you have questions about this letter, please contact me by telephone at XXXXX, or by e-mail at XXXXX.

Sincerely,

/s/

XXXXX

Supervisory Attorney/Team Leader

Enclosure