



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

5 POST OFFICE SQUARE, 8<sup>TH</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

AUG 27 2010

Ms. Maria Geryk  
Interim Superintendent  
Amherst-Pelham Regional School District  
170 Chestnut Street  
Amherst, Massachusetts 01002

Re: Complaint No. 01-10-1098  
Amherst-Pelham RSD

Dear Superintendent Geryk:

We are writing to inform you that the Office for Civil Rights (OCR) is closing the investigation of the above-referenced complaint filed on March 1, 2010, against the Amherst-Pelham Regional School District (District).

The Complainant alleged that the District failed to implement certain provisions of the Student's Section 504 Plan calling for: 1) assistive technology; 2) extended time on homework; and 3) frequent teacher check-ins. The Complainant also alleged that the District failed to respond when she told District administrators that the Student was being harassed by her teachers, based on her disability. Lastly, the Complainant alleged that a District teacher retaliated against her and the Student when the teacher informed the Student's coach by email that the Student was having academic difficulties and told the Student she should not participate in sports, in response to the Complainant's advocacy on behalf of the Student. During the course of the investigation, District counsel, on behalf of the District, indicated an interest in resolving two allegations of the complaint, and the District signed a voluntary resolution agreement (Agreement). In its investigation of the third allegation of the complaint, OCR determined there was insufficient evidence to establish a violation of the laws enforced by OCR.

OCR initiated an investigation of the Complainant's allegations pursuant to our authority under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation found at 34 C.F.R. Part 104 (Section 504) and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation found at 28 C.F.R. Part 35 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability. The District is subject to Section 504 because it receives Federal financial assistance from the

U.S. Department of Education, and it is subject to Title II because it is a public entity that operates an educational system.

Based on the allegations presented in the complaint, OCR accepted the following issues for investigation:

1. Whether the District denied the Student a free appropriate public education (FAPE) by failing to implement the provisions in her Section 504 Plan calling for: 1) assistive technology; 2) extended time on homework (biology); and 3) frequent teacher check-ins, contrary to the requirements set forth at 34 C.F.R. Section 104.33 and 28 C.F.R. Section 35.130(a) and (b);
2. Whether the District failed to provide a prompt and equitable response to the Complainant's reported concern regarding treatment of the Student by her science and math teachers, contrary to the requirements set forth at 34 C.F.R. Section 104.7(b), and 28 C.F.R. Section 35.107(b); and
3. Whether a District teacher retaliated against the Complainant and the Student when the teacher informed the Student's coach by email that the Student was having academic difficulties, and told the Student she should not participate in sports after the Complainant advocated on behalf of the Student, contrary to the requirements set forth at 34 C.F.R. Section 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, incorporated into the regulation implementing Section 504 at 34 C.F.R. Section 104.61; and Title II at 28 C.F.R. Section 35.134.

Issues 1 and 2: Implementation of the Student's 504 Plan; Prompt and Equitable Response to Allegations of Disability Harassment

During the investigation, and before OCR had reached any conclusions regarding the legal issues presented, District counsel, on behalf of the District, expressed interest in resolving the first two issues in the complaint and the District subsequently signed an Agreement to resolve the Complainant's allegations regarding implementation of the Student's Section 504 Plan and the District's response to the Complainant's concerns of harassment on the basis of disability. A copy of that Agreement is enclosed with this letter.

OCR determined that the provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation. Additionally, the provisions are consistent with the applicable regulations and the Complainant has been

made aware of this resolution. Accordingly, we are closing this complaint investigation with regards to the above-mentioned allegations as of the date of this letter. Consistent with OCR's monitoring provisions, the District agrees to provide OCR the first monitoring report on the status of completion of the steps of the Agreement on or before September 17, 2010.

### Issue 3: Retaliation

#### Legal Standard

The implementing regulation for Section 504, at 34 C.F.R. Section 104.61, which incorporates 34 C.F.R. Section 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits a covered entity, such as the District, from coercing, intimidating, threatening, or interfering with an individual because the individual exercised any right granted or protected by Section 504. A similar prohibition under the implementing regulation for Title II is found at 28 C.F.R. Section 35.134(b).

In investigating a retaliation complaint, OCR examines whether there is sufficient evidence to establish that: (1) the complainant engaged in a protected activity; (2) the district was aware of the protected activity; (3) the district took adverse action against the complainant; and 4) an inference of a causal connection exists between the protected activity and the adverse action.

If one of the above elements cannot be established, then OCR ends its analysis and finds insufficient evidence of a violation. If, however, all of these elements are established, then OCR will determine: (5) whether the covered entity has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR carefully scrutinizes any such reason provided by the covered entity in order to determine: (6) whether the reason is supported by the evidence, or whether it appears to be a pretext for retaliation (that is, a reason designed to conceal a retaliatory motive).

If OCR finds that the covered entity has not offered a legitimate, non-retaliatory reason, or if that reason is found to be a pretext for retaliation, then OCR will make a finding of retaliation. Alternatively, if OCR concludes that the covered entity has offered a legitimate, non-retaliatory reason for its action, and OCR does not establish that the reasons provided are a pretext for retaliation, OCR will find insufficient evidence to prove retaliation.

### Investigative Approach

To investigate this issue, OCR reviewed information and documentation obtained from the Complainant and the District, and conducted telephone interviews with the Complainant, the Student, and District staff, including the Student's guidance counselor, mathematics teacher, biology teacher, and assistant principal. A summary of our investigation and the basis for our conclusion that we have insufficient evidence to support the Complainant's allegation are provided below.

### Relevant Facts and Analysis

First, OCR examined whether the Complainant engaged in a protected activity under Section 504. After examining numerous emails between the Complainant and several District staff, OCR determined that the Complainant consistently advocated on behalf of the Student in person and by email regarding implementation of the Student's Section 504 Plan. Since the Complainant exercised rights covered under the provisions of Section 504 and Title II in these communications with the District, OCR also found that her advocacy on behalf of the Student also constituted protected activities.

Next, OCR examined whether the District was aware that the Complainant engaged in this protected activity. OCR determined that the District was put on notice of the Complainant's advocacy regarding the Student's Section 504 plan through email correspondence with the Complainant throughout the 2009-2010 school year. Consequently, OCR found that the District was aware of the Complainant's protected activities.

OCR found, therefore, that the first two steps of the retaliation analysis were satisfied. OCR then considered the third step of the retaliation analysis, whether the District took adverse action against the Student and/or the Complainant. To be adverse, an action must cause tangible or lasting harm, or be likely to have a deterrent effect on a reasonable person's future protected activity. A transitory or merely unpleasant incident is not sufficiently serious to constitute an adverse action under a retaliation analysis.

The Complainant alleged that as a result of her protected activity, the Student's biology teacher sent an email to the School Athletic Director and head of the Student's sports team informing them that the Student was having academic difficulties. OCR learned that the biology teacher sent an email to the School Athletic Director and the Boys' Team Coach (Boys' Coach) on April 27, 2010, informing them that the Student was "struggling a bit to keep up with her outside of class work" and asking for "any help

and support” from the Student’s athletic team staff, such as encouraging the Student to stay after school to complete assignments. The biology teacher told OCR that she contacted the Boys’ Coach at the suggestion of the School Interim Assistant Principal (Assistant Principal), since the Boys’ Coach was the Student’s English teacher and coached the same sport that the Student was participating in [REDACTED]. Email (b)(7)(C) correspondence on April 6, 2010 from the Assistant Principal to the biology teacher and on April 27, 2010 from the Assistant Principal to the Complainant corroborated this explanation.

The Boys’ Coach forwarded the biology teacher’s email to the Student’s coach (Girls’ Coach), to whom it had not been sent originally. That same day, the Girls’ Coach forwarded that email to the Complainant, writing, “Let me know if/how I can help [the Student] catch up – if she needs to be late to practice to meet with [the biology teacher], I would be fine with that (and the [Athletic Director] suggested that it would be OK if necessary).”

In emails on April 27, 2010, and April 28, 2010, the Complainant referred to the biology teacher’s email to the Boys’ Coach and Athletic Director as retaliatory, asserting that the email “has given [the Girls’ Coach] the impression that [the Student] is in danger of failing.” When interviewed by OCR, the Girls’ Coach said that he understood the email in question as a request to allow the Student to stay after school, if needed, and not to dock her playing time during competitive events if she had to miss part of practice for schoolwork. He stated that the request did not affect the Student’s playing time or other competitive opportunities on the team, and did not have an effect on his relationship with or attitude towards the Student. Additionally, he stated that to his knowledge the Student did not miss any practice or competitive events due to staying after school for biology or any other classes.

The Complainant also alleged that as a result of her protected activity, the biology teacher told the Student in the presence of another student in her class that she should not participate in sports activities, causing the Student embarrassment and diminished self-confidence. The biology teacher also told OCR that she had a conversation with the Student after school shortly before the District’s April 2010 spring break to let the Student know that she could miss part of her sports team practice to get extra help on assignments after school. The biology teacher told OCR that this conversation was prompted by late assignments for which the Student already had been granted extensions, as well as by a general concern with the Student’s involvement in upcoming team tournaments which might cause the Student to miss class. Though the teacher told OCR that there might have been another student present for this conversation, she said that the other student was not within earshot of the teacher’s conversation with the

Student. In an April 27, 2010 email to the biology teacher, Assistant Principal, and Guidance Counselor, the Complainant asserted that these actions caused the Student to “feel humiliated and discouraged from seeking [the biology teacher’s] assistance.”

Based on its investigation, OCR found insufficient evidence to establish that either the biology teacher’s email or after-school conversation with the Student rose to the level of adverse actions such that they could be considered retaliatory. The Complainant was unable to articulate any tangible or significant harm, such as a formal disciplinary sanction or loss of academic or extracurricular opportunities, resulting from either of these actions. According to the Girls’ Coach, neither of these actions affected the Student’s ability to engage in competitive sports activity, and the Student did not miss a practice or competitive event for academic reasons during the season.

In regard to the after-school conversation, email correspondence, and interviews with District staff indicated that the Complainant and the Student continued to seek assistance from the biology teacher in the time period following this conversation. For example, in an April 30, 2010 email, the Assistant Principal told the Complainant that the biology teacher granted the Student an extension on an assignment, noting that the Student was able to communicate to the biology teacher that she needed more time. Documentation provided by the District corroborated this statement. The biology teacher provided OCR a copy of her grade book, which demonstrated that the Student had an A average in the class and was ultimately not penalized for lateness or failure to complete any assignments.

Though these events might have been unpleasant for the Student, without more evidence, OCR could not establish that either event resulted in any tangible harm to the Student’s academic or athletic activities or had a deterrent effect on the Complainant or the Student’s engagement in protected activities. Since OCR could not identify any significant and lasting harm suffered by the Student as a result of either incident, OCR concluded its analysis of the retaliation claim at this point. OCR did not establish sufficient evidence to demonstrate that either event rose to the level of an adverse action within the meaning of OCR’s retaliation analysis.

### Conclusion

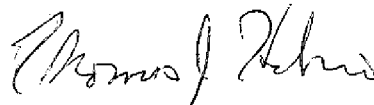
As stated above, the District has resolved Issues 1 and 2 of the complaint through the signed Agreement enclosed with this letter. Regarding Issue 3, the allegation of District retaliation, OCR found insufficient evidence to conclude that the District retaliated against the Student in violation of Section 504 and Title II.

The information contained in this letter is not intended and should not be construed to cover any other issues regarding compliance with the regulations implementing Section 504 or Title II that may exist but are not discussed therein. Please be advised that the Complainant may file a private law suit pursuant to Section 203 of the Americans with Disabilities Act of 1990, irrespective of whether OCR found a violation of Title II.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases, are not formal statements 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.

OCR would like to thank you, Attorney Regina Tate, and your staff for your assistance with this matter. If you have any questions about this letter, please raise them with Mary-Anne Khouhani, Senior Investigator, at (617) 289-0036, or by electronic mail at Mary-Anne.Khouhani@ed.gov. You may also contact Michael Joyce, Civil Rights Attorney, at (617) 289-0059; Donna L. Russell, Team Leader/Civil Rights Attorney, at (617) 289-0019; or me at (617) 289-0111.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. Hibino".

Thomas J. Hibino  
Regional Director

Enclosure

cc: Regina Williams Tate, Esquire