UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII
ARIZONA
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UTAH
WYOMING

August 28, 2012

Dr. Rose Hamway
45 W. Lambert Lane
Oro Valley, Arizona 85737

Re: Tucson Unified School District #1
Case Number 08-10-1114

Dear Dr. Hamway:

On March 2, 2010, we received your complaint of discrimination against Tucson Unified School District #1 (TUSD). We sincerely apologize for our delay in resolving this complaint. You alleged that the District retaliated against you for advocating for District students with disabilities when it intimidated you by creating a hostile environment and discontinued your employment as a school psychologist. You alleged that the retaliation was in response to your advocacy for the rights of District students with disabilities. Through our investigation, we found that the District retaliated against you as alleged. We also found that the District failed to respond to complaints of disability discrimination that you presented in writing no less than three times to the District. The District has entered into the enclosed Resolution Agreement to address these compliance concerns.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, (Section 504) which prohibit discrimination on the basis of disability in programs and activities funded by the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, (Title II) which prohibit discrimination on the basis of disability by public entities. The District, a public entity, receives Federal financial assistance from the Department and is subject to these laws and regulations.

We investigated the following issue:

> Whether the District retaliated against you for advocating for students with disabilities in violation of 34 C.F.R. §104.61, as it incorporates 34 C.F.R. §100.7(e), and 28 C.F.R. §35.134.

During our investigation we interviewed you, witnesses identified by the District and witnesses identified by you, and we reviewed documents submitted by you and those submitted by the District through its counsel.

Background

You were employed by the District as a high school psychologist for the 2009-2010 school year.[1] You worked at two high schools, Rincon and Sahuaro, for a relatively short amount of time from the beginning of the school year through December 10, 2009. You alleged that certain special education and administrative staff at these two high schools lacked knowledge of Federal disability laws, and in some instances ignored these laws, resulting in discrimination against students with disabilities in violation of their rights under Section 504 and the Title II. You made these concerns known both verbally and in writing multiple times prior to and close in time to the events that led to the District's decision not to reemploy you as a school psychologist for the 2010-2011 school year.

You filed a written grievance with the District's Employee Relations Department on September 2, 2009, and sent a copy to the District's Lead Psychologist, your direct supervisor. You did this while you were still placed at Rincon High School. The grievance sets forth in detail the circumstances you believed constituted violations of special education laws. You never received a response from the District to your grievance.

Soon thereafter you were transferred to Sahuaro High School. After working at that high school for a short time, you believed that the special education department at Sahuaro did not provide services required by their Individual Education Programs (IEP) to certain students with disabilities. Similar to your actions at Rincon, you expressed your concern that students with disabilities were not being appropriately served to School and District administrators

The more immediate events that ultimately led to administrative leave and your ultimate firing happened in early October 2009. At that time, you became concerned for the well-being of two students with mental illnesses because you believed that they were being ill served by the staff. When you did not get the response you had hoped for from School administrators, you contacted and met with the Assistant Superintendent of Government Programs and Community Outreach (Assistant Superintendent). At this meeting you explained your concerns for the safety of the two students based on your belief that the teacher and staff were not appropriately serving these students with disabilities. Afterwards, on October 26, 2009, you emailed the Assistant Superintendent and requested a meeting with the District Director of Exceptional Education. The Assistant Superintendent scheduled a meeting with you on October 29, 2009. Prior to the meeting you again committed to writing your specific concerns that students with disabilities were not being appropriately served and presented that to the Assistant Superintendent and the Executive Director of Exceptional Education at or prior to the meeting.

On October 29, 2009, the Assistant Superintendent held the scheduled meeting with you, which included the Executive Director of Exceptional Education and your Educational Leaders, Inc. (ELI) representative. You anticipated that this meeting was set to discuss the concerns for serving students with disabilities that you had previously submitted in writing. Instead, the agenda of the meeting was to rebuke you in writing and to provide

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[1] You have a Ph.D. in psychology with a minor in special education. You have over 15 years' experience as a school psychologist.

you with a written description of what your roles and responsibilities were.[2] Your allegations concerning violations of Federal disability law were not addressed during this meeting. The Assistant Superintendent gave you a written narrative enumerating what she perceived as your conflicts with school administrators and special education staff. This District document raises multiple issues, including that you were making accusations concerning staff creating an unsafe environment for students with disabilities; that you were making independent decisions concerning recommendations for IEP meetings; and most significantly to us, that you

> *... made threats to several exceptional education staff members that [you] will go to ADE [Arizona Department of Education], regarding issues at Sahuaro High School. On October 27, 2009, [Executive Director of Exceptional Education] received a call from ADE to inform her that ... [you] had called them regarding IDEA Statute violations.*

The written narrative provides that you violated Board Policy on Staff Conduct, Standard District Procedures, and Special Education Manual Procedures and specifically stated that these "violations" put your "job at-risk".

The written narrative gave you a number of directives and placed a number of limitations/restrictions on your ability to perform your job.[3] The District directed you to follow the chain of command, and to "maintain a non-biased, objective and neutral attitude at work." You were directed to identify three to five specific things that would help you be successful. In response, you prepared a list of five items that again included your concerns that District staff were not following Federal disability laws and therefore not appropriately serving students with disabilities. The District never responded to your concerns.

On December 10, 2009, an incident arose between you and a male campus monitor that resulted in both being placed on administrative leave. The situation unfolded at the conclusion of a manifestation hearing while the student and parent were waiting with you in your office for homework to be delivered as the team's final determination was to suspend the student.[4] A female campus monitor who was sent to deliver homework to the student told the parent and the student that she wanted the student to stay away from her son. You told the female monitor that

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[2] The discipline narrative and meeting of October 29, 2009 did not comport to the District's 2009-2010 MEET and CONFER AGREEMENT between TUSD and ELI for PSYCHOLOGISTS, Article 12-1 for addressing conflict with school psychologists.

[3] The Assistant Superintendent of Special Programs denied that you were singled out for restriction of duties. She claims that because of a state audit, she notified all school principals that the duties of the psychologists were to be limited as stated in "TUSD Psychologists' Roles and Responsibilities" presented to you during the October 29, 2009 meeting. We were told by your ELI representative that this was never a published policy distributed to principals or psychologists. For example, according to the Roles and Responsibilities list, all other school psychologists were allowed to often participate in group and individual counseling when other counseling providers are not available; in the October 29th letter, you were further restricted and told that you must always make an immediate referral or walk the student to an appropriate campus counselor. Furthermore, unlike other psychologists whose primary job responsibilities would include consulting with teachers regarding student behavior, you were directed to consult with the District's Lead Psychologist for direction instead of consulting with the teachers directly.

[4] The manifestation determination was scheduled to determine whether the student's disability was related to or caused her to commit an alleged drug related offense.

this was not an appropriate time or place for such a discussion. The female monitor responded by stating that she would just get a restraining order against the student. Soon thereafter, you called the female monitor back because the parent wanted to talk to the female monitor about it. When the female monitor returned she brought a male monitor with her. This interaction ultimately culminated in the male monitor pushing your office door open, which pushed you back some according to you and the parent. You responded in kind by pushing the door which hit the male monitor's toe, or as the District characterized it, you "slammed the door in his face." We note that you had previously and repeatedly complained about the District's failure to conduct manifestation determination meetings as required, which included, according to you, expressing your concerns about this particular student and the need for a manifestation hearing for this student. The evidence shows that the District used this incident as the impetus to pursue a disciplinary hearing and ultimately to discontinue your employment.[5] You never returned to work after you were initially placed on administrative leave following the December 10, 2009 incident, and ultimately took sick leave due to the stress of the situation before the School Board voted in April 2010 not to continue your employment.

Failure to Respond to a Complaint of Disability Discrimination

You filed a written grievance with the District on September 2, 2009, describing numerous violations of Federal disability law. You raised many of the same concerns in writing at least two more times in late October/early November 2009. The District did not respond in any way to two of your written complaints and did not respond to you with regard to what they found regarding your third written complaint. Because the District did not appropriately respond to several complaints of alleged disability discrimination, we find that the District's failure to respond is a violation of 34 C.F.R. § 104.7 and 28 C.F.R. § 35.107(b). These regulations require public school districts to adopt grievance procedures. Failure to implement the procedures is a violation. The District entered into the attached Resolution Agreement to resolve this violation.

Retaliation

Under the implementing regulations, recipients are prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504 and Title II of the ADA. In analyzing a retaliation claim, we determine whether: the individual engaged in an activity protected by Section 504 and Title II of which the recipient had knowledge; the recipient took adverse action against the individual; a causal connection existed between the protected activity and the adverse action; and, the recipient has a legitimate, non-retaliatory, non-pretextual reason for its action.

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[5] We note that the male campus monitor did not face a disciplinary hearing and his employment continued, although he did receive a reprimand for his behavior during this incident. The Assistant Principal told the police that this incident between the monitor and you, while not proven to be your fault, was the "straw that may have broke the camel's back." We viewed this as an indication that the District and ultimately the Board used your earlier advocacy for students with disabilities as a basis for attempting to discipline and ultimately fire you.

Analysis

Protected Activity and Knowledge of the Recipient

We first looked at whether you engaged in an activity protected by Section 504 and Title II and, if so, whether the District knew of your protected activity. The evidence clearly shows that, during your short tenure with the District, you advocated on behalf of students with disabilities to school staff and administrators as well as District officials.[6] This advocacy constitutes a protected activity. Initially, you filed a written grievance with the District's Employee Relations Department on September 2, 2009, and sent a copy to the District's Lead Psychologist. The grievance sets forth in detail your concerns that special education regulations were violated by school staff. A copy of the grievance was provided to us by the District counsel, so it is clear they received this complaint. Furthermore, it is clear from the October 29, 2009 memorandum given to you that the District was aware of your "contacting" the state Department of Education "regarding [your] concerns." Finally, our investigation firmly established that you put your concerns about the treatment of students with disabilities in writing and provided it to the District no less than a total of three times during your short period of employment with the District. Therefore, we conclude that the District had knowledge of your protected activity.

Adverse Actions/Causal Connection

We first find that the October 29, 2009 written reprimand and the ultimate non-renewal of your contract for employment with the District as a school psychologist are adverse actions. Next we turn to whether there is a causal connection between your protected activities on behalf of students with disabilities and the ultimate decision by the District not to renew your contract. The close proximity in time between your repeated attempts to advocate on behalf of students with disabilities and the written reprimand and non-renewal of your contract for employment allows us to infer a causal connection. Here, as detailed earlier in this letter, the advocacy by you and the events leading up to your non-renewal all transpired within an approximately four month period of time. Furthermore, the written reprimand presented to you on October 29, 2009 clearly articulates the District's position that your protected activity of contacting the state Department of Education placed your job with the District "at risk." Therefore, we find there are abundant and sufficient facts to clearly establish a causal connection between your advocacy for disabled students and the adverse employment action taken against you.

Consideration of Proffered Legitimate, Non-discriminatory Reasons & Pretext

We analyzed whether the District's reasons for the actions taken against you were legitimate or whether they were pretext for discrimination. The District asserted five purported legitimate reasons to explain why your employment as a school psychologist was not renewed. The District argued that your employment contract was not renewed because you: failed to follow the chain

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[6] In large part, you argued that the District did not follow the provisions of the Individuals with Disabilities Education Act (IDEA). While OCR does not enforce IDEA, our investigation discovered that specifically you raised issues to District staff and administration concerning District actions that denied students a free appropriate public education (FAPE), and that the District allegedly failed to follow appropriate evaluation and placement procedures for students with disabilities in violation of 34 CFR Part 104.

of command; failed to follow District-mandated processes for METs and IEPs; did not follow directives given to you by your supervisors; and did not establish good working relationships with staff so as to accomplish your responsibilities. The District finally argued that you had an altercation with two of the District's campus monitors and asserts that you assaulted one of them.

Failure to follow chain of command: The District told us in its data response that you failed to follow the chain of command. It cited to an example with a student, J.R., but that example seems more focused on how you interacted with staff and offers no specific details as to who you did or did not talk to in the chain of command to address your concerns about J.R. Because the District's data response lacked any specifics to support its conclusion that you failed to follow the chain of command, we asked the District for more information. At that point the District referred us to the October 29, 2009 memorandum it issued to you at a meeting on the same date. The memo directed you to follow the chain of command "as previously instructed by the Executive Director of Exceptional Education and the Lead Psychologist." The memo further directed you to direct your clinical and diagnostic concerns or seek consultative outreach with the Lead Psychologist first. You were also directed to address concerns regarding campus operations procedures, staff or students to the principal or his designee.

On its face, this written direction seems clear, but our interviews revealed that the guidance on the chain of command given to you was both contradictory and confusing. For example, when we interviewed the Lead Psychologist and asked him what guidance he gave school psychologists about the chain of command at the start of the school year, he reported that he told them that all clinical issues should be addressed to him and all administrative issues should be addressed to the Assistant to the Director of Exceptional Education Services. We noted that this differed from the October 29, 2009 memo directing you to address campus operation procedures to the school principal. The District also provided us with an email dated October 26, 2009, in which the Assistant Superintendent concludes that you have a "pattern of behavior of skipping [your] supervisor" but then, goes on to indicate that you should always go to the Lead Psychologist first before going to the principal or to her. That same email further states that "…Psychologists do not report to the campus principal, they are central administration staff." However, in the data response the District submitted to our office at the start of our investigation it states: "Psychologists are supervised directly by the principal of the school(s) to which they are assigned." We also have email evidence that could be fairly characterized as concerns about "staff or students" that you directed to the principal to which the principal never responded.

The evidence does not support that this was a legitimate reason to reprimand you. We have contradictory evidence from District and school administrators and staff members about who school psychologists were to report to. The fact that the school and District staff members we interviewed could not consistently explain the chain of command for a school psychologist suggests that this reason is not legitimate. Because the District could not provide and we did not find evidence to support, by a preponderance of the evidence, that this reason is legitimate, we find that it is not legitimate and do not need to further analyze whether it was also a pretext for discrimination.

Failure to follow District mandated processes for METs and IEPs and failure to follow directives given you by your supervisors: The District generally asserted that you did not follow these

processes or directives as a reason to support its ultimate decision not to renew your contract. We asked whether there were clear cut rules to support the District's contentions. The District offered some examples of your alleged behaviors in an effort to support these accusations. For example, the District asserted that you conducted an initial screening of a student upon her initial arrival at the school in one instance and tape recorded a meeting in violation of a District practice. In both instances, the District identified specific policies and procedures that you violated, but upon review we could not find evidence to convince us that you had clearly done something wrong or in violation of some District policy. For example, the District indicated that you had clearly violated District policy which it portrayed as stating you could not even bring up or mention a one-on-one aide during IEP meetings. We looked at the District policy that the District offered as support for this proposition and the policy stated that the final determination on whether a student is to receive a one-on-one aide or "additional adult support" is to be approved by the Assistant Director before it can be finalized or "checked on the IEP". The policy did not indicate that IEP team meeting attendees were disallowed from ever mentioning the necessity of a one-on-one aide. We note, that if this policy is used as the District asserted to have the Assistant Director decide unilaterally and separate and apart from a group of persons knowledgeable about a student that this would raise a compliance concern at 34 C.F.R. 104.35 for which OCR would seek an appropriate remedy. The District also offered the example of your use of a tape recorder in an IEP meeting, but could offer no written policy or any other documentation to support its contention that this was in violation of District policy. Further, we learned that a District administrator was present during the IEP meeting in question and should have raised a concern about the taping of the meeting, if indeed, this was a violation of District policy.

The District further attempted to support these two stated reasons for not renewing your contract by relying very heavily on a document entitled "TUSD Psychologists' Roles and Responsibilities." This document was given to you at the October 29, 2009 meeting described previously. The District stated that this document was widely disseminated to all school principals and training was provided to all school principals on this document.

We first looked to see if this document was disseminated as indicated by the District as evidence to support the legitimacy of this document. We were unable to find that it had been disseminated as indicated by the District. Other than the District's assertion that it had done so, we could not find evidence to support its claim. In fact, we uncovered evidence that directly contradicted the District's claim that this document was widely disseminated to all school principals. This led us to believe that the District created this document in an effort to curtail you from making further claims of disability discrimination against the District. Based on a preponderance of the evidence, we could conclude that these two stated reasons are not legitimate and stop our analysis there. However, we will assume, for the sake of argument, that these reasons are legitimate and move onto the pretext portion of our analysis.

Assuming these stated reasons (of your not following District mandated processes for METs and IEPs and not following directives from your supervisors) are legitimate reasons for the District to not renew you contract, we next look at whether these stated reasons are nevertheless pretext for discrimination. The District asserted that its "Roles and Responsibilities" document given to you at the October 29, 2009 meeting largely supported and legitimized these two stated reasons for

not renewing your contract. In determining whether it's stated reason was pretextual, we looked to see whether other school psychologists were treated the same as you. Based on the evidence we found, we could not establish that this document was enforced against any other school psychologist except you. Even assuming that these roles and responsibilities were imposed on all school psychologists, in order to show that there is no pretext, we would have to find that the roles and responsibilities were imposed in the same manner. In this case, the District told you in writing that you were to perform the identified responsibilities of your job like all other school psychologists with two exceptions. First, it prohibited you from consulting with teachers regarding student behaviors. Second, it prohibited you from counseling with students individually and in group settings on school related problems. According to the District's own "Roles and Responsibilities" document, all other school psychologists were allowed to perform both functions as essential functions of their jobs while you were not. The District, by its own written admission, treated you differently from all other school psychologists. We therefore find its assertion that you did not following various processes and directives is not legitimate as evidenced by this strong documentary evidence of pretext.

Failure to establish good working relationships with staff: The District asserts that it received several reports from various school staff members that you were difficult to work with and that you were confrontational. The District further asserts that you "showed that [you] thought [you] knew more than anyone else, and knew better than anyone else what was right for particular students without consultation with other school personnel who had been working with these students for a long time." While on its face this appears to be a legitimate reason the District could use to support a decision not to renew an employee's contract, we found it very difficult to separate the alleged behaviors offered in support of this contention from the very same behaviors we conclude are protected activities by you. In other words, every specific incident the District identifies to support this contention was also something you previously identified to school and district administrators as being problematic or a potential violation of Federal disability civil rights laws. We note that all of the witnesses the District identified to support its position that you failed to establish good working relationships with staff members are the same individuals you had identified as not following Federal disability laws either with the District or the state Department of Education. For example, the District accused you of not establishing a good working relationship with the one-on-one aide for a student named J.R. based on an incident that took place on October 23, 2009. However, we learned that you asked the one-on-one aide to step aside when you saw her yanking on J.R.'s arm.[7] You expressed your concern that the aide may be using a form of physical redirection that, if not authorized by the student's IEP, was inappropriate.[8] You made your concerns known to the aide on Friday, October 23rd and to several other school officials and at least one district administrator that same day and throughout that following weekend via email. The District also cites to an example involving a student named B.R. to support its contention that you did not establish good working relationships with other staff members. In the October 29, 2009 memorandum the District asserts that you made a "public accusation against [your] principal and department chair by sending out an email on Monday October 26, 2009, to several staff members that…accused these individuals of creating

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[7] During our investigation, an objective witness who asked that we not identify them by name or position, saw the one-on-one aide and described that the aide "yanked" on J.R.'s arm.

[8] You later learned and we confirmed that this student did not have a Behavior Intervention Plan and the student's IEP at the time of this incident did not authorize the use of physical redirection.

an unsafe environment for a student at Sahuaro...."[9] Our review of the October 26, 2009, email supports your contention that starting on or before October 26, 2009, you were advocating for B.R. because you believed he needed a Behavior Intervention Plan. There is no dispute that B.R had become a safety concern for the District based on his behaviors to the point where they were following him around throughout the school day and bringing him to your office. During our investigation, we spoke with several District witnesses who you did not file complaints about who describe you as being very professional, very knowledgeable about Federal disability civil rights laws, and very willing to help colleagues with difficult problems on short notice when other school administrators were unwilling or unavailable to help.[10] Based on these facts, we find that while this stated reason initially appears legitimate on its face, a preponderance of the evidence supports that this reason was actually a pretext to discriminate against an individual who repeatedly and passionately advocated for the rights of students with disabilities as evidenced by the various examples discussed previously.

Altercation with campus monitors on December 10, 2009 and performance evaluation: As an initial matter, an employee fighting with another employee while at work appears to be a legitimate reason for an employer to consider disciplinary action up to and including termination of employment. However, we find that the District's response to both the police investigation and its own investigation into the alleged altercation seemed overly harsh/prejudiced against you despite evidence in the police report about how the female and male monitors also behaved in an unprofessional manner. Furthermore, as will be discussed in more detail below, we find that the District did not follow its own policies and procedures when developing and making final your performance evaluation.

The District does not dispute that the female campus monitor initiated a personal conversation with the student and her parent when she delivered homework to the student. Specifically, the female monitor threatened to obtain a restraining order against the student if she did not stay away from her son. We also note that the female monitor invited the male monitor to accompany her back to your office following an invitation from the student's parent to further discuss the threat of a restraining order with the female monitor. We note that the female monitor in her statement to the police wrote that she asked the male monitor to come with her because she didn't know the purpose of this meeting. However, the male monitor wrote in his statement that he was accompanying the female monitor to a conversation about her and her son. We note that the District did not consider or take any disciplinary action against the female monitor or the male monitor for using professional time to address a personal matter in either of these confirmed meetings.

With regard to the male campus monitor, the District does not dispute that he accompanied the female campus monitor as a personal favor when the female monitor returned to your office. Both campus monitors acknowledged that you stated that it was inappropriate for the male campus monitor to be there because it was a confidential student matter. After reviewing all witness statements and evidence concerning this matter, it is undisputed that both you and the

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[9] We note that the email was not sent to any members of the public; it was only sent to the principal, the Lead Psychologist and the head of the District's behavior intervention team.

[10] We also note that we spoke with one of your former supervisors at a different school district and a supervisor that you worked for subsequently to leaving the District who both had similarly positive remarks about you.

male campus monitor slammed the door in response to one another. Additionally, we note that the male campus monitor was the person who apprehended the student for the misconduct that led to the suspension at issue at the manifestation determination hearing that day. We note this because it does not appear from District records or its assertions to us that the inappropriateness of the monitors' use of professional time to address a personal matter was addressed. It also does not appear that the District looked into whether it was appropriate for the male campus monitor to be present during a discussion about the female campus monitor seeking a restraining order against this student when he was the person who apprehended the student for the misconduct that resulted in her suspension.

Significantly, we find that the only District employee that was involved in this alleged altercation that was operating in her professional capacity was you. Yet the female campus monitor received no discipline for the fact that she instigated this encounter based on a personal matter and the male campus monitor who mutually engaged in the altercation received different and less harsh treatment than you. While the District did initially place the male campus monitor and you on administrative leave pending its investigation into this matter, it never issued a "Letter of Intent to Discipline" to him and his employment was not discontinued based on that incident. This difference in treatment taken together with a statement of the assistant principal that we learned of during our investigation "...this may have been the straw that broke camel's back" suggests that the reason given was actually pretext for retaliation against you for your persistent and ongoing efforts to advocate for students with disabilities. This different treatment combined with our earlier discussions about each of the District's asserted reasons for why you were treated more harshly in the wake of this altercation, leads us to conclude, by a preponderance of the evidence, that the District treated you more harshly than the campus monitors because it was retaliating against you for your ongoing advocacy for students with disabilities.

Next we turn to the District's assertion that your contract was not renewed because your performance evaluation was not satisfactory. You did receive a negative performance evaluation from the Principal. The first page of this evaluation is dated October 17, 2010[11] and the third page is dated March 17, 2010. During our investigation a former ELI representative told us that she believed this evaluation was "bogus" because the District was supposed to do a peer review as part of your evaluation and that this was never done. We confirmed that a peer review should have been conducted. According to District policy, evaluations were to include two components: a peer evaluation, as recommended by the American Association of School Psychologists, and a school principal/assistant principal evaluation. The Board-approved performance evaluation form for psychologists is a 7 page document and the pages are numbered 1-7; the performance evaluation done for you is only 3 pages long and was repaginated 1-3. It is therefore undisputed that a peer review was not accomplished in this instance.

Based on the above discrepancies, we looked closer at the Board's decision not to renew your contract. In the Board's very short meeting minutes from its April 13, 2010 meeting in which the board did not renew your contract, the minutes indicate that the "non-renewal of employment contracts for certified psychologists is governed by A.R.S. 15-503(D)." That provision of the

[11] We believe this date may be in error and that the Principal may have actually conducted that portion of the assessment entitled "IEP/MET Explanation Checklist" on October 17, 2009 while you were still employed by the District.

Arizona Revised Statute indicates, amongst other things, that the Board must give notice of its intent not to renew a contract on or before April 15th. It appears the Board issued a letter dated April 14, 2010 to you. However, it is A.R.S. 15-503(C) that is more on point with respect to the issue of the negative performance evaluation. Arizona Revised Statute 15-503(C) requires, amongst other things, that "After the transmittal of the assessment a board designee shall confer with the certificated school psychologist to make specific recommendations as to areas of improvement in the certificated school psychologist's performance." It also requires that the "evaluation process for certificated school psychologists is to include appeal procedures for certificated school psychologists who disagree with the evaluation of their performance, if the evaluation is for use as criteria for establishing compensation or dismissal." We learned from you, and your current attorney, that the first time you saw the negative performance evaluation was when you reviewed the documents the District submitted in response to your unemployment claim. There is also no evidence that anyone from the District attempted to confer with you after the evaluation was completed on March 17, 2010. Furthermore, and most importantly, we can find no evidence that you were ever given notice of or an opportunity to appeal this evaluation with which you disagreed once you received a copy of it through the unemployment claim process. We find, by a preponderance of the evidence, that this performance evaluation should never had been used as a basis for non-renewal of your contract and do not find that it is a legitimate reason for the District's decision not to renew your contract.

Finally, we turn back to the matter of pretext in light of the memorandum given to you at the October 29, 2009 meeting. That memorandum mentions your protected activities no less than three times. Most notably, the District states in writing that your "job is at risk" after reprimanding you for taking your concerns to the state Department of Education. We are hard pressed to conclude that any of the stated reasons for not renewing your contract are legitimate in light of such strong evidence of pretext. We find that this case presents a clear example of a District getting rid of an employee who was engaged in an ongoing protected activity of which it was clearly aware and which it did not like. This, along with the fact that the District never once responded to your repeated written complaints of discrimination against students with disabilities, weighs in favor of our ultimate finding that the District retaliated against you as alleged. We therefore find that the District retaliated against you for advocating for students with disabilities in violation of 34 C.F.R. §104.61, as it incorporates 34 C.F.R. §100.7(e) and 28 C.F.R. §35.134.

As was stated previously, the District agreed to take corrective action to resolve the violation found in this case. We are closing our investigation of this matter effective the date of this letter and will continue to monitor the District's implementation of the attached corrective action agreement.

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. You may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, we may release this document, related records, and correspondence upon request. If OCR receives a request, we will protect personal information to the extent provided by law.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by Federal law.

We thank you for bringing these allegations and other compliance concerns to our attention. If you have any questions, please contact Michael Sentel, at (303) 844-3333.

Sincerely,

Michael Sentel

for Erica R. Austin
Chief Attorney

Enclosure

Resolution Agreement
Tucson Unified School District
Case Number 08-10-1114

The U.S. Department of Education, Office for Civil Rights ("OCR") received a complaint against the Tucson Unified School District alleging, in relevant part, that the District retaliated against her for advocating for students with disabilities when it acted to intimidate her by creating a hostile environment and did not continue her employment as a school psychologist. OCR investigated the allegations and found evidence to support a finding that the District retaliated against the complainant when it threatened her employment and then did not renew her employment contract. Additionally, OCR found evidence to support a finding that the District failed to respond to disability complaints filed with the District by the complainant.

OCR determined that the District actions violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. pt. 104, which provide that no program or activity receiving Federal financial assistance from the U.S. Department of Education may discriminate on the basis of disability; and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-65, and its implementing regulation at 28 C.F.R. pt 35, which prohibit discrimination on the basis of disability by public entities. Specifically, individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134.

1. By August 31, 2012, the District shall provide the Complainant a check in the amount of ($180,000.00).[1]

   REPORTING REQUIREMENT: By August 31, 2012, the District will provide OCR with documentation evidencing payment to the Complainant of $180,000.

2. By August 31, 2012, the District will remove all 2009-2010 performance evaluations, the District's decision not to renew the complainant's employment with the District, and any other comments regarding the Complainant's conduct or performance during the 2009-2010 school year contained in the Complainant's personnel file. The Complainant's resignation from her employment with the District, effective June 30, 2010, will be placed in her personnel file together with a copy of OCR's resolution letter in this case.

   REPORTING REQUIREMENT: By September 15, 2012 the District will provide OCR with a written verification demonstrating that the District has removed all items identified in Term #2, and placed the Complainant's resignation and a copy of OCR's resolution letter in this case in her personnel file.

3. By August 31, 2012, the District shall designate one individual administrator who the District has established to be the only person designated by the District to provide future

[1] This amount represents approximately two years back pay plus two years front pay. The Complainant has agreed to provide the District with a settlement and release agreement as a condition of receiving the compensation.

employers reference information concerning the Complainant. The District will provide OCR with any contact information for witnesses in this investigation.

REPORTING REQUIREMENT: By September 15, 2012 the District will provide OCR with written notification of the name and title of one individual administrator who the District has established to be the only person designated by the District to provide future employers reference information concerning the Complainant and the witness contact information per written request made by OCR.

4. Within 60 days of the effective date of this Agreement, the District shall redistribute its policy for complaints of retaliation (Governing Board Policies AC, AC-R and GBP) to staff and administrators. The policies may be distributed electronically. At a minimum, the District will advise its staff and administrators that TUSD in no way condones any retaliatory behavior. Retaliation for opposition to discrimination is prohibited by federal and state laws and TUSD Governing Board Policies. All TUSD employees are required to comply with these legal requirements. Additionally, the notice to staff will include the requirements pertaining to retaliation found in Section 504 of the Rehabilitation Act of 1973, and its implementing regulation found at 34 C.F.R. pt. 104.; and Title II of the Americans with Disabilities Act of 1990, and its implementing regulation at 28 C.F.R. pt 35.

   REPORTING REQUIREMENT: By October 31, 2012 the District will provide OCR with a copy of the electronic notice made to all staff and administrators called for in #4.

5. Within 120 days of the effective date of this Agreement, the District will provide training about the District's Discrimination Grievance Procedure to all District personnel who may be involved in or need knowledge of the Procedure. At a minimum this training will be provided to all employees in the Exceptional Education Department and Equal Employment Opportunity Office, explaining the Procedure and how it will be followed.

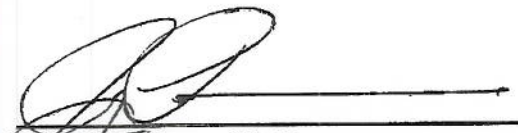
   REPORTING REQUIREMENT: Within 30 calendar days of the completion of #5 above, the District will provide OCR with documentation that it has provided appropriate District staff with the training referenced in item #5, including the dates of the training, the names and titles of the trainer(s), a copy of any materials used or distributed during the training, and a sign-in sheet with the names and titles of the District's staff who attend the training.

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the recipient has fulfilled the terms of this agreement and is in compliance with the regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. pt. 104; and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131-65, and its implementing regulation at 28 C.F.R. pt 35, which were at issue in this case.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before

initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

The District understands that by signing this agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with the regulation implementing Section 504 and Title II, which were at issue in this case.



John P. Pedicone, Ph.D.
Superintendent

8-27-12
Date