



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

November 18, 2014

Dr. Margaret Dolan
Superintendent
Westfield School District
302 Elm Street
Westfield, New Jersey 07090

Re: Case No. 02-14-1274
Westfield School District

Dear Dr. Dolan:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) with respect to the above-referenced complaint filed against the Westfield School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the bases of his disability and race, or, in the alternative, retaliated for her disability-related advocacy, by failing to provide the Student with home instruction for his English class from February 2014 until the end of school year 2013-2014.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the Department. In addition, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. OCR is also responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in educational programs and activities receiving financial assistance from the Department. The District is a recipient of financial assistance from the Department, and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504, the ADA and Title VI.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI, provides that:

No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In its investigation, OCR interviewed the complainant and reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant/injured party was subjected to an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

The complainant engaged in protected activity by advocating on behalf of the Student during school years 2012-2013 and 2013-2014 and filing previous OCR complaints on behalf of the Student.¹ The District was aware of this protected activity.

The complainant alleged that the District discriminated against the Student, on the bases of his disability and race, or, in the alternative, retaliated for her disability-related advocacy, by failing to provide the Student with home instruction for his English class from February 2014 until the end of school year 2013-2014. The complainant informed OCR that the Student is one of a few black students in the District. The complainant stated that she believed that the Student was discriminated against on the basis of his race because white students received the requisite home instruction; however, she did not provide OCR with specific examples of any such white students.

During school year 2013-2014, the Student was in the 12th grade at Westfield High School (the School);² and was eligible to receive related aids and services, outlined in a Section 504 Plan, dated October 9, 2013, to accommodate XXXXXXXXXX.³

¹ On April 12, 2013, the complainant filed OCR Case No. 02-13-1181 against the District. On June 11, 2013, the complainant filed OCR Case No. 02-13-1267 against the District. Both cases were resolved on August 26, 2013 through OCR's Early Complaint Resolution process.

² XXXXXXXXXXXXXXXX

³ The Student's Section 504 Plan provided the following related aids and services: permission to go to the school nurse when needed during class and testing; permission to make up any missed class or test time; permission to carry a water bottle and snacks during class and testing; permission to refrain from strenuous aerobic or non-aerobic activity during physical education class, and have the physical education teacher assign an alternate activity; and provision of teacher or student notes when requested by the Student.

In or around January 2014, the complainant submitted to the District an application for home instruction, citing an exacerbation of the Student's medical issues.⁴ The District granted the request, and created a formal home instruction plan for the Student.⁵ The home instruction plan provided one hour per week of home instruction to the Student for each major course in which he was enrolled, including his English class.⁶

OCR determined that between January 1 and 27, 2014, the District contacted eleven teachers in the District, and asked whether they would be willing to provide home instruction to the Student for his English class; all of these teachers declined the position. The District informed OCR that the teachers declined the offer because they were aware that prior home instructors encountered problems with scheduling home instruction sessions for the Student,⁷ as the complainant was difficult to reach and often cancelled appointments at the last minute.⁸

The District found a home instructor for the Student's English class on January 28, 2014. The home instructor made many attempts to contact the complainant by telephone to make an appointment, but the complainant's voicemail would not accept messages. The instructor ultimately scheduled an appointment for February 7, 2014; however, the complainant cancelled the appointment shortly before it was supposed to begin. The complainant and the home instructor re-scheduled the appointment for February 10, 2014. On February 10, 2014, the home instructor arrived at the complainant's home at the scheduled time, but neither the complainant nor the Student were home. The complainant called the home instructor later that evening stating that she and the Student were not at home because they were at a doctor's appointment. The home instructor submitted her resignation to the District on February 12, 2014, citing the difficulty scheduling appointments with the complainant and the complainant's inability to keep the appointments.

Immediately thereafter, the District began to search for another English class home instructor, but were not successful because District teachers were aware of the difficulties of scheduling home instruction sessions with the complainant. In March 2014, the District contacted a home instructor referral service company (the company), to locate a new English class home instructor for the Student. Between March and May 2014, the District repeatedly followed up with the company, but the company was not able to locate a home instructor for the Student until May 5, 2014. The District expedited the background security check of the home instructor, and she began providing English class home instruction to the Student on May 23, 2014, and continued doing so through the end of school year 2013-2014. The District informed OCR that during this time, the Student was able to make up the work that he had missed earlier in the school year; and ultimately passed the English class.

⁴ The Student's Section 504 Plan for school year 2013-2014 did not require home instruction.

⁵ The written plan was dated February 10, 2014; although the District began looking for an instructor prior to that, on January 1, 2014.

⁶ The complainant's allegation relates only to the District's alleged failure to provide the Student with home instruction for his English class.

⁷ The Student had received home instruction at various times throughout his four years at the School.

⁸ The District informed OCR that home instructors are paid only when a home instruction session is completed; they do not get paid if a parent cancels a session unexpectedly.

OCR determined that 67 other students in the District received home instruction during school year 2013-2014; of these 67 students, seven are black, and 42 are disabled. The District asserted that it provided each of the 67 students with the requisite home instruction, and that none of these students or their families engaged in protected activity.

On November 12, 2014, the District voluntarily entered into the attached resolution agreement to resolve the complaint, in accordance with Section 302 of OCR's Case Processing Manual. OCR will monitor implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

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

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 complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this letter and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that if released could constitute an unwarranted invasion of personal privacy.

If you have questions about OCR's determination or wish to discuss it further, please contact Richard L. Anderson, Compliance Team Investigator, at (646) 428-3781 or Richard.Anderson@ed.gov; or Coleen Chin, Senior Attorney, at (646) 428-3809 or Coleen.Chin@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.