



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
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NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
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July 12, 2016

Carmen Fariña
Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, New York 10007

Re: Case No. 02-13-1194
New York City Department of Education

Dear Chancellor Fariña:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the New York City Department of Education (NYCDOE). The complainant alleged that the NYCDOE discriminated against her daughter (the Student), on the basis of her disability, by failing to respond appropriately to her request for related aids and services for the Student during school year 2012-2013 (Allegation 1); and, failing to provide related aids and services to the Student in accordance with her Section 504 plan during school year 2012-2013 (Allegation 2).¹

OCR is responsible for enforcing 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 and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also 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. The NYCDOE 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 and the ADA.

¹ During OCR's investigation of Allegation 1, OCR sought additional information from the complainant regarding Allegation 1. In the course of those discussions, the complainant raised Allegation 2.

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

OCR determined that during school year 2012-2013, the Student was in the ninth grade. The Student attended New Dorp High School (the School).

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires recipients to provide a free, appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction. The provision of an appropriate education is the provision of regular or special education and related aids and services that are (i) designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students are met; and (ii) based upon adherence to procedures that satisfy the evaluation and placement requirements of §§ 104.34, 104.35 and 104.36. The implementation of a Section 504 plan is one means of meeting this requirement.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(c), provides that in interpreting evaluation data and making placement decisions, including decisions regarding a student's eligibility for special education and related aids and services, a recipient shall draw upon information from a variety of sources and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. The regulation implementing Section 504, at 34 C.F.R. § 104.36, requires recipients to establish and implement a system of procedural safeguards that includes notice when identifying, evaluating, or determining the educational placement of persons with disabilities.

With respect to Allegation 1, the complainant alleged that the NYCDOE discriminated against the Student, on the basis of her disability, by failing to respond appropriately to the complainant's request for related aids and services for the Student during school year 2012-2013. Specifically, the complainant alleged that on August 29, 2012, she submitted a request to the School for a Section 504 plan for the Student, which contained a list of recommended related aids and services from the Student's physician. The complainant stated she never received a response from School or NYCDOE officials, and did not receive a copy of a Section 504 plan or official notice from the NYCDOE that it had been approved.

OCR determined that on or about August 29, 2012, the complainant spoke with the School's guidance counselor regarding the Student's disability, XXXXXXXXXXXXXXXX. Following this conversation, the guidance counselor informed the Student's teachers of the Student's disability. OCR determined that also on or about August 29, 2012, the Student's physician submitted the following to the School:

- (1) the NYCDOE "Request for an Accommodation under Section 504" form, with a handwritten notation that stated, "extended deadline for assignments, extra time for exams, extra set of text books for home, copies of notes during absence, do not grade on lack of participation due to absence;"

- (2) a list of requested accommodations appended to the form, including: (1) patient has difficult time completing assignments; (2) extra help on assignments; (3) extended deadlines to complete assignments during her absences; (4) extra copy of text books to keep at home; (5) home schooling, if necessary; (6) provide student an opportunity to make-up assignments; (7) absences will not be held against Student at grading time; and (8) give child shorter assignments, to focus on material missed during absences; and
- (3) a letter from the physician, dated August 29, 2012, that recommended the following accommodations: “another set of textbooks to leave at home; restroom privileges; no gym-PE; and when absent, notes given upon return”.

OCR determined that on September 6, 2012, the School’s assistant principal (AP 1), who also served as the School’s Section 504 Coordinator, convened a meeting with the School’s guidance counselors and its assistant principal of pupil personnel (AP 2) to discuss the complainant’s request for accommodations, dated August 29, 2012. OCR determined that the complainant was not present at the meeting, and the NYCDOE did not provide any evidence to substantiate that the complainant was notified of or invited to the meeting. At the meeting, the group approved the request for related aids and services for the Student, memorialized in a form AP 1 completed. On the form, dated September 6, 2012, AP 1 checked a field marked “approved”, and wrote, “[The Student] is approved for extended time on all exams. In addition she may have the opportunity to make up missing work.” This form was attached to the “Request for an Accommodation under Section 504” form that the complainant had previously submitted on August 29, 2012. According to the NYCDOE, the following related aids were approved for the Student: opportunity to make up her class work and homework within a reasonable amount of time following an absence; extra set of textbooks provided if the teacher uses textbooks in the class; and extra time on all exams and quizzes. The NYCDOE did not approve the complainant’s request that the Student not be graded on the fact that she missed school or that absences not count against her, but instead gave the Student the opportunity to make up all missed class work and homework, as described above. OCR determined that the NYCDOE did not provide written notification to the complainant of the approved plan, nor did it seek the complainant’s signed consent to implement the plan.

The NYCDOE’s Section 504 policies and procedures, which are found in Chancellor’s Regulation A-710, expressly require the NYCDOE and its schools to include a parent as part of any Section 504 team, provide the parent with advance notice of any team meetings, provide written notification to the parent of the 504 team’s determination with respect to her or his child, and also seek the parent’s signed consent before implementing a Section 504 plan.

The School’s guidance counselor asserted that she contacted the complainant on October 4, 2012, to inform her that a Section 504 plan had been approved for the Student. The NYCDOE provided documentation confirming that a conversation took place between the complainant and the guidance counselor; however, the complainant denied that the guidance counselor or anyone at the NYCDOE informed her at that time or any other time whether the plan had been approved. The complainant stated that she was aware that the Student’s teachers were provided with a copy

of the Student's Section 504 plan at the beginning of the school year, in September 2012; however, no one provided a copy to her.

Based on the above, OCR determined that the School and the NYCDOE failed to notify the complainant of the meeting scheduled to discuss the Student's eligibility for related aids and services under Section 504, and of its determination with respect to her request for Section 504 related aids and services, in violation of the regulation implementing Section 504, at 34 C.F.R. § 104.36.

On July 8, 2016, the NYCDOE agreed to implement the enclosed resolution agreement, which addresses the compliance issues identified with respect to Allegation 1. OCR will monitor implementation of the resolution agreement.

With respect to Allegation 2, the complainant alleged that the NYCDOE discriminated against the Student, on the basis of her disability, by failing to provide related aids and services to the Student in accordance with her Section 504 plan during school year 2012-2013.² Specifically, the complainant alleged that School staff failed to provide to the Student with (a) extra time to make up a test she missed due to a disability-related absence; (b) extra time to make up assignments that she missed due to disability-related absences; (c) copies of class notes; and (d) an extra set of textbooks to keep at her home.

The Student's teachers informed OCR that they were aware of the Student's Section 504 plan from the beginning of the school year. OCR's review of electronic mail (email) correspondence between the complainant and the Student's teachers confirmed this.

With respect to Allegation 2(a), the complainant alleged that on one unspecified occasion during the fall of 2012, the Student's Spanish teacher for that semester (Spanish teacher 1) did not allow the Student to make up a test she missed during a disability-related absence. OCR determined that the Student's Section 504 plan did not specifically require teachers to allow the Student to make up missed tests. Nevertheless, OCR determined that Spanish teacher 1 interpreted the provision in the Student's Section 504 plan allowing the Student extra time to make up class work and homework within a reasonable time, to also include tests. Spanish teacher 1 stated that the Student missed several tests in his class, but never arranged to make up her missed exams.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find the complainant's assertion that Spanish teacher 1 failed to allow the Student to make up a test she missed during a disability-related absence was supported by a preponderance of the evidence. Accordingly, OCR will take no further action regarding Allegation 2(a).

With respect to Allegation 2(b), the complainant alleged that Spanish teacher 1 generally did not allow the Student to make up missed work or submit completed make-up work. The

² The complainant advised OCR that she was under the impression that the Student had a Section 504 plan in place, as she believed that upon the School's receipt of her request, dated August 29, 2012, the Student was entitled to the related aids and services recommended by the Student's physician.

complainant did not provide any specific information about the work the Student missed, such as dates or descriptions of assignments.³ As stated above, the Student's Section 504 plan required teachers to provide the Student with an opportunity to make up her class work and homework within a reasonable amount of time following an absence.

Spanish teacher 1 informed OCR that he provided the Student with the opportunity to make up her missed class work and homework during the fall 2012 semester, but the Student did not avail herself of the opportunity. Spanish teacher 1 stated that pursuant to the Student's Section 504 plan, he informed the Student that during her time in his class he would accept all late assignments that were handed in within a reasonable period of time after she returned from her absences. With respect to missing assignments, Spanish teacher 1 stated that the Student turned in several missed homework assignments, but did not do so for several weeks after returning to school. He stated that he did not consider this a reasonable amount of time; therefore, he could not accept the assignments.

Additionally, in affidavits submitted to OCR by the Student's other teachers, the teachers stated that much of the time, the Student did not submit makeup work even after they reminded her to do so. They also stated that the Student often failed to complete classwork that was assigned when she was present in class, and did not avail herself of extra time she had been provided to take quizzes and tests. The teachers' assertions are corroborated by contemporaneous emails between the complainant and the Student's teachers during school year 2012-2013, regarding the Student's completion of classwork and homework. There are multiple references to teachers' providing the Student extra time to complete missed assignments but the Student's not submitting makeup assignments until weeks after an absence. Teachers also made reference to the Student's submitting makeup work that was only partially completed.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find the complainant's assertion that Spanish teacher 1 failed to allow the Student to make up missed work or submit completed make-up work was supported by a preponderance of the evidence. Accordingly, OCR will take no further action regarding Allegation 2(b).

With respect to Allegation 2(c), the complainant alleged that School staff failed to provide copies of class notes to the Student. OCR determined that although the complainant requested that the Student's Section 504 plan provide for the Student to receive copies of class notes, no such provision was ultimately included in the Section 504 plan created as a result of School staff's meeting about the Student on September 6, 2012. Accordingly, OCR has determined that the Student was not entitled to receive copies of class notes, pursuant to her Section 504 plan during school year 2012-2013. Accordingly, OCR will take no further action regarding Allegation 2(c).

With respect to Allegation 2(d), the complainant alleged that the Student did not receive an extra set of textbooks to keep at home during school year 2012-2013, as required by the Student's

³ The complainant generally asserted that the Student's other teachers did not follow her Section 504 plan, but she did not provide other specific examples in support of this assertion. Accordingly, OCR determined that the complainant's allegation lacked sufficient detail for OCR to infer that discrimination may have occurred; and, OCR did not further pursue this part of the complainant's allegation.

Section 504 plan. During the course of the investigation, the complainant clarified that only the Student's history class had a textbook in addition to the workbooks that were used in the rest of the Student's classes. The complainant stated that the Student's English class used several novels, but these were not difficult for the Student to transport between home and school.

The NYCDOE asserted that during school year 2012-2013, the School provided extra textbooks to the Student as appropriate, but most of the time, there were no textbooks being used during instruction. AP 1 advised OCR that the School's teachers typically used workbooks and handouts, instead of textbooks, to differentiate lessons for specific students within their classrooms. AP 1 advised OCR that most of the Student's classes during school year 2012-2013, including history, used workbooks and handouts that students were required to complete with information gleaned during in-class instruction. AP 1 stated that it would not have been feasible to provide the Student extra workbooks for home use, because the Student would require in-class assistance to complete any workbook assignments she missed during an absence. Therefore, the Student's teachers helped her complete the workbook assignments in school when she returned from an absence. OCR determined that the Student's history class did not use a textbook, as the complainant alleged; however, OCR determined that the Student's math class used a textbook, and the School provided an extra math textbook to the Student for home use.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the NYCDOE discriminated against the Student, on the basis of her disability, by failing to provide an extra set of textbooks to the Student for home use during school year 2012-2013, as required by the Student's Section 504 plan. Accordingly OCR will take no further action with respect to Allegation 2(d).

This letter should not be interpreted to address the NYCDOE'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 file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the NYCDOE 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, you 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, it 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.

If you have any questions regarding OCR's determination, please contact Eric Bueide, Compliance Team Attorney, at (646) 428-3851 or Eric.Bueide@ed.gov; or Crystal Johnson, Senior Compliance Team Investigator, at (646) 428-3821 or Crystal.Johnson@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Robin Greenfield, Esq.