



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

January 21, 2014

Dr. Judith Pastel
Interim Superintendent of Schools
Skaneateles Central School District
45 East Elizabeth Street
Skaneateles, New York 13152

Re: Case No. 02-13-1290
Skaneateles Central School District

Dear Dr. Pastel:

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 you filed against the Skaneateles Central School District (the District). The complainant alleged that the District discriminated against her daughter (the Student), on the basis of her disability, by failing to respond to her complaint, made on January 18, 2013, that students subjected the Student to harassment because of her disability (Allegation 1). The complaint also alleged that the District retaliated for her disability-related advocacy on behalf of the Student, by filing a report of educational neglect regarding the Student with Child Protective Services (CPS) on or about May 13, 2013 (Allegation 2).

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 and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the 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 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 both Section 504 and the ADA.

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 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which 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.

The regulation implementing Section 504, at 34 C.F.R. §104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the requirements of Section 504 and its implementing regulation. The regulation, at 34 C.F.R. §104.8(a), also requires each such recipient to take appropriate steps to notify participants, beneficiaries, applicants and employees that it does not discriminate on the basis of disability; and, that this notice should also include the identity of its designated coordinator(s). In addition, the regulation implementing Section 504, at 34 C.F.R. §104.7(b), provides that recipients shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. The regulation, at 34 C.F.R. §104.8(b), requires recipients to publish this notice in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees.

The regulation implementing Title II of the ADA, at 28 C.F.R. §35.107(a), states that a public entity that employs fifty or more persons shall designate at least one employee to coordinate its efforts to comply with the requirements of the ADA, including any investigation of any complaint communicated to the public entity alleging noncompliance with or any actions that would be prohibited by the ADA or its implementing regulation. The regulation also requires each such public entity to make available to all interested individuals the name, office address, and telephone number of its designated coordinator(s). In addition, the regulation implementing Title II of the ADA, at 28 C.F.R. §35.107(b), provides that each such public entity shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action prohibited by Title II or its implementing regulation.

During its investigation, OCR interviewed the complainant and members of District staff. OCR also reviewed documentation provided by the complainant and the District. In analyzing the information obtained, OCR reviewed whether the District had: (a) designated and provided notice of a Section 504/ADA Coordinator; (b) provided notice that it does not discriminate on the basis of disability; and (c) adopted and published grievance procedures providing for the prompt and equitable resolution of student and employee complaints of discrimination and harassment on the basis of disability.

Section 504/ADA Coordinator:

OCR determined that the District has designated the Dignity Act Coordinator as its Section 504/ADA Coordinator. Accordingly, OCR has determined that the District has designated an individual to coordinate its efforts to comply with the requirements of both Section 504 and Title II, as required by 34 C.F.R. §104.7(a) and 28 C.F.R. §35.107(a).

Notice of Non-Discrimination:

OCR determined that the District's Code of Conduct, which is available in hard copy and on the District's website, includes a notice of non-discrimination prohibiting the harassment or discrimination of students on the basis of disability, but does not identify the Section 504/ADA Coordinator. OCR determined that District Policy 1940, from its Policy Handbook, states that the District prohibits discrimination and harassment of students on the basis of disability, but does not identify the Section 504/ADA Coordinator. The District's School Calendar for 2013-2014 includes a notice of non-discrimination prohibiting discrimination on the basis of disability, but it does not identify the Section 504/ADA Coordinator. OCR determined that not all applications for employment contain a non-discrimination statement; and no applications identified the Dignity Act Coordinator as the Section 504/ADA Coordinator, or provided an email address, phone number, or office address for the coordinator.

Grievance Procedures:

In accordance with OCR policy, elements for determining whether procedures are prompt and equitable include whether the procedures: (a) provide for notice to students and employees of procedures, including where complaints can be filed; (b) apply to discrimination/harassment by employees, students, and third parties; (c) provide for adequate, reliable and impartial investigation, including an opportunity to present witnesses and evidence; (d) have reasonably prompt timeframes for major stages of the grievance process; (e) provide for notice to the parties of the outcome; and (f) provide assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate.

The District's Policy 1940 states that the District will investigate all complaints of harassment and discrimination, either formal or informal, and take prompt corrective measures, as necessary. Complaints will be investigated in accordance with applicable policies and regulations. The policy further states that if, after an appropriate investigation, the District finds that this policy has been violated, corrective action will be taken in accordance with District policies and regulations, the Code of Conduct, and all appropriate federal or state laws. OCR determined, however, that the District has neither adopted nor published grievance procedures to implement this policy.

With respect to the complainant's allegations, OCR determined that the Student was in the seventh grade at Skaneateles Middle School during school year 2012-2013. The Student was classified as eligible for special education and related services under the eligibility category of "intellectual disability."

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of her disability, by failing to respond to her complaint, made on January 18, 2013, that students subjected the Student to harassment because of her disability. Specifically, the complainant informed OCR that she complained to the Director of Pupil Personnel and Special Services (the Director) that students were harassing the Student because of her disability by raising their fingers to their foreheads and forming the letter "L" for "loser". Disability harassment is a form of discrimination prohibited by Section 504, the ADA and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently severe, persistent, or pervasive to limit an individual's ability to participate in or

receive benefits, services or opportunities in the institution's program. If OCR determines that harassing conduct occurred, and that the District had actual or constructive notice of the harassment, OCR will examine additional factors to make a determination as to whether a hostile environment existed and whether the District took prompt and effective action to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects.

OCR determined that on or about November 28, 2012, the complainant sent an email to the Director, in which she alleged that an unidentified school staff member confirmed that students in the school building commonly used the "L" gesture, and that this constituted a form of bullying of the Student.¹ OCR determined that the Director conducted an investigation of the complainant's allegation by requesting written statements from nine adult staff members who were present with the Student throughout the school day: an administrative assistant; the speech pathologist, the three special education paraprofessionals working with the Student; the occupational therapist; and the three special education teachers working with the Student.² OCR reviewed copies of these statements and determined that all staff indicated that they had not observed any instances of bullying in the form of the use of "L" sign for "loser" being directed at the Student. OCR determined that four of the "Affirmation" statements included additional remarks from District staff, which indicated that students were kind and friendly to the Student, and it was actually the Student they had witnessed using the "L" gesture.

Based on her investigation, the Director concluded that the evidence did not support the complainant's claim that students used the "L" for "loser" gesture towards the Student. The Director notified the complainant by letter, dated December 7, 2012, that she spoke with each staff member that worked with the Student, and no staff member had seen or heard other students using the "L" for "loser" gesture towards the Student. The Director also requested that the complainant identify any staff member that may have advised the complainant otherwise, so that the Director would be able to follow up with that person. The Director informed OCR that the complainant never identified a staff member that witnessed the alleged conduct. In addition, no staff member thereafter reported witnessing any such conduct.

OCR determined that during a meeting on January 18, 2013, the complainant reported to the Director that the Student had been coming home from school using the "L" sign for "loser". The complainant believed that the Student was imitating other students, and asserted that it was a form of disability harassment.³ The Director stated that she informed the complainant that she had already investigated the alleged harassment of the Student in response to a complaint the complainant had previously made in November 2012; and that the Director could not corroborate the complainant's allegation. The complainant advised the Director that she was not alleging that there had been any new incidents of alleged harassment since her previous complaint.

¹ Prior to this complaint, in early November 2012, the complainant complained to the Director that the Student was subjected to general bullying in school. In response, the Director questioned the staff members who were present with the Student throughout the day as to whether the Student was being bullied at school. The Director informed the complainant by letter, dated November 16, 2012, that she found no evidence to corroborate that the Student was being bullied at school.

² The Director informed OCR that there is always one of nine adult staff members present with the Student; and that if any bullying or harassment had occurred during the school day, a staff member would have witnessed and reported such conduct.

³ At the meeting, the complainant also expressed interest in home-schooling the Student. This is discussed below in connection with Allegation 2.

Based on the foregoing, OCR determined that the District promptly and equitably investigated the complainant's complaint that students were directing the "L" for "loser" sign at the Student when she first complained on or about November 28, 2013. OCR determined that the complainant's subsequent complaint, made on January 18, 2013, concerned allegations that had already been raised and investigated. The complainant did not provide and OCR did not find any evidence that the complainant presented the District with any information or evidence on January 18, 2013, that would have obligated the District to conduct any additional investigation at that time. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District discriminated against the Student, on the basis of her disability, by failing to respond to her complaint, made on January 18, 2013, that students subjected the Student to harassment because of her disability. Accordingly, OCR will take no further action with respect to Allegation 1.

With respect to Allegation 2, the complainant alleged that the District retaliated for her disability-related advocacy on behalf of the Student, by filing a report of educational neglect regarding the Student with CPS on or about May 2, 2013. 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 suffered 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.

OCR determined that the complainant engaged in protected activity by advocating on behalf of the Student during school year 2012-2103, beginning in fall 2012. OCR further determined that the District was aware of her protected activity.

OCR determined that on February 23, 2013, the District filed a report of educational neglect regarding the Student with CPS. The District asserted that it was required to do so pursuant to District policy and state law, because the Student had accumulated more than 20 unexcused absences.⁴ The Director stated that by February 25, 2013, the Student had accumulated 37 unexcused absences since November 13, 2012; and had not attended school at all since January

⁴ OCR determined that District Policy 7610 states that the New York State Child Protective Services Act of 1973 mandates that school personnel report suspected cases of child abuse and neglect to the appropriate agency. Excessive unexcused absences are considered educational neglect. The Director stated that it is the District's practice to report a matter to CPS where a student has accumulated more than 20 unexcused absences.

2, 2013.⁵ The Director stated that she was therefore obligated to file a report of educational neglect regarding the Student with CPS on February 25, 2013.⁶

The District informed OCR that during school years 2011-2012 and 2012-2013, it filed only one other report of educational neglect concerning a student (Student 2), after Student 2 had accumulated more than 20 unexcused absences; the parent or guardian had not engaged in any protected activity. The complainant did not provide and OCR did not find any evidence that there were any instances where a student had accumulated more than 20 unexcused absences and the District did not submit a report of educational neglect to CPS.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-retaliatory reason for submitting a report of child neglect to CPS; specifically, the Student had 37 unexcused absences. OCR further determined that the District's proffered reason was not pretext for unlawful retaliation, because its actions were in accordance with New York State Law and District policies, requiring the District to report the matter to CPS; and the District had reported a similarly situated student whose parent or guardian had not engaged in protected activity. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District retaliated for her disability-related advocacy on behalf of the Student, by filing a report of educational neglect regarding the Student with CPS on or about May 2, 2013. Accordingly, OCR will take no further action with respect to Allegation 2.

On January 21, 2014, the District voluntarily agreed to implement the enclosed resolution agreement to address the above-referenced compliance concerns regarding the District's notice of non-discrimination and grievance procedures. OCR will monitor the District's implementation of the resolution agreement. If the District fails to comply with its terms, OCR will resume its investigation of this complaint.

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.

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

⁵ The Director stated that the complainant unilaterally removed the Student from school on or about November 13, 2012; and reported that the Student only attended school for one or two days in December 2012. At a meeting on January 18, 2013, which included the Director, the complainant, the complainant's attorney and a representative of the complainant from Options for Independence, the complainant expressed interest in home-schooling the Student. The Director advised OCR that she provided the complainant and her attorney with information related to home-schooling; and informed her that she must complete and return the Individual Home Instruction Plan (IHIP) for the Student. The complainant failed to submit an IHIP for the Student. The Director stated that she requested receipt of the IHIP from the complainant's attorney on February 7 and 12, 2013, but never received it.

⁶ The District informed OCR that once a report of educational neglect concerning a District student is filed with CPS, the Cayuga County Social Services investigates the matter and determines whether to file a petition with the Family Court of New York. Based on its investigation of the District's report of educational neglect concerning the Student, the Assistant Attorney for Cayuga County filed a "Petition of Child Neglect" regarding the Student on or about May 2, 2013.

released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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.

If you have any questions, please contact Crystal Johnson, Senior Compliance Team Investigator, at (646) 428-3821 or Crystal.Johnson@ed.gov; or Ryan Milligan, Compliance Team Attorney, at (617) 289-0189 or Ryan.Milligan@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.