

April 23, 2015

David M. Healy
Superintendent of Schools
Toms River Regional Schools
1144 Hopper Avenue
Toms River, New Jersey 08753

Re: Case No. 02-15-1008
Toms River Regional School District

Dear Superintendent Healy:

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 Toms River Regional School District. The complainant alleged that the District discriminated against her XXX (the Student), on the basis of XXX disability, by failing to respond appropriately to complaints that she made alleging that a teacher (the Teacher) discriminated against the Student on the basis of XXX disability, or retaliated against her for her advocacy on behalf of the Student, by reporting her to the New Jersey Department of Children Protection and Permanency (DCPP)¹ in January 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 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 (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 Section 504 and the ADA.

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

¹ The DCPP was formerly known as the New Jersey Division of Youth and Family Services (DYFS), an agency within the New Jersey Division of Children and Families (DCF).

The regulation implementing Section 504, at 34 C.F.R § 104.7(b), requires that a recipient 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. In addition, 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 implementing Section 504, 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). 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 the ADA has similar provisions, at 28 C.F.R. §§ 35.106 and 35.107.

Section 504/ADA coordinator:

The District identified the Principal of Intermediate East School as the District's 504/ADA Coordinator, the individual designated to coordinate its efforts to comply with the regulations implementing Section 504 and the ADA. Accordingly, OCR determined that the District met the requirement of the regulations implementing Section 504 at 34 C.F.R. § 104.7(a) and the ADA at 28 C.F.R. § 35.107(a).

Notice of Non-Discrimination:

The District provided a copy of Policy 1510: Rights of Persons with Handicaps or Disabilities/Policy on Non-Discrimination, which is published with its other public notices on its website, as well as in its Code of Student Conduct Affirmative Action Policy. OCR determined that Policy 1510 and the Code of Student Conduct Affirmative Action Policy contain a notice of non-discrimination prohibiting discrimination based on disability. OCR further determined that the title and contact information for the District's 504 Coordinator is included in Policy 1510, but not in the Code of Student Conduct Affirmative Action Policy. OCR determined that the publication of the notice of non-discrimination in Policy 1510 and in the Code of Student Conduct Affirmative Action Policy was not sufficient to notify all participants, beneficiaries, applicants and employees that the District does not discriminate on the basis of disability, because it was not easily located or searchable on the District's website. Further, the District did not provide any documentation or other information demonstrating that the appropriate notice is published in any recruitment materials or other publications provided electronically or otherwise containing general information that it makes available to participants, beneficiaries, applicants and employees.

Grievance procedures:

In accordance with OCR policy, elements for determining if grievance procedures are prompt and equitable include whether the procedures: (a) provide for notice to students and employees of the 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 written 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.

OCR determined that the District's grievance procedure is published in its "Affirmative Action Overview Handbook" (the Handbook). OCR determined that the Handbook is posted on the District's website, which provides notice to students and employees of the procedure. The grievance procedure affords a grievant the opportunity to file a complaint and meet with the Affirmative Action Officer (AAO) regarding his or her concerns; accordingly, the procedure provides notice of where complaints can be filed. The grievance procedure provides for a three-step process for investigating complaints of discrimination, including complaints of disability discrimination filed by students, parents, employees, or members of the community. The grievance procedures include reasonably prompt timeframes for each of these steps. At Step 1, the Affirmative action officer has 10 days to meet and resolve the matter before it is escalated to the Superintendent. At Step 2, the Superintendent has 20 days to resolve the matter. If not, it goes to the District's Board of Education. At Step 3, the grievant must file a written grievance with the Board Secretary, and the Board of Education has 5 days from the meeting to respond. The procedure does not expressly provide the parties with an opportunity to present witnesses and evidence; although, it provides the grievant with an opportunity to present a written statement in his/her complaint. The procedure does not provide for written notice of the outcome to both parties, nor does it provide an assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate. The grievance procedure also provides for the right of the grievant to appeal the AAO's decision, but it does not offer that right to the accused.²

The Complainant's Allegation:

The complainant alleged that the District discriminated against the Student, on the basis of XXX disability, by failing to respond appropriately to complaints she made alleging that a teacher discriminated against the Student on the basis of XXX disability, or retaliated against her for her advocacy on behalf of the Student, by reporting the complainant to the DCPD in January 2014. During school year 2013-2014, the Student was enrolled in the District's XXX (the School). The

² Additionally, OCR noted that the District publishes a "Chain of Command" dispute resolution policy, at http://www.trschools.com/newsnotes/chain_of_command.asp. The "Chain of Command" Policy reads as follows: "... parents can become informed about the "Chain of Command", or where to begin the communication sequence regarding their child's problem. Parents of children with special needs should refer to the Special Education section below. Many parental questions are easily and completely answered by communicating directly with the educator in charge of the class or program. Each situation should first be addressed at whatever level the initial action was taken with appeals moving on to the next level on the chain of command. The easiest way to communicate would be by email (please see the respective e-mail addresses listed below). A phone call would be the next preferable way to communicate." It is unclear whether this policy is intended to serve as an additional grievance procedure for complaints of discrimination. These dual policies may confuse students, parents, employees and members of the public as to which is the appropriate policy. The "Chain of Command" policy, which is more readily found on the District's website than its grievance procedure, is not distinguished from the District's grievance procedure and requires an individual to resolve a matter with an individual's superior who may not, necessarily, be the AAO.

Student was classified as XXX, with a diagnoses of XXX cerebral palsy, and received special education and related aids and services pursuant to an Individualized Education Plan (IEP).

On or about January 10, 2014, District staff filed a report with DCPD alleging that the Student had been arriving to school in a wet pull-up, was suffering from untreated eczema, and exhibited the emergence of new behavioral symptoms that were suspected to be seizures. On or about January 13, 2014, the complainant contacted the School's Assistant Principal and other District staff to attempt to obtain information regarding the identity of the staff member(s) who made the referral. The complainant informed the Assistant Principal that she believed the DCPD report was made by the Student's teacher out of "revenge" for previous complaints that the complainant made. The complainant believed that the teacher was upset with her because her complaints resulted in the removal of the Student's classroom paraprofessional from the class. The Assistant Principal advised the complainant that DCPD reports are confidential and that she could not identify who made the report. The Assistant Principal did not take any further action in response to this communication.

Subsequently, in February or March 2014, the complainant contacted the Assistant Superintendent and informed him that she believed that the teacher had made the DCPD report because the teacher did not believe that the Student was in the appropriate placement, and the report was made to get the Student removed from that placement. The Assistant Superintendent stated that he investigated the matter by speaking with the previous Director of Special Education during a meeting, and concluded that the call to DCPD was appropriate; however, he did not speak directly with any other staff member who may have been involved with the complainant's allegation, and did not collect or examine any documentation or other evidence that may have been relevant to the issue. Further, the Assistant Superintendent never communicated the results of his investigation or his determination to the complainant or any other staff member.

On September 15 and 16, 2014, the complainant called the District's Supervisor of Special Services³ (Supervisor), and informed the Supervisor that she believed that the teacher made the DCPD filing in January 2014 "in retaliation and an attempt to get [the Student] out of her class." The Supervisor informed the complainant that DCPD calls are anonymous and that she could not confirm whether the teacher was the person who made the report; and, the Supervisor explained the DCPD abuse and neglect reporting process to the complainant.⁴ The Supervisor did not investigate whether the basis for the DCPD referral was discriminatory or retaliatory, or otherwise address the complainant's complaint.

In an electronic mail message (email) on October 5, 2014, the complainant informed the District's Board of Education that she believed that the complaint to DCPD was "discrimination and harassment" because the alleged behaviors upon which the DCPD report were based were

³ The prior Director had retired, and was replaced by this Director in July 2014.

⁴ According to the DCPD guidelines, reports of abuse and neglect shall be made by persons "having reasonable cause to believe that a child has been subjected to abuse or acts of abuse." Abuse is defined as "the physical, sexual or emotional harm or risk of harm to a child under the age of 18 caused by a parent or other person who acts as a caregiver for the child." Neglect is defined as occurring "when a parent or caregiver fails to provide proper supervision for a child or adequate food, clothing, shelter, education or medical care although financially able or assisted to do so."

related to the Student's disability. She also stated that no one at the District had responded to her request for an investigation into possible misconduct by the teacher to "force the parents to remove the child from her classroom, rather than confront her ineffectiveness." By email dated October 6, 2014, the Superintendent informed the complainant that he had referred the matter to the Supervisor and the Assistant Superintendent.

On or about October 7, 2014, the complainant spoke with the Director of Special Education (Director) regarding the DCPD referral. The Director advised OCR that she could not recall anything about the complainant's call, other than she was angry about the call to DCPD, believing it to be retaliatory and somehow connected to the teacher, and that the Director stopped her from discussing anything further and redirected her to a different issue with which she thought she could help the complainant. The Director informed OCR that she explained the mandated reporter requirements and discussed current matters related to the complainant's concerns about the Student's placement. The Director advised OCR that she did not know why the complainant asserted that the DCPD call was retaliatory or discriminatory, nor did she further investigate the assertion.

Later that day, the complainant emailed the Assistant Superintendent, stating that in speaking with the Director, "none of [her] allegations of discrimination are alleviated and that hearing anyone can call [DCPD] with concerns is not acceptable into this matter. There needs to be an investigation into this teacher misconduct." The Assistant Superintendent and the Supervisor stated that they did not further respond to the complainant's email because they believed that there was nothing more that could be done, since the matter involved a DCPD filing and such filings were confidential.

Based on the above, OCR determined that the complainant notified the District in or around February or March 2014, and again in September and October 2014, that she believed a District employee had discriminated on the basis of disability and/or retaliated by filing the DCPD report regarding the Student in January 2014. OCR determined that although the Assistant Superintendent inquired into circumstances regarding the complainant's concerns in March 2014, he did not conduct an adequate investigation in arriving at his determination that the DCPD call was founded, and did not inform the complainant of the results of the investigation. Additionally, in September and October 2014, when the complainant again complained about the DCPD referral, the District failed to specifically address or respond to the complainant's allegation that the filing with DCPD was discriminatory on the basis of disability, or retaliatory.

OCR independently investigated the complainant's concerns that a District employee filed a complaint of abuse with DCPD in order to discriminate against the Student on the basis of disability because she wanted XXX out of her class due to XXX "high needs"; and/or to retaliate against the complainant for her advocacy on behalf of the Student. Witnesses OCR interviewed stated that on several occasions the Student arrived at school with a pull-up soaked so thoroughly with urine that it appeared the pull-up had not been changed from the night before; and the Student had an unusually strong, acrid urine odor. Witnesses also stated that on one occasion, the Student had arrived at school in wet clothing and while attempting to change XXX, the overfull pull-up had disintegrated at the touch from being soaked, and was so full of urine that it spilled over onto the Student's socks. District staff informed OCR that by being in a wet pull-up

repeatedly for extended periods of time, the Student's skin had become so raw, chafed and painful, that it made it difficult for XXX to urinate without crying out in pain. According to the teacher, she and the paraprofessional raised the concerns with the complainant, but the complainant "did not want to hear it." Instead, the complainant questioned the teacher and paraprofessional as to why the school was using so many pull-ups during the school day, which the teacher believed meant that the complainant wanted the Student to sit in them longer to avoid using so many. District staff also informed OCR that the Student was arriving at school so hungry XXX had trouble participating in class, and the staff had to supplement the food the complainant supplied for the Student. District staff stated that when the complainant was confronted about the Student's extreme hunger and the fact that the allotment of food she had sent to school daily was insufficient to satisfy XXX hunger, the complainant's response was that the Student was being "manipulative" and that XXX was not really hungry. Staff also informed OCR that they contacted the complainant when the Student began manifesting new behavioral tics, which were suspected to be seizures; but the complainant did not indicate that she was planning to initiate medical evaluations or physician consultations in response to these concerns.

OCR's review of DCPD reports District staff filed regarding other students, including those whose parents or guardians had not engaged in protected activity, revealed that the report filed regarding the Student was made consistent with other reports. There were XXX other DCPD reports filed by District staff involving students at XXX during school year 2013-2014, of which the complainant was one; XXX reports involved disabled students, of which the Student was one. The bases for these reports included XXX, XXX, XXX, concerns regarding a student's XXX, and XXX concerns.

Based on the above, OCR determined that the District proffered a legitimate, non-discriminatory and non-retaliatory reason for making a DCPD report in January 2014 regarding the Student; namely, District staff suspected that the Student was being subjected to abuse and neglect. OCR determined that the proffered reason was not pretextual, as District staff members' concerns regarding the Student's welfare were reasonable based on their observations of the Student; District staff members are legally mandated to report incidents of suspected abuse and neglect to DCPD; and the DCPD report filed regarding the Student was made in accordance with DCPD guidelines and consistent with reports involving potential threats to a student's health and welfare made regarding other District students.

On April 16, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to this complaint. 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 letter 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 complainants 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 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 questions, please contact Gina Damasco, Compliance Team Attorney, at (646) 428-3924 or Gina.Damasco@ed.gov.

Sincerely,

Timothy C.J. Blanchard

Encl.