



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION II

32 OLD SLIP, 26th FLOOR  
NEW YORK, NY 10005-2500

REGION II  
NEW JERSEY  
NEW YORK  
PUERTO RICO  
VIRGIN ISLANDS

May 5, 2015

Dr. John Kellmayer  
Superintendent  
Brooklawn Public School District  
Alice Costello School  
Haakon Road  
Brooklawn, New Jersey 08030

Re: Case No. 02-15-1018  
Brooklawn School District

Dear Dr. Kellmayer:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against the Brooklawn School District. The complainant alleged that the District discriminated against her son (the Student) on the basis of his disability, or in the alternative retaliated because she xxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, by terminating the Student's enrollment in the District's before and after school program (the Program) on September 9, 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 U.S. Department of Education (the Department). OCR is also 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 education system. Therefore, OCR has jurisdictional authority to investigate this complaint under 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.

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

The complainant alleged that the District discriminated against the Student on the basis of his disability, or in the alternative retaliated because she xxxxxxxxxxxxxxxxxxxxxxxxxxxx, by terminating the Student's enrollment in the Program on September 9, 2014.

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/alleged injured party 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 when she xxxxxxxxx with the New Jersey Department of Education for a xxxxxxxxxxxxxxxx for the Student in or around xxxxxxxx. OCR further determined that the District was aware of the complainant's protected activity.

The Program is a before and after school program sponsored by the District's Board of Education (the Board). It provides child care services between the hours of 7:30 a.m. to 8:10 a.m.; and 3:00 p.m. to 5:45 p.m. for children attending the Alice Costello Elementary School (School 1), grades pre-k through eighth grade. To be eligible for the Program a student must be enrolled in the District; there are no other eligibility criteria. The regular daily tuition rate for one child to attend the Program during school year 2014-2015 is \$3.00 per hour, per child, if the child attends the Program regularly, and \$4.00 per hour, per child, if the child attends the Program occasionally.

On April 10, 2014, during school year 2013-2014, the District determined that the Student, then xxxxxxxx, was eligible to receive special education and related services. During school year 2013-2014, the Student attended a xxxxxxxxxxxxxxxxxxxxxxxx class for students with disabilities in an out-of-District school (School 2). Pursuant to the Student's Individualized Education Programs (IEPs) dated xxxxxxxx, and xxxxxxxx, for school year 2014-2015, the District recommended the Student's placement in a self-contained full-day (6.5 hours) xxxxxxxxxxxxxxxx program with opportunities for inclusion at School 1.<sup>1</sup> The Student's IEP also mandated that the Student receive: in-class occupational therapy once per week for 25 minutes; occupational therapy twice per week for 25 minutes on an individual basis; physical therapy once per week for 25 minutes on an individual basis; speech therapy twice per week for 25 minutes on an individual basis; and in-class speech therapy once per week for 25 minutes. The District's Child

---

<sup>1</sup> The District has one pre-kindergarten through 8<sup>th</sup> grade school.

Study Team (CST) also determined that the Student was eligible for Extended School Year services from July 7, 2014 - August 15, 2014, receiving the same related services as outlined for the regular school year. The Student's IEPs did not address the Student's participation in the Program.

OCR determined that the Student participated in the Program's before and after school services at School 1 in the spring 2014 to prepare the Student to transition to School 1 in September 2014. In or around xxxxx, the complainant xxxxxxxx because she disagreed with the District's proposed placement for the Student in a preschool class. The complainant informed OCR that she did not agree with the District's recommendation that the Student be placed in a three-year old pre-kindergarten class because the Student was xxxxxxxx, high functioning, verbal, and able to learn a xxxxxxxx curriculum.

On or about September 3, 2015, the start of school year 2014-2015, the Student began attending the Program. The complainant alleged that on or about September 9, 2014, the Student's case manager left her a voicemail message stating that the Superintendent no longer wanted the Student to attend the Program, but that he could remain in the Program for the remainder of that day.

In a letter to the complainant dated September 10, 2014, the Superintendent stated:

I regret that the [District] cannot at this time enroll [the Student] in the district before and after school program. You have disputed the district's capacity to provide an adequate program and services for your son during the school day. Because the before and after school program is operated and staffed by the district, if your premise is accepted that the district cannot provide an adequate program and services for your son during the school day, then logically it cannot provide an adequate program and services for your son in the before and after school program. The staff in the before and after school program are not certified teachers, let alone certified special education teachers. The staff in the class to which [the Student] would be assigned if he attended school in the district includes several certified teachers with specialized training in special education. The ratio of staff to students in the before and after school program is about 15-1. The ratio of staff to students in the class to which [the Student] would be assigned is 3-1.

The District advised OCR that the complainant had raised concerns about supervision and services regarding the District's proposed educational placement for the Student at School 1, which the District believed were also applicable to the Program, as the Program offered limited supervision and did not have certified staff, a nurse, a psychologist, or a behaviorist. OCR determined that instead of attending School 1 at the beginning of school year 2014-2015, the Student continued attending School 2.

The District asserted that because the complainant was challenging the in-District placement, District personnel believed that the complainant's concerns also applied to the Student's enrollment in the Program, which had fewer supports available than the Student's classroom

placement; and raised new issues relative to the Student's safety in the Program. The District informed OCR that during negotiations of the complainant's xxxxxxxxxxxxxxxx, the District, with input from the administrative law judge, offered to let the Student return to the Program if the complainant signed a waiver regarding the safety issue; however, the complainant declined. The complainant advised OCR that she and the District negotiated a resolution of the xxxxxxxxxxxxxxxx, but ultimately determined that the Student's enrollment in the Program was a separate issue from the Student's placement.

In a letter dated xxxxxxxxxxxxxxxx, the District informed OCR that the Student was permitted to attend the Program, effective as of xxxxxxxxxxxxxxxx; and that the Student would be transitioning to School 1 on xxxxxxxxxxxxxxxx, pursuant to a settlement agreement with the complainant. The District agreed to transport the Student to the Program on a daily basis.

The regulation implementing Section 504, at 34 C.F.R. § 104.3(k)(4), states that a qualified individual with a disability, with respect to services other than employment or educational services, is defined as one who meets the essential eligibility requirements for the receipt of such services. The regulation implementing the ADA, at 28 C.F.R. § 35.104, contains a similar provision.<sup>2</sup> OCR determined that the Student met the essential eligibility requirements for the Program; i.e., he was enrolled in the District. Accordingly, OCR determined that the Student was a qualified individual with a disability with respect to the Program.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives financial assistance from the Department. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a), contains a similar provision. The regulation implementing Section 504, at 34 C.F.R. § 104.38, provides that a recipient that provides a preschool educational or day care program or activity may not, on the basis of disability, exclude qualified persons with disabilities and shall take into account the needs of such persons in determining the aid, benefits or services to be provided. Pursuant to OCR policy, when voluntary noneducational programs are offered on a free or tuition basis, qualified children with disabilities may not be categorically excluded from those noneducational programs on the basis of their disabling condition.

Based on the above, OCR determined that the District excluded the Student from participating in the Program because of his disability; and, did not conduct an assessment to determine the aids, benefits, or services the Student needed in order to participate in the Program. OCR determined that the District did not provide the Student with before and after school services from September 10, 2014, through February 3, 2015. On April 17, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in this letter. OCR will monitor the implementation of the resolution agreement. If the

---

<sup>2</sup> The regulation implementing the ADA, at 28 C.F.R. § 35.104, defines a qualified individual with a disability as one who, with or without reasonable modifications to rules, policies or practices, or with the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of such services or the participation in programs or activities provided by a public entity.

District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

With respect to the portion of the allegation alleging retaliation, the District informed OCR that it was not the Superintendent's intention to retaliate against the complainant or the Student by excluding the Student from the Program; rather, the Superintendent sincerely believed that the Student could not participate in the Program if he was not receiving the appropriate aids and services, and that these would be determined during the xxxxxxxxxxxxxxxxxx. OCR determined that the proffered reason demonstrated a misconception on the part of the Superintendent, but the evidence did not indicate that the proffered reason was a pretext for retaliation. In support of this conclusion, OCR notes that the complainant xxxxxxxxxxxxxxxxxx in xxxxxxxxxx, but the Student was allowed to start the Program in September 2014. Therefore, OCR determined that a preponderance of the evidence did not support a retaliatory motive on the part of Superintendent. Accordingly, OCR will take no further action with respect to the retaliation portion of the allegation.

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 complainant may 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 that, 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 Jeanette Tejada Bustos, Compliance Team Attorney, at (646) 428-3777 or [jeanette.tejadabustos@ed.gov](mailto:jeanette.tejadabustos@ed.gov); Jocelyn Panicali, Compliance Team Attorney, at (646) 428-3796 or [jocelyn.panicali@ed.gov](mailto:jocelyn.panicali@ed.gov); or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

cc: xxxxxxxxxxxxxxxxxx

Encl.