



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

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NEW JERSEY  
NEW YORK  
PUERTO RICO  
VIRGIN ISLANDS

May 29, 2015

Dr. Edward A. Salina, Jr.  
Superintendent of Schools  
Plainedge Public Schools  
241 Wyngate Drive, Box 1669  
North Massapequa, New York 11758

Re: Case No. 02-15-1091  
Plainedge Public Schools

Dear Dr. Salina:

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 Plainedge Public Schools (District). The complainant alleged that District staff discriminated against a student, on the basis of her disability, by failing to select her for the Junior Varsity (JV) cheerleading squad at Plainedge High School (the School) on or about June 13, 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, the student's mother (Parent 1), the student, and District staff. OCR also reviewed documentation that the complainant and the District submitted. In the course of the investigation, OCR reviewed whether the District met the procedural requirements of the regulations implementing Section 504 and the ADA by designating at least one person to coordinate its efforts to comply with the requirements of Section 504 and the ADA; adopting and publishing a notice of non-discrimination; and, adopting and publishing grievance procedures. OCR made the following determinations.

Section 504/ADA Coordinator and Notice of Non-Discrimination

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 the ADA, at 28 C.F.R. § 35.107(a), contains a similar requirement in the instance of a public entity that employs 50 or more persons. The regulation implementing Section 504, at 34 C.F.R. §104.8(a), requires each 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 implementing Section 504, 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, at 28 C.F.R. § §35.106, contains similar requirements.

The District has not furnished to OCR the name or contact information of the individual currently designated to coordinate its efforts to comply with Section 504/ADA; and OCR was not able to locate this information on the District's website. Accordingly, OCR determined that the District has not met the requirements 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).

OCR determined that the District's Regulation 5030-R states that the District does not discriminate on the basis of race, color, national origin, religion, sex, age, handicap, or marital or family status in its educational programs or employment practices, including vocational education opportunities; however, Regulation 5030-R is not published on the District's website or in any publications. When asked to provide to OCR copies of or links to a notice of nondiscrimination in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, the District provided a copy of the District's Calendar and School guide, which is distributed annually. The Calendar and School guide contain a notice of nondiscrimination that states that discrimination or harassment on the basis of race, color, national origin, religion, age, handicap, sex, and marital status is prohibited in its educational programs or employment practices, including vocational educational opportunities. This notice of nondiscrimination directs inquiries and/or complaints to the Section 504 Coordinator; however, it does not provide the contact information for the 504 Coordinator. Therefore, OCR determined that this is not an adequate notice of non-discrimination. The District did not provide any other recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees.

On May 29, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with regard to the District's designation of a Section 504/ADA Coordinator and notice of non-discrimination. OCR will monitor the implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

Grievance procedures

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 the ADA, at 28 C.F.R. § 35.107(b), states that a recipient shall adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action prohibited by the ADA. In accordance with OCR policy, elements for determining if 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 Section 504 grievance procedures are set forth in Policy 5030, which is posted on the District's Board of Education website.<sup>1</sup> District Regulation 5030-R "Student's Complaints and Grievances" (regulation) provides that an employee or student of the district may file a formal or informal grievance with the Coordinator; however, it does not specify where specifically a complaint may be filed or that complaints can be filed by third parties. The regulation requires the Coordinator to conduct an investigation in response to an informal grievance and to notify the complainant within ten school days of the disposition of the complaint; at which time if the complainant is not satisfied with the outcome, the complainant may proceed to file a formal, written grievance. If a formal grievance is made, pursuant to the regulation, the Coordinator must organize an investigation of the complaint and render a written determination within ten school days; and, make appropriate recommendations to correct any deficiencies to the Superintendent of Schools with a copy to the complainant. The regulation does not specifically state that the parties have an opportunity to present witnesses and other evidence during the course of the investigation. The complainant has the right to appeal to the Board if the determination is not acceptable; there is not similar right listed for the respondent. The regulation specifically provides for notice to the complainant of the outcome of an informal grievance, but not to the respondent; and in the case of a formal grievance, does not specify to whom the notice is directed.

OCR reviewed the District's procedures and determined that the procedures do not meet the requirements of the regulation implementing Section 504 and OCR's policy. Specifically, the District's procedures, as described above, do not state specifically where complaints can be filed; do not provide for complaints by third parties; do not specifically provide for an opportunity for the parties to a complaint to present witnesses and evidence; provide for notice of the outcome only to the complainant in the case of an informal grievance; and do not specify to whom notice of the outcome is directed in the case of a formal grievance.

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<sup>1</sup> [http://www.plainedgeschools.org/files/BYJUd/ffcbeefaecdda2e3745a49013852ec4/Revised\\_Policy\\_Manual\\_2-24-15.pdf](http://www.plainedgeschools.org/files/BYJUd/ffcbeefaecdda2e3745a49013852ec4/Revised_Policy_Manual_2-24-15.pdf)

On May 29, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with regard to the District's Section 504/ADA grievance procedures. OCR will monitor the implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

### Allegation

The complainant alleged that District staff discriminated against a student, on the basis of her disability (speech or language impairment), by failing to select the student for the JV cheerleading squad at the School on or about June 13, 2014. The complainant asserted that on June 14, 2014, during the student's meeting with the Varsity and JV Coaches (collectively, referred to as the Coaches), the Varsity Coach informed the student that they did not select her for the JV squad because of her processing delays. Parent 1 asserted that the student stated that she was sure that she did not misunderstand the Varsity Coach, because the student asked the Varsity coach to repeat herself.

OCR determined that during school years 2013-2014 and 2014-2015, the District classified the student as having a speech or language impairment; noting that the student has difficulty processing orally presented material and directions. The District provided the student with related aids and services pursuant to an individualized education program (IEP). OCR determined that the Student's IEP indicated that she was permitted to participate in extracurricular and nonacademic activities; however, the IEP did not contain a provision stating that the Student was to receive any related aids or services or other accommodations during those activities.

The student was a member of the JV cheerleading team for school year 2013-2014.<sup>2</sup> During school year 2014-2015, the student was in the 10<sup>th</sup> grade at the School. Try-outs for the School's 2014-2015 cheerleading team were held on June 12, 2014, following three days of tryout practice/training sessions from June 9 – June 11, 2014. Approximately forty-five students tried out for the cheerleading team,<sup>3</sup> which consisted of a Varsity squad and a JV squad. During the tryout practice/training sessions on June 9, 10 and 11, 2014, the Coaches, who were assisted by current and former team members, taught the students a cheer, a dance routine, and jumps/stunts that the students had to practice and perform for the tryout. Additionally students were permitted to demonstrate their tumbling skills, if any. The coaches also asked each student to indicate each stunt position she would perform: flyer, sidebase, mainbase or backspot.

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<sup>2</sup> As a member of the JV cheerleading team, the Student participated in the sideline, traditional cheer for the fall 2013 football season (Traditional cheer); however, the Student was an alternate on the competitive team (Competitive cheer) and did not participate in any competitive events during the 2013-2014 competitive cheer season.

<sup>3</sup> The District asserted that as of June 13, 2014, the date of the tryouts, the New York State Public High Schools Athletic Association (NYSPHAA) had proposed but not adopted new regulations for separate cheerleading tryouts for the Traditional and Competitive cheer squads, respectively; accordingly, the District conducted a single tryout.

At the tryouts held on June 12, 2014, the Coaches and two former cheerleaders evaluated each student on her cheer, dance, jumps, tumbling<sup>4</sup> and overall performance. The judges completed a “cheerleading tryout score sheet” (rubric) for each student. The judges rated performance on: cheer, dance, jumps and overall performance; giving an overall rating in each sub-category on a numerical scale of 1 to 5, for a total possible score of 100 points. The District stated that the Coaches selected the team based on each students’ stunting position, rubric scores, prior experience (including on the Varsity or JV squad), and potential for the competitive cheer team (i.e. tumbling, more advanced stunting and jumps).<sup>5</sup> Both coaches informed OCR that their primary consideration was each student’s stunting position as they had to form multiple stunt groups consisting of the four stunt positions (flyer, mainbase, sidebase, and backspot) for the Varsity and the JV squads. The Coaches also stated that they selected the students they believed had the strongest skills in each of the stunt positions, and used the rubric to compare students numerically.

The student was not selected. The District denied that the student’s selection was in any way related to her disability, as she had been selected for the team in the prior school year. The District stated that the student was not selected for the cheerleading team for school year 2014-2015 because of stiffer competition.<sup>6</sup> The Coaches informed OCR, and the student acknowledged that she had sufficient time and was able to learn the required routines for the tryout.<sup>7</sup> The Coaches stated that they did not select the student for the JV squad, because compared to the students who were selected for the JV squad, the student’s rubric score (i.e., 63.5) and performance during the tryout was weaker; the student could not perform more advanced, higher level stunts or jumps; the student’s cheer movements were not as “sharp” or “quick”; and she had not shown improvement in her skills as a JV member in the prior school year.<sup>8</sup> Both the Varsity Coach and the JV Coach denied making any reference to the student’s speech or language disability, “processing,” or ability to process the cheers at any time during the tryout. The Coaches stated that during their meeting with the student on June 13, 2014, they discussed the student’s failure in “progressing” her skills when they discussed their reasons for not selecting her for the JV squad, and offered her the opportunity to be the team manager. 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 that a preponderance of the evidence substantiated the complainant’s assertion that

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<sup>4</sup> The Coaches informed OCR that tumbling was not a skill which was required in order to be selected for the team, but that it was helpful to have tumbling skills for the Competitive cheer team.

<sup>5</sup> District staff informed OCR that beginning in or around October 2014, the NYS PHAA directed that the selection for cheerleading teams be revised from a combined selection (team members who would participate in sideline cheer team and /or the competitive team) to two separate selection processes; one selection for the sideline cheer squad and one for the competitive cheer team. The District informed OCR that after the regulations went into effect, it held additional tryouts for the Competitive cheer squad on or about November 14 – 16, 2014; however, the Student did not tryout.

<sup>6</sup> The District asserted that the competition was so minimal for school year 2013-2014 that the student would have been the only student of those trying out who would not have been selected for the team; therefore, the Coaches decided to allow her to be on the team rather than be the only student not selected.

<sup>7</sup> The Coaches informed OCR that the students were not rated on their participation during the pre-tryout sessions.

<sup>8</sup> The complainant and student’s parents acknowledged that during their conversations with District staff about the student’s participation in the cheerleading tryouts, they did not request that any accommodation or other supplemental aids or services be provided to the student during the cheerleading tryouts.

the Coaches made the alleged discriminatory comments about the Student's disability or discriminated against the Student based upon her disability.

OCR's review of the data indicated that the overall average score of the students who tried out for the cheerleading team was 73; the student's score was 63.5.<sup>9</sup> Additionally, OCR determined that one of the students the District selected for the JV squad is a student with a disability; and three of the five students who tried out and did not make the cheerleading team are students without disabilities.

Based on the above, OCR determined that the District proffered legitimate, non-discriminatory reasons for not selecting the student for the JV squad; namely, the student's rubric score, performance, and skills during the tryout were weaker than those of the students who were selected. OCR determined that the proffered reasons were not a pretext for discrimination, because the District selected a student with a disability and rejected students without disabilities for the cheerleading team. 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 select the student for the JV cheerleading squad at the School on or about June 13, 2014. Accordingly, OCR will take no further action regarding Allegation 1.

During the course of OCR's investigation, OCR determined that after the cheerleading tryouts, on or about June 14 and 15, 2014, Parent 1 complained to several District staff members, including the JV Coach, the District's then Director of Special Education/504 Coordinator (the 504 Coordinator), and the District's Athletic Director (Athletic Director) that the student did not make the cheerleading team because of her disability. On June 23, 2014, the student, Parent 1, and the student's father (Parent 2) met with the Athletic Director, the Varsity Coach, the JV Coach, the 504 Coordinator, and a School psychiatrist (the Psychiatrist). During the meeting, the student read aloud a statement that she had written at the suggestion of Parent 1. The student's statement, provided in relevant part:

I am here to represent myself by being discriminated by [the cheerleading coaches].... [The Varsity coach] stated that...due to my processing it took me longer to understand the routines...You said it in that similar way. You def [sic] did use the word processing because I asked you to repeat yourself so I could make shore [sic] I heard you properly...I was upset that you used my ~~processing~~ [strikeout included in original] disability as an excuse [sic] to be on the team...I didn't appreciate you using my learning disability as a poor excuse [sic]...

Thereafter, Parent 1 also complained that after tryouts, the Varsity Coach mentioned to the student that her disability was a reason why the student was not selected for the cheerleading

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<sup>9</sup> The District acknowledged that two students with lower rubric scores than the student were chosen for the JV team; however, the District stated that the student tried out in the "flyer" position, and these students were instead chosen based on their stunting position and tumbling ability. OCR determined that the Coaches selected four "flyers" (students 1 – 4) for the JV squad; all of whom had higher overall rubric scores than the student (i.e., 88, 77, 75, and 72, respectively).

team. The Varsity Coach noted that Parent 1 also said, ‘You’re bullies --- you are the reason school shootings happen.’ Parent 1 stated that after the meeting held on June 23, 2014, she left a voicemail message for the 504 Coordinator in which she complained about the District’s failure to select the student for the cheerleading team, but he did not return her telephone call. In a letter to the District’s Superintendent, dated July 11, 2014, the complainant alleged that the student had been denied an equal opportunity to participate in extracurricular activities due to her disability and requested a meeting with District staff. In a letter dated August 7, 2014, the complainant asked to meet with District representatives and reiterated the concerns of his letter dated July 11, 2014. He also requested that a copy of his letters, dated July 11, 2014, and the August 7, 2014, be forwarded to each member of the Board. The District did not provide and OCR did not find any evidence indicating that the District provided a written response or that the Board placed this matter on its agenda.

During the interviews with OCR, the 504 Coordinator acknowledged that he did not investigate the allegations of disability-based discrimination that Parent 1, Parent 2, the student, and the complainant made. District staff acknowledged that in early July 2014, the District’s Superintendent met with the 504 Coordinator, Coaches, and Athletic Director; however, the 504 Coordinator acknowledged that that he took no action following this meeting.

Based on the above, OCR determined that the District failed to respond appropriately to complaints that the District discriminated against the student, on the basis of her disability, by not selecting her for the JV cheerleading squad at the School on or about June 13, 2014. On May 29, 2015, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to the District’s failure to respond to the complaints of disability discrimination with respect to the student. OCR will monitor the 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.

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 should occur, the complainant may file a separate complaint alleging such harassment or intimidation.

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 Marykate O'Neil, Compliance Team Attorney, at (646) 428-3814 or [marykate.oneil@ed.gov](mailto:marykate.oneil@ed.gov); Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3763 or [jane.momo@ed.gov](mailto:jane.momo@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

XXXXXX X. XXXX, Esq.