

May 29, 2015

Dr. Frank Alvarez, Ed.D.
Superintendent
Rye City School District
411 Theodore Fremd Avenue
Rye, New York 10580

Re: Case No. 02-15-1099
Rye City School District

Dear Dr. Alvarez:

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 Rye City School District (the District). The complainant alleged that the District discriminated against her disabled son (the Student) and other disabled students at Midland Elementary School (the School), during school year 2014-2015, by providing a shorter school day for them than it provided to non-disabled students (Allegation 1). The complainant also alleged that the District discriminated against the Student and the other disabled students in his classroom by not providing substitutes when the special education teacher was absent (Allegation 2). The complainant further alleged that the accessible entrance to the School is kept locked, and does not have a buzzer system for persons with mobility impairments to gain access to the School (Allegation 3). In addition, the complainant alleged that the District retaliated for her advocacy on the Student's behalf, during school year 2014-2015, by (a) placing the Student's class in a former administrator's office, which is smaller than classrooms used for regular education students; and (b) not placing an interactive white board in the Student's classroom until December 2014 (Allegation 4).

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 also interviewed the complainant and District staff. OCR made the following determinations.

The Student, who is XXXXX XXXXX XXX and has been classified by the District with XXXXXX since pre-school, was enrolled in the XXXXXX XXXXX at the School during school year 2014-2015. The District's Committee on Special Education (CSE) met on September 2, 2014, and developed an Individualized Education Plan (IEP) for the Student for school year 2014-2015. The Student was placed in a self-contained classroom with one other classified student. The Student's one-to-one aide, a teaching assistant, and a special education teacher were also present in the classroom.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student and other disabled students at the School, during school year 2014-2015, by providing a shorter school day for them than it provided to non-disabled students. Specifically, the complainant alleged that while the School's general education students' school day lasts from 8:40 a.m. to 3:00 p.m., the School's disabled students' school day lasts from 8:40 a.m. to 2:30 or 2:45 p.m.

District staff advised OCR that the school day for all School students, both disabled and non-disabled, begins at 8:45 a.m. and concludes at 3:00 p.m. The first bell rings at 8:40, at which time students line up to enter the School; the school day begins at 8:45 a.m., when the second bell rings. Students are dismissed at 3:00 p.m.

OCR determined that contrary to the complainant's allegation, the Student's class, Class A, is dismissed from the School at 3:00 p.m., at the same time that non-disabled students depart the School. OCR determined that two of the three students (Student A and Student B) in another self-contained classroom (Class B) are the only students in the School that receive bus transportation, which is in accordance with their IEPs. The third student (Student C) does not receive transportation from the District. Students A and B are escorted to the District's only bus at 2:45 p.m., and the bus leaves between 2:45 and 3:00 p.m.¹ Student C is dismissed at 3:00 p.m.

¹ Student A is transported daily to and from the School, and Student B is transported on two days per week; Student B's parents drive her to and from the School on three days per week.

District staff advised OCR that the School is located on a busy thoroughfare, and most parents arrive at 3:00 p.m. to pick up their students, causing significant traffic congestion in the School's driveway. Consequently, the School scheduled the special education bus to depart a few minutes early, between 2:45 and 3:00 p.m., in order to facilitate the bus being able to exit the parking lot without undue delay and discomfort for Students A and B. With respect to Students A and B, OCR determined that their IEPs provide for transportation to and from the School, but do not provide for a shortened school day as part of their educational program. OCR determined that 39 other students with disabilities at the School who are classified as eligible for special education and related aids and services with an IEP, as well as 38 students with disabilities at the School who receive related aids and services pursuant to a Section 504 plan, are enrolled in regular education classrooms and arrive and depart the School at the same time as non-disabled students.

Based on the above, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District discriminated against the Student, on the basis of his disability, by providing him with a shorter school day than it provided to non-disabled students. OCR determined, however, that the District provided Students A and B with a shorter school day than it provided to non-disabled students; and, that a shorter school day is not consistent with their IEPs. 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 regulations implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(ii)-(iv), and the ADA, at 28 C.F.R. § 35.130(b)(ii)-(iv), provide that a recipient may not, on the basis of a person's disability, [a]fford a qualified disabled person an opportunity to participate in or benefit from [an] aid, service or benefit that is not equal to that afforded others; [or] provide different or separate aid[s], benefits or services to disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aid[s], benefits, or services that are as effective as those provided to others. Transportation of a student with a disability should not be provided in a manner that results in the student having a shorter school day than nondisabled students, unless his IEP or Section 504 plan states otherwise. Administrative convenience is never an excuse for impermissibly shortening the instructional time that students with disabilities receive.

On May 29, 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 District fails to implement the terms of the resolution agreement, OCR will resume its investigation of the complaint.

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student and the other disabled students in his classroom by not providing substitutes when the special education teacher was absent. In support of her allegation, the complainant described one occasion during school year 2014-2015 when she learned that a substitute for the special education teacher was not located and provided by the School; she did not provide a specific date of this incident.

District staff advised OCR that the District arranges for substitutes for special education classes as it does for all classes in the School. The District requires special education teachers, like all other teachers, to enter their absence information into an “absence management and substitute replacement” software system entitled “AESOP.” The system then notifies appropriate District staff to secure a substitute. The District’s director of special education (the director) also advised OCR that in addition to AESOP, she and her assistant personally contact a number of candidates that they use often to substitute for Classes A and B when necessary. The Student’s special education teacher and classroom aides confirmed that the District assigned substitutes to Class A, the Student’s class, when the special education teacher was absent during school year 2014-2015.

The complainant did not provide, and OCR did not find any evidence to support the complainant’s assertion that the District failed to assign a substitute to the Student’s class when the special education teacher was absent. 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 the District did not provide substitutes when the special education teacher was absent was supported by a preponderance of the evidence. Accordingly, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that the District discriminated against the Student and the other disabled students in his classroom by not providing substitutes when the special education teacher was absent. Therefore, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3, the complainant alleged that the accessible entrance to the School is kept locked, and does not have a buzzer system for persons with mobility impairments to gain access to the School. The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides that “[n]o qualified person with a disability shall, because a recipient’s facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.” The ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149.

OCR determined that the School building was constructed in 1951, and the building has undergone numerous alterations since that date; although its main entrance, which is not accessible to persons with mobility impairments, has not been altered since that date. One of the accessible entrances is located at the entrance to the cafeteria addition to the School building, constructed in 1995; and another is located at the entrance to the classroom addition to the School building constructed in 2006. The District acknowledged that the School’s main entrance is not accessible to persons with mobility impairments because it requires the use of stairs; and the School’s two accessible entrances are kept locked and lack a buzzer or camera system.

Therefore, OCR determined that although the designated accessible entrances may be accessible to and usable by individuals with disabilities, the means by which persons with disabilities gain access to the School is not equal to or as effective as that which is provided to nondisabled persons. OCR also identified a concern with respect to the lack of directional signage at the

main entrance, and with respect to the lack of appropriate signage bearing the International Symbol of Accessibility on the designated accessible entrances.

On May 29, 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 District fails to implement the terms of the resolution agreement, OCR will resume its investigation of the complaint.

With respect to Allegation 4, the complainant alleged that the District retaliated for her advocacy on the Student's behalf, during school year 2014-2015, by (a) placing the Student's class in a former administrator's office, which is smaller than classrooms used for regular education students; and (b) not placing an interactive white board in the Student's classroom until December 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 advocated on behalf of the Student with the XXX XXXX XXXXX XXXXXXXXXXXX (XXXXX) regarding the Student's special education class size and age range during school years 2012-2013 and 2013-2014. OCR further determined that the District was aware of the complainant's protected activity.

With respect to Allegation 4(a), the complainant alleged that the District retaliated for her advocacy on the Student's behalf, during school year 2014-2015, by placing the Student's class in a former administrator's office, which is smaller than classrooms used for regular education students. The District advised OCR that it assigns classroom spaces based on the size of the instructional group. Most District classrooms contain 20 or more students, and are situated in classrooms that are approximately 800 square feet in size. Accordingly, most District classrooms provide approximately 40 square feet per student. As mentioned above, the Student's classroom has only two students, including the Student. The Student's classroom is approximately 328 square feet in size, and was converted into a classroom from a former administrator's office during school year 2013-2014. Accordingly, the Student's classroom provides approximately 164 square feet per student.

OCR determined that during school year 2013-2014, the complainant filed a complaint with XXXXX regarding the age range of the students in the Student's classroom, and XXXXX ruled that the District must provide a separate self-contained special education class. OCR determined that when implementing the XXXXX's ruling in or around February 2014, the former principal

of the School showed the complainant available spaces, and the complainant selected an administrator's office to be converted into a classroom for the Student. District staff advised OCR that the classroom has adequate space for the Student and the other student in the class. The room contains a teacher's desk, a desk for each student, a computer station, a group work table, an interactive white board and three full-sized windows. District staff stated that the students have enough room to work and they occasionally do yoga exercises in the room.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-retaliatory reason for the size of the Student's classroom; namely, there are only two students in the class, and they do not require a bigger classroom. OCR determined that the proffered reason was not a pretext for retaliation, because the room adequately accommodates the students and actually provides more square footage per student than the average classroom. Further, OCR determined that the complainant selected the Student's classroom location in consultation with District staff and administrators during school year 2013-2014. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District retaliated for her advocacy on the Student's behalf, during school year 2014-2015, by placing the Student's class in a former administrator's office, which is smaller than classrooms used for regular education students. Accordingly, OCR will take no further action regarding Allegation 4(a).

With respect to Allegation 4(b), the complainant alleged that the District retaliated for her advocacy on the Student's behalf, during school year 2014-2015, by not placing an interactive white board in the Student's classroom until December 2014. OCR determined that during summer 2014, the complainant made a request that the District install an interactive whiteboard in the Student's classroom for school year 2014-2015, to which the District agreed. The District advised OCR that the acquisition and installation of an interactive whiteboard requires the whiteboard to be disconnected from another classroom or purchased, and electricians have to install the interactive technology into the classroom. The installation of the whiteboard was completed in December 2014. The District advised OCR that four months is the average length of time it has taken to complete the relocation or installation of an interactive whiteboard in other classrooms, including classrooms of students whose parents have not engaged in protected activity.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-retaliatory reason for the delay in installing the interactive whiteboard until December 2014; namely, the whiteboard is a technological instrument that must be purchased and installed, and it takes approximately four months to do so. OCR determined that this reason was not a pretext for retaliation, since the District has taken four months to install interactive whiteboards in classrooms of students whose parents have 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 advocacy on the Student's behalf, during school year 2014-2015, by delaying the installation of an interactive whiteboard in the Student's classroom until December 2014. Accordingly, OCR will take no further action regarding Allegation 4(b).

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 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 any questions about OCR's determination, please contact Crystal Johnson, Senior Compliance Team Investigator, at (646) 428-3781 or crystal.johnson@ed.gov; or James Moser, Compliance Team Attorney, at (646) 428-3792 or james.moser@ed.gov.

Sincerely,

Timothy C. J. Blanchard

Enc.

cc: XXXXXXXXXXXXXXXXXXXXXXX