

April 1, 2016

Dr. Kriner Cash  
Superintendent  
Buffalo Public Schools  
720 City Hall  
Buffalo, New York 14202

Re: Case No. 02-16-1003  
Buffalo Public Schools

Dear Dr. Cash:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) with respect to the above-referenced complaint filed against the Buffalo Public Schools (the District). The complainant alleged that the District discriminated against her daughter (the Student) on the basis of her disability, or in the alternative retaliated for her disability-related advocacy on the Student's behalf, by failing to provide the Student with the following special education related aids and services in her XXXXXXXXXXXXXXXX course (the course) offered at XXXXXXXXXXXXXXXX (the College) during school year 2015-2016, as stipulated in the Student's Individualized Education Plan (IEP), or ensure that the College provided such related aids and services: (a) highlighted notes; (b) multiple day administration of tests; and (c) a Live Scribe Smart Pen (Smart Pen) (Allegation 1). The complainant also alleged that the District retaliated for her disability-related advocacy on the Student's behalf, by: (a) threatening to withdraw special education related aids and services from the Student's IEP during a meeting on September 28, 2015; and (b) refusing to provide adequate training to the Student on how to use her Smart Pen, in October 2015 (Allegation 2).<sup>1</sup>

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<sup>1</sup> During the investigation of the complaint, the complainant clarified that her concerns regarding the provision of the above-referenced related aids and services were limited to the course at the College. Additionally, in her complaint, the complainant alleged that the District failed to provide, or ensure that the College provided, the Student with "extended testing time and conditions" and "special adaptive equipment needed for college level courses that are part of her high school program"; but during investigation of the complaint, the complainant clarified that she was referring to multiple day administration of tests and a Smart Pen, respectively. Finally, in her complaint, the complainant alleged that the District retaliated by refusing to provide adequate training to the Student on how to use her "mechanical assistance device," in October 2015; but during investigation, the complainant clarified that she was again referring to the Smart Pen.

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 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 and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

Additionally, 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, 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 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/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.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation, at 34 C.F.R. § 104.33(b)(1)(i), defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The implementation of an IEP is one means of meeting this standard.

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.

OCR determined that during school year 2015-2016, the Student was enrolled at Middle Early College High School (the school), and took the course at the College. The Student was identified as a student with a disability, and had Individualized Education Programs (IEPs) for school year 2015-2016, dated February 10 and September 28, 2015. Pursuant to a Memorandum of Understanding (MOU) between the District and the College, effective September 4, 2014, the District is responsible for providing District students taking courses at the College with their required special education related aids and services.

OCR determined that the complainant engaged in protected activity when she complained to District staff members that the Student's IEP was not being implemented in fall 2015. OCR determined that the District was aware of this protected activity.

With respect to Allegation 1(a), the complainant alleged that the District discriminated against the Student on the basis of her disability, or in the alternative retaliated for her disability-related advocacy on the Student's behalf, by failing to provide or ensure that the College provided the Student with highlighted notes in the course during school year 2015-2016, as stipulated in the Student's IEP. OCR determined that pursuant to the Student's IEP in effect for school year 2015-2016, the Student's teachers were to "modify instructional presentation" for her by, among other things, "provid[ing] a copy of class notes and highlight[ing] all important information."

The District acknowledged that at the beginning of school year 2015-2016, no one provided the Student with copies of highlighted class notes for the course. The District informed OCR that the Student was the first District student with an IEP to take a course at the College, and the District was unsure whether it was obligated to provide the Student with this related service at the College. The District stated that in or around late September 2015, when it learned the Student was not being provided with the service, it promptly contacted the New York State Education Department (NYSED) to determine its obligations with respect to providing the service; and upon learning it was obligated to provide the service, began providing the service.

OCR determined that in late September or early October 2015, the District secured a note taker for the course (the note taker), but the note taker did not highlight her notes for the Student. On or about November 10, 2015, the District assigned a District special education instructor (the instructor) to highlight the note taker's notes for the Student. The complainant acknowledged that the instructor began providing highlighted course notes to the Student in mid-November 2015, through the end of the course on December 8, 2015.

Based on the foregoing, OCR determined that the District violated the regulation implementing Section 504, at 34 C.F.R § 104.33(a), by failing to ensure that the Student was provided with a copy of class notes with all important information highlighted for the course, from the beginning of school year 2015-2016 through November 10, 2015. On April 1, 2016, the District entered into the enclosed resolution agreement with OCR to resolve this compliance concern.

With respect to the retaliation portion of Allegation 1(a), OCR determined that the District proffered a legitimate, non-retaliatory reason for the delay in providing the Student with a copy of class notes with all important information highlighted for the course, from the beginning of school year 2015-2016 through November 10, 2015; namely, the Student was the XXXXX

District student with an IEP to take a course at the College and the District was unsure whether it was obligated to provide the Student with this related service at the College. OCR determined that the proffered reason was not a pretext for retaliation, because when it learned the Student was not being provided with the service, the District promptly contacted the NYSED to determine its obligations with respect to providing the service; and upon learning it was obligated to provide the service, began providing the service. 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, by failing to ensure that the Student was provided with highlighted notes for the course. Accordingly, OCR will take no further action with respect to this portion of Allegation 1(a).

With respect to Allegation 1(b), the complainant alleged that the District discriminated against the Student on the basis of her disability, or in the alternative retaliated for her disability-related advocacy on the Student's behalf, by failing to provide or ensure that the College provided the Student with multiple day administration of tests in the course during school year 2015-2016, as stipulated in the Student's IEP. OCR determined that pursuant to the Student's IEP in effect for school year 2015-2016, the District would provide multiple day administration on all tests and on state assessments when approved.<sup>2</sup>

OCR determined that there were three scheduled examinations in the course. Immediately following the first scheduled examination (exam 1) on or around September 30, 2015, the Student notified the professor of the course (the professor) that she had not taken exam 1 because the District had not fully implemented her IEP.<sup>3</sup> The Student subsequently took exam 1 in November 2015, and failed the exam. Following exam 1, the complainant complained to the District that no one informed the Student that she could take exam 1 over multiple days, in accordance with her IEP; therefore, the Student took exam 1 in one sitting. The District contested the complainant's assertion, and stated that the Student was informed that she could take the exam over multiple days but insisted on taking the exam in one day.

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 the complainant's assertion that the District failed to ensure that the Student was offered multiple day administration of exam 1 when she took exam 1 in November 2015 was supported by a preponderance of the evidence.

OCR determined that the District agreed to allow the Student to re-take exam 1, and created a schedule for the Student to take all three course examinations. The Student did not take any of the examinations, and instead took an incomplete in the course and obtained an extension until May 14, 2016, to complete the course and all course examinations.<sup>4</sup> The District informed OCR

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<sup>2</sup> The IEP did not state that the District would affirmatively inform the Student that she was entitled to multiple day administration of tests prior to each test.

<sup>3</sup> The complainant asserted that at the time of exam 1, the Student did not have access to highlighted class notes or a Smart Pen, as stipulated in her IEP.

<sup>4</sup> To date, the Student has not taken any of the course examinations. The District informed OCR that the complainant indicated that she will not allow the Student to take any of the course examinations unless the District provides the Student with a tutor. The Student is not entitled to tutoring or similar support pursuant to her IEP.

that it will ensure that the Student is provided with all testing accommodations stipulated in her IEP on all three course examinations if and when the Student takes the examinations.

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 her disability, or in the alternative retaliated for the complainant's disability-related advocacy on the Student's behalf, by failing to provide or ensure the College provided the Student with multiple day administration of course examinations. Accordingly, OCR will take no further action with respect to Allegation 1(b).

With respect to Allegation 1(c), the complainant alleged that the District discriminated against the Student on the basis of her disability, or in the alternative retaliated for her disability-related advocacy on the Student's behalf, by failing to provide or ensure that the College provided the Student with a Smart Pen in the course during school year 2015-2016, as stipulated in the Student's IEP. OCR determined that pursuant to the Student's IEP in effect for school year 2015-2016, the District would provide the Student with a Smart Pen for use in all of her classes.

OCR determined that on September 28, 2015, on the day the Student's IEP was amended to include a provision for a Smart Pen, the complainant, the Student, and District staff completed and signed a Borrowing Equipment Agreement. The District informed OCR that it tried several times during the week of September 28, 2015, to install software required to use the Smart Pen onto the Student's laptop, but could not successfully install the software due to technical difficulties. The Student took her laptop home, but then brought it back to school on October 13, 2015, and the software was successfully installed. The District then trained the Student on use of the Smart Pen during the week of October 13, 2015. The complainant confirmed that the Student was provided with the Smart Pen in mid-October 2015. The complainant did not identify any harm suffered by the Student as a result of the approximate two week delay in receiving the Smart Pen. Accordingly, OCR determined that the failure of the District to provide the Student with a Smart Pen for approximately two weeks while it coordinated installation of necessary software and worked out technical difficulties did not constitute a denial of a FAPE.

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 her disability, by failing to provide the Student with a Smart Pen during school year 2015-2016, as stipulated in her IEP. With respect to the retaliation portion of Allegation 1(c), OCR determined that the District proffered a legitimate, non-retaliatory reason for the delay in providing the Smart Pen; specifically, it could not successfully install the software during the week of September 28, 2015, due to technical difficulties; and, the Student thereafter took her laptop home, and did not bring it back to school until October 13, 2015. OCR determined that the proffered reason was not a pretext for retaliation, because the District signed an agreement to provide the Smart Pen on September 28, 2015, and successfully installed the software for the Smart Pen on the Student's laptop once she brought it back to school on October 13, 2015. Accordingly, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District retaliated for her disability-related advocacy on the Student's behalf, by failing to provide the Student with a Smart Pen during school year 2015-

2016, as stipulated in her IEP. Accordingly, OCR will take no further action with respect to Allegation 1(c).

With respect to Allegation 2(a), the complainant alleged that the District retaliated for her disability-related advocacy on the Student’s behalf, by threatening to withdraw special education related aids and services from the Student’s IEP during a meeting on September 28, 2015. The complainant stated that on September 28, 2015, she met with District staff members to discuss implementation of the Student’s IEP. The complainant alleged that during the meeting, she asserted that the District was not properly implementing the IEP, and the District’s XXXXXX XXXXXX XXXXXX (the Director) then threatened to remove related aids and services from the Student’s IEP.

OCR reviewed a recording of the meeting held on September 28, 2015, and determined that no staff member threatened to remove related aids and services from the Student’s IEP during the meeting. Additionally, the Director denied making any such statement, and the school principal, who attended the meeting, did not recall the Director making any such statement.<sup>5</sup> In the absence of an adverse action, OCR does not proceed further with the retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 2(a).

With respect to Allegation 2(b), the complainant alleged that the District retaliated for her disability-related advocacy on the Student’s behalf, by refusing to provide adequate training to the Student on how to use her Smart Pen, in October 2015. The XXXXXXXX XX XXXXXXXXXXXXXXXX XXXXXXXX informed OCR that the District’s XXXXXXXX XXXXXXXX evaluator (the evaluator) trained the XXXXXXXX and the Student’s teacher on use of the Smart Pen, and the XXXXXXXX then trained the Student on October 16, 2015. The XXXXXXXX informed OCR that the training included information regarding how to use the Smart Pen and how to sync it to the Student’s laptop; the XXXXXXXX asserted that the Student told her that the Smart Pen “was easy to use.” The XXXXXXXX further stated that she told the Student to seek assistance from District staff if she had any questions about using the Smart Pen, and the District informed OCR that the Student never requested help regarding the Smart Pen after her training.

The complainant acknowledged that District staff trained the Student on use of the Smart Pen in mid-October 2015; however, she asserted that the training lasted 5-10 minutes and only consisted of learning how to turn the Smart Pen on and off, and that the trainer did not know how to hook the Smart Pen up to the Student’s computer.<sup>6</sup> The complainant asserted that she complained about the training to the principal, and District staff scheduled a second training. The complainant stated that she missed the second training because she was sick, and the District did not follow up by offering additional training.

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<sup>5</sup> During the meeting, an unidentified staff member told the complainant that “you don’t want to make enemies of people going above and beyond for your daughter.” The principal informed OCR that she recalled the statement but could not recall who had made it, and the Director denied making the statement. The principal explained that she did not interpret this statement as a threat; rather, it was meant to remind the complainant that the District was providing services to the Student that were not required by her IEP.

<sup>6</sup> The complainant also asserted that the evaluator, rather than the XXXXXXXXXXXX, trained the Student.

The District denied that the complainant or the Student raised any complaints with District staff regarding the Smart Pen, or indicated to District staff that the training provided regarding use of the Smart Pen was not adequate. The District asserted that shortly after the Student received the training, the complainant asked the District to train her on use of the Smart Pen. The District offered to do so in late October 2015, but the complainant did not attend. The Student's IEP does not stipulate that the District will train the complainant on use of the Smart Pen.

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 the complainant's assertion that the District refused to provide adequate training to the Student on how to use her Smart Pen, in October 2015, was supported by a preponderance of the evidence. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 2(b).

OCR will monitor the implementation of the resolution agreement.

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 that, 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 please contact Bernard Dufresne, Compliance Team Attorney, at (646) 428-3802 or [bernard.dufresne@ed.gov](mailto:bernard.dufresne@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXX XXXXX