

April 8, 2016

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

Re: Case No. 02-16-1014
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 Buffalo Public Schools (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by failing to provide him with the following special education related aid and assistive technology, as stipulated in his Individualized Education Program (IEP): an FM system, at the beginning of school year 2015-2016 (Allegation 1); and books on CD or electronic books (e-books), during school years 2014-2015 and 2015-2016 (Allegation 2).¹

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

¹ In her written complaint, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to properly implement his IEPs during school years 2014-2015 and 2015-2016, including failing to provide him with certain assistive technology. Specifically, the complainant alleged that the District failed to “properly adhere to individualized education plan [and] make required accommodations,” and failed to “provide necessary adaptive equipment needed for [the Student] to learn with CAPS and APS.” During OCR’s investigation of the complaint, the complainant clarified that her concerns with respect to implementation of the Student’s IEPs were limited to the provision of an FM system at the beginning of school year 2015-2016; and “reading technology,” which she defined as books on CD or e-books, during school years 2014-2015 and 2015-2016.

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

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 personnel. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

During school year 2014-2015, the Student was in XX grade at Bennett Park Montessori School #32 (school 1), and eligible to receive special education related aids and services pursuant to IEPs dated May 28, 2014 (IEP 1), February 24, 2015 (IEP 2) and May 28, 2015 (IEP 3). During school year 2015-2016, the Student was in XX grade at Middle Early College High School (school 2), and eligible to receive special education related aids and services pursuant to IEPs dated July 29, 2015 (IEP 4), September 9, 2015 (IEP 5) and December 8, 2015 (IEP 6).

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide him with an FM system at the beginning of school year 2015-2016, as stipulated in his IEP. IEPs 4, 5 and 6 stipulated that the District would provide the Student with access to a "personal auditory training/FM system during instructional time," in all academic classes. During school year 2015-2016, the Student had two teachers for his academic classes: one teacher (teacher 1) taught the Student XXXXXX XXXXX XXXXXXXX; and another teacher (teacher 2) taught the Student XXXXX XXX XXXXXXXX.

The chairperson of school 2's Committee on Special Education (CSE) informed OCR that in early or mid-September 2015, she forwarded IEP 5 to the District's XXXXXXXX (the XXXXXXXX), so that the XXXXXXXX could acquire an FM system for the Student. The District acknowledged that the FM system was not delivered to school 2 until October 15, 2015, and the XXXXXXXXXXXX did not provide training to the Student, the chairperson and teachers 1 and 2 regarding use of the FM system until October 30, 2015.² Accordingly, the District acknowledged that it did not provide the Student with access to an FM system during school year 2015-2016 until October 30, 2015.

² The District informed OCR that training did not occur on October 15, 2015, when the FM system was delivered to school 2, because the Student and relevant staff were not available that day. The training was subsequently scheduled for October 23, 2015, but had to be rescheduled because the chairperson had a death in the family. An Audiology Consultation Report completed by the XXXXXXXX on October 30, 2015 stated that "training was completed in the use and care of the FM auditory trainer system that is available to [the Student] in his two instructional classrooms. Written instructions were also made available and the staff can contact this office with any concerns."

Teacher 1 advised OCR that beginning on October 30, 2015, the FM system was available for the Student's use each day. Teacher 1 further stated that every morning she asked the Student whether he wanted to use the FM system throughout the day, for both her and teacher 2's classes, and the Student always declined.³ Teacher 1 informed OCR that she notified the complainant of the Student's reluctance to use the FM system on November 24, 2015; advised the complainant that she could not compel the Student to use the FM system against his will; and asked the complainant to contact the school 2 principal if she had any concerns.⁴ OCR was unable to interview teacher 2, because teacher 2 was on a leave of absence from the District beginning on XXXXXXXXXXXX. However, teacher 1 informed OCR that she reviewed the Student's IEP with all substitute teachers for teacher 2, to ensure that the Student's IEP was properly implemented.

Based on the foregoing, OCR determined that the District provided the Student with access to an FM system each day from October 30, 2015 to the present, as stipulated in IEPs 4, 5 and 6.⁵ However, OCR determined that the District violated the regulation implementing Section 504, at 34 C.F.R. § 104.33(a), by failing to provide the Student with access to an FM system for his instructional classes from the beginning of school year 2015-2016 through October 29, 2015, as stipulated in IEPs 4, 5 and 6. On April 8, 2016, the District entered into the enclosed resolution agreement to resolve this compliance concern.

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide him with books on CD or e-books during school years 2014-2015 and 2015-2016, as stipulated in his IEP. Pursuant to IEPs 1-6, the Student was entitled to receive "books on tape or other recording device" in all academic classes as a related service, with the following service delivery recommendation: "access to electronic textbooks or books on CD."⁶

The District informed OCR that it maintains e-books in an online portal on its website. The District informed OCR that all of the Student's textbooks and required books for his academic courses were available to the Student as e-books on the portal, and that District staff told the complainant how to access the e-books through the portal during CSE meetings. The District further asserted that the complainant never complained to District staff that the Student did not have access to e-books via the portal. The complainant denied that District staff advised her that

³ Teacher 1 maintained an "anecdotal behavior form" for the Student beginning on November 16, 2015, which indicated that teacher 1 offered the Student access to the FM system each day, and the Student declined the offer each day. Teacher 1 informed OCR that she encouraged the Student to use the FM system, but that the Student told her that he is embarrassed to use the FM system. The Student's IEPs did not state that District staff was required to compel the Student to use the FM system.

⁴ Teacher 1 stated that she followed-up with the principal, and learned that the complainant never contacted her regarding the FM system.

⁵ During the course of OCR's investigation, the complainant informed OCR that there was a delay in the provision of the FM system, but that it is currently being provided to her satisfaction. The complainant did not indicate the date she believed the FM system was first provided to the Student.

⁶ A copy of one of the relevant IEPs provided by the District stated, in the "meeting information" section, that "[the Student] may benefit from e books available through the district portal." However, other relevant IEPs provided did not contain this statement.

e-books were available for the Student through the portal, and stated that CSE members told her that the District would give the Student books on CD or e-books for all of his classes.

On April 8, 2016, the District entered into the enclosed agreement with OCR to resolve Allegation 2 without further investigation. OCR will monitor the implementation of the 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 David Krieger, Compliance Team Attorney, at (646) 428-3893 or david.krieger@ed.gov; or Bernard Dufresne, Compliance Team Attorney, at (646) 428-3802 or bernard.dufresne@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXX XXXXXXX