



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

June 7, 2016

Kathleen E. Maerten
Superintendent
Alexander Central School District
3314 Buffalo Street
Alexander, New York 14005

Re: Case No. 02-16-1100
Alexander Central School District

Dear Superintendent Maerten:

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 Alexander Central School District (the District). The complainant alleged that from September 2015 through November 2015, staff at the Bornhava Special Education School (the School), a private educational placement that the complainant's son (the Student) attended at the District's expense, discriminated against the Student, on the basis of his disability, by failing to provide the Student with the following related aids and services, pursuant to his Individualized Education Program (IEP) for school year 2015-2016: (a) occupational therapy; (b) physical therapy; (c) speech therapy; and (d) access to his picture exchange communication (PEC) system (Allegation 1). Additionally, the complainant alleged that the School discriminated against the Student, on the basis of his disability, by failing to administer the Student's medications as prescribed in an order provided to the School's nurse (Allegation 2). The complainant also alleged that on several occasions from September 2015 through November 2015, staff at the School harassed the Student on the bases of his disability and race, or in the alternative retaliated against him for the complainant's disability-related advocacy (Allegation 3). Further, the complainant alleged that for a period of approximately one month from November 2015 through December 2015, after the complainant withdrew the Student from the School, the District failed to provide the Student with the following related services, pursuant to his IEP: (a) occupational therapy; (b) physical therapy; and (c) speech therapy (Allegation 4).

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also 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 Department. Further, OCR 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 Title VI, 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, 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.

OCR interviewed the complainant during the course of the investigation. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

The Student is three years old and is a resident of the District. The Student was diagnosed with XXXXXXXXXXXXXXXX at birth, and shortly thereafter was determined to have a XXXXXXXXXXXXXXXXXXXXXXXX that was surgically corrected when he was three months old. He has since also been diagnosed with XXXXXXX, XXXXXXXXXXX, and XXXXXXXXXXX, and has significant XXXXXXXXXXX as a result. He also has XXXXXXXXXXX. In May 2015, the Student was referred to the District for a special education evaluation and was determined to be eligible to receive related aids and services pursuant to IEPs dated September 9, 2015, October 7, 2015, and November 20, 2015.

With respect to Allegation 1, the complainant alleged that from September 2015 through November 2015, the School discriminated against the Student, on the basis of his disability, by failing to provide the Student with the following related aids and services, pursuant to his IEP for school year 2015-2016: (a) occupational therapy; (b) physical therapy; (c) speech therapy; and (d) access to his PEC system. The complainant stated that although the Student began attending the School on September 9, 2015, the School did not hire an occupational therapist until September 26, 2015. The complainant also stated that although the Student was to receive physical therapy four times per week, pursuant to his IEPs dated September 9, 2015, and October 7, 2015, the School only provided two sessions per week. Finally, the complainant stated that the School's speech therapist did not use a PEC system with the Student.

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 disabled person 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. Implementation of an IEP is one means of meeting this requirement.

During school year 2015-2016, from September 9, 2015, to November 6, 2015, the District placed the Student in a private, out-of-district preschool program at the School. During the school day on November 6, 2015, the complainant removed the Student from the School, and subsequently notified the District and School that the Student would no longer attend the School.

The regulation, at 34 C.F.R. § 104.33(b)(3), states that a recipient may place a qualified disabled person in or refer such person to a program other than the one that it operates as a means of carrying out the requirement to provide a FAPE; however, the recipient remains responsible for ensuring that the requirements of Section 504 are met with respect to any qualified disabled person so placed or referred. The District provided OCR with copies of the Student's related services logs from his time at the School.

With respect to Allegation 1(a), OCR determined that pursuant to the Student's IEPs dated September 9, 2015, and October 7, 2015, the Student was entitled to receive occupational therapy four times weekly, for 30 minute sessions. OCR determined that the Student began receiving occupational therapy services during the week of Monday, September 21, 2015. During that week, the Student received two occupational therapy sessions. OCR determined that from the week of Monday, September 28, 2015, through Friday, November 6, 2015, the date on which the complainant withdrew the Student from the School, the School provided the Student with four occupational sessions per week, pursuant to his IEPs. Therefore, OCR determined that the Student missed approximately six occupational therapy sessions between September 9 and 21, 2016.

During OCR's investigation of Allegation 1(a), the District expressed interest in voluntarily entering into a resolution agreement that would resolve the allegation without further investigation. Accordingly, OCR obtained the enclosed resolution agreement to address this compliance concern.

With respect to Allegation 1(b), OCR determined that pursuant to the Student's IEPs dated September 9, 2015, and October 7, 2015, the Student was entitled to receive physical therapy four times weekly, for 30 minute sessions. OCR determined that the Student began receiving physical therapy services on the first day of school year 2015-2016, Wednesday, September 9, 2015. OCR determined that beginning with the full week of Monday, September 14, 2015, through Friday, November 6, 2015, the School provided the Student with four physical therapy sessions per week, pursuant to his IEPs. Based on the foregoing, OCR determined that there is insufficient evidence to substantiate the complainant's allegation that the School discriminated against the Student, on the basis of his disability, by failing to provide the Student with physical

With respect to Allegation 3, the complainant alleged that from September 2015 through November 2015, School staff discriminated against the Student on the bases of his disability and race (African American), or in the alternative retaliated against him for the complainant's disability-related advocacy, by engaging in several acts of harassment toward him. As stated above, the complainant stated that she placed an audio recording device on the Student during School days on October 28, and November 3, 4, and 5, 2015. The complainant alleged that on November 4, 2015, a School staff member told the Student, "move it monkey" while walking him to meet with his vision therapist after a wagon ride. The complainant also alleged that on November 5, 2015, a School staff member referred to the Student as "Nutty Professor," and remarked to a colleague that the Student's hairline and glasses bore a resemblance to Eddie Murphy's character in the movie of that name. The complainant did not describe specific remarks by School staff that she believed constituted disability discrimination or harassment. The complainant stated that School staff also made disparaging remarks about her family and the Student's home life. Alternatively, the complainant alleged that the School staff's conduct toward the Student constituted retaliation against her for opposing the School's proposal, during a meeting on October 28, 2015, to reduce the amount of occupational and physical therapy sessions the Student would receive while attending the School.

Racial harassment is a form of discrimination prohibited by Title VI and its implementing regulation at 34 C.F.R. § 100.3. Disability harassment is a form of discrimination prohibited by Section 504 and its implementing regulation at 34 C.F.R. § 104.4, as well as the ADA and its implementing regulation at 28 C.F.R. § 35.130. Harassing conduct by an employee, another student, or a third party may take many forms; including verbal acts and name-calling, graphic and written statements, or other conduct that may be physically threatening, harmful, or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a beneficiary's participation in or receipt of benefits, services, activities, or opportunities offered by a recipient.

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 or injured party was subjected to 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 during a meeting on October 28, 2015, to discuss the Student's occupational and physical therapy. OCR determined that the School was aware of the complainant's protected activity.

OCR determined that the complainant did not file with the District a formal or informal complaint alleging that School staff harassed the Student on the basis of his race or disability, or retaliated. The District advised OCR that after the complainant removed the Student from the School, the complainant advised the Student's case manager that teachers at the School had

called the Student “names,” but did not provide any specific details about what the teachers said, or provide any indication that the names were racially or disability based. Additionally, the complainant did not provide the District with any indication that the School retaliated against her. The District informed OCR that it only learned of the complainant’s allegations when it received the instant OCR complaint notification.

During OCR’s investigation of this allegation, the District expressed interest in voluntarily entering into a resolution agreement that would resolve Allegation 3 without further investigation. Accordingly, OCR obtained the enclosed resolution agreement to address the allegation.

With respect to Allegation 4, the complainant alleged that for a period of approximately one month from November 2015 through December 2015, after the complainant withdrew the Student from the School, the District discriminated against the Student, on the basis of his disability, by failing to provide the Student with the following related services, pursuant to his IEP: (a) occupational therapy; (b) physical therapy; and (c) speech therapy.

OCR determined that the complainant removed the Student from the School on Friday, November 6, 2015, without advance notice to the District. OCR determined that on the same date, the Student’s case manager at the District inquired as to whether another out-of-district educational placement, KidStart, had any openings in its program for the Student. OCR further determined that on November 20, 2015, the District convened a group of persons knowledgeable about the Student, including the complainant and her husband, at which the Student’s IEP was amended to provide home-based related services until the District could locate an appropriate school-based educational placement for the Student. OCR determined that the District began providing the Student with related services in his home pursuant to the amended IEP on Monday, November 23, 2015.

OCR determined that the District made special education and related aids and services available to the Student, in conformance with the regulations implementing Section 504, at 34 C.F.R. §§ 104.33 and 104.34. OCR determined that under the circumstances of the complainant’s sudden, unilateral withdrawal of the Student from the School on November 6, 2015, without any prior notice to the District, the District’s two week delay in arranging home-based related services for the Student was reasonable.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that for a period of approximately one month from November 2015 through December 2015, after the complainant withdrew the Student from the School, the District discriminated against the Student, on the basis of his disability, by failing to provide the Student with the following related services, pursuant to his IEP: (a) occupational therapy; (b) physical therapy; and (c) speech therapy. Accordingly, OCR will take no further action with respect to Allegation 4.

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, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination or wish to discuss it further, please contact Eric Bueide, Compliance Team Attorney, at (646) 428-3851 or eric.bueide@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Jennifer Schwartzott, Esq.