



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

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NEW JERSEY
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VIRGIN ISLANDS

January 25, 2017

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

Re: Case No. 02-16-1372
Buffalo Public Schools

Dear Dr. Cash:

This letter is to notify you of the determination made by the U.S. Department of Education, 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 his son (the Student), on the basis of his disability, by failing to provide him with a small group testing environment for his English, algebra, and global studies classes, as stipulated in his Section 504 plan, from the beginning of school year 2015-2016 through November 2015.¹

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 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 a Section 504 plan is one means of meeting this standard.

¹ During the course of OCR's investigation, the complainant clarified that his concerns were limited to the provision of a small group testing environment in the Student's English, algebra, and global studies classes.

In its investigation, OCR interviewed the complainant, the Student and District personnel. OCR also reviewed documentation that the District submitted. OCR made the following determinations.

The complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide him with a small group testing environment for his English, algebra, and global studies classes, as stipulated in his Section 504 plan, from the beginning of school year 2015-2016 through November 2015. The complainant and the Student were not able to provide the specific date(s) of the examination(s) for which the Student was not provided a small group testing environment from the beginning of school year 2015-2016 through November 30, 2015.

During school year 2015-2016, the Student was in the XXXX grade at XXXXXX (the school), and was eligible to receive related aids and services from the beginning of school year 2015-2016 through November 30, 2015, pursuant to a Section 504 plan dated XXXX XX, 2015 (the 504 plan).² Among other provisions, the 504 plan stipulated that the District would provide the Student with tests administered in a small group (no more than 10 students).

With respect to the Student's English class, the Student had one teacher (teacher 1) for the period from the beginning of school year 2015-2016 through November 24, 2015; and another teacher (teacher 2) from November 25 through November 30, 2015. Teacher 1 stated that the Student took his exams in another classroom of 8-10 students, proctored by two school staff members. Teacher 2 asserted that no tests were administered in the Student's class from November 25-30, 2015. The Student confirmed to OCR that English tests were administered in a small group setting in the resource room during the time in question. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District failed to provide the Student with a small group testing environment for his English class, as stipulated in his Section 504 plan, from the beginning of school year 2015-2016 through November 2015.

With respect to the Student's algebra class, the teacher (teacher 3) informed OCR that four tests were administered to the Student's class from the beginning of school year 2015-2016 through November 30, 2015. Teacher 3 acknowledged that she administered three of the four tests to the Student in the Student's classroom, and not in a small group setting.³ Teacher 3 stated that the Student was absent on the day the fourth exam was administered so she excluded the fourth exam from the Student's grade calculation.⁴

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 provide the Student with a small group testing environment for algebra tests administered from the beginning of school year 2015-2016 through November 30, 2015, as stipulated in the Student's Section 504 plan.

With respect to the Student's global studies class, the teacher (teacher 4) informed OCR that three tests were administered to the Student's class from the beginning of school year 2015-2016 through November 30, 2015.⁵ Teacher 4 stated that the tests were administered in the Student's classroom because the alternate site typically used for the Student's testing was not available; however, she stated that she "believed" that, prior to each test,

² The Student's Section 504 plan, dated XXXX XX, 2015, remained in effect until it was replaced by a subsequent Section 504 plan, dated XXXXXXXX XX, 2016.

³ Teacher 3 stated there was no alternate site available.

⁴ The Student received the following test scores on the first three algebra tests: 9% on the test administered on September 15, 2015; 15% on the test administered on September 28, 2015; and 31% on the test administered on October 19, 2015.

⁵ The Student received the following test scores on the three global studies tests: 76% on the test administered on October 2, 2015; 85% on the test administered on October 9, 2015; and 100% on the test administered on November 13, 2015.

she offered the Student the opportunity to take the test in an empty classroom, but the Student rejected her offers. The Student advised OCR that teacher 4 did not offer him the opportunity to take the three global studies examinations in an empty classroom. The District provided no documentation or other information to substantiate that teacher 4 offered the Student the opportunity to take his exams in a small group setting as required by his Section 504 plan. 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 preponderance of the evidence substantiated that the Student was provided with a small group testing environment for his global studies tests administered from the beginning of school year 2015-2016 through November 30, 2015, as stipulated in the Student's Section 504 plan.

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 provide the Student with a small group testing environment for his global studies tests administered from the beginning of school year 2015-2016 through November 30, 2015, as stipulated in the Section 504 plan.

On January 24, 2017, the District entered into the enclosed resolution agreement to resolve the above-referenced compliance concerns. 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 individual 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, Senior Compliance Team Attorney, at (646) 428-3893 or david.krieger@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXX, Esq.