



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

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VIRGIN ISLANDS

March 31, 2017

John Bilodeau  
Superintendent  
Gloucester Township Public Schools  
17 Erial Road  
Blackwood, New Jersey 08012

Re: Case No. 02-17-1002  
Gloucester Township Public Schools

Dear Superintendent Bilodeau:

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 Gloucester Township Public Schools (the District). OCR investigated the complainant's allegation that the District discriminated against her son (the Student), on the basis of his disability, by failing to consider the provision of related aids and services for the Student to participate in the XXX Elementary School's Latchkey program (the program), from the beginning of school year 2016-2017 through the present.

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. § 104.3(k)(4), states that a qualified individual with a disability, with respect to services other than employment or educational services, is defined as one who meets the essential eligibility requirements for the receipt of such services. The regulation implementing the ADA, at 28 C.F.R. § 35.104, contains a similar provision.<sup>1</sup>

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.

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<sup>1</sup> The regulation implementing the ADA, at 28 C.F.R. § 35.104, defines a qualified individual with a disability as one who, with or without reasonable modifications to rules, policies or practices, or with the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of such services or the participation in programs or activities provided by a public entity.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(i) and (vi), provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service, or otherwise limit qualified individuals with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. The regulation implementing the ADA, at 28 C.F.R. § 35.130, contains a similar provision.

The regulation implementing Section 504, at 34 C.F.R. § 104.38, provides that a recipient that operates a day care program or activity may not, on the basis of disability, exclude qualified persons with disabilities and shall take into account the needs of such persons in determining the aid, benefits or services to be provided. When voluntary noneducational programs are offered on a free or tuition basis, qualified children with disabilities may not be categorically excluded from those noneducational programs on the basis of their disabling condition; and, students with disabilities must be offered meaningful and equal access to that program.<sup>2</sup>

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

OCR determined that the program is a tuition-based, before and after school program sponsored by the District, which provides child care services from 7:00 a.m. until the beginning of the school day and from the end of the school day until 6:00 p.m. for children in kindergarten through fifth grade at all seven elementary schools within the District, including the Student's school, XXX Elementary School (the school). The program provides opportunities for free play and structured activities to promote the development of emotional, social, and physical skills. Program activities include free outdoor play; arts and crafts; organized games/activities; quiet time for reading/homework; group activities; and a snack (in the afternoon program).

To be eligible for the program, a student must be enrolled in the District in kindergarten through fifth grade, and be at least five years old by September 30 of the school year and no older than twelve years old by June 30 of the school year. In addition, proof of employment for all adults in a student's household is required. The regular tuition rate for one child to attend the program in the morning, five days per week, during school year 2016-2017 was \$36.00 per week, and \$27.00 for additional siblings; or, a daily rate (per child) of \$12.00 per morning, with a minimum attendance requirement of twice per week. The regular tuition rate for one child to attend the program in the afternoon, five days per week, during school year 2016-2017 was \$73.00 per week, and \$67.00 for additional siblings; or, a daily rate (per child) of \$19.00 per afternoon. Program policy addressing behavior states that one-on-one care is not provided for children during the program.

The District asserted that the program is not operated by the District. In support of this assertion, the District stated that the program is funded entirely through parental fees, which in turn are used for program operating expenses, including paying program employees and paying the District \$175,000 to lease space for the program. The District also asserted that program funds are in a separate account from the funding for the District's general programming. The District further asserted that the program is not considered an extension of the

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<sup>2</sup> See *Riley v. Jefferson County Bd. of Educ.*, Case No. CV-89-P-0169-S (N.D. Ala. Aug. 9, 1989) (holding that school district's policy of charging more for the noneducational after school care of disabled students, based on the additional cost of caring for the students, violates Section 504, as recipients may be required to make reasonable modifications to accommodate students with disabilities). For additional information, see OCR's Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance, issued by Acting Assistant Secretary William Smith on January 3, 1990.

school day; academic programming is not provided during the program; and, program staff members are not qualified to provide special education services.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(v), provides that a recipient may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefits, or services to beneficiaries of the recipient's program. The regulation implementing the ADA, at 28 C.F.R. § 35.130(b)(1)(v), contains a similar provision. If OCR finds that a recipient is providing significant assistance to an agency or organization that discriminates on the basis of disability, the recipient must either obtain compliance by the other entity or terminate the assistance. Appendix A to the regulation implementing Section 504 explains that among the criteria to be considered when determining whether a recipient is providing significant assistance to another entity are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

OCR determined that the District has an arrangement with the program to provide day care services to its beneficiaries. Specifically, OCR determined that the District provides indirect and direct financial and other support to the program, as follows:

- The program operates in the District's seven elementary schools, and the District contracts with the program to lease the District property for \$175,000.
- The program is overseen by the supervisor and program coordinator, both of whom are District employees.
- The program is only available to students enrolled in the District in kindergarten through fifth grade.
- Information for the program is available on the District's website.
- Program employees are employed and paid by the District.
- Registration forms are sent to, and program fees are made out to the District.
- Program funds are deposited in a District account.
- The District provides administrative services to the program; including the receipt of tuition and payments, which are submitted to the District at its offices.
- The program follows the District's school calendar.

Based on the foregoing, OCR determined that the District provides a day care service for students enrolled in the District; and, operates the program, or at least has a contractual arrangement with and provides significant assistance to the program to provide day care services to the program beneficiaries.

The Student was in XXX grade at the school during school year 2016-2017 and received special education services pursuant to an individualized education program (IEP), dated XXX XX, 2016,<sup>3</sup> with a classification of XXX. Among other related aids and services during the school day, the Student's IEP stated that the Student was to be provided with a one-to-one aide. The IEP also included a Behavioral Intervention Plan (BIP), which included a number of techniques to address the Student's behavior, including the use of positive reinforcement and anger control management.

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<sup>3</sup> While the IEP was dated XXX XX, 2016, the IEP states that the effective date for implementation was September 7, 2016. The IEP dated XXXXX, 2016, replaced the Student's prior IEP dated XXX XX, 2016. Notably, at the meeting on XXX XX, 2016, the IEP team changed a provision in the Student's prior IEP from a shared aide to a one-on-one aide.

OCR determined that the Student met the essential eligibility requirements for the program; i.e., he was enrolled in the District in XXX grade, and the complainant provided proof of employment. Accordingly, OCR determined that the Student was a qualified individual with a disability with respect to the program. The Student applied to, and was admitted into, the morning and afternoon sessions of the program at the school five days per week for school year 2016-2017.

Following an incident in the program on XXXXX, 2016, in which the Student was disciplined,<sup>4</sup> the complainant and the Student's father sent an electronic mail (email) message to the Student's XXX on XXXXX, 2016 requesting an emergency IEP meeting to "again... [ask] for additional supports to be put in place for [the Student] due to the behavior challenges stemming from [the Student's] disability."<sup>5</sup> The following school day, the XXX responded via email and offered to convene an IEP team meeting, but stated that the program is not a part of the Student's 'school day,' and thus is not something that the IEP team can address. The complainant and the XXX continued to exchange emails on XXX, 2016, and the XXX reiterated that the aids and related services provided in the Student's IEP do not carry over into the program, and encouraged the complainant to contact the District's Supervisor of Student Support Services (the supervisor), who oversees the program or the XXX. The IEP team convened on XXX, 2016, and the complainant again requested related aids and services for the Student during the program, but was told that IEP services are not provided in the program. The supervisor stated that he was aware of the email exchanges between the complainant and the XXX, and restated to OCR the program's policy that one-on-one aides are not provided to students in the program. The supervisor further stated that he has received requests for a one-on-one aide from parents for other program students at least once a year, but the program has always denied such requests.

The District asserted that it would be an undue financial burden to provide and pay for related aids and services for the Student, including the cost of the Student's one-on-one aide.<sup>6</sup> The regulation implementing the ADA, at

<sup>4</sup> On XXX, 2016, XXX XXXXXXXX XXX XXXXX XXXX XXXXXXXX XXXXXXXX XXXXXXXX XXX XXXXX XXX XXXXXX X  
XXXX XXXX, XXX XXXXXXXX XXX XX XXXXX XXX XXXXX XXX XX X XXXXXXXX XX X XXXXXXX XXX  
XXXXXXXXXXXX XXXX. The District XXX and suspended the Student from the program for one day as a result of the incident.  
Prior to this incident, on XXX, 2016, the complainant was called because during the program, XXXXX XXXXXXXX XX XX XX  
XXXXX XXX XXXXXXXX XXXXXXXX XX XXX XXXXXXXXXXXX XX XXXXX XXXXXXX XXX XXX XXXXXXXXXXXXXXX XXXX  
XXXXXXXX XXXXX XXXXXXXXXXXX XXX XXXXX XXX XXXXXXXXXXX. The Student was subsequently disciplined for other  
incidents that took place during the program. On XXX, 2016, the Student XXXXXXX XX XXXXX XXXXXXX XXXXXXXXXXX XXX  
XXXXXXXX XX XXXXXXXXXXXXXXX XXXXXXX XXXXXXXXXXX XXXXXXXXXXX XXXX XXXXXXX X XXXXX XXX  
XXXXXXXX XX XXXX XXXX X XXXXXXXXXXX XXX XXXXXXXXXXX XXX XXXXX XX XXXXXXX. The Student's parents were  
called, and asked to pick up the Student early from the program. On XXX, 2016, the Student XXXXXXX X XXXXX XXXX XX  
XXX XXXXXXX XXX XXXXXXX XX XXX XX XXXX XXXX XXXXX XX XX XX. The Student was suspended from the  
program for one day as a result of this incident. In documenting this incident to the Student's parents, the XXX opined, "[the  
Student] may be better served by a program that provides him with the one to one attention he needs and we are not able to provide."  
The District advised OCR that it did not consider whether the Student's conduct for any of these incidents was a manifestation of his  
disability, or could have been averted with related aids and services, including a one-on-one aide or implementation of the Student's  
BIP. OCR determined that the Student's parents were not reimbursed for the days the Student was suspended from attending the  
program or asked to leave the program early.

<sup>5</sup> The complainant stated that she and the Student's father had previously made repeated oral and written requests that the program provide the related aids and services set forth in the Student's IEP during the program, including a one-to-one aide and a behavior plan, but the District denied all such requests, asserting that it had no legal obligation to accommodate the Student's disability during the program as the program is non-academic in nature.

<sup>6</sup> Unlike other parts of the ADA, Title II does not contain its own definition of the term undue burden; nor does it include a list of the factors to be used in making an undue burden determination. OCR has borrowed the definitions of the terms “undue burden” and “undue hardship” from Title I (employment) and Title III (public accommodations) and applied them in the context of Title II. Undue burden is defined as an action requiring significant difficulty or expense. OCR also requires that factors similar to those found in Title I and Title III be considered in assessing whether a burden is undue. These factors generally include the nature and cost of the accommodations needed and the overall financial resources of the facility or facilities involved in the provisions of the reasonable

28 C.F.R. § 35.164, provides that the decision that compliance would result in an undue burden for the recipient must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity; and, must be accompanied by a written statement of the reasons for reaching that conclusion.

The supervisor estimated that the cost of a one-to-one aide would be \$10-\$20 per hour, and further noted that the District generally has had difficulty finding and retaining one-on-one aides, as there is a high turnover rate in the field. The District asserted that these additional costs would be an undue financial burden considering the tuition charged for the program. The supervisor stated that the program budget is approximately \$1.6 million and the overall District budget is approximately \$100 million. The District did not provide any documentation in support of its cost estimates for the provision of a one-on-one aide or any other related aids and services; nor did it provide any documentation detailing the program's operating costs, rent, or utilities or the District's overall budget. Even assuming that the District's projected cost of \$10-\$20 per hour for a one-on-one aide is accurate, it represents an insignificant portion of the District's approximately \$100 million budget.

OCR found no evidence that the District conducted the type of inquiry or analysis required by the regulation implementing the ADA in determining whether providing the Student with a one-on-one aide would constitute an undue financial burden. Therefore, OCR determined that the District did not meet its burden in demonstrating that requiring it to provide a one-on-one aide and other related aids and services for the Student would be an undue financial burden.

Based on the foregoing, OCR determined that the District's actions in not considering aids and related services, including a one-on-one aide, for the Student to participate in the program violated the regulation implementing Section 504, at 34 C.F.R. § 104.38. In addition, the District failed to demonstrate that providing related aids and services, including a one-on-one aide, would fundamentally alter the nature of the service, program or activity; or cause an undue financial burden.

On March 31, 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.

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accommodations; the number of persons employed at such facility; the effect on expenses and resources; and the impact otherwise of such accommodation upon the operation of the facility. See 42 USC § 12111(10)(A)(B); 28 C.F.R. § 35.104; 42 U.S.C. § 12181(9)

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If you have any questions, please contact Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or [Jonathon.LeBeau@ed.gov](mailto:Jonathon.LeBeau@ed.gov); David Krieger, Compliance Team Attorney, at (646) 428-3893 or [David.Krieger@ed.gov](mailto:David.Krieger@ed.gov); or Anna Moretto Cramer, Compliance Team Leader, at (646) 428-3826 or [Anna.Moretto.Cramer@ed.gov](mailto:Anna.Moretto.Cramer@ed.gov).

Sincerely,

\_\_\_\_\_  
/s/

Timothy C.J. Blanchard

Encl.

Cc: XXX XXX, Esq.