

July 17, 2017

Pablo Muñoz
Superintendent of Schools
Passaic Public School District
101 Passaic Avenue
Post Office Box 388
Passaic, New Jersey 07055

Re: Case No. 02-17-1151
Passaic Public School District

Dear Superintendent Muñoz:

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 Passaic Public School District (the District). The complainant alleged that the District discriminated against disabled students, including her two sons, by excluding them from participation in the District's Saturday Academy Enrichment Program during school year 2016-2017.

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.

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 that receives financial assistance from the Department. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a), contains a similar provision as it relates to public entities.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(i) and (vi), further 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. § 104.37, also provides that a recipient must provide non-academic and extracurricular services and activities in such a manner as is necessary to afford qualified individuals with disabilities an equal opportunity for participation in such services and activities.

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

During school year 2016-2017, Students 1 and 2 were enrolled in the XXXXX grade in the District. Student 1 was assigned to XXXXXX XXXXXX XXXXXX XXXXXX XX, and Student 2 was assigned to XXXXXX XXXXXX XXXXXX XXXXXX X (School 1). Students 1 and 2 were eligible to receive related aids and services in accordance with an Individualized Education Program (IEP). Their IEPs identified their disability as XXXXXX.

The program is a technology and academic enrichment program operated by the District on Saturdays for students in grades kindergarten through eighth grade who reside in the City of Passaic. According to the District, the program is designed to engage students in authentic, stimulating experiences and inquiry-based learning. During school year 2016-2017, the program offered the following courses: STEM, Virtual Google, Lego, Readers' Theater, Coding, Economics and Entrepreneurship, Digital Photography, Young Lawyers, History Day, Art, and Instrumental Music. Families of students submit an application in order to enroll a student into the program. The district informed OCR that all students are accepted into the program.

During school year 2016-2017, the program began on October 22, 2016, and ended on April 22, 2017, for a total of 20 Saturday sessions. The program was located at School 1, Abraham Lincoln Middle School Number 4 and Dr. Martin Luther King, Jr. School Number 6. At the elementary school level, two ninety-minute sessions operated between 8:30 a.m. and 11:30 a.m.

The complainant stated that she enrolled Students 1 and 2 into the program at School 1, and they attended the first session of the program on October 22, 2016. She stated that on that date, she spoke with the principal of School 1 (the principal) and the teacher of Students 1 and 2's

program class (the teacher), and requested that a special education teacher and aide assist Students 1 and 2 during their program class, since the students received these services pursuant to their IEPs. According to the complainant, the principal and the teacher informed her that the program could not accommodate the students because of their disability; the program would not provide the students with the services she requested; and, they would not be able to return to the program. The complainant stated that this position was later confirmed by an electronic mail message (email) to her, dated October 28, 2016, from the Director of Special Education (SPED director); and during a telephone conversation on November 1, 2016, with the Director of Elementary and Secondary Education (ESE director), who was responsible for admission into the program. The complainant stated that, as a result, she did not send Students 1 and 2 back to the program after October 22, 2016.

The District denied that it informed the complainant that Students 1 and 2 could not participate in the program. The ESE director informed OCR that the principal informed her on October 22, 2016, that the complainant requested a special education teacher and aide to support Students 1 and 2 during the program. The ESE director stated that, accordingly, on October 24, 2016, she spoke with the SPED director and determined that they could assign a special education substitute teacher to assist Students 1 and 2 during the program. The ESE director stated that the District assigned a special education substitute teacher to the students' class; and, that this teacher attended five classes, beginning with the class on October 29, 2016, and ending with the class held on December 10, 2016. The District asserted that since Students 1 and 2 did not return to the program after October 22, 2016, it did not have the special education substitute teacher return to the class after December 10, 2016.

The complainant advised OCR that she was not made aware that the District had hired a special education teacher to assist Students 1 and 2. The District acknowledged that it did not inform the complainant that it had done so. The ESE director asserted that she spoke with the complainant by telephone on November 1, 2016, and offered her the opportunity to bring Students 1 and 2 back to the program so that the District and the complainant could assess what services they would need in order to participate in the program. The ESE director informed OCR that the District could not conduct this assessment because the complainant never brought the students back to the program. The complainant denied that the District ever notified her of the possibility of such an assessment. The District could not provide any information or documentation to substantiate that anyone at the District so notified the complainant.

The District denied that it had ever excluded any disabled students from the program since it began in 2014. The District also asserted that no parent or guardian, other than the complainant, had ever requested that the District provide services to accommodate a student's disability during the program. The complainant did not provide any examples of students who were allegedly excluded from the program because of their disabilities, except Students 1 and 2.

In the District's data response to OCR, dated April 21, 2017, the District's attorney stated, "Treating [the program] as another curricular component of the District's elementary and secondary programs, such as by incorporating students' IEPs, would fundamentally alter [the program]....Neither [Student 1] nor [Student 2] could successfully participate in [the program], though they were provided opportunities. The content was too advanced and required skills that

they are still developing.” During OCR’s interview of the ESE director on July 7, 2017, however, the District’s attorney stated that it was the District’s plan that after the District observed Students 1 and 2, and determined what services were necessary for them to enable them to participate in the program, it would assess whether such services would fundamentally alter the program.

In an email to the complainant, dated October 28, 2016, from the SPED director, the SPED director stated, “The purpose of the program is to reinforce the general education curriculum learned during the school day. Therefore, in order for a student to participate, s/he must be able to follow along with the unmodified general education curriculum for his/her grade-level. Both of your sons participate in educational programs that modify the curriculum in accordance with their IEP. As such, neither [Student 1] nor [Student 2] are performing the grade-level curriculum that the Saturday Enrichment Program reinforces.” There is no mention of an invitation for Students 1 and 2 to return to the program for an assessment or the assignment of a substitute special education teacher to assist Students 1 and 2 during the program. OCR obtained a copy of this email from the complainant. The District did not include the email in its data response. During OCR’s interview with the SPED director, she stated that the complainant did not respond to this email; however, the complainant provided OCR with a copy of an email that she sent in response, also dated October 28, 2016, in which the complainant stated that the District should publicize that students with IEPs are excluded from the program. During her interview with OCR, the SPED director stated that she shared her email to the complainant with the ESE director, and acknowledged to OCR that the ESE director advised her that the program is not connected to the general education curriculum; therefore, it does not “reinforce” it, as the SPED director had stated in the email.

Based on the above, OCR determined that Students 1 and 2 were qualified individuals with disabilities with respect to the program, as they met the eligibility requirements for participation in the program. Further, OCR determined that a preponderance of the evidence substantiates that the District effectively excluded Students 1 and 2 from participating in the program, when the SPED director sent the complainant an email on October 28, 2016, advising her that neither Student 1 nor Student 2 were performing at the grade-level curriculum that the program reinforced. Further, the District failed to advise the complainant that it had hired a special education teacher to assist Students 1 and 2; and, statements from the District’s attorney that neither Student 1 nor Student 2 could successfully participate in the program, and that their participation would fundamentally alter the nature of the program, supports the finding that the District effectively excluded Students 1 and 2 from participating in the program, in violation of the regulation implementing Section 504, at 34 C.F.R. § 104.4(a).

On July 17, 2017, the District agreed to implement the enclosed resolution agreement to resolve the compliance issues OCR identified. 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 individual may file a 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, please contact Coleen Chin, Senior Attorney, at (646) 428-3809 or coleen.chin@ed.gov; or Crystal Johnson, Senior Investigator, at (646) 428-3821 or crystal.johnson@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard