

August 10, 2017

James Grossane, Ed. D.
Superintendent
Smithtown Central School District
26 New York Avenue
Smithtown, New York 11787

Re: Case No. 02-17-1203
Smithtown Central School District

Dear Dr. Grossane:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against Smithtown Central School District (the District). The complainant alleged that the District's Committee on Special Education (CSE) discriminated against her, on the basis of her XXXXXXXX-related disability, by failing to accommodate her during a CSE meeting that she attended as a special education advocate for a student (the Student) on February X, 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.

In its investigation, OCR reviewed information that the complainant and the District submitted. OCR also interviewed the complainant, District staff, and a third party witness. OCR made the following determinations.

The complainant alleged that the District's CSE discriminated against her, on the basis of her XXXXXXXX-related disability, by failing to accommodate her during a CSE meeting that she attended as a special education advocate for the Student on February X, 2017 (the CSE meeting).

The complainant asserted that she contacted the CSE chairperson (the chairperson) by electronic mail message (email) on February 6, 2017, to request a quiet room and a note taker as accommodations for her XXXXXXXX-related disability.¹ The complainant stated that in response to her email, the chairperson stated that the room would be quiet, but that the District did not have staff available to take notes; so instead, the District would provide a summary of the meeting in the form of a “prior written notice” to the Student’s parent (the parent).

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 or otherwise be subjected to discrimination under any program or activity operated by a recipient. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a), contains a similar provision. Additionally, the regulation implementing the ADA, at 28 C.F.R. § 35.130(b)(7), requires a public entity to make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination based on disability unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program or activity. It further provides that a public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in a service, program, or activity of the public entity. 28 C.F.R. § 35.160(b)(1). In determining what types of auxiliary aids and services are necessary, a public entity must give primary consideration to the requests of individuals with disabilities. 28 C.F.R. § 35.160(b)(2).

The District provided to OCR copies of its policies and procedures governing the provision of accommodations based on disability for District programs and activities, including to parents, guardians, advocates, and/or third parties participating in Section 504 and/or CSE meetings.² OCR determined that, other than one of its policies that includes a provision for accommodating parents with disabilities who attend CSE meetings, none of the District’s policies addresses providing accommodations for advocates or other members of the public who have disabilities.

OCR determined that in an email to the chairperson sent on February X, 2017, the complainant advised that she would attend the CSE meeting on February X, 2017, as the Student’s special education advocate; that she had a XXXXXXXX disability; and that she requested “a note taker and a quiet room with little or no background noise or distractions.” The chairperson forwarded the complainant’s email to his supervisor, the XXXXXXXXXXXX XXXXXXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX (the administrator), to seek guidance on how to address the complainant’s request. The chairperson and administrator both informed OCR that they had never before received a request for a disability-related accommodation for a CSE meeting. The administrator asked the Assistant Superintendent of Pupil Personnel Services (the assistant

¹ The complainant informed OCR that she relies on a combination of XXXXXXXX and XXXXXXXX XXXX to understand others’ speech, and that she is therefore often unable to write notes at the same time. She stated that she would have referenced the note taker’s notes both during and after the meeting.

² Specifically, the District provided Board Policy 1920, entitled “Relations with Persons with Disabilities” (policy 1); Board Policy 1925, entitled “Interpreters for Hearing-Impaired Parents” (policy 2); Board Policy 4321.6, entitled “Preferral [sic] Intervention Strategies in General Education Prior to Referral to Special Education” (policy 3); Board Policy 4321.14, entitled “Special Education Personnel” (policy 4); Board Policy 4321, entitled “Programs for Students with Disabilities Under the IDEA and New York’s Education Law Article 89” (policy 5); and Board Policy 0110, entitled “Policy Against Discrimination and Harassment of Students and Staff” (policy 6).

superintendent) for guidance. The administrator informed OCR that the assistant superintendent consulted with the District's local representative from the New York State Education Department Special Education Quality Assurance Office (the NYSED representative), who advised her that the District was not obligated to provide disability-related accommodations to "a hired representative of the parents" at CSE meetings. The administrator further informed OCR that, in reliance upon the NYSED representative's advice, the District did not further consider or try to accommodate the complainant's request for a note taker. The administrator informed the chairperson that the District could not transcribe the meeting for the complainant, but that it could provide a recording of the meeting.

The chairperson replied to the complainant's email on February 7, 2017, stating that the location for the meeting was quiet, but that the District did not have a staff member to record notes and would instead provide the parent with a written summary of the meeting results and summarize the outcome of the meeting prior to its conclusion. In the complainant's response to the chairperson, she stated that although she disagreed with the NYSED representative's position, she would proceed with the CSE meeting without a note taker "in the spirit of not being adversarial"; but stated that she was aware that she could file a complaint with OCR if she felt that she missed pertinent information.

OCR determined that a total of eight people attended the CSE meeting, which lasted approximately 1.5 hours. This meeting was the annual review of the Student's IEP. At the beginning of the CSE meeting, the chairperson stated that he would record the meeting. The chairperson did not inform the other attendees of the complainant's disability. After all members introduced themselves, the complainant announced that she had a XXXXXXXX disability and that she might ask for the attendees to repeat themselves if she could not XXXX XXXX XXXXXXXX.

OCR reviewed an audio recording of the CSE meeting. The audio recording began after the attendees' introductions and continued until the conclusion of the meeting. Based on its review of the audio recording, OCR determined that the complainant did not ask any of the attendees to repeat themselves during the course of the meeting. OCR also determined that the complainant was an active participant throughout the meeting; she frequently asked substantive follow-up questions, advocated for the Student on various issues, and interjected her disagreement with various points, in the regular course of the dialogue among the meeting attendees. In addition, the parent informed OCR that, notwithstanding the complainant's apparent frustration during some moments when multiple attendees spoke simultaneously, the complainant was an effective advocate for her during the CSE meeting; the parent stated that the complainant addressed all of her talking points, asked follow-up questions, and helped explain information to her.³ OCR determined that the chairperson did not summarize the meeting before ending it as he had advised the complainant he would do.

The complainant acknowledged that the room in which the CSE meeting took place was quiet, but she asserted that she missed some of the resource room teacher's statements made during the meeting, and that the parent had to relay this information to her afterward. The complainant also

³ The parent informed OCR that during her conversations with the complainant after the CSE meeting, she learned that the complainant had missed some details from the meeting.

stated that the chairperson made an audio recording of the CSE meeting, but despite her making several requests, the District never provided her with a transcript or copy of the recording of the CSE meeting.

On February 22, 2017, the parent emailed the superintendent to state that she had yet to hear of an outcome from the CSE meeting, and that she also had yet to receive the recording of the CSE meeting. On March 2, 2017, the complainant emailed the chairperson to request a copy and transcript of the recording from the CSE meeting. OCR determined that the administrator attempted to have the audio recording transcribed through the District's court reporting service, but the court reporter informed the administrator that it was not possible to transcribe the audio recording.⁴ The administrator then provided the audio recording to the assistant superintendent. The District thereafter mailed the recording to the parent on compact disc (CD); however, the District did not provide the audio recording to the complainant, as requested.⁵

Based upon the foregoing, OCR determined that the District provided a quiet room for the CSE meeting, per the complainant's request, but denied the complainant's request for a note taker. Without engaging in an interactive process with the complainant to discuss mutually acceptable alternatives, the District only offered the complainant an alternative of summarizing the meeting at the end and providing a written summary of the meeting to the parent; however, the chairperson failed to summarize the meeting at the end and did not discuss with the complainant whether providing the parent with a written summary of the meeting afterwards would be an effective alternative to a note taker for her. While OCR determined that the complainant fully participated in the CSE meeting, and was able to serve in her role as the Student's advocate at the CSE meeting, OCR determined that the complainant missed some of what was said when multiple individuals were talking at once. The District provided an audio recording of the CSE meeting to the parent, but did not discuss with the complainant whether recording the CSE meeting would be an effective alternative to a note taker for her. Moreover, the District never provided the audio recording or a transcript of the CSE meeting to the complainant. Therefore, OCR determined that the District violated the regulations implementing Section 504, at 34 C.F.R. § 104.4(a), and the ADA, at 28 C.F.R. §§ 35.130(a), 35.130(b)(7), 35.160(b)(1) and (b)(2) by denying the complainant's requested accommodations for the CSE meeting, failing to engage in an interactive process to discuss alternatives, and failing to provide the alternatives it unilaterally chose.

On August 8, 2017, the District agreed to implement the enclosed resolution agreement, which addresses the compliance issues described above. 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

⁴ The administrator informed OCR that the court reporter stated it was impossible to accurately transcribe the meeting because the court reporter was not present during the meeting, multiple people spoke simultaneously throughout the course of the meeting, and the court reporter could not discern who was speaking at any given moment.

⁵ Neither the District nor the parent was able to confirm the exact date that the recording was sent or received.

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 regarding OCR's determination, please contact Aditi Shah, Compliance Team Attorney, at (646) 428-3897 or aditi.shah@ed.gov; or Michele Ginter-Barbara, Compliance Team Investigator, at (646) 428-3816 or michele.ginter-barbara@ed.gov.

Sincerely,

/s/

Timothy C. J. Blanchard

Encl.

cc: XXXXXX X. XXXXX, Esq.