



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

August 28, 2019

Robert Carranza
Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, New York 10007

Re: Case No. 02-17-1353
New York City Department of Education

Dear Chancellor Carranza:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), in the above-referenced complaint filed against the New York City Department of Education (the NYCDOE). The complainant alleged that during school year 2016-2017, the NYCDOE discriminated against her son (the Student), on the basis of his disability, by failing to provide him with the following services identified in his Individualized Education Program (IEP): special education teacher support services (SETSS) in his English language arts class twice per week (Allegation 1); SETSS in his math class three times per week (Allegation 2); individual counseling once per week (Allegation 3); and, speech therapy twice per week (Allegation 4).

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 (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 NYCDOE 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 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 an IEP is one means of meeting this requirement.

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

During school year 2016-2017, the Student was in XXXXXX grade at the NYCDOE’s New Explorations into Science, Technology and Math school (the School). The Student was eligible for special education and related aids and services, under the eligibility category of “XXXXXXXXXXXXXXXXXXXX.” The Student’s IEP for much of school year 2016-2017, effective February 24, 2016, through May 9, 2017, stated that his educational placement was general education, with related services of integrated co-teaching (ICT) in English language arts (ELA), social studies, math, and science; and, group speech therapy twice per week. A second IEP for school year 2016-2017, effective May 9, 2017, through the end of school year 2016-2017, as well as school year 2017-2018, maintained the aforementioned related services and also included SETSS for ELA two times per week, SETSS for math three times per week, and individual counseling services once per week.

With respect to Allegations 1 and 2, the complainant alleged that the NYCDOE discriminated against the Student, on the basis of his disability, by failing to provide him SETSS in his ELA class twice per week and in his math class three times per week during school year 2016-2017. As stated above, OCR determined that the Student was entitled to these services pursuant to his IEP, effective May 9, 2017. Specifically, the Student’s IEP stated that he would receive SETSS as a direct service in a group setting.¹

The NYCDOE acknowledged to OCR that the Student did not receive SETSS for either ELA or math from May 9, 2017, through the end of school year 2016-2017, as required by his IEP. The NYCDOE asserted that it did not provide SETSS to the Student due to a number of logistical issues related to the School schedule during May and June 2017²; and, the incorporation of the new service into the Student’s existing ICT classroom services.³ Additionally, the NYCDOE advised OCR that it was unable to provide push-in SETSS to the Student in his ICT classroom because “a student may not receive two special education services at the same time.” Conversely, pull-out SETSS was also “not a viable educational option” because on May 9, 2017, with 23 school days

¹ SETSS, provided as a direct service, involves a special education teacher providing specially designed instruction part-time to a group of up to eight students. This may take place in the general education classroom (push-in) or somewhere else in the school (pull-out). See <https://www.schools.nyc.gov/special-education/preschool-to-age-21/special-education-in-nyc> (site last visited on August 28, 2019).

² The NYCDOE advised OCR that it did not begin providing SETSS to the Student on May 9, 2017, because from May 8 through May 19, 2017, Advanced Placement exams were taking place at the School, which caused scheduling difficulties with teachers; and then during the week of May 22-26, 2017, the School became a New York State Regents Pilot Testing site. By May 29, 2017, the NYCDOE asserted, the School’s students only had ten instructional days remaining to prepare for the June Regents exam.

³ Classrooms with ICT services include students with and without IEPs. Two teachers, a general education teacher and a special education teacher, work together to adapt materials and modify instruction. The NYCDOE views SETSS as a separate program option from an ICT classroom on its continuum of services for special education students.

remaining in school year 2016-2017, the School would have had to change the Student's class schedule, dropping one class entirely to establish a period for pull-out SETSS. Moreover, because other ICT classrooms at the School were full, the NYCDOE asserted that it would have had to change not just the Student's schedule, but the schedules of other students in the existing ICT classrooms in order to implement the Student's new SETSS programming. Thus, the School's administrators determined that the School instead would begin providing the Student's SETSS services at the start of school year 2017-2018.

With respect to Allegation 3, the complainant alleged that the NYCDOE discriminated against the Student, on the basis of his disability, by failing to provide him with individual counseling once per week during school year 2016-2017. As stated above, OCR determined that the Student was entitled to individual counseling once per week, pursuant to his IEP effective May 9, 2017. Pursuant to the IEP, each counseling session was scheduled to be 40 minutes long.

As of the school week beginning on May 8, 2017, eight weeks remained in school year 2016-2017. In one of those weeks, the New York State Regents exam was administered every day; so students were released and related services were not provided. Thus, if the Student's IEP was fully implemented, he would have been expected to receive seven 40-minute counseling sessions for the remainder of school year 2016-2017.

Notwithstanding the start date of May 9, 2017, listed in the Student's IEP, the NYCDOE's service records for the Student indicate that he received two 40-minute counseling sessions in the week of May 1, 2017: one on May 1, 2017, and the other on May 5, 2017; however, the Student's attendance records indicate that he was not present in school on May 5, 2017. The Student's counselor advised OCR that she did not know the reason for this discrepancy and posited that perhaps it was a typographic error. The service records indicate that the Student received one counseling session during the week of May 8, 2017. He did not receive a counseling session during the week of May 15, 2017; however, he received one 40-minute session during the week of May 22, 2017. During the week of May 29, 2017, following the Memorial Day holiday, the Student received two shorter counseling sessions, of 10 minutes and 20 minutes, respectively, on May 30 and 31, 2017. The counselor advised OCR that these shorter sessions were "catch-up" sessions. The Student received one 40-minute counseling session during the week of June 5, 2017, and again during the week of June 12, 2017. The School administered Regents exams to students between June 13 and 23, 2017, so no related services were provided during that time. During the final week of school year 2016-2017, the Student was absent on the two school days he was scheduled to receive counseling services: June 27 and 28, 2017.⁴ Thus, the School was unable to provide the Student counseling during that week. OCR determined that in total – not counting the counseling session indicated in the Student's service logs on May 5, 2017, despite his absence from school on that date – the Student received five 40-minute counseling sessions, plus the two, shorter "catch-up" sessions on May 30 and 31, 2017.

With respect to Allegation 4, the complainant alleged that the NYCDOE discriminated against the Student, on the basis of his disability, by failing to provide him with speech therapy twice per week during school year 2016-2017. As stated above, OCR determined that the Student was entitled to

⁴ NYCDOE schools were closed on Monday, June 26, 2017, to observe Eid al-Fitr.

group speech therapy for the entirety of school year 2016-2017, pursuant to both IEPs that were in effect during the school year. The sessions were scheduled to be 40 minutes long.

OCR determined that during school year 2016-2017, not taking into account factors such as holidays, the Student's attendance, and/or the availability of the School's speech therapist, the School would have had to provide the Student with somewhere within the range of 72 to 78 speech therapy sessions (depending on whether services were provided during the first and last weeks of the school year, and/or during the weeks in which there was only one school day). The School's service logs for the Student reflected that he received 61 speech therapy sessions during school year 2016-2017. Of those 61 sessions documented in the service logs, five were logged for dates on which the Student's records indicate that he was absent from the School.⁵ Additionally, three sessions were logged as having a duration of zero minutes.⁶

The School's speech therapist advised OCR that during school year 2016-2017, she maintained a set schedule for providing group sessions of speech therapy, to which the Student was entitled pursuant to his IEP, but she could not recall the specific days of the set schedule; and, she stated that she would change the set schedule as warranted, based on both the Student's availability and hers.⁷ The speech therapist stated that her service logs for the Student included information about any time that she entered the Student into the NYCDOE's Special Education Student Information System (SEGIS)⁸ database, including just scheduled sessions; but the detailed information she included for each logged session would indicate whether the Student was absent. The speech therapist opined that the zero-minute session in the service logs was likely a date on which she was absent from the School, so she would have logged the session in this manner to remind herself that she needed to make it up to her students. Accordingly, OCR determined that, based on the service logs and testimony of the speech therapist, the Student received at most 53 sessions of speech therapy during school year 2016-2017.

Prior to OCR's completing its investigation, the NYCDOE signed the enclosed agreement on August 22, 2019, to resolve the complaint without further investigation. OCR will monitor the implementation of the resolution agreement.

This letter should not be interpreted to address the NYCDOE'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.

⁵ The Student's attendance record indicated that he was absent on the following dates on which the School's records indicate he received speech therapy sessions: XXXXXXXX XX, XXXX; XXXXXXXX XX, XXXX; XXXX XX, XXXX; XXXX XX, XXXX; and, XXXX XX, XXXX.

⁶ The dates of these sessions were: December 21, 2016; March 13, 2017; and, May 24, 2017.

⁷ For example, the speech therapist advised OCR that she would not have provided services on October 17, 2016, because XXX XXXX XXX XXX XXX XX XXXXXXXX XXXXXXX.

⁸ SEGIS was created in 2011 to track NYCDOE special education student progress toward IEP goals and objectives and the provision of related services, among other data. At all relevant times herein, special education teachers and related service providers were required to log all sessions with students into SEGIS.

Please be advised that the NYCDOE 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 this matter, please contact Eric Bueide, Senior Attorney, at 646-428-3851, or eric.bueide@ed.gov; or Coleen Chin, Senior Attorney, at 646-428-3809, or coleen.chin@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Enclosure

cc: XXXXX XXXXXX