



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
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NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
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June 24, 2019

Dr. Brian K. Hartwell
District Superintendent of Schools
BOCES Cayuga-Onondaga
1879 West Genesee Street Road
Auburn, New York 13021

Re: Case No. 02-19-1135
Cayuga-Onondaga Board of Cooperative Educational Services

Dear Superintendent Hartwell:

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 the Cayuga-Onondaga Board of Cooperative Educational Services (BOCES). The complainants alleged that staff at BOCES discriminated against their son (the Student), on the basis of his disability, by failing to provide the Student: (a) extra time to complete class assignments; (b) 1:1 support; and, (c) repeated directions, as required by his Individualized Education Program (IEP) during school year 2017-2018 (Allegation 1). In addition, the complainants alleged that BOCES discriminated against the Student, on the basis of his disability, by failing to respond to complaints made on August 16 and November 27, 2018, that staff at BOCES failed to provide the Student with the related aids and services required by his IEP during school years 2016-2017 and 2017-2018 (Allegation 2).

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. BOCES is a recipient of financial assistance from the Department, and is a public elementary and secondary educational system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

OCR reviewed information that the complainants and BOCES submitted to OCR. OCR also interviewed the complainants and BOCES staff. OCR made the following determinations.

During school year 2017-2018, the Student's XXXX school district, the XXXXXXX XXXXXXXX XXXX School District (the District) classified the Student as a student with a disability based on his diagnosis of XXXXXXX. Pursuant to the Student's IEPs dated March 28, 2017, July 20, 2017, January 29, 2018, and April 18, 2018, for school year 2017-2018, the District placed the Student in a special education program XXXXXXX XXXXXXX XXXXXXX XXXX XXXXXXX that was operated by BOCES. During school year 2017-2018, the Student was placed in XXXXXXX special education classrooms for English, math, and social studies; and, a XXXXXXX classroom for science.

The complainants filed a complaint against BOCES with the New York State Education Department (NYSED) on XXX X, 2018, in which they alleged that: (1) BOCES had failed to notify them of personnel changes related to the aides assigned to support the Student; (2) BOCES staff had mistreated the Student; and, (3) BOCES had failed to ensure that the Student's aides were informed of their responsibilities to implement the recommendations on the Student's IEP. NYSED dismissed the first two allegations for lack of jurisdiction; however, NYSED investigated the third allegation, which included a review of the Student's school records and interviews of several BOCES special education teachers and aides.

NYSED issued its determination by letter dated XXXX X, 2018. NYSED determined that all of the BOCES staff members stated that they had been informed of their responsibility to implement the Student's IEP, and confirmed having access to the Student's IEP during school years 2016-2017 and 2017-2018; however, NYSED's determination letter stated that BOCES did not provide any documentary evidence that corroborated the assertions of their staff that they were aware of their responsibilities in implementing the Student's IEP. Therefore, NYSED sustained the complainants' allegation that BOCES failed to ensure that the Student's aides were informed of their responsibility to implement the Student's IEP; and, NYSED required BOCES to take corrective action to remedy this issue.

Pursuant to a "Compliance Assurance Plan," BOCES was required to submit "a written procedure outlining how BOCES will ensure special education teachers inform support staff of their responsibility to implement the recommendations on students' IEPs"; and, a formal sign-off sheet that was to be used for each student with a disability. BOCES was also required to provide the names and contact information of all staff assigned to work with the Student for school year 2018-2019; and, written evidence that support staff had been informed, prior to the implementation of the IEP, of their responsibility to implement the recommendations of the Student's IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the Student in accordance with the IEP.¹ Based on OCR's review of the documentation provided, OCR determined that NYSED's determination addressed whether the Student's aides were informed of their responsibilities to implement the recommendations in the Student's IEP, but it did not include any findings that addressed whether the Student's IEP was actually implemented during school years 2016-2017 and 2017-2018.

¹ In a letter, dated September 24, 2018, NYSED notified the complainants and BOCES that BOCES had complied with the terms of the compliance assurance plan.

With respect to Allegation 1, the complainants alleged that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide him (a) extra time to complete class assignments; (b) 1:1 support; and, (c) repeated directions, as required by his IEP during school year 2017-2018. In support of Allegation 1, the complainants asserted that the Student's xxxxxx special education teacher (teacher 1) and aides 1, 2, and 3 (the aides) failed to strictly follow the Student's IEP during school year 2017-2018. Specifically, the complainants asserted that the Student reported that teacher 1 and the aides rushed him to finish his work; chastised him for not staying on task and progressing with his work; told him, "you are on your own" in class; and, refused to repeat questions and/or directions for him. The complainants also asserted that when the Student tried to explain to teacher 1 and the aides that he had difficulty completing his work, they "cut him off" and responded by stating, "We are not doing your work for you." The complainants informed OCR that they had not realized that the Student's IEP had not been properly implemented until after the NYSED issued the determination in July 2018. OCR reviewed the Student's IEPs in effect for school year 2017-2018, and determined that the IEPs each state that the Student requires extra time to process new information, individual support, and repeated directions.

The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipients to provide a free appropriate public education to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met; and, are based upon adherence to the evaluation and placement procedures set forth in the regulation. Implementation of an IEP is one means of meeting this requirement.

With respect to Allegation 1(a), the complainants alleged that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide him extra time to complete class assignments, as required by his IEP during school year 2017-2018. The complainants did not identify any specific class or specific classroom assignments for which the Student was denied extra time.

OCR determined that the Student's IEP for school year 2017-2018 did not explicitly state that he should receive extra time to complete class assignments; however, the Student's IEP repeatedly stated that the Student needed additional time to process information, including: "time to work with the teacher step by step to solve the problem" when he becomes overwhelmed in math; to allow [the Student] to learn at a pace that he is comfortable with"; "additional 'think time' to process auditory information"; and, that the Student has a "slower rate of learning than his typical peers."

The Student's special education teacher for xxxxxxxxxxxx (teacher 2) informed OCR that all students with disabilities in a XXXXXX or XXXXX classroom, such as the Student, are automatically granted extra time to complete their classroom assignments. Aide 1 informed OCR that she provided the Student with extra time to complete assignments "as necessary" and as often as possible; and, she stated that she often provided the Student with extra time to complete algebra, global studies, and biology assignments during his study hall periods during school year 2017-

2018. Aide 2 stated that students in the XXXX XXXXXX class, including the Student, were not given a set amount of time to complete any XXXXXXXX tasks during school year 2017-2018. Aide 3 stated that she provided the Student with extra time to complete his biology assignments “quite often” by staying after class to help him complete his lab during school year 2017-2018. OCR reviewed email exchanges between the complainant and various teachers during school year 2017-2018, which indicate that the Student was given extended time on assignments.

Based on the foregoing, OCR determined that testimony provided to OCR by teacher 2, and the aides, and email exchanges between the complainant and various teachers indicate that the Student received extra time to complete his assignments during the time period at issue; including during his algebra, global history, biology, and XXXX XXXXXX classes, and study hall periods and/or labs. Therefore, OCR determined that there was insufficient evidence to substantiate the complainants’ allegation that BOCES staff discriminated against the Student, on the basis of his disability, by failing to provide the Student with extra time to complete class assignments, as required by his IEP during school year 2017-2018. Accordingly, OCR will take no further action with respect to Allegation 1(a).

With respect to Allegation 1(b), the complainants alleged that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide him with 1:1 support, as required by his IEP during school year 2017-2018. The complainants did not identify any specific class or specific incidents in which the Student was denied 1:1 support.

OCR determined that the Student’s IEP for school year 2017-2018 did not explicitly provide for the service of a 1:1 aide;² however, his IEP stated that the Student requires “individualized prompts”, individual testing, and the assistance of an aide during math.³ In addition, the Student’s IEP stated that an aide accompanied him to his math class. The Student’s IEP also stated that he required simplified directions and assignments; assistance to stay organized in his classes; and, assistance to help him to remain on task or to redirect him, if necessary.

Although BOCES asserted that the Student’s IEP in effect for school year 2017-2018 did not require that the Student receive the services of a 1:1 aide, BOCES stated that several teacher’s aides, including aides 1, 2, and 3, who were assigned to the XXXXX and XXXXXX classes provided individual support to the Student when needed. Aide 1 stated that she provided the Student with 1:1 support “100% of the time” by always XXXXXXXX XXXX to the Student in any class in which she was assigned to work with him. Aide 2 also stated that she provided the Student with 1:1 support during XXXXXXXX assignments in the XXXX XXXXXX class “as necessary”; and, that the small group setting of this class allowed for her to provide all students, including the Student, with individual support. Aide 3 stated that she XXX XXXX to the Student in his classes on a daily basis to offer him 1:1 support since he required it.

Based on the foregoing, OCR determined that testimony the aides provided to OCR corroborated that the Student received 1:1 support during the time period at issue. Therefore, OCR determined

² OCR understood the complainants’ allegations to relate to the Student being provided 1:1 support by BOCES staff as opposed to the provision of a 1:1 aide.

³ BOCES stated that the Committee on Special Education added a 2:1 aide to the Student’s IEP for school year 2018-2019.

that there was insufficient evidence to substantiate the complainants' allegation that BOCES staff discriminated against the Student, on the basis of his disability, by failing to provide the Student with 1:1 support, as required by his IEP during school year 2017-2018. Accordingly, OCR will take no further action with respect to Allegation 1(b).

With respect to Allegation 1(c), the complainants alleged that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide him with repeated directions, as required by his IEP during school year 2017-2018. The complainants did not identify any specific class or specific classroom assignments for which BOCES staff failed to provide the Student with repeated directions.

OCR reviewed the Student's IEPs in effect for school year 2017-2018 and determined that the Student required directions given to him "one at a time"; that the Student required "extra clarification" of directions; and, that directions should be "short and to the point." In addition, the IEPs stated that the Student needed information presented in small chunks; and, that new information should be "repeated" to enhance retention of new learning. The Student's IEPs further stated that he required small group instruction with "consistent skill repetition and review of skills" to retain information.

Aide 1 stated that during school year 2017-2018, she would often have to clarify and/or repeat information to the Student in his classes; and, she also redirected the Student when he appeared to be "lost" during the lesson. Aide 2 stated that she frequently needed to repeat directions for the Student during XXXXXXXX activities. Aide 3 further asserted that she repeated any directions to the Student "on a daily basis." Aide 3 informed OCR that the Student would either ask her to repeat information or she would know from the Student's certain behaviors that he needed the information repeated (e.g., the Student would just look at her or not complete the assignment at all). Teacher 2 corroborated the accounts of the aides.

Based on the foregoing, OCR determined that testimony the aides provided to OCR indicated that the Student frequently received repeated directions to complete his work during the time period at issue; and, teacher 2 corroborated the accounts of the aides. Therefore, OCR determined that there was insufficient evidence to substantiate the complainants' allegation that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide the Student with repeated directions, as required by his IEP during school year 2017-2018. Accordingly, OCR will take no further action with respect to Allegation 1(c).⁴

With respect to Allegation 2, the complainants alleged that BOCES discriminated against the Student, on the basis of his disability, by failing to respond to complaints the complainants made to BOCES, on August 16, 2018 (complaint 1) and November 27, 2018 (complaint 2), in which they expressed concerns regarding the alleged improper implementation of the Student's IEP by teacher 1, who was the Student's special education teacher for school year 2016-2017 and XXXX of school year 2017-2018, and the aides who had worked with the Student during school years

⁴ Although Allegation 1 only pertained to the implementation of the Student's IEP during school year 2017-2018, aides 1, 2, and 3 informed OCR that they were also assigned to assist the Student during school year 2016-2017. Testimony provided by aides 1, 2, and 3 indicated that they also provided the Student with extra time to complete his assignments, 1:1 support, and repeated directions during school year 2016-2017.

2016-2017 and 2017-2018. In support of Allegation 2, the complainants provided to OCR copies of complaints 1 and 2 that their attorney sent to BOCES, dated August 16, 2018, and November 27, 2018. The complainants asserted that, to date, BOCES has failed to conduct an investigation of complaints 1 and 2.

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 or benefits from federal financial assistance. The regulation implementing the ADA contains a similar provision, at 28 C.F.R. § 35.130(a).

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. The regulation implementing the ADA, at 28 C.F.R. § 35.107(b), contains a similar requirement for public entities. OCR determined that BOCES has policies and procedures prohibiting discrimination on the basis of disability, which are published on BOCES's website and describe the process for filing complaints alleging discrimination on the basis of disability.⁵

Complaint 1

OCR determined that in complaint 1, dated August 16, 2018, among other issues, the complainants asserted that teacher 1 and the aides had not implemented the Student's IEP during school years 2016-2017 and 2017-2018. Specifically, the complainants stated in complaint 1 that teacher 1 and the aides "had been rushing [the Student] to finish his work"; "[old] him not to ask questions and that they did not want to repeat questions"; and, that they were not "available to provide him with the 1:1 assistance that he needed" contrary to the requirements of the Student's IEP, which provided for extra time, 1:1 support, and repeated directions.

BOCES Director of Special Education (the director) informed OCR that, pursuant to her practice, after receiving complaint 1 in August 2018, she contacted the Principal of Special Education (the principal) and teacher 2 (who was one of the Student's special education teachers for school year 2017-2018 in addition to teacher 1)⁶ to discuss the complainants' allegations. She asserted that she also met with other BOCES staff as part of an "internal check-in" to ensure that the Student's IEP was being implemented.

The principal advised OCR that at the time the director notified her about complaint 1, she informed the director that BOCES was implementing the Student's IEP. Thereafter, the principal

⁵ See, https://www.google.com/url?client=internal-uds-cse&cx=003214251488659891388:xevlk_02jm0&q=http://www.caybores.org/tfiles/folder616/Complaint%2520Procedure.pdf&sa=U&ved=2ahUKEwjP-r7Ftr7iAhXyIOAKHfXwC4QQFjABegQIDhAB&usg=AOvVaw0o3WMsbbgOjHmwCG3Lkk1v (site last visited on May 29, 2019).

⁶ OCR determined that teacher 1 XXXX BOCES in October 2017.

stated that she rearranged the schedules of BOCES staff members to ensure that the staff about which the complainants expressed concern would no longer interact with the Student. The principal stated that she determined that there was no need to discuss the specific allegations contained in complaint 1 with BOCES staff because BOCES had ongoing conversations regarding the implementation of its students' IEPs.⁷ The director and principal both acknowledged that they did not speak with the complainants and/or the Student regarding their allegation that the Student's IEP had been improperly implemented during school year 2017-2018.

In a letter from BOCES counsel to the complainants' attorney, dated September 26, 2018, in response to complaint 1, BOCES stated that it would strictly follow the Student's IEP for school year 2018-2019; and, that the aides assigned to assist the Student were "aware of [the Student's] needs and trained to meet them." Counsel further stated that BOCES had responded to the complainants' request that BOCES ensure that the aides not be assigned to work with the Student; and, all but one aide had been XXXXXXXXXXXX to a XXXXXXXXXXXX XXXXXXX. BOCES stated that it would direct the XXXXXXXXXXXX aide not to interact or communicate with the Student; however, such a "commitment from BOCES would necessitate [the complainants] entering into an agreement whereby they execute a full waiver and release of any claims they may have against the BOCES." OCR determined that BOCES did not take any further action in response to complaint 1.

Complaint 2

OCR determined that in complaint 2, dated November 27, 2018, among other issues, the complainants specifically requested that the District and the BOCES initiate their own investigation into the allegations concerning the improper implementation of the Student's IEP. The director stated that after receiving complaint 2, pursuant to her practice, she again conducted an "internal check-in" with the principal, teacher 2, and the aides to ensure that they were implementing the Student's IEP; however, the principal, teacher 2, and the aides denied being informed of complaint 2, or otherwise discussing it with the director. The director acknowledged that she did not speak with the complainants and/or the Student regarding their allegation that the Student's IEP had not been improperly implemented during school year 2017-2018. The director asserted that additional investigation of complaint 2 was unnecessary because the complainant's allegations had previously been addressed during NYSED's investigation. Specifically, BOCES asserted that during NYSED's investigation, the NYSED investigators asked the aides whether they had implemented the Student's IEP during school year 2017-2018, and the aides confirmed that they had. BOCES asserted that the aides subsequently shared this information with the principal and director; however, BOCES informed OCR that it does not have any written documentation to corroborate the aides' assertions regarding the content of NYSED's investigation.

In a letter from BOCES counsel to the complainants' attorney, dated December 7, 2018, BOCES responded to complaint 2. In the letter, BOCES counsel stated that BOCES and NYSED had previously investigated the complainants' allegations; and, on September 24, 2018, NYSED

⁷ Teacher 2 and the aides all confirmed that they did not participate in any additional investigations by BOCES after NYSED completed its investigation in July 2018.

informed the complainants and BOCES that BOCES' subsequent actions had resolved the previously identified issue of non-compliance. Counsel further stated:

“it is respectfully requested that [the complainants] cease and desist from continually requesting the investigation of matters that have been determined to be resolved. Matters already investigated and resolved to the satisfaction of [NYSED] are considered closed. BOCES will certainly investigate any new claims that [the Student] has been improperly treated or that his IEP has not been implemented. Such claims however, must be accompanied by specific and articulable facts.”

OCR determined that BOCES did not take any further action in response to complaint 2.

Based on the foregoing, OCR determined that the information the complainants provided in complaints 1 and 2 regarding the alleged improper implementation of the Student's IEP constituted sufficient notice to BOCES of alleged disability discrimination which would be prohibited by Section 504 and the ADA, to enable BOCES to respond to the complainants' allegations. OCR determined that BOCES did not investigate the complainant's allegations that teacher 1 and the aides failed to implement the Student's IEP. BOCES did not attempt to clarify the complainants' allegations or provide the complainants with the opportunity to provide information in support of their allegations. BOCES also did not interview staff regarding the allegations obtained in complaints 1 and 2, or otherwise obtain specific information responsive to the allegations. Moreover, to the extent that the BOCES relied upon NYSED's investigation, OCR determined that the documentation that the BOCES submitted to OCR did not indicate that NYSED specifically investigated whether BOCES staff implemented the Student's IEP during school year 2017-2018. In addition, NYSED's determination did not include any conclusions about the actual implementation of the Student's IEP. Therefore, OCR determined that the NYSED's investigation did not specifically address the complainant's allegation in complaints 1 and 2.

Based on the foregoing, OCR determined that BOCES did not provide a prompt and equitable resolution of the complainant's allegations of disability discrimination. On June 13, 2019, BOCES signed the enclosed Agreement to remedy the compliance issue identified in this investigation.⁸ OCR will monitor the implementation of the Agreement. Upon BOCES's satisfaction of the commitments made under the Agreement, OCR will close the case.

This letter should not be interpreted to address BOCES'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

⁸ As stated previously with respect to Allegation 1, OCR investigated the complainants' allegation that staff at BOCES discriminated against the Student, on the basis of his disability, by failing to provide the Student with repeated directions, as required by his IEP during school years 2016-2017 and 2017-2018, as part of its investigation of the instant complaint and determined that there was insufficient evidence to substantiate this allegation. Therefore, OCR determined that it was not necessary to require BOCES to conduct an investigation of the complainant's allegations in complaints 1 and 2 as part of the Agreement.

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.

The complainants have a right to appeal OCR's determination with respect to Allegations 1(a)-(c) within 60 calendar days of the date indicated on this letter. In the appeal, the complainants must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied; and, how correction of any error(s) would change the outcome of the case. Failure to do so may result in dismissal of the appeal. If the complainants appeal OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit, to OCR, a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that BOCES 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 Joy M. Purcell, Senior Compliance Team Attorney, at (646) 428-3766 or joy.purcell@ed.gov; Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or jessica.daye@ed.gov; or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXX XXX, Esq.