



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
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NEW YORK, NEW YORK 10005

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DIRECTOR
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August 21, 2019

Dr. Richard Carranza
Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, New York 10007

Re: Case No. 02-19-1194
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), regarding the above-referenced complaint filed against the New York City Department of Education (NYCDOE). The complainant alleged that staff at the NYCDOE's District 75 Public School 369 at Public School 67 (the School) discriminated against students in his special education class, on the basis of their disabilities, by failing to provide students with the following related aids and services during school year 2018-2019: (a) mandated occupational therapy (OT) sessions, (b) substitute one-to-one paraprofessionals, and (c) the use of iPads (Allegation 1); failing to promptly address a radiator leak and resulting flood in his classroom, in December 2018 (Allegation 2); excluding students from a School trip to a Christmas tree lighting ceremony, in December 2018 (Allegation 3); and, failing to invite NYCDOE administrators to a publishing party held in his classroom during school year 2018-2019 (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). In addition, OCR is 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 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.

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

During school year 2018-2019, the complainant was a special education teacher at the School. OCR determined that the complainant has xxxx at the School since 2003. The School is part of the NYCDOE's District 75 network; therefore, all of the students who attend the School are students with disabilities. During school year 2018-2019, the complainant xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx.¹ The complainant's classroom included special education students with a disability classification of xxxx (Students A-F); one special education teacher (the complainant); two, one-to-one paraprofessionals (paraprofessionals 1 and 2); and, one classroom paraprofessional (paraprofessional 3). The NYCDOE informed OCR that the classroom originally included xxxx students; however, in or around xxxx xxxx, one of the students (Student F) left the School, and for the remainder of the school year, the classroom xxxx xxxx xxxx students (Students A-E). The NYCDOE stated that it assigned paraprofessionals 1 and 2 to work specifically with one student each, as mandated in those students' IEPs. OCR determined that the students in the complainant's class were xxxx xxxx.

With respect to Allegation 1(a), the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by failing to provide the students with mandated OT sessions during school year 2018-2019. Specifically, the complainant asserted that on the occasions when OT providers cancelled the students' sessions because of the OT providers' absences or unavailability, the students were denied a free, appropriate public education (FAPE) because the NYCDOE did not provide the students with make-up OT sessions.

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 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 Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act is one means of meeting this requirement.

OCR determined that during school year 2018-2019, Students A-E were entitled to receive OT services pursuant to their IEPs.² OCR reviewed NYCDOE OT Service Records for Students A-E for the time period between September 6, 2018 (the first day of school) and May 17, 2019; a period that includes 24 full weeks of school.³ OCR's review of the records indicated that Students A-E

¹ The NYCDOE stated that the School has 19 classrooms, 10 of which have a xxxx classroom ratio.

² As noted above, Student F left the School in or around xxxx xxxx; accordingly, OCR excluded Student F from this analysis.

³ OCR requested data regarding OT services on May 1, 2019; and, this was the available data for the school year as of the time of the request.

did not receive OT services as delineated in their IEPs when sessions were cancelled because of provider absence or unavailability.⁴

The principal stated that she is responsible for ensuring that all students at the School receive the services mandated in their IEPs. The principal stated that when the OT providers at the School miss sessions with students, the providers provide make-up sessions at their discretion. The principal stated the OT providers are not required to provide make-up sessions if the extra sessions would force the providers to work more than eight hours per day. The NYCDOE confirmed to OCR that the OT providers assigned to Students A-E did not make up the OT sessions that were missed due to OT provider absences or OT provider unavailability.

Based on the foregoing, OCR determined that the NYCDOE failed to provide Students A-E with all of the OT services that they were mandated to receive pursuant to their IEPs during school year 2018-2019 in order to be provided a FAPE. On August 21, 2019, the NYCDOE signed the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement.

With respect to Allegation 1(b), the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by failing to provide students with substitute one-to-one paraprofessionals during school year 2018-2019. The complainant asserted that the School deliberately failed to assign substitute one-to-one paraprofessionals to his classroom to save money and to make it more difficult for him to teach his class. The complainant asserted that on the occasions when one-to-one paraprofessionals were absent, students in his class were denied a FAPE, because their IEPs mandated that they receive one-to-one paraprofessionals.

School staff stated that the NYCDOE uses the Substitute Central System (SubCentral), an automated absence management system for staff. A full-time paraprofessional must contact SubCentral to report an absence with as much notice as possible before the date of the absence.⁵ SubCentral then selects a qualified and available substitute for the assignment. School staff stated that if a student's regularly-assigned paraprofessional fails to contact SubCentral or SubCentral cannot locate an available substitute, the principal or assistant principal will attempt to provide coverage for absent paraprofessionals by either reassigning a paraprofessional from another assignment in the School that day,⁶ or substituting with another appropriately trained School staff member. The principal stated that in accordance with the School's practice, if the School cannot find an available substitute, the classroom paraprofessional and classroom teacher will cover the duties of the one-to-one paraprofessional.

⁴ Student A, whose IEP mandated 30 minutes of individual OT two times per week, did not receive 8 out of 48 sessions; Student B, whose IEP mandated 30 minutes of individual OT two times per week, did not receive 5 out of 48 sessions; Student C, whose IEP mandated 30 minutes of individual OT three times per week, did not receive 17 out of 72 sessions; Student D, whose IEP mandated 30 minutes of individual OT three times per week, did not receive 9 out of 72 sessions; and Student E, whose IEP mandated 30 minutes of individual OT two times per week, and 30 minutes of group OT (group of 2) one time per week, did not receive 12 out of 72 sessions.

⁵ Full-time paraprofessionals can report absences to SubCentral either online or by telephone.

⁶ For example, the principal stated that the administration may reassign a paraprofessional from another assignment if the paraprofessional's assigned student is absent from school that day.

OCR determined that for school year 2018-2019, Student C's and E's IEPs mandated that Students C and E have full-time one-to-one health paraprofessionals on a daily basis. For school year 2018-2019, Students C and E were assigned paraprofessionals 1 and 2, respectively. The School stated that the complainant's class also had a classroom paraprofessional (paraprofessional 3), who assisted all of the students and staff in the classroom, including Students C and E.

With respect to Student C, his IEP stated that Student C needed xxxx xxxx. Paraprofessional 1 stated that he was responsible for helping Student C in the classroom, walking him to the bathroom, and assisting him at lunch. Paraprofessional 1 also stated that Student C is xxxx, and he helps Student C xxxx xxxx xxxx xxxx xxxx xxxxx xxxx. During school year 2018-2019, the NYCDOE did not provide a substitute paraprofessional for Student C when paraprofessional 1 was absent on the following seven dates: xxxx xxxx; xxxx; xxxx; xxxx; and, xxxx. OCR determined that paraprofessional 1 did not report his absences to SubCentral on xxxx xxxx, and xxxx xxxx; therefore, SubCentral did not have notice to provide substitutes for his absences on those dates. The School administration was also unable to provide a substitute for those dates. For the remaining five dates, neither SubCentral nor the School administration was able to provide a substitute paraprofessional for paraprofessional 1. Paraprofessional 1 stated that when he was absent, paraprofessional 2 helped Student C xxxx xxxx, if needed. Paraprofessional 3 stated that on the dates that paraprofessional 1 was absent without a substitute, the classroom ran in the same way it usually runs, with all of the classroom staff supporting all of the students. The principal also noted that classroom staff were trained to contact a crisis line to request assistance if an issue ever arose with Student C's behavior that they were unable to xxxx effectively on an occasion when paraprofessional 1 was absent.

With respect to Student E, his IEP stated that he requires xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx; and, that Student E xxxx xxxx xxxx xxxx xxxx xxxx xxxx. Paraprofessional 2 stated that he was responsible for walking with Student E on the stairs, assisting him with personal hygiene, and generally supervising Student E throughout the school day.⁷

During school year 2018-2019, the NYCDOE did not provide a substitute paraprofessional for Student E when paraprofessional 2 was absent on the following five dates: xxxx xxxx; xxxx xxxx; and, xxxx xxxx. OCR determined that paraprofessional 2 did not report his absences to SubCentral on xxxx xxxx; therefore, SubCentral did not have notice to provide substitutes for his absences on those dates. The School administration was also unable to provide a substitute for those dates. For the remaining three dates, neither SubCentral nor the School administration was able to provide substitute paraprofessionals for paraprofessional 2. Paraprofessional 3 stated that for the dates that paraprofessional 2 was absent without a substitute, she and paraprofessional 1 supervised Student E, including at xxxx xxxx, which is when Student E required more assistance. Paraprofessional 1 also stated that the classroom usually had the added support from an occupational therapist at xxxx xxxx.

None of the School staff, including the complainant, provided any information indicating that Student C or Student E experienced a particular and concrete harm as a result of the lack of a substitute one-to-one paraprofessional in the classroom, such as failing to meet the measurable goals and objectives set forth in either student's IEP; regressing from previously stated present

⁷ Paraprofessional 2 stated that he also assisted Student E at xxxx, per Student E's mother's request.

levels of academic achievement; or, being denied individualized program modifications, or special education or related aids and services, set forth in either student's IEP. Moreover, School staff did not report receiving any complaints from Student C's or Student E's parents related to substitute coverage for paraprofessional 1's or paraprofessional 2's absences.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR determined that a preponderance of the evidence did not substantiate that Student C or Student E was denied a FAPE when paraprofessional 1 or 2 were absent without a substitute. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that School staff discriminated against students in his class, on the basis of their disabilities, by failing to provide students in his class with substitute one-to-one paraprofessionals during school year 2018-2019. Accordingly, OCR will take no further action with respect to Allegation 1(b).

With respect to Allegation 1(c), the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by failing to provide students with the use of iPads during school year 2018-2019. The complainant asserted that the IEP for one of the students in his classroom recommended that the student xxxx xxxx xxxx xxxx.

OCR determined that during school year 2018-2019, none of the IEPs for the students in the complainant's classroom mandated the use of an iPad or any assistive technology device; nor did any of the IEPs include goals that necessitated the use of an iPad. OCR determined that in April 2019, Student E began using an iPad Mini, based on the assistive technology evaluation (ATE) team's evaluation, dated xxxx xxxx; and, the NYCDOE stated that Student E's IEP team would consider amending Student E's IEP to reflect this recommendation at his next IEP meeting, set for September 2019.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that School staff discriminated against students in his class, on the basis of their disabilities, by failing to provide students with the use of iPads during school year 2018-2019. Accordingly, OCR will take no further action with respect to Allegation 1(c).

With respect to Allegation 2, the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by failing to promptly address a radiator leak and resulting flood in his classroom in December 2018. The complainant stated that he first noticed a leak in his classroom on December 10, 2018, and he reported it to a custodian on the same date. The complainant also stated that paraprofessional 3 reported the leak to the assistant principal on December 17, 2018, and again on January 15, 2019. The complainant stated that his classroom was the only part of the School that was affected by the leak. The complainant asserted that the School administration was aware of the leak for over a month but failed to take any action to repair the leak until the complainant sent a xxxx xxxx regarding the leak to the principal. The complainant did not provide a copy of this xxxx xxxx to OCR; nor did the complainant provide any information to OCR to support that his classroom was treated differently from other classrooms with respect to how the School responded to notification of the leak.

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 subjected to discrimination under any program or activity that receives or benefits from federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. 35.130(a), contains a similar provision. The regulation implementing Section 504, at 34 C.F.R. § 104.4 (b)(1), provides that a recipient, in providing any aid, benefit or service, may not directly or through contractual, licensing or other arrangements on the basis of disability: (ii) afford a qualified disabled person an opportunity to participate in or benefit from the aid, benefit or service that is not equal to that afforded to others; or, (iv) provide a different or separate aid, benefit or service, to disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aids, benefits or services that are as effective as those provided to others. The regulation implementing the ADA, at 28 CFR § 35.130(b)(1)(ii) and (iv) contains similar provisions.

The assistant principal stated that she first learned of a radiator leaking in the complainant's classroom in or around January 2019, when paraprofessional 1 informed her that the radiator had been leaking for a week. The assistant principal stated that paraprofessional 1 told her that the classroom staff waited until the leak was "really bad" before reporting it to her. Paraprofessional 1 advised OCR that he recalled a leak in the classroom in November 2018 and that a custodian tried to fix the leak a couple of times but was not initially successful. Paraprofessional 1 stated that the classroom leak lasted approximately two weeks. Paraprofessional 3 stated that the classroom leak lasted approximately one month. Paraprofessional 2 recalled that there was a leak but had no additional information about it.

OCR determined that by email dated January 15, 2019, the assistant principal asked the School custodian to repair the leak; and, the custodian reported to the assistant principal on January 15, 2019, that the leak had been fixed. The NYCDOE stated that in or around March 2019, the assistant principal informed the principal that the radiator had started to leak again; so, she immediately relocated the complainant's class to a different classroom. The assistant principal stated that the custodian thereafter fixed the leak; and, the complainant's class returned to their classroom approximately three days after the report. Paraprofessional 1 confirmed that the custodian fixed the March 2019 leak quickly after the leak was reported.

Based on the foregoing, OCR determined that the School responded promptly to the classroom staff's reports of radiator leaks. OCR did not find, and the complainant did not provide any evidence to support his allegation that his classroom was treated differently from other classrooms with respect to how the School responded to notification of the leak. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that School staff discriminated against students in his class, on the basis of their disabilities, by failing to promptly address a radiator leak and resulting flood in his classroom in December 2018. Accordingly, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3, the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by excluding students from his class from a School trip to a Christmas tree lighting ceremony in December 2018. The complainant stated that School administrators had asked the other classes to go on the trip, while excluding his class. The regulation implementing Section 504, at 34 C.F.R. § 104.37(a), states that recipients are required

to provide non-academic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity for participation in such services and activities.

The NYCDOE stated that other teachers at the School organized four field trips in December 2018, including a trip to Rockefeller Center on December 12, 2018;⁸ and, that seven different School classes, all with students with xxxx, attended these four field trips, including a class with the same xxxx as the complainant's class. The NYCDOE stated that the complainant did not request for his class to attend any of the four field trips in December 2018. The complainant stated that he was not aware that he needed to request approval to participate in field trips.

School administrators advised OCR that they had no knowledge of anyone preventing the complainant's class from participating in field trips; and, no knowledge regarding exclusion from a "tree lighting ceremony." Paraprofessionals 1, 2 and 3 did not recall the School administration preventing the complainant's class from attending any field trips during school year 2018-2019, including a trip to a tree lighting ceremony.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that School staff discriminated against students in his class, on the basis of their disabilities, by excluding students from his class from a School trip to a Christmas tree lighting ceremony in December 2018. Accordingly, OCR will take no further action with respect to Allegation 3.⁹

With respect to Allegation 4, the complainant alleged that School staff discriminated against students in his class, on the basis of their disabilities, by failing to invite NYCDOE administrators to a publishing party held in his classroom during school year 2018-2019. OCR determined that publishing parties are informal teacher-directed events designed to showcase student work. The NYCDOE stated that teachers rarely invite School administrators to their publishing parties. The principal, assistant principal, and paraprofessionals 1, 2 and 3 all denied that the complainant held a publishing party for his classroom or invited School administrators to such an event during school year 2018-2019. During the course of investigation, the complainant clarified that he did not hold a publishing party for his classroom during school year 2018-2019; rather, he held the party in the previous school year. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that School staff discriminated against students in his class, on the basis of their disabilities, by failing to invite NYCDOE administrators

⁸ The other three teacher-organized field trips in December 2018 were: (1) Operation Santa Claus on December 5, 2018; (2) Macy's Herald Square on December 18, 2018; and, (3) Alpine Movie Theater on December 19, 2018.

⁹ In an email to OCR dated May 2, 2019, the complainant copied and pasted a letter he addressed to the principal dated May 1, 2019. In the letter, the complainant asserts xxxx xxxx xxxx xxxx xxxxx. The complainant did not provide evidence that he sent the letter to the principal. To the extent that the complainant is alleging that the NYCDOE excluded his class from School trips because of his xxxx, OCR does not have jurisdiction to investigate allegations of discrimination based on xxxx. OCR enforces federal laws that prohibit discrimination on the bases of race, color, national origin, disability, sex, and age. OCR also is responsible for enforcing the Boy Scouts of America Equal Access Act. In the complaint filed with OCR, the complainant alleged that the School staff discriminated against him in his employment, on the basis of his xxxx, which OCR referred in its entirety to the U.S. Equal Employment Opportunity Commission on xxxx xxxxx.

to a publishing party held in his classroom during school year 2018-2019. Therefore, OCR will take no further action with regard to Allegation 4.

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.

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.

The complainant has a right to appeal OCR's determination regarding Allegations 1(b), 1(c), 2, 3 and 4, within 60 calendar days of the date indicated on this letter. In the appeal, the complainant 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 complainant appeals 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.

If you have any questions regarding OCR's determination, please contact Lisa Khandhar, Compliance Team Attorney, at (646) 428-3778 or lisa.khandhar@ed.gov; or Genara Necos, Compliance Team Attorney at (646) 428-3828 or genara.necos@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Julia De Persia, Esq.