



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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DIRECTOR
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February 25, 2020

Sent by email only to: superintendent@nbpsnj.net

Aubrey A. Johnson
Superintendent of Schools
New Brunswick Public Schools
268 Baldwin Street
New Brunswick, New Jersey 08901

Re: Case Nos. 02-19-1238 and 02-19-1433
New Brunswick Public Schools

Dear Superintendent Johnson:

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 complaints filed against the New Brunswick Public Schools (the District). In Case No. 02-19-1238, the Complainant alleged that the District discriminated against his daughter (the Student), on the basis of her disability (XXXXXXXXXXXXXXXXXX), by failing to provide class notes to the Student for math, English, health education, and driver's education, from September 2018 to March 2019 (Allegation 1); and, ensure that the Student had adequate time to set up her XXXXXXXXXXXXX – XXXXXXXXXXX XX XXXXXXX before giving instructions for the New Jersey Partnership for Assessment of Readiness for College and Careers (PARCC) testing, administered on April 11, 2019 (Allegation 2). In Case No. 02-19-1433, the Complainant alleged that the Student's gym/health education/driver education teacher discriminated against the Student, on the basis of her disability, by failing to use the XXXXXXX XX XXX on each Thursday that he conducted class, from March through June 2019 (Allegation 3).

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 or 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 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 Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

www.ed.gov

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, at 28 C.F.R. § 35.130(a), states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

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 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 a Section 504 plan is one means of meeting this standard.

During school year 2018-2019, the Student was enrolled in the XXXXX grade at XX (the School). The School is one of the high schools in the District that has a competitive admission process. Its curriculum is focused on math, the sciences, and the humanities, to prepare students for careers in medicine and healthcare. Students are required to maintain a cumulative 3.0 grade point average to remain at the School.

The District had previously determined the Student to be a student with a disability based on a XXXXXXXXXXXXXXXXXXXXXXXX, and eligible for a Section 504 plan. The District asserted that the Student did not have an agreed upon Section 504 plan for much of school year 2018-2019.¹ The District acknowledged that, although the Student's Section 504 plan was in draft form for most of the school year, the District agreed to implement the provisions in each successive version of the plan, pending adoption of a plan. OCR determined that on March X, 2019, the Complainant signed a proposed Section 504 plan for the Student (the March 2019 plan) but made a notation that he was signing "under protest." OCR determined that as of March X, 2019, the District considered the March 2019 plan to be in effect.

With respect to Allegation 1, the Complainant alleged that the District discriminated against the Student, on the basis of her disability, by failing to provide class notes to the Student for math, English, health education, and driver's education, from September 2018 to March 2019. The Complainant asserted that the District's failure to do so resulted in the Student's being unable to maintain the required grade point average of 3.0 to remain in the School.² The Complainant asserted that the teachers either did not provide any notes or provided only very limited notes for the Student's classes. The Complainant further asserted that, based on discussions with the District in developing the Student's Section 504 plan, it was agreed that notes that would otherwise appear

¹ OCR determined that since the Student's enrollment in the School for xxxxxx grade during school year 2017-2018, the School developed several draft versions of Section 504 plans for the Student, but the Complainant did not agree with the proposed plans and continued to request additional revisions.

² For school year 2019-2020, the Student is enrolled in another District high school.

on the board or Smart Board in the classroom would be provided to the Student in paper format or through Google classroom.³

OCR reviewed four versions of the Student’s Section 504 plan for the time period at issue in the complaint. These included drafts dated XXXXXXXX 2018 (draft 1), XXXXXXXX, 2018 (draft 2), XXXXXXXX, 2019 (draft 3); and, the March 2019 plan. OCR determined that each version provided for class notes with slightly different language, as follows: draft 1 stated “provide copies of class notes in print or posted on Google classroom”; draft 2 stated “provide class notes in print or on Google classroom as appropriate”; and, draft 3 and the March 2019 plan both stated “provide copies of class notes in print or on Google classroom.” The District asserted that it provided class notes to the Student throughout the school year, in accordance with the relevant language of each draft Section 504 plan in existence at the time.

With regard to the Student’s math class (XXXXXXX), the XXXXXXXX teacher (Teacher 1) informed OCR that he provided to every student, including the Student, a workbook in hard copy that contained the notes from the publisher that he used to teach the class. He stated that the students used the workbooks both in class and at home. Teacher 1 stated that he also created notes that he distributed in hard copy to the entire class, including the Student; and, occasionally created notes specifically for the Student, which he handed to her in class. The Complainant stated to OCR that when he assisted the Student with her math homework, the Student reported that she did not receive any handouts and he was not otherwise aware of any handouts being provided to the Student. The Student acknowledged having a workbook that contained notes; however, she stated that Teacher 1 sometimes wrote notes on the board that were not the same as the notes in the book. The Student confirmed that Teacher 1 gave all students in the class handouts with the relevant formulas the week before exams but denied that Teacher 1 created any notes specifically for her. Despite OCR’s request, the District did not provide any documentation to corroborate Teacher 1’s assertion that he created notes specifically for the Student. Teacher 1 reported that the Student completed each homework assignment for the course. The Student achieved a passing grade of “X” in XXXXXXXX.

With regard to the Student’s XXXXXXX XXXXXXXX course during school year 2018-2019, OCR determined that the course met three times per month. The teacher of the XXXXXXXX XXXXXXXX course (Teacher 2) acknowledged that he did not provide class notes to the Student but asserted that because the class was not a lecture course it was not necessary to do so. He stated that he provided each student the required course material in hard copy (i.e., the New Jersey XXXXXXX XXXXXXXX and a study guide that included questions on chapters in the manual), as well as worksheets for students to use in their small groups during class. Teacher 2 stated that he also used Google classroom to post links to websites that he referred to in class, as well as worksheets and study guides. Teacher 2 asserted that he specifically recalled posting the study guide for the written New Jersey XXXXX test in late April or early May 2018. The Student explained that the class was held in a section of the cafeteria with students seated around large tables and that there was no board. The Student said that Teacher 2 would have students work individually to complete the worksheets and then would review the answers with the class and

³ See www.edu.google.com, which provides that, with Google classroom, teachers and students can sign in from any computer or mobile device to access class assignments, course materials and feedback (site last visited on February 10, 2020).

students would correct their own work. Teacher 2 reported that the Student received a passing grade of XX on the XXXXXXXX test and scored a passing grade of XX or above in each of the three marking periods for the course.

With regard to the Student's English class, XXXXXXXX, the teacher for the class (Teacher 3) informed OCR that the course was not taught in lecture format and was structured so that the students reflected critically on what they read through their writing and class discussions. Teacher 3 stated that there were no class notes from the board or elsewhere to provide to the Student, as students engaged in discussions with their peers rather than taking notes during class, and no class notes were required to follow along in the course. Teacher 3 also stated that students were not expected to take notes, but were expected to record their own observations in a notebook that they kept, similar to a journal; the notebook contained essays or reflections by the student about the meaning of a "prompt" (i.e., a quote from a book that the students had read), or other citation that Teacher 3 selected.⁴ Teacher 3 recalled distributing some materials to the class in hard copy, but stated that she also posted these materials in the Google classroom in case any of the students misplaced the materials. The Student stated that Teacher 3 sometimes used the board to write goals, reminders, assignments, and grammar rules that the students had to copy. The Student received a final grade of "X" in XXXXXX.

Prior to the completion of OCR's investigation with respect to Allegation 1, on February 21, 2020, the District signed the enclosed agreement to resolve this allegation without further investigation.

With respect Allegation 2, the Complainant alleged that the District discriminated against the Student, on the basis of her disability, during the New Jersey PARCC testing administered on April 11, 2019, by failing to implement provisions in her draft Section 504 Plan(s) requiring the District to ensure that the Student had adequate time to setup her XXXXXX before giving her instructions. The Complainant acknowledged that on the test date, the Student arrived late to school; however, the Complainant asserted that after the Student retrieved her XXXXXX from the main office and arrived at the classroom for the test, the proctor continued speaking to the other students and did not give the Student enough time to properly set up the XXXXX XXXX XXXX XXXX, which had XXXXX XXXX. OCR determined that the March 2019 plan, in effect at the time, provided that for statewide assessments, the District would ensure that the XXXXXXXX and other devices or equipment were functioning properly.

District and School staff informed OCR that the Student was not administered New Jersey PARCC testing in April 2019, as alleged, as the PARCC test had been discontinued. Rather, the Student was administered the New Jersey Student Learning Assessments (NJSLA) on multiple days, including on April X, 2019. The teacher who proctored and administered the NJSLA to the Student (Teacher 4) informed OCR that the Student and XXXX other students who received testing accommodations pursuant to an IEP or Section 504 plan took the NJSLA XXXXXXXXXX other students taking the test. Teacher 4 informed OCR that on each day of the test, she XXXXXXXX and placed XXX XXXXXXXX next to the laptop prior to the Student's arrival. Teacher 4 stated that when the Student arrived, the Student would log into her laptop and XXXXX XXX

⁴ The assignments usually asked for the student to provide an opinion in response to an open-ended question or quote, along with any supporting evidence from the book. The assignments were given in class and posted on Google classroom.

XXXXXXXXXXXX; and when the Student indicated that she was ready, Teacher 4 would give the test instructions aloud and the Student would take the test on the laptop.⁵

According to Teacher 4, on April XX 2019, the second day of the testing, the Student arrived to take the test approximately 15 minutes late. Upon her arrival, the Student logged in XXX XXXXXXXX to her laptop. Teacher 4 stated that after the Student had completed these steps, the Student indicated to Teacher 4 that she was ready to proceed by looking directly at Teacher 4 and nodding affirmatively. Teacher 4 stated that she then provided the instructions for the test to the Student. Teacher 4 further stated that the Student did not have any questions and proceeded to take the test on the laptop. Teacher 4 stated that the Student's late arrival had no impact on the time allotted, XX XXX XXXXXXXX XXX XXXXXX XX XXXXX XXXXX. Teacher 4 denied that the Student reported at any time during the test taken on April XX 2019, that XXXXXXXXXXXX not working properly or that she needed additional time to XXXXXXXXXXXX. The Complainant did not provide any documentation or other evidence to refute the District's account of what occurred on AprilXX, 2019.

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 did not find that the Complainant's allegation that the District failed to ensure that the Student had adequate time to setup her FM system before giving her instructions for the NJLSA testing, administered on April 11, 2019, was supported by a preponderance of the evidence. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the District discriminated against the Student, on the basis of her disability, during the New Jersey PARCC testing administered on April XX 2019, by failing to implement provisions in her draft Section 504 Plan(s) requiring the District to XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Accordingly, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3, the Complainant alleged that Teacher 2 discriminated against the Student, on the basis of her disability, by failing to XXX XXX XXXXXXXX XXX XXXXX on each XXXXXXXX that he conducted class, from March through June 2019. OCR determined that with regard to the XXXXXXXXXXXX, under XXXXXXXXXXXXXXXX," draft 3 of the Section 504 plan stated, XXXXXXXXXXXXXXXXXXXXXXXX." The March 2019 plan contained substantially similar language to draft 3, under the section entitled XXXXXXXXXXXXXXXXXXXXXXXXXXXX. Neither draft 3 nor the March 2019 plan specifically stated under what circumstances XXXXXXXX was required to be used in the classroom, or if and when any of the Student's teachers were not required XX XXX XXX XXXXXXXX.

Teacher 2 acknowledged that he did not XXXXXXXXXXXXXXX, but stated that he was aware of the Student's XXXXXXXXXXXXXXXXXXX and had her XXX XXXX XX where he was teaching. The District asserted that because of the Student's proximity to Teacher 2, and the other students in her work group, she was able XX XXXX Teacher 2 and the other students even though Teacher 2 did XXX XXX XXX XX XXXXXXXX . The Complainant informed OCR that the Student XX

⁵ The Complainant explained that there are two ways to use the XXXXXXXX during standardized tests; either the teacher speaks into a microphone component or the Student plugs a cable from the computer into the XXXXXXXX device. The sound is then transmitted to the Student's XXXXXXXX XXX.

XXXXXX XXXXXXXXXXXXXXXX, but explained that XXX XXXXXXXX increases the Student's XX.

Prior to the completion of OCR's investigation with respect to Allegation 3, on February 21, 2020, the District signed the enclosed agreement to resolve this allegation without further investigation. OCR will monitor the implementation of the agreement. Upon the District's satisfaction of the commitments made under the agreement, OCR will close both cases (Case Nos. 02-19-1238 and 02-19-1433).

This letter sets forth OCR's determination in the above-referenced individual OCR cases. 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 a 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 the individual 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 with respect to Allegation 2 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 Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3763 or jane.momo@ed.gov; or Félice A. Bowen, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: George Hendricks, Esq.