



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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October 28, 2022

Sent via email only to dmoyer@acsdny.org

Dave Moyer, Ed.D.
Superintendent
Arlington Central School District
144 Todd Hill Road
LaGrangeville, New York 12540

Re: Case No. 02-21-1289
Arlington Central School District

Dear Superintendent Moyer:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the complaint filed against the Arlington Central School District. The Complainant alleged that the District discriminated against XXX XXXXXX and other elementary school students on the basis of disability by failing to make individualized determinations regarding their eligibility for extended school year (ESY) services on an integrated basis with general education students during summer 2021 (Allegation 1). The Complainant further alleged that the District discriminated against XXX XXXXXX and other elementary school students on the basis of disability by beginning its ESY program at 8:00 a.m. during summer 2021 (Allegation 2). For the remainder of this letter, OCR will refer to the Complainant's XXXXXX as "the Student."

OCR enforces 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 Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under Title II, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. As a recipient of federal financial assistance from the Department, the District is subject to Section 504. As a public elementary and secondary education system, the District is subject to Title II.

In its investigation, OCR interviewed the Complainant and District staff, and reviewed documentation that the Complainant and the District provided. As discussed below, OCR determined that there was insufficient evidence to substantiate Allegation 2. Before OCR completed its investigation of Allegation 1, the District expressed a willingness to resolve the complaint by taking the steps in the enclosed Resolution Agreement (Agreement), and OCR

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determined that a voluntary resolution is appropriate to resolve Allegation 1 pursuant to Section 302 of OCR's *Case Processing Manual*.¹ The District signed the enclosed Agreement to resolve Allegation 1 of the complaint on October 19, 2022.

Applicable Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.4, provides that qualified individuals with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity that receives federal financial assistance from the Department. The regulation implementing Title II, at 28 C.F.R. § 35.130, contains a similar provision.

Additionally, the regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires that a recipient that operates a public elementary or secondary education program or activity provide a free appropriate public education (FAPE) to each qualified disabled person 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), 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 nondisabled persons are met. The implementation of an IEP is one means of meeting this standard.

The regulation implementing Section 504, at 34 C.F.R. Section 104.34(a), requires that a student with a disability be educated with students without disabilities to the maximum extent appropriate to the needs of the student with a disability. In accordance with this provision, school districts must place students with disabilities in the regular educational environment unless it can be demonstrated that education in the regular setting with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a school district places a student with a disability in a setting other than the regular educational environment, it shall take into account the proximity of the alternate setting to the student's home.

Investigative Findings, Legal Analysis, and Conclusions

The District is a suburban public school district located in Dutchess County, New York. The District has eight elementary schools, two middle schools, and one high school. During school year 2020-2021, the District enrolled 3,248 elementary school students, 16.72 percent of whom were students with disabilities.

The Student was in XXXXX grade in the District's Titusville Intermediate School during school year 2021-2022. During school years 2020-2021 and 2021-2022, the District placed the Student in a XXX XXXXXX class for XXXXX and XXXXXX XXXX XXXXX, and placed the Student in an integrated setting with students without disabilities, XXXX XX XXXX, for other subjects and certain related services.

During the summer of 2021, the Student attended the District's ESY program for six weeks, three hours per day, in accordance with XXX IEP dated XXXX XX, 2021. According to the Student's IEP, the Student's Committee on Special Education (CSE) determined that for XXX ESY program

¹ See *Case Processing Manual* (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

for summer 2021, the Student should be placed in a XXXXX class (XXXXX), and receive XXXX XXXXXX XXXXX XX XXXXX XXXXX XXXXXXXX XXXXX XXXXXXXX XXXX XXXXXXXX, XXXXXXX XXXXXXX XXXXXXX XXX XX XXXXXXX XXXX XXXXXXX, XXXXXXX XXXXXXX XXXXXXX for XX minutes XXXX weekly, and XXXXXXXX XXXXXXXX XX X XXXX XXXXX XXXXXXX XXX XX XXXXXXX XXXX XXXXXXX. The CSE designated the Student's XXXXX class and related services for the ESY as non-integrated and determined that without ESY services, the Student would experience substantial regression.

Allegation 1

With respect to Allegation 1, the Complainant alleged that the District discriminated against the Student and other elementary school students on the basis of disability by failing to make individualized determinations regarding their eligibility for ESY services on an integrated basis with general education students during summer 2021. Specifically, the Complainant alleged that during summer 2021, the District offered a general education summer program, the Elementary School Summer Program (ESSP), to all District elementary school students, but it did not offer students with disabilities who received ESY the opportunity to participate in their summer program alongside non-disabled peers. The Complainant further asserted that the District could not otherwise provide students receiving ESY services with any integration during the summer because it chose to operate its ESY program and ESSP in different locations and failed to make individualized determinations as to whether students with disabilities required a non-integrated summer program.

The Complainant stated that upon learning of the District's intention to offer ESSP, XXX requested that the Student and other students whose IEPs included integration during the school year integrate with students without disabilities during the ESY program, consistent with their school year placements. The Complainant stated that the District denied XXX request, asserting that it could not provide integration because the ESY program and ESSP were housed in different locations. The Complainant further alleged that for summer 2021 and for summers prior, the District never considered whether the Student should be placed in an out-of-district ESY placement for the purpose of integration because the District offers its own non-integrated ESY program.

OCR reviewed the District's policies with respect to the evaluation and placement of disabled students for special education services. The policies state that the District "supports a system of services offered in the least restrictive environment" by "providing for the education of students with disabilities with non-disabled peers to the extent appropriate." The policies also provide that students with disabilities will have the same opportunity to participate in non-academic and extracurricular services and activities as students without disabilities. OCR determined that the District provides notice to parents of the procedural safeguards relating to placement decisions.

OCR determined that the District's ESY is a self-contained program designed to prevent students with disabilities from experiencing "substantial regression," as defined in New York State Education Law.² During summer 2021, the District held ESY at Vail Farms Elementary School

² Under Part 200.1(aaa) of the New York State Education Law, "substantial regression" is defined as a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August

(School 1) for six weeks between July 5 and August 13, 2021, from 8:00 a.m. to 11:00 a.m., five days per week. During summer 2021, the District held ESSP at two other schools, Noxon Road Elementary School (School 2) and Overlook Primary School (School 3). For summer 2022, the District offered ESY at School 1, during the same timeframe as it did for summer 2021. The District offered a more limited ESSP during summer 2022, available only to students who were performing one to two grade levels behind and were recommended by their teachers.

The District determines students' eligibility for ESY based on the recommendation of the CSE and regression statements from students' teachers and service providers. The ESY program includes the following programs and services: special class 12:1+1, special class 8:1+1, special class reading 5:1, speech and language therapy, occupational therapy, physical therapy, vision services, orientation and mobility services, and psychological counseling. Instruction during special classes is focused on reading and math, with some writing. Science and social studies may be addressed in a thematic approach. There is no lunch or recess, but teachers may take students to the gym or outside for 15-minute breaks.

OCR determined that on XXXX XX 2021, the Complainant sent an email to the District's Director of Special Education (the Director), in which XXX expressed XXX concern that ESY students were not integrated with their peers without disabilities during the summer and asked if there was a plan to offer ESY and ESSP in the same location so that ESY could be a less restrictive environment. The Director responded by email dated XXXX XX, 2021, stating, "The District runs its own ESY program every summer for 6 weeks to prevent significant regression for students with disabilities. General Education students do not attend ESY. There is no plan to integrate students into the [ESSP]. The ESY is being held at [School 1]."

In an email to the CSE dated XXX XX, 2021, the Complainant requested "to amend [the Student's] ESY IEP without a meeting to include XXXXXXXXXXXX XXXXXX to remain consistent with the school year and to prevent regression and meet XXX needs in relation to XXX goals." The Complainant asserted that XXX thereafter called District staff to further discuss this request, and District staff responded that the District could not offer integrated ESY because it did not exist.

The Director informed OCR that in making determinations as to whether students should be placed in ESY, the CSE considers only whether students will experience substantial regression without ESY and does not consider whether such students should be educated with non-disabled peers during the summer. The Director asserted that the District's ESY is approved by New York State as a non-integrated program and the District could not provide integrated ESY without obtaining approval to change its program.

OCR determined that the District's elementary school CSEs recommended 130 students for its ESY program in 2021. The District provided documentation indicating that 65 students attended ESY in 2021, but asserted to OCR that the documentation was not complete, as more than 65 students attended ESY. The District indicated its willingness to resolve Allegation 1 voluntarily prior to providing additional information regarding ESY attendance. The IEPs for 22 of these 65 students (including the Student) recommended integration for part of the school day during the

of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year.

school year. Another 12 students who attended integrated programs during the school year qualified for ESY for a limited purpose, attending ESY only for the instruction or services for which they were in non-integrated programs during the school year (e.g., special class reading or physical therapy, speech language therapy, etc.).

For summer 2021, the District offered students in Kindergarten through fourth grade³ the opportunity to attend one of two two-week sessions of ESSP at Schools 2 and 3, with the location determined by where a student resides. The ESSP ran from 9:00 a.m. to 11:30 a.m., five days per week. Students attending ESSP were grouped into classes but participated in assemblies with students from other classes. There was no lunch or recess. OCR determined that in an email to parents and guardians of District elementary school students on April 29, 2021, the District described ESSP to District families as an “opportunity for students to experience team building activities supported by socio-emotional learning, STEAM activities, as well as Reader’s Theater [and to] have daily access to the school library.” District staff described the program as focused primarily on social-emotional learning as a way for students who had previously received virtual instruction to reacclimate to attending school in person. The District asserted that it did not offer ESSP before summer 2021.⁴

As stated previously, prior to the completion of OCR’s investigation, on October 19, 2022, the District signed the attached Agreement to voluntarily resolve Allegation 1, that the District discriminated against the Student and other elementary school students on the basis of disability by failing to make individualized determinations regarding their eligibility for ESY services on an integrated basis with general education students during summer 2021.

Obligations Under the Agreement

Pursuant to the Agreement, the District will explicitly consider the requirements of 34 C.F.R. § 104.34(a) in the District’s CSE and/or Section 504 team recommendations for all students for educational services through the District’s ESY program (or another summer program) for summer 2023, including students whom the CSEs and/or Section 504 teams recommended for educational services on an integrated basis for school years 2022-2023 and 2023-2024. The District will also contact in writing the parents/guardians of students who were recommended for educational services through the District’s self-contained ESY program during summers 2021 and 2022 pursuant to their IEPs or Section 504 plans who were also recommended for educational services on an integrated basis during school year 2021-2022 and 2022-2023, respectively, and offer to reconvene the CSE and/or Section 504 team to consider whether the recommendation of the self-contained ESY program during summer 2021 and/or 2022 (as applicable) was consistent with the District’s obligations pursuant to 34 C.F.R. § 104.34(a); and, if not, whether any compensatory services are required. If the CSE and/or Section 504 team determines that the student is entitled to remedial and/or compensatory services, the team will develop a plan for providing such services, with a completion date for providing the services not to extend beyond June 30, 2023. The District will also provide training to the District’s staff with administrative responsibilities for the

³ The District offered students in fifth grade (rising sixth graders) a separate general education program at its two middle schools.

⁴ The District denied that it offered a general education summer program in 2019, as the Complainant alleged.

education of students with disabilities, and all CSE/Section 504 Team Chairpersons regarding the District's obligations with respect to summer programs pursuant to 34 C.F.R. § 104.34(a).

OCR will monitor the District's implementation of the Agreement. Upon the District's compliance with the terms of the Agreement, Section 504 and its implementing regulations at 34 C.F.R. Part 104, and Title II and its implementing regulations at 28 C.F.R. Part 35, which were at issue in this case, OCR will close the case.

Allegation 2

With respect to Allegation 2, the Complainant alleged that the District discriminated against the Student and other elementary school students on the basis of disability by beginning its ESY program at 8:00 a.m. during summer 2021.

In support of Allegation 2, the Complainant alleged that for six weeks during summer 2021, the District forced special education elementary school students who attended ESY to wake up significantly earlier than their peers in the ESSP, which started at 9:00 a.m. The Complainant further alleged that during the school year, special education elementary school students began school at 8:40 a.m. and most attended schools that were geographically closer to their homes than they were to School 1, where ESY was located. The Complainant alleged that the centralization of the ESY at one school site resulted in some elementary school ESY students taking "hour-long bus rides."

The Director informed OCR that the ESY has started at 8:00 a.m. every summer for more than five years because of the challenges in securing staffing for ESY. She stated that teachers are generally more willing to work during the summer if their workday ends earlier. Teacher survey data the District provided reflected that more than a quarter (8 out of 31) of the teachers and providers who worked in ESY during summer 2021 responded to the survey that they would not work during the summer if ESY started at 9:00 a.m. instead of 8:00 a.m. An additional six staff members indicated they were willing to start at 9:00 a.m. but preferred to start at 8:00 a.m. By contrast, more than three quarters (7 out of the 9) of the ESSP staff from summer 2021 who responded to the survey indicated their preference to begin the day at 9:00 a.m. instead of 8:00 a.m.

Based on the foregoing, OCR determined that the District proffered a legitimate non-discriminatory reason for scheduling ESY at 8:00 a.m., namely, aligning the start time with the preferences of the ESY program staff to ensure adequate staffing for the program. OCR determined that the proffered reason was not a pretext for discrimination, as the District similarly aligned the start time for the ESSP with the preferences of the ESSP staff. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the District discriminated against elementary school students, including XXX XXXXX, on the basis of disability by beginning its ESY program at 8:00 a.m. during summer 2021. Accordingly, OCR is closing Allegation 2 as of the date of this letter.

This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual 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 District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint against the District with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If 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 in this letter 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, please contact William Poorten, Senior Attorney, at (646) 428-3829 or william.poorten@ed.gov; Lauren Numeroff, Compliance Team Attorney, at (646) 428-3895 or lauren.numeroff@ed.gov; or Andy Artz, Compliance Team Leader, at (646) 428-3901 or alexander.artz@ed.gov.

Sincerely,

/s/
Rachel Pomerantz

Attachment

cc: Michael K. Lambert, Esq.