



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

RACHEL POMERANTZ
DIRECTOR
NEW YORK OFFICE

August 11, 2022

Sent via email only to: superintendent@nbpsnj.net

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

Re: Case No. 02-22-1137
New Brunswick School District

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), with respect to the complaint filed against the New Brunswick School District.

The Complainant alleged that the District discriminated against her son (the Student) on the basis of his disability by failing to provide him with: compensatory occupational therapy (OT) services during summer 2021 (Allegation 1); and multi-sensory instruction (Allegation 2); and sensory breaks (Allegation 3) from September 2021 through about February 3, 2022, as required by his individualized education program (IEP).

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.

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 in any program or activity that

receives Federal financial assistance. The regulation implementing Title II, at 28 C.F.R. § 35.130(a), contains a similar provision.

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires recipients to provide a free, appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction. The provision of 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 disabled students as adequately as the needs of non-disabled students are met.

As discussed below, OCR determined that there was insufficient evidence to substantiate Allegations 2 and 3. Before OCR completed its investigation of Allegation 1, the District expressed a willingness to resolve Allegation 1. OCR determined that a voluntary resolution is appropriate under Section 302 of OCR's *Case Processing Manual (CPM)*¹ to resolve OCR's concerns about Allegation 1. Subsequent discussions between OCR and the District resulted in the District's agreeing to take the steps in the enclosed resolution agreement to address OCR's concerns about Allegation 1 to date.

In its investigation, OCR interviewed the Complainant and current and former District staff. OCR also reviewed documentation that the Complainant and the District submitted. OCR made the following determinations.

OCR determined that the District identified the Student as a qualified individual with a disability eligible for special education and/or related aids and services during school year 2019-2020, when the Student was enrolled as a XXXX student at the District's Puerto Rico Action Board (PRAB) Early Childhood Education Center.² During school year 2020-2021, the Student attended XXXX at the District's Livingston Elementary School (School 1). During school year 2021-2022, the Student attended XXXX grade at the District's A.C. Redshaw Elementary School (School 2). The Complainant withdrew the Student from the District in February 2022, and enrolled him in the XXXX District in Pennsylvania.

With respect to Allegation 1, the Complainant alleged that the District discriminated against the Student on the basis of his disability by failing to provide him with compensatory OT services during summer 2021. In support of her allegation, the Complainant stated that at the beginning of school year 2019-2020, while the Student was enrolled as a XXXX student at PRAB, the District determined at a Committee on Pre-School Education that the Student was eligible for OT twice a week for 30 minutes. The Complainant stated that there was a two-month delay in arranging for a therapist to provide OT to the Student at PRAB, and as a result, the District owed the Student eight hours of compensatory OT for September and October 2019. The Complainant acknowledged to OCR that the District provided OT sessions to the Student twice per week for 30 minutes, as required by the Student's IEP, during school years 2019-2020, 2020-2021, and 2021-2022, but asserted that the District never provided the eight hours of compensatory OT owed to the Student because of the District's delay in initiating OT services in September and October 2019.

¹ CPM (July 18, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

² The District classified the Student as having XXXX.

OCR determined that the Student's IEP dated June 3, 2020, and in effect for school year 2020-2021, stated "[The Student] is owed 8 hours of compensatory occupational therapy. His therapist believes this time will be made up by the end of the 2020-2021 school year." The District's Assistant Superintendent for Pupil Personnel Services (the Assistant Superintendent) acknowledged to OCR that the District owed the Student the compensatory OT from school year 2020-2021 at PRAB, but was unable to say for certain why PRAB had not provided the OT prior to the Student's entering XXXX at School 1 in September 2020. The Assistant Superintendent told OCR, and OCR confirmed, that the case notes for the Student state that the District did not provide the compensatory OT to the Student during school year 2020-2021 because of the OT therapist's schedule. The Assistant Superintendent stated that the Student's file did not contain any other information about scheduling the Student's compensatory OT during school year 2020-2021.

OCR determined that the Student's IEP dated May 28, 2021, and in effect for school year 2021-2022, stated "[The Student] is still owed 8 hours of compensatory OT from school year 2019-2020. Since he was not able to receive it during the school year due to the therapist's schedule, parents would like for him to receive it in person during the summer when he attends the enrichment program." The Assistant Superintendent acknowledged to OCR that the District did not provide the compensatory OT to the Student during the enrichment program in summer 2021. The Assistant Superintendent stated that she was not aware of, and the Student's file did not contain, any specific information about why the District was unable to schedule the Student's compensatory OT during the enrichment program in summer 2021, or during school year 2021-2022, when he attended School 2, and prior to the Student's leaving the District in February 2022.

Prior to the completion of OCR's investigation with respect to Allegation 1, on August 4, 2022, the District signed the enclosed resolution agreement to voluntarily resolve Allegation 1, that the District discriminated against the Student on the basis of his disability by failing to provide him with compensatory OT services during summer 2021.

With respect to Allegations 2 and 3, the Complainant alleged that the District discriminated against the Student on the basis of his disability by failing to provide him with multi-sensory instruction (Allegation 2); and sensory breaks (Allegation 3) from September 2021 through about February 3, 2022, as required by his IEP. In support of her allegations, the Complainant stated that pursuant to his IEP, the Student was supposed to get up and move around the classroom every 30 minutes, but she was unsure if that occurred. The Complainant also informed OCR that during the first two weeks of January 2022, while the District was offering remote-only instruction, the Complainant observed the Student's classroom special education teacher (the Teacher) incorporate "dance breaks" into the lessons, but she was unsure whether the Teacher offered the same breaks during in-person learning. The Complainant stated that she believed the Teacher did a good job implementing the Student's IEP and acknowledged that the Student received multisensory instruction and movement breaks during his twice weekly OT sessions with his OT therapists.

OCR reviewed the Student's IEP dated May 28, 2021, which was in effect during school year 2021-2022. The IEP stated that the Student was entitled to "multisensory instruction" and "sensory breaks provided every 30 minutes" for "movement activities" among other modifications and accommodations. The District placed the Student in a self-contained XXXX combined classroom,

in the presence of general education students for less than 40% of the day. The Teacher and one general paraprofessional aide (the Aide) were assigned to the classroom of approximately 16 students.

The Teacher informed OCR that her practice is to review the IEPs of all her students at the beginning of the school year. According to the Teacher, the Student and most of her other students had some sort of multisensory instruction or sensory movement breaks incorporated in their IEPs. The Teacher stated that multisensory instruction is aimed at incorporating the auditory, kinesthetic, touch, and visual senses in the lesson. The Teacher informed OCR that she incorporated multisensory instruction and sensory movement breaks into her daily lesson plans, which included creating daily slide presentations with pictures, live links to resources, sound effects and videos that she displayed on the classroom's interactive smartboard.

The Teacher provided examples of some of the ways she incorporated multisensory instruction and sensory movement breaks into her teaching. She stated that during language arts lessons she incorporated movement by having students act out sight words and incorporated the sense of touch by having students create letter shapes with Play-doh. During phonics lessons, she incorporated the auditory senses by playing a game called, "Guess that Sound," during which she would play a sound effect and the students had to guess what it was. The Teacher stated that during math lessons, she incorporated multisensory instruction by singing songs, playing games involving counting out loud around the classroom, and having the students use Play-doh to form numbers. The Teacher also stated that throughout the day, each student used a touch-screen Chromebook on which they played "brain camp" games and at other times participated in regularly scheduled "brain breaks," during which she played a music video and asked the students to stand up and dance behind their desks. The Aide confirmed to OCR that the Teacher incorporated visual, auditory, and movement aspects in her lesson plans. The Aide also stated that she worked with the Student using manipulatives during math, and confirmed to OCR that "dance breaks" occurred throughout the day.

OCR reviewed the Teacher's lesson plans and classroom presentation slides from school year 2021-2022. OCR determined that the daily slides included pictures, videos, and sound effects to accompany each lesson. The slides included regular opportunities for movement such as acting out sight words and "brain breaks" to "dance it out." The slides outlined frequent opportunities for movement and designated "dance breaks" with links to music videos. The Teacher's lesson plans included the use of multisensory instruction strategies such as use of sound maps, letter tiles, using crayons to draw a picture to solve a math problem, and interactive games.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the Complainant's allegations that the District discriminated against the Student on the basis of his disability by failing to provide him with multi-sensory instruction and sensory breaks from September 2021 through about February 3, 2022, as required by his IEP. Accordingly, OCR is closing Allegations 2 and 3, as of the date of this letter.

As stated previously, on August 4, 2022, the District signed the enclosed resolution agreement to voluntarily resolve Allegation 1, that the District discriminated against the Student on the basis of his disability, by failing to provide him with compensatory OT services during summer 2021.

Pursuant to the resolution agreement, the District will make arrangements with the Student's current school district to provide the Student with eight hours of compensatory OT. The District will also provide training to relevant District-contracted providers and District staff members and administrators (including those who were responsible for providing OT to the Student and for developing, implementing, and monitoring the Student's IEP during school years 2020-2021 and 2021-2022), regarding the requirements of Section 504 and Title II and the District's obligation to ensure compensatory services, including OT, are provided in a timely manner.

OCR will monitor the District's implementation of the resolution 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.

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 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 a 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 regarding Allegations 2 and 3 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, please contact Natasha Fitzsimmons, Compliance Team Attorney, at (646) 428-3899 or natasha.fitzsimmons@ed.gov; or Crystal Johnson, Compliance Team Investigator, at (646) 428-3821 or crystal.johnson@ed.gov.

Sincerely,

/s/

Rachel Pomerantz

cc: George Hendricks, Esq., *via email only to* george@hendricksllaw.com