



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

32 OLD SLIP, 25TH FLOOR
NEW YORK, NEW YORK 10005

RACHEL POMERANTZ
DIRECTOR
NEW YORK OFFICE

June 29, 2023

Sent via email only to: robioliv@shenschools.org

Dr. L. Oliver Robinson
Superintendent of Schools
Shenendehowa Central School District
5 Chelsea Place
Clifton Park, New York 12065

Re: Case No. 02-23-1154
Shenendehowa Central School District

Dear Superintendent Robinson:

This letter is to notify you of the determination made by the U.S. Department of Education (the Department), Office for Civil Rights (OCR), regarding a complaint filed against the Shenendehowa Central School District (the District). The Complainant alleged that the District discriminated against her daughter (the Student) on the basis of disability by failing to evaluate the Student for a suspected disability following her request for an evaluation made on January 5, 2023. OCR also considered whether the Complainant's allegation raised possible systemic concerns.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving federal 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 regulations 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 public entity that receives federal financial assistance from the Department, the District is subject to Section 504, Title II, and their implementing regulations.

As discussed below, after receiving notice of this complaint, the District took action to resolve the Complainant's allegation. In addition, before OCR completed its investigation, the District expressed a willingness to address possible systemic concerns OCR identified regarding the District's treatment of other students by taking the steps in the attached Resolution Agreement (the Agreement). 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 the District's compliance with its obligations under

¹ *Case Processing Manual (CPM)* (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.
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Section 504 and Title II. The District signed the attached Agreement to resolve the complaint on June 28, 2023.

I. Applicable Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.3(k)(4), states that a qualified individual with a disability, with respect to services other than employment or educational services, is defined as one who meets the essential eligibility requirements for the receipt of such services. The regulation implementing Title II, at 28 C.F.R. § 35.104, contains a similar provision.² The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), 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.

Pursuant to the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(ii), (iv) and (vii), a recipient may not, on the basis of disability, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; provide different or separate aid, benefits, or services to qualified individuals with a disability, unless such action is necessary to provide the qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others; or, otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(1)(ii), (iv) and (vii), contains similar provisions. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.38, states that a recipient that operates a preschool education program or activity must take into account the needs of qualified individuals with disabilities in determining the aid, benefits, or services to be provided under the program or activity.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(i) and (vi), provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service, or otherwise limit qualified individuals with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. The regulation implementing Title II, at 28 C.F.R. § 35.130, contains a similar provision. The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(v), provides that a recipient may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefits, or services to beneficiaries of the recipient's program. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(1)(v), contains a similar provision.

If OCR finds that a recipient is providing significant assistance to an agency or organization that discriminates on the basis of disability, the recipient must either obtain compliance by the other entity or terminate the assistance. Appendix A to the regulation implementing Section 504 explains that

² The regulation implementing Title II, at 28 C.F.R. § 35.104, defines a qualified individual with a disability as one who, with or without reasonable modifications to rules, policies or practices, or with the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of such services or the participation in programs or activities provided by a public entity.

among the criteria to be considered when determining whether a recipient is providing significant assistance to another entity is the substantiality of the relationship between the recipient and the other entity, including financial support the recipient provides, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself.

Significant assistance is tested by several factors indicating whether a substantial relationship exists between a recipient of federal funding and another entity. The factors evaluated include: (1) direct financial support the recipient provides; (2) indirect financial support the recipient provides; (3) provision of tangible resources such as staff, facilities, and/or materials at no cost or reduced cost; (4) intangible benefits such as the lending of recognition and approval; (5) selectively providing privileges and resources to the private entity; and (6) whether the relationship is occasional and temporary or permanent and long-term. Not all factors must be present to support a finding of significant assistance.

II. Investigative Findings, Legal Analysis, and Conclusions

During school year 2022-2023, the District offered a free, universal pre-kindergarten program (the Program) to students residing in the District who turned four on or before December 1, 2022. The Program was funded by state and federal grants. The District directed parents/guardians to apply to the Program through its online lottery process, and the District assigned selected students to available spots at child-care provider sites with which it contracted to offer the Program during the school year.³ During school year 2022-2023, the District contracted with several childcare providers to offer the Program, including Little Genius, New Meadow, and the Kidzlodge Early Learning Center run by the Capital District YMCA XXXX XXXXXX.⁴ Based on the foregoing, OCR determined that for school year 2022-2023, the District had contractual arrangements with and provided significant assistance to several childcare providers, including XXX XXXXXX, which served as sites for the Program.

A. The Student

The Complainant alleged that the District discriminated against the Student on the basis of disability by failing to evaluate the Student for a suspected disability following her request for an evaluation made on January 5, 2023. In support of her allegation, the Complainant stated that she submitted an application to the Program on behalf of the Student for school year 2022-2023. By email dated October XX, 2022, the District's registrar (the Registrar) informed the Complainant that the District had admitted the Student to the Program for school year 2022-2023 and assigned the Student to XXX XXXXXX. The Registrar also stated that the Complainant should contact XXX XXXXXX directly to determine when the Student could begin attending the Program.

In an email dated December XX, 2022, the Complainant notified District staff, including the Academic Administrator for Special Education (the Administrator), that the Student had been accepted to the Program and that she had scheduled a meeting with XXXXXX staff to develop a Section 504 Plan (504 Plan) for the Student to address her XXXXXXXXXXXXXXX XXXXXXXXXXXX to XXXXX and XXX XXXXXXXXXXX. The Complainant also asked the Administrator about the District's process for developing 504 Plans for students enrolled in the Program. OCR determined

³ <https://www.shenet.org/registration>; See also, <https://www.shenet.org/upk-lottery/> (Last visited June 28, 2023).

⁴ <https://cdymca.org/locations/kidzlodge-early-learning-center> (Last visited June 28, 2023).

the Administrator did not respond to this email. In an email to the Administrator dated January X, 2023, the Complainant requested that the District hold a Committee on Preschool Special Education (CPSE) meeting to develop a 504 Plan for the Student in advance of her enrollment in the Program at XXX XXXXXX. In a reply email sent the following day, the Administrator advised the Complainant to contact XXX XXXXXX directly to develop a 504 Plan for the Student. The Administrator stated that the Complainant could also request that the District conduct a CPSE evaluation of the Student by submitting a “Parent Referral for Initial Evaluation—Preschool (the Referral Form). By email dated January X, 2023, the Complainant returned the Referral Form to the Administrator, and requested that the District refer the Student to the CPSE for an evaluation for a 504 Plan. The Complainant alleged that the District did not respond to her request.

The District informed OCR that on XXXXX X and XX, 2023, approximately two months after the Complainant submitted her request that the District evaluate the Student, it sent the Complainant forms seeking her consent to evaluate the Student for special education and/or related aids and services. On XXXXX X, 2023, the Complainant provided written consent for the Student’s evaluation; and on XXXXX XX, 2023, the District identified the Student as a student with a disability and developed a 504 Plan for the Student. The District provided to OCR a copy of the 504 Plan it developed for the Student, which included an individual health care plan, specific seating arrangements, access to a school nurse, a communication plan for the Complainant and the Student’s teacher at XXX XXXXXX, and training for staff at the XXXXXX regarding how to administer the Student’s XXXXXXXX.

The Complainant informed OCR that the XXXXXX began implementing the Student’s 504 Plan following its creation on XXXXX XX, 2023, and she has no further concerns regarding her allegation. Pursuant to Section 110(d) of OCR’s *CPM*,⁵ OCR will dismiss an allegation if OCR obtains credible information indicating that the allegation the complainant raised has been resolved, and there is no systemic allegation. Based on the above, OCR determined that the Complainant’s individual allegation is resolved. Accordingly, OCR is dismissing the allegation under Section 110(d) of OCR’s *CPM*.

B. Other Students

OCR requested information from the District regarding its policies and procedures for identifying and evaluating students suspected of having disabilities. OCR also requested documentation regarding the District’s relationship with the childcare providers it contracts with for the Program, and its policies and procedures for administering the Program. As stated above, prior to the completion of its investigation pursuant to Section 302 of OCR’s *CPM*, the District signed the attached Agreement to voluntarily resolve OCR’s concern that the District may have excluded or limited the participation of students in the Program’s activities on the basis of disability and/or failed to respond to requests for evaluations made by parents/guardians of students with suspected disabilities attending the Program. The District signed the attached Agreement to resolve the complaint on June 28, 2023.

⁵ *CPM* (July 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Obligations under the Agreement

Under the Agreement, the District will notify parents/guardians of students enrolled in the Program, administrators and classroom staff of each contracted provider in the Program, and District employees responsible for overseeing the District's implementation of the Program, regarding the requirements of Section 504 and Title II. The notice will state that the District (1) may not discriminate against students on the basis of disability; (2) may not exclude or limit the participation of students in the Program's activities on the basis of disability; (3) must make individualized determinations with regard to the evaluation, referral, and/or placement of students requiring accommodations and/or special education and/or related aids and services; (4) must conduct appropriate evaluations prior to taking any action with respect to the initial placement of students in general or special education and any subsequent significant change in educational placement; and (5) must take into account the needs of students with disabilities on an individual basis in determining the aid, benefits, or services to be provided. The Agreement also requires the District to revise its Program policies and procedures to provide a process for parents/guardians to request, and for Program staff to individually consider, the provision of aids, benefits, and services to ensure that qualified individuals with disabilities have an equal opportunity to participate in the Program; and to publish the revised policies and procedures on the District's website. The Agreement further requires the District to train all administrators and staff of each contracted provider and District administrators and staff who are responsible for implementation of the Program regarding the obligations under Section 504 and Title II stated above, and Section 504's and Title II's prohibition against the District's contracting with and/or providing significant assistance to an agency, organization, or person that discriminates on the basis of disability.

The Agreement also requires the District to provide to OCR information about the Program for school years 2022-2023 and 2023-2024, regarding: (1) requests the District and/or its contracted providers received from or on behalf of Program participants for aid, benefits, and services to meet the needs of students with disabilities and/or suspected of having disabilities; (2) students in the Program who were referred for evaluations to determine their need for accommodations and/or special education and/or related aids and services; (3) students who were selected through the District's lottery to enroll in the Program but were not assigned to a Program site; and (4) Program participants who were discharged from the Program.

OCR will monitor the District's implementation of the Agreement. Upon the District's compliance with the terms of the Agreement, with 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. An individual 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.

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 Felice Bowen, Compliance Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Rachel Pomerantz

cc: Susan Johns, Esq. (by email)