



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
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August 12, 2011

John Scavelli, Jr.
Superintendent
Evesham Township School District
Administration Building
25 South Maple Avenue
Marlton, New Jersey 08053

Re: Case No. 02-11-1072
Evesham Township School District

Dear Superintendent Scavelli:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR), in the above-referenced complaint filed against the Evesham Township School District. The complainants alleged that the District discriminated against their daughter (the Student), on the basis of her disability, by requiring that they pay the costs for a one-to-one aide and behaviorist in order for the Student to attend the District's after school child care program, the Evesham Child Care (ECC) program.

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 (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 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 Section 504 and the ADA.

In its investigation, OCR reviewed documentation the complainant and the District provided, as well as public documents OCR obtained concerning the ECC program. OCR made the following determinations.

OCR determined that the ECC program is a before and after school program sponsored by the Evesham Township Board of Education (the Board). It provides child care services between the

hours of 7:00 a.m. and 6:00 p.m. for children in kindergarten through fifth grade at all elementary schools within the District. While at the ECC program, students are provided with the opportunity to complete homework, play independently, or participate in structured activities designed to promote their physical and social development. To be eligible for the ECC program, a student must be enrolled in the District in Kindergarten to Grade 5. OCR determined that the regular daily tuition rate for one child to attend the ECC program during school year 2010-2011 was \$5.50 per day, and \$5.00 for additional siblings.¹

OCR determined that in or around July 2010, the complainant applied to the ECC program for the Student's admission for school year 2010-2011, and notified the ECC Program Director that the Student would require an aide because of the Student's disability of autism (non-verbal). At the time of the complainant's application to the ECC program, the Student received special education services at the District's Jaggard Elementary School pursuant to an Individualized Education Program (IEP) with a classification of "autistic"; and was placed in a self-contained class with the assistance of a one-to-one aide. Pursuant to her IEP, the Student also received home bound instruction with a behaviorist for 10 hours per month.

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 the ADA, at 28 C.F.R. § 35.104, contains a similar provision.² OCR determined that the Student met the essential eligibility requirements for the program; i.e., she was enrolled in the District in Grade 5. Accordingly, OCR determined that the Student was a qualified individual with a disability with respect to the ECC program.

OCR determined that on or about September 7, 2010, the District notified the complainant that the Student could enroll in the ECC program, provided the complainant pay the regular daily tuition rate, as well as the costs of a 1:1 aide and a behaviorist for the Student.³ The District further stated that the cost of a one-on-one aide would be \$35.76 per day, which would increase to \$39.29 per day, as of April 1, 2011; and, the cost of a behaviorist would be \$50.00 per hour.

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 financial assistance from the Department. 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. § 104.38, provides that a recipient that provides day care may not, on the basis of disability, exclude qualified persons with disabilities

¹ The District informed OCR that the cost to attend the ECC program has risen since the beginning of school year 2010-2011, to \$7.00/day for pickup by 4:00 p.m. and \$10.00/day for pickup by 6:00 p.m.

² The regulation implementing the ADA, 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.

³ The complainants informed OCR that they believed the Student required only a one-to-one aide to participate in the ECC program.

and shall take into account the needs of such persons in determining the aid, benefits or services to be provided. Pursuant to OCR policy, when voluntary noneducational programs are offered on a free or tuition basis, qualified children with disabilities may not be categorically excluded from those noneducational programs on the basis of their disabling condition. OCR policy further provides that parents of children with disabilities may not be required to provide their own aides and babysitters to care for their children, where the parents of nondisabled children are not subject to the same requirements; and parents of children with disabilities may not be charged more than the parents of nondisabled children are charged for their children's participation in the program.⁴

Even if a recipient does not directly operate the day care program, but contracts or arranges with others to do so, the regulation implementing Section 504, at 34 C.F.R. § 104.4, 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 the ADA, at 28 C.F.R. § 35.130, contains a similar provision.

The District asserted that the ECC program is not a day care program that the District operates. In support of this assertion, the District stated that the ECC program is not a corporate entity, does not have a charter or any by-laws, has no officers, and is organized as an enterprise fund of the District.⁵ The District further described the ECC program as a “government unit” that is exempt from taxes or from filing a tax return. The District stated that the ECC program is “sponsored by” the Board, but is not “funded by the Board;” and the ECC program’s revenue is “generated solely by tuition” paid by the parents of students attending the program. Further, the District asserted that the ECC program does not have a rental agreement or lease with the Board to operate its programs; and, that the Board requires the ECC program to reimburse the Board for use of its facilities, the cost of utilities, and other such expenses to the extent that the ECC program is capable of providing that reimbursement.

Despite these assertions, OCR determined that the District operates the ECC program, or at least has an arrangement with ECC to provide day care services to its beneficiaries. Specifically, OCR determined that the District provides indirect and direct financial and other support to the ECC program, as follows:

⁴ See OCR’s Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance, issued by Acting Assistant Secretary William Smith on January 3, 1990. These OCR guidelines specifically address the application of Section 504 to noneducational programs offered by recipients of federal funding, such as day care, after-school care, summer recreational programs, and similar activities that are not part of the educational program of school-age children.

⁵ The District defines an enterprise fund as, “A fund established to finance and account for the acquisition, operation and maintenance of governmental facilities and services that are entirely or predominantly self-supporting by user charges; or for when the governing body of the government has decided periodic determinations of revenues earned, expenses incurred, and/or net income is appropriate....”

- The District publicizes the ECC program on the District’s website, which contains links to the ECC program website, and lists the ECC program as one of its “programs and services during the instructional day and after school.”
- The ECC program operates in the District’s seven elementary schools and common areas, including the auditorium and cafeteria.
- The ECC program is overseen by a Director “on behalf of the Board” and the District School Business Administrator, both of whom are District employees.
- All ECC employees⁶ are employed and paid by the Board. Board meeting minutes for school years 2009-2010 and 2010-2011 further indicated that the Board authorizes personnel actions for employees at the ECC; including hiring, salaries, and promotions.⁷
- The District absorbs certain expenses that the “ECC is unable to afford.” Board public records indicated that from June 18, 2010, through March 25, 2011, the Board authorized \$531,963.34 for ECC expenses.
- The District provides administrative services to the ECC program; including the receipt of tuition and payments, which are submitted to the District at its offices.
- For school years 2009-2010 and 2010-2011, the ECC program handbook indicated that the program followed the District’s school calendar and the District’s disciplinary policy.
- Students enrolled in the ECC program are permitted to attend after school clubs and activities during ECC program hours and must report back to the ECC program for dismissal.
- On days students in the ECC program are absent from school, they are not permitted to attend the ECC program; and all changes in a child’s schedule must be reported to the ECC and the child’s teacher.

Accordingly, as OCR has determined that the District operates the ECC program, or at least has an arrangement with ECC to provide day care services to its beneficiaries, the District may not exclude the Student from the ECC program; allow the ECC to exclude the Student from the ECC program; or require the complainants to pay the costs for providing aids and services to ensure the Student’s opportunity to participate in the ECC program.

The District also asserted that the ECC program is allowed to refuse entry based on the inability to pay; however, OCR determined that the complainants did not indicate that they would be unable to pay the program tuition. As stated above, under OCR policy, parents of children with disabilities may not be charged more than the parents of nondisabled children are charged for their children’s participation in a day care program.

In addition, the District asserted that the provision of a one-to-one aide was not a standard component of the program; and that the complainant’s request for the provision of an aide would alter the ECC program. The regulation implementing the ADA, at 28 C.F.R. § 35.130(b)(7), provides that a public entity is required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would

⁶ The District describes employees who work in the ECC program as mainly high school and college age individuals who work part-time to provide child care services.

⁷ Board public records also reflected that the Board approved seventy-nine (79) ECC personnel actions between August 26, 2010, and December 16, 2010; including appointments and resignations of ECC counselors, and transfers, reassignments and salary adjustments for ECC personnel.

fundamentally alter the nature of the service, program, or activity. The regulation implementing the ADA, at 28 C.F.R. § 35.164, does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity. The regulation implementing the ADA further provides that in those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity, a public entity has the burden of proving that compliance with this provision would result in such alteration. The decision that compliance would result in such a burden must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity; and must be accompanied by a written statement of the reasons for reaching that conclusion.

As the District acknowledged, the fundamental purpose of its ECC program is to provide before and after school childcare. The District conceded that the ECC program is non-academic in nature; and as set forth in the description of the ECC program, students are provided with the opportunity to complete homework, play independently, or participate in structured activities designed to promote their physical and social development. Pursuant to OCR policy, providing additional supervision in a daycare program, such as a one-to-one aide, will not ordinarily change the fundamental nature of a program that is designed to provide supervision for children. Moreover, the District did not conduct the analysis required by 28 C.F.R. § 35.164 in making its decision. Therefore, OCR determined that the District did not meet its burden in demonstrating that requiring it to provide an aide for the Student would be a fundamental alteration of its ECC program.

The District also asserted that it would be an undue financial burden on the ECC to provide and pay for the cost of the Student's one-on-one aide. Undue burden is defined as an action requiring significant difficulty or expense.⁸ Factors to be considered in assessing whether a burden is undue generally include the nature and cost of the accommodations needed; the overall financial resources of the facility or facilities involved in the provisions of the reasonable accommodations; the number of persons employed at such facility; the effect on expenses and resources; the impact otherwise of such accommodation upon the operation of the facility; the overall size of the entity; the type of operation(s) of the entity, including the composition, structure and functions of the workforce; and the geographic separateness, administrative or fiscal relationship of the facility in question to the covered entity.⁹

The regulation implementing the ADA, at 28 C.F.R. § 35.130(f), prohibits a public entity from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with nondiscriminatory treatment. Further, OCR policy has established that in day care programs run by public educational entities, providing extra supervision to a child with a disability ordinarily will not unduly burden a recipient; and where undue burden has not been demonstrated, recipients must provide each child with services necessary to his or her meaningful enjoyment of the benefit offered. Further, the regulation implementing the ADA, at 28 C.F.R. § 35.164, provides that the decision that compliance would result in such a burden must be made by the head of the public

⁸ See 28 C.F.R. § 36.303(a).

⁹ See 42 U.S.C. §§ 12111(10); 12181(9).

entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity; and must be accompanied by a written statement of the reasons for reaching that conclusion.

The District estimated that the cost of a one-on-one aide would be \$35.76 per day, which would increase to \$39.29 per day, as of April 1, 2011; and the behaviorist would be \$50.00 per hour. The District asserted that these additional costs would be an undue financial burden considering the ECC's per day income after operating costs was \$115.80 per day, not including rent and utilities. The District did not provide any documentation in support of its cost estimates for the provision of an aide or behaviorist; nor did it provide any documentation detailing the ECC's operating costs, rent, or utilities. Further, OCR's review of Board public records for the period August 2010 through April 2011, indicated that the District's projected budget for school year 2011-2012 is \$72,934,295 dollars. OCR was not provided with the budget of the ECC program. Even assuming that the District's projected cost of \$39.29 per day for an aide and \$50.00 per hour for a behaviorist for the Student is accurate, it represents an insignificant portion of the District's over \$72 million budget. Further, OCR determined that from June 18, 2010, through March 25, 2011, the District paid \$531,963.34 of the ECC program's expenses.

The regulation implementing the ADA requires the District to consider, among other factors, its overall financial resources and the overall financial resources of the program involved in the provision of the reasonable accommodation. OCR found no evidence that the District conducted the type of inquiry or analysis required by the regulation in determining whether providing the Student with an aide and a behaviorist constituted an undue financial burden. Therefore, OCR determined that the District did not meet its burden in demonstrating that requiring it to provide an aide for the Student would be an undue financial burden.

OCR determined that the District's actions in requiring the complainant to pay for the Student's one-to-one aide and a behaviorist in order to attend its ECC program denied the Student an equal opportunity to participate in that program and subjected her to different treatment on the basis of her disability. In addition, the District failed to demonstrate that providing a one-to-one aide and a behaviorist would fundamentally alter the nature of the service, program or activity; or cause an undue financial burden.

On August 10, 2011, the District voluntarily signed an agreement, a copy of which is enclosed herewith, which when fully implemented will resolve the aforementioned concerns regarding the allegation. OCR will monitor the implementation of the resolution agreement. If the District fails to implement the terms of the agreement, OCR will immediately resume its investigation.

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.

It is unlawful to harass or intimidate an individual who has filed a complaint or participated in actions to secure protected rights.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this letter 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 constitute an unwarranted invasion of personal privacy.

If you have questions about OCR's determination, please contact Gina Damasco, Compliance Team Attorney, at (646) 428-3924, or gina.damasco@ed.gov; or Jane Tobey Momo, Compliance Team Attorney, at (646) 428-3763, or jane.momo@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: William Donio, Esq.
Rebecca Winkelstein, Esq.