

November 16, 2015

Donald James, Ed.D.  
Superintendent  
Commack School District  
P.O. Box 150  
Commack, New York 11725

Re: Case No. 02-15-1323  
Commack School District

Dear Dr. James:

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 Commack School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, and subjected him to harassment because of his disability, by assigning him a one-to-one aide during his XXXXXX XXXXXX XXXXXX class at the Commack High School, from the beginning of school year 2014-2015 through January 6, 2015, contrary to the requirements set forth in his Individualized Education Program (IEP).

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.

In its investigation, OCR reviewed information and documentation that the complainant and the District submitted. During school year 2014-2015, the Student was a XXXXX-grade student enrolled at the Commack High School (the School). The District's Committee on Special Education (CSE) classified the Student as having an "XXXXX XXXXXX XXXXXXXXXXXX" in the Student's IEPs for school year 2014-2015, dated March 28 and September 30, 2014; and,

February 10 and March 6, 2015.<sup>1</sup> None of the Student's IEPs for school year 2014-2015 required the District to provide the Student with a one-to-one aide.

The complainant alleged that the District discriminated against the Student on the basis of his disability, and subjected him to harassment because of his disability, by assigning him a one-to-one aide (the Aide) during his XXXXXX XXXXXX XXXXXX class, from the beginning of school year 2014-2015 through January 6, 2015, contrary to the requirements set forth in his IEP. The complainant alleged that during regular class sessions and in the computer lab, the Aide would sit next to the Student and "attend" to him whether or not he requested or required assistance. For example, the complainant stated that the Aide would tap the Student on the shoulder when he did not respond promptly to the teacher; or, she would prompt him to continue working on his computer during computer lab. The complainant stated that the Aide "embarrassed" the Student and violated his privacy, as the presence of a one-to-one aide indicated to other students that the Student was disabled and "in need of assistance." Further, the complainant asserted that one of the manifestations of the Student's disability is that he struggles "socially"; and, she believed the presence of the Aide could have diminished his "social stature."

The complainant stated that she complained to District personnel about the Aide on several occasions between approximately October 15, 2014, and December 18, 2014.<sup>2</sup> The complainant stated that the District denied that the Aide was a one-to-one aide assigned to the Student; rather, the District asserted that the Aide was a "monitor" assigned to the class because it was a large class and the Student's teacher required an assistant. The complainant stated that after she complained about the Aide to the District's Superintendent in an electronic mail message (email) sent on December 18, 2014, the Student's XXXX XXXXXXXX responded by calling her on January 6, 2015; and, at the complainant's request, the XXXX XXXXXXXX agreed to remove the Aide on that same day.<sup>3</sup>

The regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(iv), states that a recipient, in providing any aid, benefit, or service, may not, on the basis of disability, provide different or separate aids, benefits, or services to disabled students, unless such action is necessary to provide the disabled student with aids, benefits or services that are as effective as those provided to others (which would be documented in an individual educational plan, such as an IEP). The regulation implementing the ADA, at 28 C.F.R. § 35.130(b)(1)(iv), contains a similar provision.

In addition, disability harassment is a form of discrimination prohibited by Section 504, the ADA and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits,

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<sup>1</sup> The Student's IEPs indicated that he has difficulty moderating his emotional responses and sustaining focus during writing tasks; that he required extra time for transitioning; and, that he presents with deficits in executive functioning and social interactions.

<sup>2</sup> The complainant stated that during this timeframe, she complained to the School's assistant principal, members of the CSE, and the District's Superintendent.

<sup>3</sup> The complainant asserted that the XXXX XXXXXXXX's prompt action in removing the Aide on January 6, 2015, constituted "proof" that the Aide was a one-to-one aide assigned to the Student and not a class monitor as the District had claimed.

services or opportunities in the institution’s program. If OCR determines that harassing conduct occurred, OCR will examine additional factors to determine whether a hostile environment existed and whether the school took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects.

OCR determined that the District’s CSE had recommended an Integrated Co-Teaching model for the Student to enable teachers to support him in the general classroom environment; however, the complainant rejected this placement for the Student’s XXXXXXXX XXXXXXXX class and requested that the Student be placed in the XXXXXXXX XXXXXXXX XXXXXXXX class, which did not have a co-teacher. The District stated that in order not to exclude the Student on the basis of his disability, it agreed to place the Student in the class; and, significant accommodations and modification were put in place to help facilitate his success.

The District denied that it assigned a one-to-one aide to the Student. Rather, the District informed OCR that at the beginning of school year 2014-2015, the Student’s teacher expressed concerns to District personnel about meeting the requirements of the Student’s IEP(s) as well as the needs of the other students in her class. The District stated that various administrators offered guidance to the teacher, but she continued to report difficulties in meeting the needs of all of her students without assistance. Therefore, in October 2014, the District assigned the Aide to work with the class. The District stated that the Aide’s responsibilities included the following: assisting students in keeping on task with their individual work and in the computer lab; and, assisting the teacher with collecting and disseminating instructional materials and notes.

The District acknowledged that the Aide had been in close proximity to the Student during lecture portions of the class; and, when it was necessary to redirect the Student, she did so with a verbal cue or a nonverbal gesture. The District asserted that due to manifestations of the Student’s disabilities, the Aide may have presumed he needed more support and attention than the other students in the class when she executed her classroom duties.<sup>4</sup> The District stated that after the complainant complained to the District’s Assistant Superintendent sometime in October 2014 that the Student felt that the Aide was there to “watch over” him, the Assistant Superintendent directed the District’s Special Education Coordinator to inform both the Aide and the teacher that the Aide should not be in close proximity with the Student or otherwise focus her attention on him as compared to other students in the class. OCR determined that the Student’s XXXX XXXXXXXX removed the Aide from the Student’s class at the complainant’s request, effective January 7, 2015.<sup>5</sup> The District stated that thereafter, the Student continued to attend and passed his XXXXXXXX XXXXXXXX XXXXXXXX class.

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<sup>4</sup> The District stated that the Student often has difficulty in meeting deadlines, organizing notes or other instructional materials, sustaining attention to lengthy tasks and lectures, and following directions; and, he often has emotional “meltdowns.”

<sup>5</sup> The District stated that during the time that the Aide was in the Student’s class, it identified two significant incidents wherein the Aide intervened to address the Student’s behavior. The District stated that on one occasion, the Aide reported that the Student broke a paper clip and began to cry loudly. In response, the Aide escorted the Student out of the room in an attempt to “preserve his dignity”; and, she also facilitated a meeting with his XXXX XXXXXXXX. The District further stated that on the second occasion, the Aide reported that the Student became frustrated with the classroom printer and became agitated and very loud in the classroom, which drew the attention of the other students; in response, the Aide removed the Student from the classroom and assisted him in printing from another printer.

On November 9, 2015, the District entered into a Resolution Agreement (attached) with OCR to voluntarily resolve the allegation without further investigation, as set forth in Section 302 of the Case Processing Manual. OCR will monitor the implementation of the enclosed resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

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 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 he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another 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, which, 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 Letisha Morgan, Senior Compliance Team Investigator, at (646) 428-3827 or [letisha.morgan@ed.gov](mailto:letisha.morgan@ed.gov); or, Félice Bowen, Compliance Team Leader, at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Very truly yours,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXX X XXXXX, Esq.