

May 13, 2016

Dr. Kriner Cash
Superintendent
Buffalo Public Schools
720 City Hall
Buffalo, New York 14202

Re: Case No. 02-16-1069
Buffalo Public Schools

Dear Dr. Cash:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) with respect to the above-referenced complaint filed against Buffalo Public Schools (the District). The complainant alleged that the District discriminated against her son (the Student), on the bases of his race and disability, by refusing to provide him with occupational and speech therapy services at XXXXXXXX XXXXXXXX XXXXXXXX (school 1) during school year 2015-2016.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color or national origin in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also 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 and activities receiving financial assistance from the Department. Additionally, OCR is 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 Title VI, Section 504 and the ADA.

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), provides that no person shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program operated by a

recipient. Additionally, the regulation implementing Title VI, at 34 C.F.R. § 100.3(b)(1) (i) and (ii), prohibits recipients from, on the basis of race, color or national origin, denying students any service or benefit provided under the program, or providing services or benefits that are different from or provided in a different manner from services or benefits provided to other students. The regulation implementing Section 504, at 34 C.F.R § 104.33(a), provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified person with a disability 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)(i), 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 non-disabled persons are met. The implementation of an Individualized Education Program (IEP) is one means of meeting this standard.

In its investigation, OCR interviewed the complainant and District personnel. OCR also reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

The complainant alleged that the District discriminated against the Student, on the bases of his race and disability, by refusing to provide him with occupational and speech therapy services at school 1 during school year 2015-2016. The complainant asserted that in late XXXXXX 2015, after she informed the District that she intended to home-school the Student for school year 2015-2016, the District's XXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXXXXXX (supervisor 1) told her that the Student could obtain the related services set forth in his IEP at the District school of her choice, if the complainant provided transportation. The complainant stated that supervisor 1 told her she should contact her desired school on the first day of school to coordinate the provision of the related services. The complainant stated that on the first day of school, and several times in subsequent weeks, she attempted to contact school 1 but was unable to reach anyone. The complainant stated that she therefore contacted the District's XXXXXXXX XXXXXX XXXXXXXXXXXX (supervisor 2)¹ on or about XXXXXXXX, 2015, who said that she would facilitate the provision of related services at school 1; however, the complainant stated that she did not hear back from supervisor 2. The complainant asserted that in XXXXXXXXXXXX, she spoke to a staff member at school 1 (staff member 1)² who informed her that the Student could not receive services at school 1 pursuant to a District policy requiring home-schooled students to receive their related services at their assigned neighborhood school, and insinuated that the Student could not receive services at school 1 because of his race. The complainant asserted that later that same day, supervisor 2 informed her that the Student could not receive related services at school 1, pursuant to the policy, and that the District would provide the services at the Student's assigned neighborhood school (school 2).

OCR determined that pursuant to an IEP created on XXXXXX XX, 2015, the Student, who is XXXXXX, was eligible to receive special education related aids and services during school year

¹ Supervisor 2 replaced supervisor 1 in XXXXXXXX 2015.

² The complainant provided the name of staff member 1; however, the District advised OCR that it had no record of any employee with that or a similar name.

2015-2016, including occupational and speech therapy services.³ OCR determined that on XXXXXX XX, 2015, the complainant notified the XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX that she planned to home-school the Student for school year 2015-2016. The District had no records reflecting that supervisor 1 then advised the complainant that the Student could receive his related services at the school of the complainant's choice, or that the complainant attempted to contact staff at school 1 during the first few weeks of school to arrange for the provision of services, as alleged.⁴ Supervisor 2 informed OCR that she did not learn that the Student was being home-schooled until XXXXXXXX 2015, when she spoke to the complainant and the complainant informed her that the Student was not receiving his occupational and speech therapy services and requested that the services be provided at school 1.⁵ Supervisor 2 informed OCR that when she spoke to complainant in XXXXXXXX, the complainant reported to her that she had spent several weeks trying to reach staff at school 1.

OCR determined that the District does not have a written policy governing where special education related services will be provided to students who are home-schooled.⁶ The District informed OCR that its practice is to provide related services to such students at their assigned neighborhood school (e.g., the grade-appropriate school closest to their home), provided that service providers at the neighborhood school have availability to provide the services.⁷ The District further informed OCR that pursuant to its practice, supervisor 2 provides parents of home-schooled students with contact information for their assigned neighborhood school to coordinate the provision of services, within a few days of the creation of the IEP or notification that the Student will be home-schooled, whichever date is later. If the District receives a request for the provision of services at a school other than the assigned neighborhood school, the District tries to accommodate the request, but can only do so if service providers at the requested school have availability, and if applicable, there is room in group therapy sessions.

Supervisor 2 informed OCR that after speaking to the complainant, she inquired about the availability of occupational and speech therapists at school 1, and determined that they did not have sufficient availability to meet the Student's needs, as set forth in his IEP. OCR determined that during school year 2015-2016, there were two speech therapists and two occupational therapists at school 1. OCR confirmed that the therapists did not have enough availability to meet the Student's needs.

Supervisor 2 then spoke to the District's XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX and the District's XXXXXXXXXXXX to determine where the Student could receive his related services.

³ Specifically, the Student's IEP included provisions for two sessions of 30-minute individual occupational therapy per six day cycle, and six sessions of 30-minute small group speech therapy services per six day cycle.

⁴ Supervisor 1 is no longer employed by the District. OCR attempted but was unable to interview supervisor 1.

⁵ Supervisor 2 denied that she spoke to the complainant on XXXXXXXX XX, 2015, as alleged, and stated that her first conversation with the complainant took place in XXXXXXXX 2015.

⁶ Pursuant to District Policy 8470, entitled "Home Schooling," the District "shall offer a home-instructed student with disabilities the special education services as addressed in the approved [IEP]." Policy 8470 states that the District is not required to provide the services in the Student's home, but it does not state where such services will be provided.

⁷ The District stated that its practice is in accordance with guidance from the New York State Education Department (NYSED), which provides that "[a] board of education determines the location where special education services will be available to home-schooled students, which could include the site of the home school."

Supervisor 2 then informed the complainant by phone that the Student’s related services would be provided at school 2. By letter to the complainant dated XXXXXXXXXX, 2015, the District confirmed that the Student’s related services would be provided at school 2, and provided the complainant with contact information to initiate the services.

The District informed OCR that the complainant XXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX during schools year 2014-2015 and 2015-2016. During school year 2014-2015, the District provided related services to four home-schooled students, two of whom are black and two of whom are white; all four received their related services at their neighborhood school. During school year 2015-2016, the District provided related services to three other home-schooled students, all of whom are white; all three received their related services at their neighborhood school.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-discriminatory reason for refusing to provide the Student’s related services at school 1; namely, the Student was not entitled to receive the services at school 1, since it is not the Student’s neighborhood school, and service providers at school 1 did not have adequate availability to provide the Student’s requisite related services. OCR determined that the proffered reason was not a pretext for discrimination, because the District acted in accordance with its practice for providing related services to home-schooled students, and treated similarly situated students of other races in the same manner.

During the course of the investigation, OCR determined that prior to XXXXXXXXXX 2015, the District had not arranged to provide the Student with the occupational and speech therapy services set forth in his IEP at any school or location. The District informed OCR that pursuant to District Policy 7653, parents of home-schooled students must request that the District provide special education related services for the following school year in writing prior to June 1. OCR determined that the policy does not explicitly refer to home-schooled students. Rather, the policy refers to non-public school students pursuant to a NYSED regulation (3602-c) indicating that for special education purposes, students with disabilities who are home-schooled will be considered non-public school students. Therefore, the District’s policy states that parents of non-public school students must notify the District by June 1 preceding the school year for which the request for services is made. The District’s regulation 8470, titled “Home Schooling,” states that parents of home-school students must notify the District by July 1 of their intent to home school and that “the District must offer a student with disabilities the special education services as addressed in the approved Individualized Education Program (IEP) by the Committee on Special Education.” The District asserted that the complainant had not made any such written request by June 1, 2015, and was therefore not entitled to related services during school year 2015-2016. The District could not determine whether the parents/guardians of other home-schooled students who received related services during school year 2015-2016 had requested such services prior to June 1, 2015. On May 12, 2016, the District entered into the enclosed agreement with OCR to resolve this issue without further investigation. OCR will monitor the implementation of the agreement.

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 the right to 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination, please contact David Krieger, Compliance Team Attorney, at (646) 428-3893 or david.krieger@ed.gov; or Bernard Dufresne, Compliance Team Attorney, at (646) 428-3802 or bernard.dufresne@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXX XXXXXXXXXXXX