

August 24, 2016

Dr. Patrick Tierney
Superintendent
Jefferson Township Public School District
31 Route 181
Lake Hopatcong, New Jersey 07849

Re: Case No. 02-16-1215
Jefferson Township Public School District

Dear Dr. Tierney:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Jefferson Township Public School District. The complainant alleged that the District discriminated against her daughter (the Student), on the basis of her disability, by failing to consider requests the complainant made that the District exempt the Student from its attendance policy, in February 2016.

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 and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also 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 both Section 504 and the ADA.

In its investigation, OCR interviewed the complainant and District staff. 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 basis of her disability, by failing to consider requests the complainant made in February 2016, that the District exempt the Student from its attendance policy. The complainant asserted that the

District implemented a new attendance policy in school year 2015-2016, which placed the Student at risk of losing academic credits because she accrued numerous absences as a result of her XXXX and other medical conditions. The complainant asserted that she asked District staff to create a Section 504 plan for the Student that would include a provision exempting the Student from the new attendance policy, but District staff refused to consider the request and told her that they could not include any provision in a Section 504 plan that did not comport with District policy.

The regulation implementing Section 504, at 34 C.F.R § 104.4(b)(4), states that a recipient may not utilize criteria that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of their disability. Additionally, the regulation implementing the ADA, at 28 C.F.R. § 35.130(b)(7), states that a public entity shall make reasonable modifications to 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 fundamentally alter the nature of the service, program, or activity.

OCR determined that as of February 2016, the Student was not receiving special education or related aids or services pursuant to a Section 504 plan or Individualized Education Program (IEP). By letter dated February 16, 2016, an assistant principal informed the complainant that the Student was at risk of losing credits in two courses pursuant to the new attendance policy effective school year 2015-2016, because she had accumulated more than 25 absences in the courses. By electronic mail message (email) to the school XXXXX (the counselor) dated February 18, 2016, the complainant requested that the Student be evaluated to determine her eligibility to receive special education related aids and services under a Section 504 Plan, including exemption from the attendance policy. The complainant did not provide any medical documentation in support of her request. The counselor reported that on February 17, 2016, she spoke to the complainant about her request and asked the complainant to provide documentation from the Student's physician supporting the request.

On or about February 19, 2016, the counselor forwarded the complainant's request to the XXXXX coordinator. By email dated February 22, 2016, the complainant provided background information to the coordinator regarding the Student's medical condition and its impact on the Student's attendance. On February 23, 2016, the counselor and the coordinator advised the complainant that the Student could not be excused from the attendance policy, but that the complainant could appeal any loss of credit due to the Student's absences pursuant to the attendance policy. The counselor and the coordinator also agreed to speak with District administrators regarding the complainant's request for exemption from the attendance policy pursuant to a Section 504 plan.¹

On February 23, 2016, the complainant spoke to the District's Director of Student Personnel Services (the director) about her request. The director stated to OCR that she informed the complainant about the availability of home instruction for students who are absent due to illness,

¹ The counselor and the coordinator reported that they also told the complainant that the District's standard accommodation regarding attendance was to allow a parent to submit a note to excuse up to 5 absences, and then allow the parent to provide an updated doctor's note to excuse further absences. OCR determined that the counselor and coordinator also provided information to the complainant about the availability of home instruction.

and the complainant’s right to appeal any denial of credit pursuant to the attendance policy. The director also encouraged the complainant to use the Section 504 committee process to discuss other accommodations the District could provide to the Student to address issues other than her attendance issues.² The director advised OCR that the District does not offer exemptions from the attendance policy, and asserted that the other two options presented were sufficient to meet the Student’s needs. By email dated February 24, 2016, the complainant informed the director that she was interested in securing a Section 504 plan for the Student that “protects [her] from the attendance policy.”

By email dated February 25, 2016, the director informed the complainant that she had discussed the matter with a representative from the New Jersey Department of Education and OCR,³ who allegedly confirmed that home instruction and an attendance appeal process were reasonable accommodations for a student absent due to a chronic illness. The director further informed the complainant that “exempting [the Student] from the attendance policy will not be put into a 504 accommodation plan;” however, she encouraged the complainant to meet with the Section 504 committee to determine other appropriate accommodations for the Student. The complainant rejected this offer and did not request that the Section 504 committee convene to discuss the Student’s eligibility for special education and/or related aids and services at this time.⁴

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), defines an appropriate education as the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met and (ii) based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35 and 104.36. The regulation implementing Section 504, at 34 C.F.R. § 104.35(c), provides that in interpreting evaluation data and making placement decisions, including decisions regarding a student’s eligibility to receive special education related aids and services under a Section 504 plan, a recipient shall “(1) draw upon information from a variety of sources . . . and (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options”

Based on the foregoing, OCR determined that in February 2016, the District determined that the Student was not eligible for exemption from the attendance policy as a special education related aid/service without first drawing upon information from a variety of sources and ensuring that the decision was made by a group of persons, including persons knowledgeable about the

² The director explained that she was concerned with providing the Student with a blanket exemption from the attendance policy, because in the past students had misused such an exemption for absences unrelated to the disability.

³ OCR found no record that the District contacted OCR for technical assistance.

⁴ By email dated April 5, 2016, the complainant requested that the Student be provided with testing accommodations under a Section 504 plan. The Section 504 committee convened on April 7, 2016, and determined that the Student was eligible for testing accommodations. The committee did not discuss or otherwise consider whether exemption from the attendance policy was appropriate for the Student.

Student, the meaning of the evaluation data, and the placement options, in violation of the regulation implementing Section 504, at 34 C.F.R. § 104.35(c). On August 17, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance issue identified with respect to this complaint. OCR will monitor implementation of the resolution 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, please contact Anna Moretto Cramer, Compliance Team Leader, at (646) 428-3826 or anna.moretto.cramer@ed.gov.

Sincerely,

Timothy C.J. Blanchard

Encl.