



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I

5 POST OFFICE SQUARE, 8TH FLOOR
BOSTON, MASSACHUSETTS 02109-3921

February 18, 2014

Dr. Catherine C. Latham
Superintendent
Lynn Public Schools
Administrative Offices
100 Bennett Street
Lynn, Massachusetts 01905

Re: Case No. 01-10-5004

Dear Superintendent Latham:

This is to advise you of the resolution of the above-referenced compliance review initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR) against the Lynn Public Schools (District). The compliance review assessed whether the District discriminated against Black students, on the bases of race or disability, in the pre-referral, referral, evaluation and placement of these students in special education programs; specifically, the placement of these students in alternative school special education programs.

OCR initiated this review under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI), and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination based upon race, color, or national origin by recipients of Federal financial assistance from the Department. OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities operated by recipients of Federal financial assistance; and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (Title II), and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by certain public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to Title VI, Section 504, and Title II. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies Section 504 standards.

Prior to the conclusion of OCR's investigation, the District expressed an interest in voluntarily resolving this case and entered into an agreement that commits the District to specific actions to address the issue under review. This letter summarizes the applicable legal standards, the information gathered during the review and how the review was resolved.

Legal Standards

Title VI

The standards for determining compliance with Title VI are set forth in the regulation at 34 C.F.R. § 100.3(a) and (b). The regulation, at 34 C.F.R. § 100.3(a), states that no person shall, on

the grounds 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 receiving Federal financial assistance. Section 100.3(b)(1)(i)-(vi), further states that a recipient may not, on the grounds of race, color or national origin, deny an individual any service or benefit of its programs; provide any services or benefits to an individual which are different or provided in a different manner; subject an individual to separate treatment; restrict an individual in the enjoyment of any benefits of its programs; treat an individual differently in determining continued enrollment in its programs; or, deny an individual an opportunity to participate in a program through the provision of services which is different from that afforded others under the program. The regulation, at 34 C.F.R. § 100.3(b)(2), also provides that a recipient may not utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

The pre-referral, referral, evaluation, and placement of students in special education can result in unlawful discrimination based on race in two ways: first, if students are subject to different treatment based on their race, and second, if a policy is neutral on its face and administered neutrally but has a disproportionate and unjustified effect on students of a particular race.

Title VI prohibits schools from intentionally treating students differently based on race, national origin or color. Enforcement of a rule or application in a discriminatory manner is prohibited intentional discrimination. When similarly-situated students of different races are treated differently, OCR assesses the recipient's explanation for the differences in treatment to determine if the reasons were legitimate and nondiscriminatory, or were a pretext for unlawful discrimination.

Intentional discrimination in the pre-referral, referral, evaluation, and placement of students in special education can take many forms, however, and can be proven even without the existence of a similarly-situated student. OCR examines whether the recipient treated a student in a manner that was inconsistent with its established policies and procedures or whether there is any other evidence of race discrimination. Additionally, a school's adoption of a facially-neutral policy with an invidious intent to target certain races is prohibited intentional discrimination. Whether OCR finds a violation of Title VI will be based on the facts and circumstances surrounding the particular situation.

In addition to different treatment of students based on race, schools violate Federal law when they evenhandedly implement facially neutral policies or practices that were not adopted in order to discriminate but their implementation nonetheless has an unjustified effect of discriminating against students on the basis of race, national origin or color. The resulting discriminatory effect is commonly referred to as "disparate impact."

Facially neutral pre-referral, referral, evaluation, and placement policies that result in an adverse impact on students of a particular race, national origin or color will be evaluated against the disparate impact standard to ensure that they are not discriminatory. In examining the application of a facially neutral policy, OCR will consider whether the policy results in an

adverse impact on students of a particular race, national origin or color as compared with students of other races, national origin or color; whether the applicable policy is necessary to meet an important educational goal; and even in situations where the policy is necessary to meet an important educational goal, whether there are comparably effective alternative policies available that would meet the stated educational goal with less of a burden or adverse impact on the disproportionately affected racial or ethnic group.

Section 504 and Title II

The applicable standards for determining compliance with Section 504 are set forth in the implementing regulation at 34 C.F.R. Sections 104.33-104.36. Section 104.33 provides, in pertinent part, that a recipient is responsible for providing a free and appropriate public education (FAPE) to qualified persons with disabilities. Section 104.34 states that a qualified student with a disability shall be placed in the regular educational environment unless it is demonstrated by the District that the education of the student in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily. This is commonly referred to as the “least restrictive environment” (LRE). Further, the regulation at 34 C.F.R. Section 104.35(a)-(c) sets forth specific procedures designed to ensure appropriate evaluation, reevaluation, and placement, and the regulation at 34 C.F.R. Section 104.36 prescribes relevant procedural safeguards. The applicable Title II regulatory provision is set forth at 28 C.F.R. Section 35.130 and is interpreted consistent with the provisions of Section 504 mentioned above.

Overview of the District

According to data obtained by OCR during this review, the District currently has 18 elementary schools, 3 middle schools, 2 traditional high schools, 1 vocational technical institute serving primarily grades 9-12, and 1 alternative junior/senior high school. As of the 2012-2013 school year, the District was the fifth largest in Massachusetts and had the sixth largest number of Black students in the state, with approximately 1,598 (11.3%) Black students out of its total enrollment of 14,139 students.

OCR learned during the review that the District’s two alternative school programs are located at Fallon Elementary School (FES) for grades pre-K-6 and Fecteau-Leary Junior/Senior High School (FLJSHS) for grades 7-12. FES, with a total population of 46 in the 2012-2013 school year, is a 100% special education self-contained education program. FLJSHS is an alternative school with both a regular education (students without disabilities determined to need intensive regular education services and smaller class sizes to address social, behavioral, attendance, and related challenges) and a special education population (the latter had 73 students, which constituted 45% of the 163 students at the school in the 2012-2013 school year). OCR learned from interviews with District staff and from file reviews, as well as a review of District policies and procedures, that both alternative school special education programs admit students with disabilities only from other District schools who, due to emotional, behavioral and/or social difficulties, are, as determined by their Individualized Education Program (IEP) teams, unable to be successfully educated in their special education programs in regular education settings. OCR’s investigation revealed that in the 2012-2013 school year, Black students made up 11.3%

of the District's student enrollment (1,598 of 14,139 students enrolled in the District), but 20.5% (15) of the 73 students in the secondary-level alternative school special education program.

In initiating this review, OCR reviewed data indicating that in the 2009-2010 school year, Black students made up 15.4% of District enrollment (2,067 out of 13,420 students), but 19.3% of the students in special education (400 out of 2,075 students). OCR next reviewed data from the 2009-2010 school year for the District's (then) twenty-four schools. Of those schools only two, those housing the alternative school special education programs described above, showed a significant disproportionate enrollment of Black students in special education. Moreover, none of the schools in the District stood out from the others as making disproportional referrals to the alternative school special education programs. Based on this information, OCR focused its investigation on the placement of Black students with disabilities in the alternative school special education programs.

Summary of Review and Information Obtained by OCR

Data Collected

During the course of the investigation, OCR interviewed District staff members, including the Superintendent, the District's Compliance Officer, senior special education administrators, alternative school special education program principals and other administrators, and school counselors.¹

OCR additionally reviewed the District's written policies and procedures relevant to special education pre-referral, referral for evaluation, evaluation, placement, referral from a special education placement in a regular education setting to an alternative school special education program, and evaluation for, placement in and exit from an alternative school special education program. This review indicated that these policies and procedures were non-discriminatory as written and consistent with Section 504 (that is, with the applicable provisions of the Section 504 regulation regarding FAPE), and so OCR focused on how they were applied in practice.

OCR also conducted preliminary reviews of over 200 student files, including files from FES and FLJSHS. In these comparative file reviews, OCR did not find any indication of different treatment of Black students compared to White students. The file reviews and staff interviews indicated, however, gaps in the application of Section 504 District policies and procedures relating to pre-referral and referral to, evaluation for, placement in, and exiting from these schools, which may have contributed to the disproportionate placement of Black students in the alternative school special education programs.

Pre-referral

OCR reviewed the District's Student Study Team (SST) Handbook, dated November 2008 and which was being updated in fall 2013 by the Compliance Officer, which describes a rigorous

¹ OCR learned that the Compliance Officer was hired in or about December 2011 to coordinate the District's response to concerns such as those raised by this compliance review.

SST referral, data collection, team formation, and modification/intervention process; as well as related documentation. For example, the SST Handbook describes a regular education pre-referral process that would produce data on a student's performance and needs consistent with some of the types of pre-placement evaluation information required by applicable provisions of Section 504. However, OCR's student file reviews indicated that the District's documentation of the process is not consistent. For example, a number of files lack specifics as to what interventions were tried, for how long, and with what results.

The special education administrators stated in interviews with OCR that the District uses a SWIS (school-wide information system) data management system at the district-wide level and "does quarterly" to see how students are doing with the curriculum, which SSTs review on a regular basis. However, OCR did not find evidence of such regular review in student files. The special education administrators indicated to OCR that because the Compliance Officer now has oversight of the SST process, it is much-improved, which will be better reflected in student files going forward. Several District staff members also indicated in their interviews with OCR that the Compliance Officer has provided recent training to building-level staff on improved record keeping.

The FES Principal, in her interview with OCR, provided a copy of the "Intake Process/Checklist for grades Pre-K-6," including a "Fallon Referral Summary" document, new in the 2012-2013 school year (FES Intake Form). The form includes a "pre-referral process" section. The FES Principal commented to OCR that the FES Intake Form has improved the pre-referral process to her special education alternative school, requiring greater information from relevant personnel at referring schools before FES will consider a referral.

The FLJSHS Principal, in her interview with OCR, provided a copy of an "Intake Form," new in the 2012-2013 school year and required before an FLJSHS intake meeting can take place. The Intake Form on its face requires information on the reason for referral to the alternative school special education program, as well as a description of previous interventions tried and the results. The Intake Form also requires the student's school record from all previous schools and a comprehensive psychological and related history.

The FLJSHS Principal commented to OCR regarding the Intake Form that OCR's compliance review had already resulted in notable changes to District procedures and practices. For example, the alternative school special education program intake process is much more "formal" now, including better documentation. The Principal detailed for OCR how a larger team of relevant staff is now involved in the referral/intake discussion. Also, referring staff now has a record of efforts made with the student before the student comes to FLJSHS, including "[f]amily intervention, RTI [response to intervention], counseling, hospitalizations." However, because these changes are so recent, there was little or no evidence of them in the FLJSHS files reviewed by OCR.

Referral for Evaluation

According to the District's Special Education Policy and Procedure Manual (Special Education Manual), the efforts and recommendations of the SST are to be documented on a Pre-referral

Form prior to the decision regarding referral for a special education evaluation. In the event that a special education referral is made, a copy of the documentation will be attached to the referral form. As noted in the Pre-referral discussion, above, OCR did not consistently find this documentation in student files for either FES or FLJSHS. Documentation was also lacking in some cases where a student was referred for evaluation by other than school personnel, even though this is also required by the Special Education Manual. In addition, the District's Referral for Evaluation form is supposed to be signed by the building Principal. This documentation was not found in most student files. Some files also lacked information on who referred a student for evaluation and why, following what pre-referral process.

The FES Principal indicated in her interview with OCR that the referral for evaluation process requires that the SST make a referral to the Student Adjustment Counselor (SAC), who then completes a referral packet and submits it to the FES Principal. According to the FES Principal, there are now multiple, specified steps for processing the referral at FES, so that no student will be admitted to the school without the participation of the Principal or Clinical Director or both. Also, the referring team must consider, and document, alternatives to FES before referring a student. Again, OCR found that this process, which as described would be consistent with Section 504, was not consistently reflected in student files.

The FLJSHS Principal, in her interview with OCR, provided a copy of a document concerning referrals to FLJSHS, dated November 28, 2011. The stated purpose of the document is to “firm-up” the referral process, “delineate who is responsible for the rest of the steps, document parent/attorney contacts and to prevent student files from getting mixed up in the referral process.” The referral document indicates that it is mandatory that a student have been involved with a SAC prior to referral and have had a functional behavioral assessment and/or behavior intervention plan completed within the last 6 months at the referring school. The referral document also indicates that a documentation packet must accompany the referral. Moreover, the referral process requires that students must be considered for the LRE, which may include behavior classes at various regular education schools in the District, prior to a more restrictive alternative school special education program referral. This referral process, though consistent with Section 504, was not fully documented in any of the FLJSHS files that OCR reviewed.

Evaluation

The Special Education Manual provides: “In determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student's educational and developmental potential.” However, OCR reviewed several student files that lack key and/or up-to-date information on what evaluative information led to placement in a special education alternative program.

Placement

The District's Special Education Manual provides regarding LRE that “separate schooling or other removal of children with disabilities from the general education environment occurs only when the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” OCR's file

reviews thus far indicate, however, that in several cases, evidence was lacking that placement teams had properly considered LRE. For example, in one FLJSHS student's file, there was no indication in the IEP that LRE was a consideration in moving the student from FES to FLJSHS. In a student file from FES, the IEP indicated that a recent attempt to serve a student in a special education placement in a regular education setting was not successful, but detail on the interventions attempted in that setting, and why they failed, was not included.

In summary, while the District requires of its staff a data-intensive and well-documented pre-referral, referral, evaluation and placement process, OCR's review of student files indicated that many student files did not contain the required documents.

Exit from the Alternative School Special Education Programs to a Less Restrictive Environment

OCR reviewed the District's Special Education Manual guidance on LRE and found it requires that a qualified student with a disability be placed in the regular educational environment unless it is demonstrated by the District that the education of the student in the regular education environment with the use of supplementary aids and services cannot be achieved satisfactorily. However, OCR did not find in its review of student files any documentation indicating that the District's placement teams were demonstrating the need for a non-regular education placement in an ongoing manner, that is, at the periodic reevaluations required by Section 504. OCR reviewed several student IEPs indicating that the nature or severity of a student's disability, or a student's needs in relation to his or her disability could lessen to the point that placement in an alternative school special education program was no longer necessary. However, the IEPs provided no indication of criteria for making this determination.

The FES Principal explained that exit from her alternative school special education program to a less restrictive environment would depend on a student's degree of self-control to manage a special education placement in a regular education setting. She indicated that FES has defined the "process of exit" and in considering exit, school staff review factors such as student coping skills and perseverance. The FES Principal stated that the exit criteria are not in writing.

The District documented improvements in exiting students from the FES alternative school special education program since this compliance review was opened, by providing OCR with data showing that in the period from the 2010-2011 school year to the end of the 2012-2013 school year, 18 students were exited from FES back to receiving special education services in a regular education environment, with the following racial breakdown: Black: $10/18 = 55.6\%$; White: $3/18 = 16.7\%$. To put these percentages into perspective, as of the 2012-2013 school year, FES had an enrollment that was 19.6% (9 students out of 46) Black, while 28.3% (13 students out of 46) of the enrollment was White. The District was unable to provide OCR with comparable exit data for FLJSHS, but did provide data demonstrating that the disproportionate enrollment of Black students in the FLJSHS special education alternative program had decreased by nearly half between the 2009-2010 and 2012-2013 school years. Enrollment increased from 60 students in the 2009-2010 school year to 73 in the 2012-2013 school year, but the number and percentage of Black students in the program declined from 33.3% (20 students out of 60) to 20.5% (15 students out of 73).

Resolution Agreement

During the course of OCR's investigation, the District expressed interest in resolving possible compliance concerns without further investigation. On December 10, 2013, the District agreed to implement the enclosed resolution agreement to resolve the compliance review. The resolution agreement requires the District to take specific steps to ensure that students with disabilities are educated in the least restrictive environment, that is, in an environment with students who do not have disabilities to the maximum extent appropriate to the needs of the students with disabilities.

Pursuant to the enclosed resolution agreement, the District committed to form a committee with expertise in addressing the overrepresentation of minorities in special education. The committee, chaired by the District's Compliance Officer, is required to conduct a data-driven review and assessment of special education student referral to, placement in and exit from the alternative school special education programs, using multiple assessment tools to carefully assess the possible root causes of overrepresentation of Black students in these schools. This assessment is due to OCR by February 20, 2014 and must include the District's reasons for accepting or rejecting the committee's recommendations and a description of the changes the District plans to make as a result of the recommendations. The agreement also requires the District, on an annual basis, to collect and review its alternative school special education program enrollment data, specifically considering possible disproportionate representation of Black students and the causes. The District is required to use this data to assess the effectiveness of its special education identification, evaluation and placement processes, to make appropriate changes to its processes and to regularly document its progress in addressing the issues in this compliance review, as well as any changes made, to OCR.

The agreement specifically requires the District to take steps to ensure that its pre-referral program is consistently implemented at all schools, including the requirement that students be educated in the least restrictive environment. Staff members are to be provided written criteria relating to the determination of when a student with a disability does or does not need an alternative school special education program placement. The agreement also specifically requires the District to develop and distribute to all staff written guidelines for proper student file maintenance to ensure the consistent documentation of the District's decisions regarding pre-referral, referral, evaluation, placement in and exit from alternative school special education program placement and applicable criteria. The agreement also requires annual monitoring by the District of the files to make sure that they contain all the required information.

Beginning in the 2013-14 school year, at the District-scheduled annual reviews by school-based IEP teams of each Black student in an alternative school special education program, the teams will determine whether the student had a current evaluation on file and documentation that the District evaluated the student in a timely manner and in accordance with the criteria for determining the appropriate educational setting for the student. To ensure that the District's IEP teams consistently apply the criteria for referring and placing a student at an alternative special education program, the agreement also requires the District's Compliance Officer or designee to conduct an annual administrative review of the placement of every Black student at an alternative school special education program. For students who upon reevaluation are

determined not to be in the least restrictive environment, the District will revise the student's placement and provide the student with compensatory and/or remedial services as determined necessary by the IEP team. For students that the Compliance Officer or designee determines were placed by teams that did not consider the appropriate criteria or properly document this consideration, the placement teams will immediately reconvene and conduct a reevaluation of the students, including consideration of compensatory and/or remedial services. The District will also ensure and document for OCR that parents are advised of their right to procedural safeguards, including notice and a due process hearing if they disagree with the District's identification, evaluation, reevaluation, or placement decisions. As part of the monitoring, OCR will review the documentation provided by the District to support these determinations to ensure that the District's actions comply with the procedural requirements of Section 504 at Sections 104.33-104.36.

The District will also train staff on at least an annual basis on subjects including: alternative school special education program enrollment data trends, pre-referral processes, timely and appropriate evaluations, use of electronic data and proper file maintenance, outreach to students and parents, LRE, and how student racial, ethnic and cultural differences can affect special education referral, evaluation and placement processes.

The District will develop and implement a comprehensive, interactive, and ongoing informational program for the parents of students placed in the alternative school special education programs regarding its efforts to educate all of its special education students in the LRE. The District will ensure that the informational program is offered in such a manner as to ensure the maximum participation by parents, including making available written materials to parents unable to attend the program in person. These materials, like the program itself, will be provided in a language other than English for English Language Learner students and Limited English Proficient parents in the District.

Based on the commitments the District has made in the resolution agreement described above, which builds on proactive measures the District has taken to date, OCR has determined that it is appropriate to close the investigative phase of this compliance review. The District has agreed to provide data and other information, demonstrating implementation of the agreement, in a timely manner in accordance with the reporting requirements of the agreement. OCR may conduct additional visits and request additional information as necessary to determine whether the District has fulfilled the terms of the resolution agreement and is in compliance with Title VI, Section 504 and Title II with regard to the issues in the review. OCR will not close the monitoring of this agreement until it has determined that the District has complied with the terms of the agreement and is in compliance with Title VI, Section 504 and Title II.

OCR will monitor implementation of the resolution agreement. Consistent with OCR's practice concerning resolution agreements, OCR will not close the monitoring of this resolution agreement until it has determined that the District has complied with the terms of the resolution agreement and is in compliance with Title VI, Section 504 and Title II. If the District fails to implement the resolution agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the resolution agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to

enforce the resolution agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

This letter sets forth OCR's determination in an individual OCR compliance review. It 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.

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

OCR greatly appreciates the ongoing cooperation received from the District during the investigation and resolution of this case. If you have any questions, please contact Anthony Cruthird, Team Leader, at 617-289-0111 or by e-mail at Anthony.Cruthird@ed.gov, or me at 617-289-0111.

Sincerely,

/s/

Thomas J. Hibino
Regional Director

Enclosure