

August 24, 2016

Maureen Binienda
Superintendent
Worcester Public Schools
20 Irving Street
Worcester, MA 01609

Re: Case No. 01-14-1238
Worcester Public Schools

Dear Superintendent Binienda:

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 Worcester Public Schools (the District).

The Complainant alleged that the District discriminated against her son (the Student), based on his disability, by denying him a free appropriate public education (FAPE) during the 2013-2014 school year when it:

- failed to re-evaluate the Student from May 2013 through September 2014 (Allegation 1);
- failed to provide services in accordance with the Student's Individualized Education Program (IEP) during school year 2013-2014, namely, speech and language therapy, at-home Applied Behavior Analyst (ABA) therapy, and ABA supervisor/speech and language therapy consultation services (Allegation 2);
- inappropriately sought to remove the Student from the regular education setting for his speech and language therapy services during school year 2013-2014, and then failed to deliver those services when the Student refused to leave his classroom for such services (Allegation 3); and
- inappropriately disciplined the Student with respect to an incident on or about May 27, 2014 (Allegation 4).

Before OCR completed its investigation, the District requested to resolve the allegations by entering into the enclosed Resolution Agreement pursuant to Section 302 of OCR's *Case Processing Manual* (CPM).¹

¹ Section 302 of the CPM states: Allegations and issues under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and issues *and* OCR determines that it is appropriate to resolve them with an agreement during the course of an investigation.

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. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under Title II, 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 U.S. Department of Education and is a public elementary and secondary education system. Therefore, OCR had jurisdictional authority to investigate this complaint under both Section 504 and Title II.

Legal Authority

With respect to Allegation 1, the regulation implementing Section 504, at 34 C.F.R. § 104.35(d), requires recipients to periodically reevaluate students who have been provided with special education and related services. While Section 504 does not impose a specific timeframe for the reevaluation of students, conducting a reevaluation every three years, as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, is one means of complying with Section 504's reevaluation requirement.

With respect to Allegations 2 and 3, the regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipients to provide FAPE to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met; and, are based upon adherence to the evaluation and placement procedures set forth in the regulation. The implementation of an IEP or Section 504 plan is one means of meeting those educational needs. OCR interprets the Title II regulations at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

With respect to Allegation 4, pursuant to OCR policy, a district may discipline a student with a disability in the same manner as it would discipline a non-disabled child, unless the child's IEP, Section 504 plan, or Behavior Intervention Plan (BIP) specifies differently or unless the discipline creates a significant change in the student's placement. Pursuant to OCR policy, the exclusion of a student with a disability for more than ten consecutive days, or a total of more than ten days cumulatively under circumstances constituting a pattern of exclusion, constitutes a significant change in placement.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), requires a recipient to conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related aids or services before taking any action with respect to a subsequent significant change in placement. Accordingly, before implementing an exclusion that constitutes a significant change in placement, a recipient must first determine whether the student's conduct was a manifestation of the student's disability. If it is determined that the student's misconduct

With respect to Allegation 2, the Complainant alleged that the District failed to implement the provisions in the Student's IEP concerning: speech and language therapy; at-home Applied Behavior Analyst (ABA) therapy; and ABA supervisor/speech and language therapy consultation services. The Complainant informed OCR that the Student did not receive any of these services during school year 2013-2014.

With respect to Allegation 3, the Complainant informed OCR that in January 2014, she discovered that District was not providing "push-in" (i.e., within the classroom) speech and language services in the Student's classroom in accordance with his IEP, but was attempting to provide the services as "pull-out," and the Student was refusing to leave class to receive the services. The Complainant stated that prior to that time, she had no knowledge that the Student was resistant to receiving services or that the services were not being provided. The Complainant asserted that the IEP Team did not re-convene when it was unable to provide services, or revise the Student's IEP to reflect any changes in the provision of "push-in" versus "pull-out" services.

OCR found that the Student's IEP in effect from May 16, 2013 through March 11, 2014, provided, in relevant part, for: (a) one 30-minute session weekly for speech and language therapy as a direct service in the general education classroom; (b) one 120-minute session weekly of ABA therapy as a direct service in the home; (c) one 90-minute weekly consultation with an ABA supervisor on autism, as an indirect service to school personnel and parents; and (d) one 30-minute weekly consultation with a speech therapist as an indirect service to school personnel and parents. OCR further found that the Student's IEP in effect from March 11, 2014 through the end of the school year removed the direct classroom services for speech and language therapy, and provided, in relevant part, for: (a) two 120-minute sessions weekly of ABA therapy as a direct service in the home; (b) one 180-minute session weekly of ABA supervisor consultation as an indirect service to school personnel and parents; and (c) one 60-minute session weekly consultation with a speech therapist as an indirect service to school personnel and parents.

The District stated that during school year 2013-2014, it made "multiple, good faith attempts" to schedule ABA home services for the Student, but the attempts were unsuccessful, in part due to scheduling difficulties on the part of the Complainant. The District asserted that because the Student was resistant to having the speech and language therapist working with him in the classroom, the District attempted to provide services as "pull out," in an attempt to secure the Student's cooperation, which the Student also refused. The District stated that despite the Student's refusal to participate in speech and language services, and the difficulty coordinating ABA services, the Student was not negatively impacted by the lack of services, and was making both academic and social progress in a program for gifted students.

Based on the evidence obtained to date, OCR determined that the evidence indicates that the District may not have provided at least a portion of the Student's services required by his IEP, specifically, in-school speech and language therapy, and home ABA therapy. However, OCR had not yet made a compliance determination regarding the extent of any such missed services, and whether the District failed to provide consultation services at home with an ABA supervisor and speech and language therapist, as well as any efforts by the District to reconvene an IEP

Team meeting regarding the Student’s services, including any changes from “push in” to “pull out” services.

Allegation 4

With respect to Allegation 4, the Complainant alleged that the District inappropriately disciplined the Student with respect to an incident on or about May 27, 2014. The Complainant informed OCR that the Student brought a butter knife to school and jokingly told classmates to “give me your money.” The Complainant asserted that the District suspended the Student for 11 days, held a manifestation determination review (MDR), and erroneously determined that the incident was not a manifestation of the Student’s disability. The Complainant further asserted that the principal failed to conduct a disciplinary hearing regarding the incident, in accordance with the District’s disciplinary procedures.

The District informed OCR that on May 27, 2014, the Student threatened two classmates with a kitchen knife, saying “give me your money.” The District further stated that the Assistant Principal charged the Student with violating Massachusetts General Laws chapter 71, § 37H and District policy, for possessing a knife at School, and issued an initial 10-day out-of-school suspension, consistent with the District’s policies/procedures.³ The principal subsequently upheld the 10-day suspension (which took place from May 29, 2014 through June 11, 2014) and provided written notice to the Complainant. The District stated that the Student’s suspension did not require an MDR because it did not exceed 10 school days; however, the District conducted an MDR on June 2, 2015, and determined that the Student’s conduct did not have a direct and substantial relationship to his disability, as the Student was aware that what he had done was wrong and it was not an impulsive act, and was not the direct result of a failure on the part of the District to implement the Student’s IEP.⁴ The principal determined that the District would take no further disciplinary action, i.e., long-term suspension or expulsion; as a result, the District did not hold a long-term suspension hearing.

The District provided documentation concerning 181 similarly situated students who committed the same infraction during school years 2011-2012, 2012-2013 and 2013-2014, which indicated that 117 of these students were suspended for 10 or more days, including students with and without disabilities.

³ District policy provides that “[a] student shall not possess, use, or attempt to use, any weapon on school premises or at a school-related situation, including but not limited to travel to and from the situation.” Further, District policy and Massachusetts General Laws, chapter 71 § 37H(a) state that “any student who is found on school premises or at school-sponsored or school-related events, including athletic games, in possession of a dangerous weapon, including, but not limited to, a gun or knife... may be subject to expulsion or a long-term suspension from the school by the principal.” District policy further states that this provision applies “regardless of the size of the knife.”

⁴ The Complainant’s representative asserted that at the MDR, the District concluded that it had failed to implement the Student’s IEP and, therefore, the incident was a manifestation of the Student’s disability. In addition, the representative asserted that the District agreed to expunge the Student’s suspension, which it later refused to do. OCR reviewed documentation submitted by the Complainant’s representative in support of her assertions, and determined that the documentation did not demonstrate that the District made either of the alleged statements.

Based on the evidence obtained to date, OCR had not yet made a compliance determination with respect to the appropriateness of the discipline imposed on the Student for the incident of May 27, 2014, or the MDR determination.

The District voluntarily signed the enclosed Resolution Agreement (“Agreement”) to resolve this complaint on August 24, 2016. Steps that the District will take, pursuant to the Agreement, include:

- convening the Student’s IEP Team to determine whether the Student requires compensatory and/or remedial services, for the period from May 2013 through September 2014, in addition to the 2014-2015 school year and the 2015-2016 school year through January 21, 2016, for any missed services with respect to speech and language therapy, at-home ABA, and ABA supervisor/speech and language therapy consultation services, as provided for in his IEPs in effect during the specified period and subsequent school years;
- if compensatory and/or remedial services are necessary, the Team will determine whether any missed services impacted the Student’s conduct during the incident on May 27, 2015; if so, the District will revise its determination of June 2, 2014 accordingly, and provide any necessary remedial services for the Student.
- providing training to District staff involved in the development and implementation of IEPs, including the District’s special education directors and IEP Team chairpersons.⁵

OCR has determined that the provisions of the Agreement are aligned with the complaint allegations and appropriately resolve them. Further, OCR accepts the Agreement as an assurance that the District will fulfill its obligations under Section 504 and Title II with respect to this complaint. The date for implementation and specific actions are detailed in the Agreement. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding this complaint. However, OCR will actively monitor the District’s implementation of the Agreement. Please be advised that if the District fails to adhere to the actions outlined in the Agreement, OCR will immediately resume its compliance efforts.

This concludes OCR’s investigation of this complaint. 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.

⁵ The District provided documentation of ongoing training provided to District staff regarding IEPs and Section 504 plans and manifestation determination reviews.

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 questions, please contact Emma Kim, Senior Attorney, at (617) 289-0159 or Emma.Kim@ed.gov.

Sincerely,

Diane M. Henson
Regional Director

Enclosure

cc: XXXXXXXX XXXXXXXX XXXX