



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

June 18, 2018

Dr. Laurie Hunter
Superintendent
Concord Public Schools
120 Meriam Road
Concord, Massachusetts 01742

Sent Via Electronic Mail: lhunter@concordps.org

Re: Complaint No. 01-15-1024
Concord Public Schools

Dear Dr. Hunter:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Concord Public Schools (District), alleging disability discrimination. Specifically, the Complainant alleged that her son (the Student) applied for admission to the District for the 2014-2015 school year, but that the District declined to admit him because of his disability-related needs (Allegation 1). During the course of our investigation, OCR identified an additional concern regarding whether the District declined to the Student on the waiting list for admission to the District because of his disability-related needs (Allegation 2).

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 Department. 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 Department and is a public entity operating an elementary and secondary education system. Therefore, OCR had jurisdictional authority to investigate this complaint under Section 504 and Title II.

During the investigation, OCR reviewed documents provided by the Complainant and the District, and interviewed the Complainant and District staff. After carefully considering all of the information obtained, OCR found insufficient evidence to support Allegation 1. With respect to Allegation 2, prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed interest in resolving this allegation. Subsequent discussions between OCR and the District resulted in the District signing the

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enclosed Agreement which, when fully implemented, will address the concerns identified in Allegation 2.

Background

At the time this complaint was filed, the Complainant and her children were residents of Boston, Massachusetts. Two of the Complainant's three children were enrolled in the District through the Metropolitan Council for Educational Opportunity (METCO) Program, a grant program funded by the Commonwealth of Massachusetts which permits students in certain Massachusetts cities to attend public schools in other participating districts.¹ The Complainant filed this complaint after the District denied her third child enrollment in their kindergarten program for the 2014-2015 school year.

According to the District, on September 9, 2013, the District mailed and e-mailed a letter (Sibling Request Letter) to all parents/guardians of children attending the District through the METCO Program. The Sibling Request Letter informed them that if they had another child they wished to enroll in the METCO Program for kindergarten for the 2014-2015 school year, they needed to complete the enclosed form and return it no later than October 11, 2013. In bold lettering, it stated that forms received after October 11 would not be considered for sibling placement and instead, those siblings would be placed on a waiting list. Although the Complainant and the District dispute whether the District e-mailed this letter to her,² it is undisputed that the Complainant did not return the form by the October 11, 2013 deadline.

In November 2013, the District's METCO Coordinator conveyed to METCO that the District would be able to host eight kindergarten students through the METCO Program. Four of those slots had already been claimed by siblings of current METCO students whose parents had responded to the Sibling Request Letter. The District's METCO Coordinator requested from METCO the files of those four siblings, but did not request the Student's file. According to the District, because no Sibling Request Form had been submitted for the Student at that time, the District had no way of knowing that the Student would be of age to attend kindergarten in fall 2014 or that the Complainant wished to enroll him in the District.

According to the Complainant, on December 28, 2013, she picked up a registration packet at the Willard Elementary School (School), the school attended by her older children, and provided forms to METCO seeking to enroll the Student in kindergarten in the District for the 2014-2015 school year.

The District informed OCR that in January 2014 the District's METCO Coordinator began the process of notifying parents of rising kindergarten students that the District had availability for their children for the 2014-2015 school year. By April 2014, the District had completed the

¹ The METCO Program, founded in 1966, was originally funded through a grant by the Carnegie Foundation and the Department. According to the Massachusetts Department of Elementary and Secondary Education, "[i]t is a voluntary program intended to expand educational opportunities, increase diversity, and reduce isolation, by permitting students in certain cities to attend public schools in other communities that have agreed to participate." At present, there are approximately 3,300 students participating in 38 school districts in metropolitan Boston and four school districts outside of Springfield. See <http://www.doe.mass.edu/metco/>.

² The Complainant denies having received the September 9, 2013 letter.

registration process for eight METCO kindergarten students, including four siblings of current METCO students.

The Complainant told OCR that the Student participated in Kindergarten Orientation at the School in April 2014. By contrast, the District's METCO Coordinator told OCR that he sets up and runs the Orientation and that neither the Complainant nor the Student was there. There is no sign-in sheet for the event.

According to the Complainant, when she had not been contacted by the District's METCO Coordinator by May 2014, she contacted him concerning the Student's enrollment in the District. The Complainant told OCR that the District's METCO Coordinator invited her to a meeting with the Special Education Director and himself to discuss the School's implementation of the Student's Individualized Education Program (IEP) at the School during the 2014-2015 school year. By contrast, the METCO Coordinator told OCR that he told the Complainant that the Student would be placed on a waiting list, but that they agreed to meet with the Complainant as a courtesy to discuss his IEP in the unlikely event that a spot became available for him.

It is undisputed that there was a meeting attended by the Complainant, the District's METCO Coordinator, and the Special Education Director on May 20, 2014. Both the Complainant and the District confirmed that at this meeting, the District requested permission to speak with the Student's current teacher and doctor, and that while the Complainant initially agreed; she withdrew this permission by e-mail later that day. The District told OCR that the Complainant had only provided part of the IEP and so the District needed to speak to the Student's current school and physician for a more complete picture of his needs.

The following day, the METCO Coordinator wrote:

When we met yesterday, [the Special Education Director] informed [the Complainant] that she needed more information to determine if we had a program to meet [the Student's] needs. Based on the IEP alone, it does not appear that we do. However, to be sure that we exhaust all options for [the Student], [the Special Education Director] hoped to speak with his teacher ... and his developmental pediatrician. ... I am not sure why you rescinded the permission after we met yesterday, but without the permission we cannot move forward at this point and our only option would be to return [the Student's] folder to METCO, Inc.

Approximately a week later, the Complainant e-mailed to request "the form that the [District] requires for a child entering with an IEP." On June 8, 2014, the METCO Coordinator responded that he did not know which form the Complainant meant, but that the District was "no longer involved in [the Student's] placement for Kindergarten" as the METCO Coordinator had "returned [the Student's] folder to METCO last week."

The Student did not matriculate as a kindergarten student in the District at the start of the 2014-2015 school year.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4 provides that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under a recipient's programs or activities on the basis of disability. The regulation further provides that a recipient may not use criteria or methods of administration which have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability. Where, as here, Title II confers no greater rights than Section 504, OCR applies the Section 504 regulatory standards.

Analysis

Allegation 1

In her complaint the Complainant alleged that the Student was treated differently than students without disabilities when the District declined to admit him after learning that he had an IEP during a May 20, 2014 meeting with the District's METCO Coordinator and the Special Education Director. When investigating an allegation of disability discrimination under a different treatment standard, OCR first determines whether there is sufficient evidence to establish an initial, or *prima facie*, case of discrimination. Specifically, OCR determines whether the recipient treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the recipient is a pretext, or excuse, for unlawful discrimination.

Here, in declining to enroll the Student in kindergarten, OCR finds that there is sufficient evidence that the District treated him less favorably than similarly situated individuals without disabilities to meet the *prima facie* case. The District did provide data showing that there were students with Section 504 plans or IEPs enrolled in the District through the METCO Program for the 2014-2015 school year. However, OCR does not have information that would permit it to determine whether any of these students were already identified as having a disability at the time of admission/enrollment, or whether that identification occurred after the students had been attending the District for some time. Thus, the evidence that the District declined to enroll the Student, who has an IEP, as a kindergartener, coupled with a lack of evidence that the District enrolled students with disabilities as kindergarteners is sufficient for OCR to proceed to the second step of the analysis.

The District did proffer a legitimate, nondiscriminatory reason for not enrolling the Student, namely that the Complainant did not timely return the Sibling Request Letter. As such, the District maintains that at the time it enrolled METCO students for the 2014-2015 school year, it had no way of knowing the Student would be of age to attend kindergarten in fall 2014 or that the Complainant wished to enroll him in the District. Accordingly, the District contends that it did not discriminate on the basis of disability in its enrollment process. This is a legitimate, non-discriminatory reason sufficient to move to the third step of the analysis.

OCR thus next examined whether the District's proffered reason was a pretext for discrimination. In that regard, OCR first notes that the Complainant acknowledged that she did not return the Sibling Request Letter by the October 11, 2013 deadline, a fact which supports the District's account. Moreover, during our investigation OCR looked into the District's process with regard to students admitted through the METCO Program and we found no evidence to doubt the District's explanation that it determined the universe of siblings of current METCO students seeking admission to the District in November 2013, well before the Complainant brought the Student to the District's attention.

As support for the Complainant's contention that the District's proffered reason is a pretext for discrimination, the Complainant contends that prior to the May meeting, the Student had in fact already been admitted as a rising kindergartener, as shown by their participation in Kindergarten Orientation in April. The Complainant maintains that the District decided to exclude the Student only when it learned of his disability-related needs in May.

OCR cannot find that this version of events is supported by a preponderance of the evidence. The METCO Coordinator is in charge of the Orientation, and he told OCR that he ran the event and that the Complainant was not there. With no sign-in sheet showing that the Complainant and the Student attended, and no other evidence to corroborate the Complainant's version of events, OCR cannot conclude by a preponderance of the evidence that she attended the Orientation as a parent of a rising kindergartener.

The Complainant also cites as proof of enrollment a June 19, 2014 letter she claims to have received from the District informing her that the Student was enrolled in the 2014 summer school/reading camp. However, OCR has learned that the District employee whose signature appears on the letter is in charge of the reading program for grades 1-8, but has nothing to do with the reading program for kindergarteners and would not have had access to the names of rising kindergarteners. The METCO Coordinator informed OCR that he is responsible for providing the parents/guardians of rising kindergarteners with information concerning the reading camp, so any letter concerning the program would be under his signature, and he did not send a letter to the Complainant.

In addition, if, as the Complainant alleges, the District made the decision not to enroll the Student in May, it is highly unlikely that the District would send a letter in June confirming his enrollment. It is similarly unlikely that the District would confirm the Student's enrollment in a June 19 letter, after having stated in a June 8 e-mail that as of the previous week, the District was "no longer involved in [the Student's] placement for Kindergarten."

Accordingly, OCR cannot conclude by a preponderance of the evidence that the District's legitimate, non-discriminatory reason for not enrolling the Student was a pretext for discrimination. Therefore, OCR finds insufficient evidence to support the Complainant's allegation that the District declined to admit the Student because of his disability-related needs.

Allegation 2

Before completing our investigation of whether the District declined to place the Student on the waitlist for admission to the District due to his disability-related needs, the District requested a 302 voluntary resolution agreement.³ In order to complete the investigation, OCR would need to conduct additional interviews of the METCO Coordinator and the Special Education Director, and request additional data concerning the District's procedure related to placing prospective students on the waitlist.

Conclusion/Resolution

Accordingly, with regard to Allegation 1 OCR found insufficient evidence to establish a violation of Section 504 or Title II, and with regard to Allegation 2 OCR and the District entered into the enclosed Resolution Agreement which, when fully implemented, will resolve the concerns OCR identified. OCR will monitor the District's implementation of the Agreement. This concludes OCR's investigation of the 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

³ Such considerations are prohibited by Section 504. A recipient may not condition admission decisions – of which placement on a waitlist is one – on the scope of a student's disability-related needs. Of course, after a student is admitted, a school district may convene a team meeting to make, *inter alia*, placement decisions and, where appropriate, determine that the student requires an out-of-district placement. *See also* 603 C.M.R. 28.10(6) (directing how a district should proceed where a team determines that a student attending the district through the METCO Program requires an out-of-district placement).

If you have any questions, you may contact Carol Kennedy-Merrill, Civil Rights Investigator, at (617) 289-0048 or by e-mail at Carol.Kennedy-Merrill@ed.gov.

Sincerely,

/s/ Adrienne Mundy-Shephard

Adrienne M. Mundy-Shephard
Acting Regional Director

Enclosure

cc: Alisia St. Florian astflorian@mhtl.com