



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

February 27, 2018

Colleen Palmer  
Superintendent  
Westport Public Schools  
[cpalmer@westportps.org](mailto:cpalmer@westportps.org)

Re: Complaint No. 01-15-1103  
Westport Public Schools

Dear Superintendent Palmer;

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 Westport Public Schools (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability by discontinuing his disability-related services due to flawed eligibility criteria and/or evaluation processes under Section 504 of the Rehabilitation Act. As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Based on the allegations, OCR investigated the following issue:

- Whether the District failed to provide the Student a free and appropriate public education (FAPE) during the 20XX-20XX school year, in accordance with 34 C.F.R. §§ 104.33-104.36 and 28 CFR § 35.130.

During its investigation, OCR reviewed documents provided by the Complainant and District, and interviewed the Complainant, her advocate, and the Principal of the Bedford Middle School

(School). OCR also considered whether the District’s policies and procedures regarding notice and a grievance process complied with the requirements of Section 504 and Title II.

### **Free Appropriate Public Education (FAPE)**

#### Legal Standards

At 34 C.F.R. Section 104.33(a), the regulation implementing Section 504 requires that recipients such as the District provide a FAPE to students with disabilities in their jurisdiction. An appropriate education is defined as the 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 that are based upon adherence to the procedural requirements of 34 C.F.R. §§ 104.34 - 104.36.<sup>1</sup> The 504 implementing regulation requires that recipients evaluate any student who, because of disability, needs or is believed to need, special education or related aids and services, before taking any action regarding the student’s initial placement in regular or special education, and any subsequent significant change in placement.<sup>2</sup> OCR interprets Title II to require covered entities such as the District to provide a FAPE to the same extent required by Section 504.<sup>3</sup>

According to Section 504 and Title II, at 34 C.F.R. § 104.3(j) and 28 C.F.R. § 35.108, respectively, a student is disabled, and therefore entitled to individually prescribed special education or related aids and services, if the student has (1) a physical or mental impairment that (2) substantially limits (3) a major life activity. The ADA Amendments Act of 2008 (Amendments Act)<sup>4</sup> broadened coverage under Title II and Section 504 by, in relevant part, expanding the definitions and non-exhaustive lists of impairments<sup>5</sup> and major life activities.<sup>6</sup> According to the Amendments Act, certain impairments will, in virtually all cases, result in a determination of coverage, such as deafness, blindness, diabetes, major depressive disorder and obsessive compulsive disorder (OCD).<sup>7</sup>

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<sup>1</sup> 34 C.F.R. § 104.33(b)(1)(i).

<sup>2</sup> 34 C.F.R. § 104.35(a).

<sup>3</sup> 28 C.F.R. § 35.130(a).

<sup>4</sup> Amendments Act. No. 110-325 (2008), codified as amended at 42 U.S.C. § 12102.

<sup>5</sup> At 28 C.F.R. § 35.108(b), the regulation implementing Title II respectively define a *physical or mental impairment* as: “(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;” *see* 34 C.F.R. § 104.3(j)(2)(i). At 28 C.F.R. 35.108(b)(1)(ii), Title II further includes “[a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.” Finally, at 28 C.F.R. §35.108(b)(2), Title II provides that “*Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.”

<sup>6</sup> 28 C.F.R. § 35.108(d)(2)(iii).

<sup>7</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008), codified as amended at 42 U.S.C. § 12102.

The Amendments Act also lowered the standard of whether an impairment substantially limits a major life activity, by providing that the phrase “substantially limits” should be construed broadly in favor of coverage, and that it is not meant to be a demanding standard.<sup>8</sup> In particular, the impairment need not prevent, nor significantly or severely restrict, an individual from performing a major life activity in order for it to be considered substantially limiting.<sup>9</sup> Additionally, the Amendments Act provided that the ameliorative effects of any mitigating measures, except glasses/contacts, should not be considered when assessing whether an impairment substantially limits a major life activity.<sup>10</sup> Thus, when determining the impact of a student’s disability on a major life activity, the student must be considered in the unmitigated state.<sup>11</sup> Mitigating measures could include medication, reasonable accommodations, learned behavior or adaptive neurological modifications and psychotherapy, behavioral therapy, or physical therapy.

If the evaluative team determines that a student has an impairment that substantially limits a major life activity, the team next decides which regular or special education and related aids and services are needed to meet the student’s individual educational needs as adequately as the needs of students without disabilities are met.<sup>12</sup> At such time, a district may consider whether the student uses mitigating measures and if so, how they impact the services needed to provide a FAPE. If the team determines that the student has an impairment that substantially limits a major life activity, but does not need specialized regular or special education or related services, the district is not obligated to provide them (although the student is still protected by Section 504 and Title II against disability-based discrimination). If a team determines that a student does not have an impairment, or that an impairment does not substantially limit a major life activity, there is no obligation to provide specialized regular or special education, or related services.

At 34 C.F.R. § 104.36, the Section 504 regulation requires that school districts establish and implement a system of procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of students who, because of disability, need or are believed to need, special instruction or related services. Such safeguards include notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure.

### Factual Background

At the time the complaint was filed, the Student was in the XXXXXX grade at the School. He had been determined eligible for services under Section 504 as a XXXXX grader in 20XX, based on an XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX documented in academic, XXXXXXXXXXXXXXXXXXX and XXXXXX and XXXXXXXXXXX evaluations. When reevaluated in each of the following two years, the Student was again found eligible for services and provided 504 Plans that were similar to the initial plan.

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<sup>8</sup> 42 U.S.C. § 12102(4); 28 C.F.R. § 34.108(d)(1). “[T]he term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.” 28 C.F.R. 35.108(d)(1)(vi).

<sup>9</sup> 28 C.F.R. § 35.108 (d)(1)(v).

<sup>10</sup> 28 C.F.R. § 35.108(d)(1)(viii).

<sup>11</sup> 42 U.S.C. § 12102(4)(E)(i).

<sup>12</sup> 34 C.F.R. § 104.33(b).

On June 6, 20XX, the 504 team agreed that the school psychologist should conduct updated educational and social-emotional evaluations assessing the Student's XXXXXXXX and XXXXXXXXXXXXXXXXXXXX functions. The 504 team reconvened on January 22, 20XX to consider the XXXXXX XXXXXXXXXXXXXXXXXXXX evaluations, along with input from teachers, the parents, their advocate, and information from the Student's medical providers.

At this, and two subsequent team meetings, the Student was found ineligible for services under Section 504/Title II, over his parents' objections. Disagreements between District staff and the parents included whether there needed to be school-based evidence, or an academic impact, of any impairments; whether information the parents provided was sufficient to show the Student had been diagnosed with a disability; and whether and how to consider mitigating measures such as the Student's XXXXXXXX, XXXXXXXXXXXXX, and tutoring.

As part of its investigation, OCR analyzed several of the District's policies and procedures regarding the identification, evaluation and placement of students pursuant to Section 504, including the 504 Eligibility Determination Form (504 Eligibility Determination Form) that was used for all team meetings regarding the Student from 2012 through 2015. The school principal confirmed that District teams use the criteria from this form to determine eligibility under Section 504/Title II.

The form first requires documentation of the impairment, listing possible assessment tools including psychological history, physician documentation and "other." Next, it asks: "Is a major life activity limited by the impairment without consideration of mitigating measures. If so, to what degree," with a directive to list sources of information and evidence. Evaluators rank the severity of the limitation caused by the impairment (mild, moderate, severe) as well as the duration (short, medium, long), according to these instructions:

1 = negligible; 2 = mild; 3 = moderate; 4 = substantial; 5 = extreme. In order to meet the standard of **substantial limitation**, the student must be unable to perform a major life activity that the average person (age peer) in the general population (national norms, not local norms) can perform. Alternatively, the student must be **significantly restricted** as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person (age peer) in the general population (national norms, not local norms) can perform the same major life activity (emphasis in original).

OCR also analyzed the District's Policy 3511 R, Business/Non-Instructional Operations, Compliance with 504 Regulations, Administrative Procedures (Compliance Procedures). Under these procedures, any student with a disability who "needs or is believed to need accommodations, modifications, or services not available through existing programs in order to receive a [FAPE]" may be referred to the 504 team. If the team determines that the student should be evaluated, the first question is whether a physical or mental impairment can be "verified by reference to documentation by a physician or other professional." The team next considers whether the impairment substantially limits one or more major life activities; a short list of exemplary major life activities is included, with the "suggest[ion]" that 504 teams consider

the “impact of the impairment on the student’s learning and/or educational program.”<sup>13</sup> If these questions are answered in the affirmative, the team determines which “regular education accommodations and/or services,” i.e., “what reasonable accommodations, modifications and/or services” are necessary to ensure an equal educational opportunity (other District policies and/or procedures similarly limit the District’s Section 504 obligation to provide reasonable accommodations, modifications and/or services). Students who need services “beyond the scope of a 504 Plan” should be referred to a Pupil Placement Team for consideration of additional evaluations and/or eligibility for special education services.

OCR is concerned that the District’s policies and procedures for identifying, evaluating and placing students with disabilities may be inconsistent with the requirements of the Section 504 and Title II implementing regulations, and the Amendments Act. For instance, although the Amendments Act expressly provides that an impairment need not prevent, or significantly or severely restrict, an individual from performing a major life activity in order for the impairment to be substantially limiting, forms and interviews from the District suggest that it may require that impairments prevent, significantly or severely restrict a major life activity. OCR is also concerned that the District may require a limitation on learning in order for students to be eligible under Section 504, even though the Amendments Act notes a broad range of life activities might be limited by a disability so that a student may have a substantially-limiting impairment that does not impact academic performance. Also, pursuant to 34 C.F.R. § 104.35(c), districts are obligated to carefully consider all of the information provided by all sources. From the information and interviews gathered by OCR, however, it is unclear whether the District requires school-based evidence of an impairment.

Regarding placement, districts are obligated to provide students with disabilities a FAPE, i.e., the 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 persons without disabilities are met. Eligible students are entitled to any services that the placement team decides are appropriate, including regular or special education services, regardless of cost or administrative burden. Several of the District’s Section 504 policies appear to limit the District’s Section 504 obligation to providing only reasonable accommodations and/or regular education accommodations, modifications and/or services, however.

To make a compliance determination on the above concerns, OCR would need to conduct additional interviews to ascertain further how the District’s evaluation policies and procedures, and its practices, affected determinations about the Student’s 504 eligibility, as well as how widely these evaluation policies/procedures are used throughout the District, including specific information about how they were applied to other students.

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<sup>13</sup> “[L]earning, breathing, speaking, seeing, hearing, walking.”

## **Notice Requirement and Grievance Procedures**

### **Legal Standards**

The regulation implementing Section 504 requires that recipients take appropriate steps to notify participants, beneficiaries, applicants, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipients (unions/professional organizations) that they do not discriminate on the basis of disability in admission or access to, or treatment or employment in, their programs or activities, at 34 C.F.R. § 104.8. Recipients must publish this notice of non-discrimination in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees. Title II's implementing regulation similarly obligates districts to provide notification to applicants, participants, beneficiaries, and other interested parties about the protections against discrimination that are assured by Title II and its implementing regulation, at 28 C.F.R. § 35.106. Districts must also identify the individual(s) who is designated to coordinate their compliance with Section 504/Title II, as required by 34 C.F.R. §§ 104.7(a) and 104.8(a), and 28 C.F.R. § 35.107(a) respectively.

Additionally, at 34 C.F.R. § 104.7(b), the Section 504 implementing regulation requires a recipient that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging action prohibited by Section 504. The regulation implementing Title II, at 28 C.F.R. §35.107(b), requires public entities that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

### **Factual Background**

As part of its investigation, OCR analyzed several District policies and procedures relating to the notice and grievance procedures, including its: Nondiscrimination Policy 0521; Compliance Procedures; Nondiscrimination/Grievance Procedures for Section 504, Title IX, and Title VII Regulation Policy R0251; Equal Employee Opportunity/Affirmative Action Policy 4111.1 and 4211.1; and Equal Employment Opportunity Policy 2111, all of which are available online in the District's Bylaws and Policy Manual.<sup>14</sup> OCR noted to the District that the number of the District's disability-related policies could be confusing, particularly if they are not consistent. Additionally, OCR shared concerns that the policies may not comply with the obligations of Section 504/Title II, by, for instance, failing to refer to Title II. The District expressed interest in resolving this complaint prior to having an opportunity to rebut OCR's concerns and/or provide additional policies that might address these concerns.

### **Conclusion**

Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint. Subsequent discussions between OCR and the District resulted in the District signing the enclosed

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<sup>14</sup> <http://z2policy.cabe.org/cabe/Z2Browser2.html?showset=westport>, last accessed 2/8/18.

Agreement which, when fully implemented, will resolve the issues raised in these complaints. The terms of the Agreement are aligned with the complaint allegations and are consistent with the applicable laws and regulations. OCR will monitor the District's implementation of the Agreement and continue to do so until it has determined that the District has complied with the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening the complaint.

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.

If you have any questions, you may contact Civil Rights Attorney Meighan McCrea at (617) 289-0052 or by e-mail at [meighan.mccrea@ed.gov](mailto:meighan.mccrea@ed.gov).

Sincerely

Meena Morey Chandra *w/p AMM*  
Acting Regional Director

Enclosure

cc: Attorney Marsha Belman Moses, [mmoses@berchemmoses.com](mailto:mmoses@berchemmoses.com)