

Timothy Lee
Superintendent of Schools
Lenox Public Schools
6 Walker Street
Lenox, MA 01240

Re: Case No. 01-15-1235
Lenox Public Schools

Dear Superintendent Lee:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR) in the above-referenced complaint filed against the Lenox Public Schools (the District). The Complainant alleged that the District failed to provide her son (the Student) with a free appropriate public education (FAPE) by inappropriately removing him from class on multiple occasions for behavior related to his disability. As explained below, prior to OCR completing its investigation, the District requested to resolve the complaint by entering into the enclosed voluntary resolution agreement.

OCR began investigating the complaint pursuant to our authority under Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 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 is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the ADA), 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.

OCR investigated the following issue:

- Whether the District denied the Student a FAPE, in violation of 34 C.F.R. § 104.33, et seq., and 28 C.F.R. § 35.130.

Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires recipients to provide a FAPE to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation 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 student with a disability as adequately as the needs of students without disabilities are met, and are based upon adherence to the evaluation, placement and due process procedures set forth in the regulation.

The Section 504 regulation defines a person with a disability as one who has a physical or mental impairment which substantially limits one or more major life activities, at 34 C.F.R. § 104.3(j). The regulation includes a non-exhaustive list of impairments and major life activities. Title II, as amended by the *ADA Amendments Act of 2008* (Amendments Act), similarly provides an expansive definition of impairments and major life activities, so that “major life activity” is generally interpreted broadly.¹ Accordingly, in determining if a student has a disability under Section 504/Title II, schools must consider all major life activities that may be impacted by the student’s impairment, *not just learning*, and should review facts concerning the condition, manner or duration of a student’s performance of a major life activity, including for example, thinking, reading, or concentrating.

At 34 C.F.R. § 104.35(a), the Section 504 regulation requires that recipients evaluate any student who needs, or is believed to need, special education or related services before taking any action with respect to the initial placement and any subsequent significant change in placement. Schools should consider conducting an evaluation when students demonstrate considerable restlessness or inattention inappropriate for their age and grade level, and/or when students demonstrate substantial weaknesses related to beginning a task, organizing and recalling information, and completing assignments such as homework and multi-step class projects. Such behavior may indicate that a student has a disability, such as ADHD, requiring evaluation to ensure FAPE. A student with ADHD may achieve a high level of academic success, but may nevertheless be substantially limited in a major life activity due to disability because of the additional time or effort he or she must spend to read, write, or learn compared to others. Similarly, what appears to be a lack of commitment to learning may very well be a manifestation of unaddressed ADHD of any type, or perhaps ADHD and a coexisting disorder. Thus, for example, when making the determination whether to evaluate a student for a suspected disability, or in conducting such an evaluation, school districts should ask how difficult it is or how much time it takes for the student with ADHD, in comparison to a student without ADHD, to plan, begin, complete, and turn in an essay, term paper, homework assignment, or exam.

Many of the same steps and tools used to determine whether a student has a disability are also pertinent to determining placement, i.e., whatever special education services, related aids and services, or supplemental services and modifications the student needs and the appropriate setting to receive those services. Specifically, at 34 C.F.R. Section 104.35(c), the Section 504 regulation requires that placement decisions be made by a group of persons that includes persons knowledgeable about the student, the meaning of the evaluation data, and the placement options (often referred to as a team). Students who are eligible for FAPE under Section 504, including those with ADHD, are entitled to the provision of any services the placement team decides are appropriate, regardless of cost or administrative burden. Those services can be as varied and as comprehensive as the need may be. Therefore, school districts may not limit placement options under Section 504/Title II for students with disabilities to a predetermined universe of options that are unrelated to an individual determination of what particular students need. Instead, the team must consider all significant factors relating to the learning process, including adaptive behavior, i.e., the effectiveness with which the student meets the

¹ The Amendments Act specifically expanded the definition of major life activities to include, but not be limited to, the general activities of “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Additionally, it included “major bodily functions” in the definition of major life activities, to include, but not be limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

standards of personal independence and social responsibility expected of his age and cultural group.² Once the team has determined an appropriate program for a student, districts are obligated to implement that program: failure to do so may result in a denial of FAPE.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), also requires that recipients periodically reevaluate qualified students with disabilities. In addition to such periodic review, when a district has information indicating that a student on a 504 Plan is experiencing difficulty accessing his/her educational program or activity, such as falling grades, repeated behavioral incidents or disciplinary infractions, or changes in social engagement, the district may be required to reevaluate the student to determine whether the student's program is not appropriate or is not being implemented.

The implementing regulation for Title II explicitly states that it does not set a lesser standard than Section 504. Accordingly, OCR interprets Title II to impose the same FAPE obligations as those imposed by Section 504.

Investigation

To determine whether the District denied the Student a FAPE due to disciplinary removals, OCR began by investigating whether the services required by his 504 Plan were implemented; how many times, and for what reasons, the Student was removed from class (in particular, whether the removals were for behavior related to his disability); whether disciplinary or behavioral concerns, grades, or other information were sufficiently significant to put the District on notice that the Student's program might not be appropriate for meeting his individual needs; and if so, whether the District responded appropriately to such information as required by Section 504 and Title II. As part of this inquiry, OCR also considered the District's compliance with Section 504/Title II's requirements regarding evaluation and placement.

OCR reviewed documents provided by the District and the Complainant; interviewed the Complainant; and, conducted an initial onsite at the District on December 16, 2015, to interview District staff, including the District and High School Building 504 Coordinators, numerous teachers, and the High School Principal. On January 22, 2015, prior to the completion of OCR's investigation, the District requested to enter into a resolution agreement (the Agreement) to resolve the allegation, in accordance with Sections 207 and 304 of OCR's *Case Processing Manual* (CPM). We reviewed this request and determined that it was appropriate to resolve the complaint allegation with an agreement during the course of OCR's investigation.

The District agreed to review and revise its September 2015 Section 504 Procedure and Forms (Policy) to comply with the obligations of Section 504 and Title II. In particular, the revisions will incorporate the obligation, under Section 504/Title II, to consider all the potential major life activities that may be impacted by a student's impairment. The revised Policy will also reflect that students with disabilities

² Appendix A to the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), provides that an appropriate education for a student with disabilities could consist of education in regular classes; regular classes with the use of supplementary services; or, special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions, and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). See also Appendix A, at 34 C.F.R. § 104.35(c).

as defined by Section 504/Title II are entitled to the provision of special education and related services that the placement team decides are appropriate, which may include education in regular education classes with or without the use of supplementary aids or services. Additionally, the revised Policy will provide that reevaluations for students already found eligible under 504/Title II should occur upon information that a student is struggling to access the District's programs and activities, such as a change in academic performance or social engagement, increased absenteeism, a significant rise in behavioral concerns or disciplinary infractions, or other information indicating that the student's current plan is not appropriate, is not being implemented, or that the student may have additional needs. Finally, the revisions will also provide consistency across hard-copy and electronic formats regarding standards, definitions and designated staff. The District will also provide training for relevant staff regarding the above obligations under Section 504 and Title II and will provide compensatory actions for the Student.

OCR has determined that the Agreement is aligned with the allegation and is consistent with the laws and regulations OCR enforces. OCR will monitor implementation of the Agreement, and will notify the parties in writing of the monitoring closure, once it determines that the District has fulfilled the terms of the Agreement. If the District fails to comply with the terms of the Agreement, OCR will resume its investigation.

This concludes OCR's investigation of the complaint and 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 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 regarding OCR's determination, please contact Meighan McCrea, Civil rights Attorney, at 617-289-0052 or meighan.mccrea@ed.gov.

Sincerely,

Allen L. Kropp
Team Leader/Civil Rights Attorney

Enclosure

cc: Attorney Tami Fay, at tfay@mhtl.com