

March 16, 2016

Jeffrey W. Granatino
Superintendent
Marshfield Public Schools
76 South River Street
Marshfield, MA 02050

Re: Case No. 01-15-1260
Marshfield Public Schools

Dear Superintendent Granatino:

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 Marshfield Public Schools (the District). The Complainant alleged that during fall 2015, the District: (1) failed to provide her daughter (the Student) a free appropriate public education (FAPE) by failing to timely and appropriately evaluate whether, because of disability, the Student needed special education or related services under Section 504; (2) denied the Student the opportunity to participate in a XXXXX XXXXX XXXXXXXXXXXX because of her disabilities; and (3) retaliated against the Student for the Complainant's disability-related advocacy on the Student's behalf, by "badgering" the Student to leave the high school and denying her access to the bathroom. As explained below, prior to OCR completing its investigation, the District requested to resolve the complaint by entering into the enclosed voluntary Resolution Agreement (Agreement).

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 (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 elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and Title II.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which provides that:

No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceedings or hearing held in connection with a complaint.

The regulation implementing Title II contains a similar provision at 28 C.F.R. § 35.134.

Summary of Preliminary Investigation

OCR reviewed documents provided by the District and the Complainant, including the District's Section 504 Policies and Procedures, as well as correspondence between District staff and with the Complainant regarding the Student. OCR also reviewed copies of the Student's 504 Plans and Individualized Education Program (IEP) for school years 2014-2015 and 2015-2016. OCR also interviewed the Complainant and the District's Director of Special Education and Pupil Services (Director). OCR also reviewed a doctor's note the District allegedly required before it would conduct an initial Section 504 evaluation of the Student, notes from the Student's XXXXXXXXXX, and the Student's grades and attendance record. On March 3, 2016, prior to the completion of OCR's investigation, the District requested to enter into the Agreement to resolve the allegation, in accordance with Section 302 of OCR's *Case Processing Manual* (CPM). OCR determined that it was appropriate to resolve the complaint allegations with an agreement during the course of OCR's investigation.

Allegation 1: FAPE

Legal Standards

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. The regulation implementing Section 504, at 34 C.F.R. § 104.33, further 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. Students who are eligible for FAPE under Section 504 are entitled to the provision of any services the placement team decides are appropriate, regardless of cost or administrative burden.

34 C.F.R. Section 104.35(c) requires that placement decisions for a student with disabilities 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). As indicated by Appendix A to the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education for a student with disabilities as defined by Section 504 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). Since the appropriate services can be as varied and as comprehensive as a student's disability-related needs, school districts must not limit placement options under Section 504/Title II to a predetermined universe of options that are unrelated to an individual determination of a student's needs. Instead, the team must consider all significant factors relating to the learning process, including disability-related absences, behavioral issues and adaptive behavior. Once the team has determined an appropriate program for a student, districts are obligated to implement that program to ensure 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 increased absences, falling grades, repeated 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.

During its initial investigation, OCR identified three concerns: first, whether the District required a note from a medical doctor before it would evaluate the Student; second, whether the team that evaluated the Student included individuals knowledgeable about the evaluation data and placement options, as required by 34 C.F.R. § 104.35; and third, whether the District reevaluated the Student, as required by 34 C.F.R. §§ 104.35(a) and (d), to determine whether the Student's disability-related needs had changed after multiple, disability-related extended absences from school, which constituted a significant change in placement.

Resolution

Prior to OCR completing its investigation and making any findings, the District agreed to address the complainant's FAPE allegations. Specifically, the District has agreed to revise its policies and procedures and provide training to address any concerns regarding when an evaluation is necessary; the appropriate composition of the evaluation and placement teams; and the standards and documents teams should consider. The District has also agreed to reevaluate all high school students who were evaluated under Section 504/Title II during the school years 2014-2015 and 2015-2016, with appropriately-constituted teams using appropriate standards. Finally, the District has agreed to provide compensatory services and other measures for the Student, such as tutoring and reimbursing tuition for the Student to take classes missed due to her disability-related absences, as described in the Agreement.

Allegation 2: Equal Access to Extracurricular Activities

Legal Standards

Under the Section 504 regulations, a school district is required to provide a qualified student with a disability an opportunity to benefit from its programs and activities, including extracurricular activities, that is equal to the opportunities that it offers to students without disabilities. Specifically, 34 C.F.R. Sections 104.34(b), and 104.37(a) and (c), require that when a district offers extracurricular activities, including athletics, it must afford students with disabilities an opportunity to participate in such activities that is equal to the opportunity it provides for students without disabilities. OCR interprets the Title II implementing regulation, at 28 C.F.R. 35.130, to be consistent with this Section 504 obligation.

Accordingly, districts must make reasonable modifications to their policies and procedures, and must provide such aids and services, as are necessary to ensure that students with disabilities are afforded an equal opportunity to participate in extracurricular activities, unless districts can show that doing so would constitute a fundamental alteration to their program, or would create an undue financial or administrative burden. Even if a district determines that a specific modification, aid or service would result in a fundamental alteration or undue burden, the inquiry does not end with that determination. Instead, the school district should determine if other modifications, aids or services would permit the student's participation.

A district's determination of which modifications, and aids and/or services are necessary for a student to have an equal opportunity to participate in extracurricular activities should be made by making an individualized determination about the student's needs. When making this determination, districts should consider whether the modification, aid or service is necessary for the student to have an equal opportunity to participate. This requires consideration of the nexus between the functional limitations of the student with a disability, and how the modification, aid or service addresses that limitation in a way that allows the student to access to the extracurricular activity. Districts ought to provide an opportunity for students (or an appropriate family member, such as a parent or guardian) to request the modifications, aids and/or services that they think are needed for equal access, and should engage in an interactive process with parents/students who choose to do so. The modifications, aids and/or services requested by a student with a disability (or appropriate family member) should be honored, unless the district can establish that the student can be afforded an equal opportunity to participate without such modifications, aids or services, or that an alternative modification, aid or service is effective and affords the student an equal opportunity to participate in and benefit from the extracurricular activity. If the district can make such a showing, then it may provide the alternative.

Prior to completing its investigation, OCR determined that the District permitted the Student to participate in some XXXXX XXXXX. However, OCR had not yet determined whether the District appropriately considered how to provide the Student with an equal opportunity to participate in extracurricular activities in a settled and cohesive way, rather than in an ad hoc manner, as required by 34 C.F.R. § 104.37 and 28 C.F.R. § 35.130.

Resolution

The District agreed to address the Complainant’s allegations regarding the Student’s participation in XXXXX, before OCR completed its investigation or made any findings. To address the Complainant’s allegations regarding extracurricular activities, the District agreed to revise its 504/Title II policies and procedures to reflect its obligation to provide students with disabilities an equal opportunity to participate in extracurricular activities. The District will also train staff involved in 504 determinations, all high school staff, and all extracurricular advisors, coaches and assistant coaches on these obligations. Finally, as described in the Resolution Agreement, the District will provide remedies specific to the Student.

Allegation 3: Retaliation

Legal Standards

In analyzing whether retaliation occurred under Section 504/Title II, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant’s protected activity; (3) whether the complainant suffered an adverse action contemporaneous with, or subsequent to, the recipient’s learning of the complainant’s involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivations.

OCR determined that the Complainant engaged in protected activity, by requesting that the District evaluate the Student pursuant to Section 504/Title II, and that the District was aware of such activity. The District has recommended a XXXXXXXXXXXXXXX XXXXXXXXXXX for the Student, which the Complainant and the Student’s XXXXXXXXXXX assert would be detrimental to the Student, which could be considered an adverse action. However, the District asserted that it genuinely believes that a XXXXXXXXXXXXXX XXX school is an appropriate placement for the Student. With respect to the alleged bathroom incident, the District acknowledged that the Student was not allowed to leave one class, unescorted, for the bathroom. However, the District asserted that the alleged bathroom incident was the result of a safety concern, noting prior instances where staff members were unable to locate the Student after she had left class.

Resolution

Before OCR completed its investigation, the District agreed to address the Complainant’s retaliation allegations. The District agreed to review and revise its Section 504 and Title II policies, including sections on retaliation, and train staff on the District’s 504/Title II obligations, including the prohibition against retaliation. Additionally, the District agreed to convene the Student’s team following extended absences to determine her disability-related needs, such as being able to leave class for the bathroom or safely participate in other activities.

Conclusion

OCR has determined that the Agreement is aligned with the allegations 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,

Diane M. Henson
Regional Director

Enclosure