



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I

5 POST OFFICE SQUARE, 8<sup>th</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

July 24, 2017

Michael L. Hopkins  
Superintendent of Schools  
Rochester School Department  
150 Wakefield Street, Suite #8  
Rochester, NH 03867-1348

Re: Case No. 01-16-1071  
Rochester School Department

Dear Superintendent Hopkins:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed against the Rochester School Department (District) alleging discrimination against students with disabilities. Specifically, OCR investigated whether the Maple Street Magnet School (MSMS), the only magnet program in the District, is accessible to individuals with mobility impairments (Allegation 1) and whether the MSMS lottery process for admissions discriminates against students with disabilities (Allegation 2).

OCR investigated these allegations under 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 also investigated pursuant to 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, which prohibit discrimination on the basis of disability by certain public entities. The District is subject to Section 504 because it is a recipient of financial assistance from the U.S. Department of Education, and it is subject to Title II because it is a public entity operating an education system.

In conducting its investigation, OCR gathered evidence through a review of documents and information provided by the Complainants and the District, as well as interviews with the Superintendent and one of the Complainants. As explained below, OCR found that there was sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with regard to both allegations. The District agreed to enter into the enclosed resolution agreement to address the compliance violations that OCR identified during its investigation. OCR's investigation and findings are summarized below.

### **Legal Standard**

Under the Section 504 regulation at 34 C.F.R. Section 104.22, any facility, or part of a facility, for which construction commenced prior to June 3, 1977, the regulation's enactment date, is considered an "existing facility." Similarly, under the Title II regulation at 28 C.F.R. Section 35.104, read in conjunction with 28 C.F.R. Section 35.151 governing new construction and

alterations, an “existing facility” is one for which no additions or renovations have been made since January 26, 1992. For such a facility, the services, programs, and activities provided, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. Program accessibility can be provided through non-structural means, such as the redesign of equipment or relocation of programs to accessible locations, as provided by the Section 504 and Title II regulations at 34 C.F.R. Section 104.22(b) and 28 C.F.R. Section 35.150(b), respectively. Structural changes are only required of existing facilities if there is no other feasible way to make a program accessible and usable.

Under the Section 504 regulation at 34 C.F.R. Section 104.23(b) and the Title II regulation at 28 C.F.R. Section 35.151(b), each part of a facility which is altered for the use of a recipient after the respective regulation’s effective date in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by persons with disabilities. Such alterations must comply with acceptable accessibility standards. Pursuant to 28 C.F.R. Section 35.151(c)(3), compliance with the 2010 Americans with Disabilities Act Standards for Accessible Design is mandatory for new construction or alterations commenced on or after March 15, 2012.

Section 504 at 34 C.F.R. § 104.4 and Title II at 28 C.F.R. § 35.130 both provide that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any recipient program or activity. Therefore, a school district may not deny enrollment in a program or activity to applicants on the basis of disability.

### **Allegation 1: Physical Accessibility of MSMS**

#### *Factual Findings*

The MSMS building was constructed in 1928 and was altered with the addition of two stair towers in 2010 and some interior renovations and kitchen upgrades in 2013. The Complainants alleged that MSMS is not accessible to individuals with mobility impairments, pointing out, for example, that the front entrance does not have a ramp, and the cafeteria is on the second floor but the building lacks an elevator. The District did not dispute that the building is not accessible to individuals with mobility impairments.

#### *Analysis*

Under Section 504 and Title II, MSMS is an existing facility but the alterations are new construction. As an existing facility, MSMS’s services, programs, and activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. Structural changes are only required of existing facilities if there is no other feasible way to make a program accessible and usable.

With regard to the stair towers, the interior renovations, and the kitchen upgrade, the District is in violation of Section 504 and Title II inasmuch as the alterations do not comply with accepted accessibility standards for new construction. In addition, given that there is only one magnet program in the District, and it is located in a building that is entirely inaccessible, the District is

in violation of Section 504 and Title II because it has not made MSMS's services, programs, and activities, when viewed in their entirety, readily accessible to and usable by individuals with disabilities. Therefore, the District must either relocate MSMS to an accessible building or make structural changes because there is no other feasible way for MSMS to make its services, programs, and activities accessible and usable given that the building is entirely inaccessible.

**Allegation 2: MSMS Enrollment (Sibling Preference)**

*Factual Findings*

The Complainants also alleged that MSMS's admissions process was discriminatory in practice. They provided OCR with one example of a student (Student) with disabilities who was denied admission to the school's XXXXXX grade class for the 201X-201X academic year and to the school's XXXXXX grade class for the 201X-201X academic year despite having a sibling already enrolled at MSMS. According to the Complainants, the Student should have been allowed to enroll pursuant to MSMS's policy to admit students with siblings enrolled at MSMS without having to enter the lottery (sibling preference). The Complainants believed that the only explanation for the fact that the District denied him a spot was his disability even though the Superintendent met with the parents in July 201X and explained that the sibling preference did not apply to the Student. The parents of the Student have since  
XX.

The District's position was that the Student was not allowed to enroll pursuant to the sibling preference because the sibling preference did not apply to him. The Superintendent, who administers the lottery, explained to OCR that the sibling preference only applies to students seeking to enroll in kindergarten and, thus, did not apply to the Student because he was seeking to enroll in XXXXXX or XXXXXX grade.

OCR reviewed written documentation submitted by the Complainants and the District on the MSMS admissions process. The District's policy JECC-1, entitled *Assignment of Students to Magnet Schools*, states, "If a student will be enrolled in the magnet school, for the following school year their *younger* [emphasis added] siblings will be enrolled without being included in the lottery." Another document entitled *Maple Street Magnet School Enrollment Procedure*, which is posted on the MSMS's homepage and updated annually, reads, "Kindergarten students will be enrolled if siblings are already in the school if registration is completed prior to [the deadline]." The Complainants also submitted to OCR District blog posts for the 2013-2014 and 2014-2015 academic years stating that all kindergarten students with siblings were offered enrollment based on sibling preference.

Finally, OCR reviewed lottery data for three school years showing that only kindergarten students were offered enrollment and enrolled under the sibling preference lottery exemption.

*Analysis*

Under Section 504 and Title II, a school district may not exclude students from enrollment on the basis of the disability. While the language of the District's policy JECC-1 (*Assignment of Students to Magnet Schools*) is ambiguous, OCR found that the evidence supported the District's position that the sibling preference only applies to students seeking to enroll in kindergarten and, thus, did not apply to the Student because he was enrolling in XXXXXX or XXXXXX grade. In

reaching this conclusion, OCR first noted that the policy is explicit in only applying to *younger* siblings of enrolled students, rather than all siblings. In addition, *Maple Street Magnet School Enrollment Procedure* provides explicit clarification that the sibling preference only applies to kindergarten students. Furthermore, in our review of the lottery data for three school years, OCR found that only kindergarten students were offered enrollment and enrolled under a lottery exemption. In addition, the District blog posts demonstrated that the sibling preference applied only to the kindergarten class. OCR also confirmed in an interview with the Superintendent, who administers the lottery, that the sibling preference only applies to the kindergarten class. OCR found this statement to be credible when viewed together with the documentary evidence and lottery data.

Based on a preponderance of the evidence, OCR found that the sibling preference only applies to students seeking enrollment in kindergarten and, thus, did not apply to the Student. Therefore, OCR did not find that the Student, as alleged, should have been offered automatic enrollment as a sibling, nor did OCR find any indication that the Student was placed on the waitlist because he has a disability. Rather, OCR found that the District followed its enrollment procedure in placing the Student on the waitlist.

## **Allegation 2: MSMS Enrollment (Special Education Cap)**

### *Factual Findings*

OCR found language referencing a cap on special education student enrollment in numerous District publications. The document entitled *Maple Street Magnet School Enrollment Procedure* stated that “classroom and school percentage of special education students shall not exceed 20%”; the MSMS handbook included a statement that enrollment of special education students was restricted; and a District presentation from August 30, 2011, indicated that the District planned to keep special education student enrollment at MSMS at the same ratio as special education student enrollment District-wide. On July 27, 2016, following OCR’s interview with the Superintendent, OCR confirmed that the District had removed reference to the special education cap from *Maple Street Magnet School Enrollment Procedure* and the MSMS handbook.

When OCR interviewed the Superintendent, he acknowledged that the language concerning a cap was problematic but told OCR that, as the individual responsible for administering the lottery and making enrollment decisions, he never applied the cap. He also represented to OCR that students are not identified as having a disability prior to entry into the lottery or enrollment. OCR reviewed the MSMS student registration form, which is required for entry into the lottery. The form does not have a section to identify students as having a disability.

An undated District presentation showed a significant decrease in special education student enrollment from 30% in 2011-2012, the last year that the predecessor school to MSMS existed, to 16% in 2012-2013, MSMS’s first year of operation. OCR reviewed special education student enrollment data from the District for three school years. The data showed that special education student enrollment overall never exceeded 20% but that individual class enrollment did exceed 20% in certain instances. Specifically, second grade enrollment in 2013-2014 was 30.0%; fifth grade enrollment in 2013-2014 was 22.2%; third grade enrollment in 2014-2015 was 35.0%; and fourth grade enrollment in 2015-2016 was 42.1%.

### *Analysis*

Under Section 504 and Title II, a school district may not exclude students from enrollment on the basis of the disability. While the cap clearly violates Section 504 and Title II by imposing a limit on the number of special education students permitted to enroll, OCR found that the evidence supported the Superintendent's assertion that the District never applied the cap in practice.

First, the District was unable to provide lottery data disaggregated by disability at the time of the lottery because the District does not identify prospective students who enter the lottery by disability. Rather the District provided the information based on whether students *currently* are identified as having a disability. Second, the MSMS student registration form does not have a section to identify whether a student has a disability, supporting the District's position that it does not identify potential students as having a disability when they are seeking enrollment. Third, although enrollment data provided by the District for three school years demonstrates that special education student enrollment overall never exceeded 20%, individual class enrollment did exceed 20% in direct contradiction to the cap.<sup>1</sup> While OCR notes concerns about the District presentation indicating a significant decrease in special education student enrollment, OCR did not find any evidence that the District considers whether students are identified as having a disability when making enrollment decisions. OCR also confirmed that, as early as July 27, 2016, following its initial interview with the Superintendent, the District deleted the cap language from *Maple Street Magnet School Enrollment Procedure* and the MSMS handbook. Therefore, the District has resolved this allegation.

### **Conclusion**

OCR found sufficient evidence of a violation with respect to Allegation 1 that MSMS is not accessible to individuals with physical impairments. The District agreed to remedy Allegation 1 through the enclosed agreement, which requires the District to renovate or relocate MSMS such that it is fully accessible in time for the 2018-2019 academic year. The District will also submit an interim access plan for the upcoming 2017-2018 academic year, the purpose of which is to plan for the District's prompt and effective response should an already-enrolled student develop a mobility impairment or a student with a pre-existing mobility impairment enrolls. In addition, the District will include information in all application/enrollment materials for the 2018-2019 school year publicizing MSMS as fully accessible and stating that MSMS does not discriminate in enrollment based on disability. OCR will monitor the District's implementation of the agreement.

With respect to Allegation 2 and enrollment, OCR found that the District placed the Student on the waiting list pursuant to its enrollment procedure because the sibling preference did not apply to him, not because he has a disability. However, OCR found sufficient evidence of a violation based on language in multiple District publications referencing a cap on the enrollment of special education students. The District took steps to remedy this concern by deleting the language from all District publications immediately. In addition, although OCR did not find evidence that the District ever applied the cap and so is closing Allegation 2 as resolved, the agreement requires

---

<sup>1</sup> OCR is cognizant, however, that the data suggested there were only two cohorts of students – the fifth graders graduating in 2013-2014 and the cohort advancing from grade two in 2013-2014 to grade four in 2015-2016 – where more than 20.0% of the students had Section 504 plans or IEPs.

the District to publicize MSMS as fully accessible and to state that MSMS does not discriminate in enrollment based on disability in all application/enrollment materials commencing with those for the 2018-2019 school year.

This concludes OCR's investigation of the complaint. OCR's findings only address the specific allegations and legal issue identified in this complaint and do not pertain to the District's compliance with other aspects of Section 504, Title II, or any other laws enforced by OCR. This letter sets forth OCR's determination in an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases, are not formal statements 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 Complainants may have the right to file a private suit in federal court, whether or not OCR finds a violation.

Please also 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 individual 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. If OCR receives such a request, OCR will seek to protect all personal information, to the extent provided by law, that, if released, could constitute an unwarranted invasion of privacy.

OCR would like to thank the District for its cooperation throughout this investigation. If you have any questions, please contact attorney Sandy Lin at (617) 289-0095 or [sandy.lin@ed.gov](mailto:sandy.lin@ed.gov).

Sincerely,

/s/ Ramzi Ajami  
Meena Morey Chandra *W/P RA*  
Acting Regional Director

Enclosure

cc: Jeanne Kincaid