



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

September 23, 2020

Interim Superintendent Kristine E. Nash  
By email: knash@oxps.org

Re: Complaint No. 01-17-1232  
Oxford Public Schools

Dear Superintendent Nash:

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 Oxford Public Schools (District). The Complainant alleged that the District discriminated against her son (Student) on the basis of disability. Specifically, the complaint alleged that, beginning in XXXXXX XXXX, the District denied the Student a free appropriate public education (FAPE) by imposing on him a system of behavior incentives without adequate involvement by his placement team (Allegation 1). The complaint further alleged that once the plan was imposed, the provisions treated the Student differently based on his disability because it required the Student to earn XXXXX with his peers, a XXXXXX, and XXX XXXXXXXXXXXXXXXX as behavior incentives (Allegation 2). 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 (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 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 any program or activity receiving federal financial assistance from the Department. OCR also enforces 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 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.

Summary of Preliminary Investigation

The District determined that the Student was eligible for services under Section 504 during the XXXX-XXXX school year. His Section 504 Plan covering the period XXXXX XX, XXXX through XXXXX XX, XXXX included a number of “[a]ccommodations,” including a “[p]ositive behavior plan/success chart as needed.” While the Section 504 Plan states that the Student’s “Case Manager” is his Guidance Counselor, it does not otherwise indicate which individual(s) developed the Plan or how it was developed.

On XXXXXXXX XX, XXXX, the Guidance Counselor emailed the Complainant to inform her that the Student

continues to go to classes with out [sic] pencils, although I gave him about 20 two weeks ago and have told him to let me know if/when he needs more. He reports that he throws them away at the end of class. He is coming to XXXX without his book again and says that it is lost. He has a pile of work from [one teacher]. He keeps asking if he can come out of class to complete it with me. I have not had time to sit with him this week because of snow days, map testing and X XXX XXX one day this week. I have suggested to him several times that he could take some home and do for homework but he refuses. This is work that he hasn't done for homework or didn't complete in class. He and his whole table had an issue at XXXXX which resulted in XXXXX XXXXXXXX<sup>[1]</sup> for the week. We have had two reports of him targeting others [sic] students by either being mean or making fun of them. This morning he had an issue with a teacher in the hallway before the homeroom bell.

The Guidance Counselor noted that,

[i]n an attempt to manage his behavior, hold him accountable and provide more structure to his day we . . . will implement [a] point plan again.<sup>[2]</sup> This will not address behaviors during unstructured times but will encourage him to be prepared for class, do his work and be respectful. He will get his point plan in the morning from [the Student's Transitional Support Teacher (TST)] and will check out with [the TST] in the afternoon. We plan to have his homeroom with [the TST in the Transitional Support Room (TSR)] for the duration of the point plan. [The Student] will check in with me before XXXXX just as last year. If he doesn't earn his points in the morning, he will have a XXXXX XXXXX. I would like to propose that we again tie his afternoon points into going home. If he gets his points he goes home as usual. If he doesn't earn his points he stays for a XXXXXXXXXXXX that day. I would call and email you at the very end of the day if he needs to stay for a XXXXXXXXXXXX that day. Does this sound OK to you?

A handwritten note on the bottom of this email states, "X/XX/XX conversation w/ mom. She is concerned about no movement during XXXXX. If he earns XXXXX XXXXX – I will bring on walk or get some type of exercise." The Guidance Counselor subsequently emailed the Complainant to note that this conversation "focused on the fact that [the Student] was not completing his work in many of his classes," "was also asking to leave the classroom a lot and was not bring [sic] the materiasl [sic] needed to be successful in class, including homework," and

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<sup>1</sup> The XXXXXXX XXXXXXX XXXXXXX's "XXXX-XXXX Student Handbook" (Student Handbook) states that the TSR serves as the location for "[h]omeroom for students who are having behavior or medical issues and can't be in a homeroom" and "XXXXXX XXXXX for students whose behaviors do not allow them to XXX XX XX XXXXXXXXXXXX" or "who are not completing homework consistently or owe work," among other uses of the TSR.

<sup>2</sup> The District informed OCR that "[a]t the start of the XXXX/XXXX school year, [the] Student's behaviors were increasing so the Principal and guidance office implemented a point plan to help him with his work and behavior," which "was extremely successful."

“the implementation of the point plan.” She stated that she “typically [met] with [the Student] 2-3 times a day” to work on [t]he goals . . . listed on his point plan.”

On XXXXXXXX XX, XXXX, the Complainant emailed the Assistant Principal and Guidance Counselor to “request [to] have [the Student] evaluated for an” Individualized Education Program (IEP) and to note that she was “confused as to why this was not presented as an option from school Administrators in lieu of events during the school year.” The Assistant Principal responded “that legally we cannot, nor can teachers, request [special education] evaluations. That has to be done through the parent or the [Building Based Teams] process.”<sup>3</sup>

The Complainant informed OCR that she “[i]mmmediately . . . addressed [her] concerns” with the Guidance Counselor, informing her that “it was not fair that [the Student] would be working himself out of a consequence . . . two times a day,” and “asked if [she] could change it . . . so that rather than being able to attend XXXXX with the other children,” the plan “could include some kind of movement” break. She repeated these concerns in an email to the Guidance Counselor, Assistant Principal, and the former superintendent on XXXXX X, XXXX, but the Assistant Principal responded that the District “recommend[ed] against making any changes to what is currently in place with the point plan” until the District could “see . . . if this will truly be successful for him.” The Complainant asserted that “none of [her] suggestions were considered.”

The District provided OCR several copies of the Student’s “Daily Data/Communication” plan (Point Plan). The Point Plan states that the Student would earn five points in each of his classes if he completed his homework and classwork (more than 75%), respectively, for each class, and another 5 points for being “prepared for class and need[ing] less than [sic] two reminders to remain on task.”<sup>4</sup> It states that the Student would earn three points in each of his classes if he completed between 25% and 75% of his homework and classwork, respectively, for each class, and another 3 points for being “focused but . . . not prepared OR . . . prepared for class but need[ing] more than [sic] two reminders to remain on task.” It states that the Student would earn zero points in each of his classes if he completed 25% or less of his homework and classwork, respectively, for each class, and zero points if he “did not have materials for class<sup>5</sup> and/or needed more than two reminders to remain on task.” If a sufficient number of points were earned in the morning, the Student would earn XXXXX in the XXXXXXXXXX, and if a sufficient number of points were earned in the afternoon, the Student would be able to go home after school without attending XXXXXXXXXX.

On XXXXX X, XXXX, the Complainant informed the former superintendent, Assistant Principal, and Guidance Counselor that she “would not sign [a] XXXXXXXXXX slip . . . for behavior that is directly related to [the Student’s] disability,” to which the Assistant Principal responded that the District “cannot keep him without permission from” her. On XXXXX XX, XXXX, the Complainant informed the Assistant Principal that she did not “see how ‘XXXXX

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<sup>3</sup> In contrast, the District’s “Special Education Process & Procedures Manual” states that a “student may be referred for a[ special education] evaluation by a parent, guardian,” “teacher,” or “other person in a care giving capacity.” See also 34 C.F.R. § 104.35(a); 34 C.F.R. § 300.300(a)(1)(i); 603 Mass. Code Regs. 28.04(1).

<sup>4</sup> The Student Handbook states that “[s]tudents need to try every day, in every class.” It notes that students may be assigned XXXXXXXXXX or sent to the TSR for failing to comply with this obligation.

<sup>5</sup> The Student Handbook states that students must “bring with them necessary materials” for “all classes.”

XXXXX’ can possibly aide [sic] in the goal of teaching [the Student] coping skills,” as it is “a form of abuse.”

On XXXXX X, XXXX, the Complainant emailed the Assistant Principal and Guidance Counselor “that [a Clinical Behaviorist consulting with the District on a Functional Behavior Assessment (FBA) of the Student] wanted to discuss” the Point Plan and noted that she had “expressed [her] concerns for the overall cruelty of the current plan and previously proposed some changes that were denied by School Administration.”<sup>6</sup>

On XXX XX, XXXX, the District determined that the Student was eligible for an IEP. The proposed IEP notes the Complainant’s concern that the Student’s “current behavioral plan only allows [him] and [sic] opportunity to work himself OUT of an automatic consequence, [r]ather than a reward for positive behavior.” It also states that the Student “will increase his compliance with school rules and demonstrate appropriate school behavior,” with “[p]rogress . . . measured through review of discipline records and staff observation and data collection from [the Student]’s point sheet.” On XXXXXX XX, XXXX, the Complainant partially accepted the proposed IEP but rejected the aforementioned provision, stating that it was “inappropriate” and her understanding was “that [the Student]’s point sheet” – which she believed “was punitive and not a positive behavior plan” – “ha[d] been eliminated.” She noted that if the District felt that a behavior plan was necessary, “a positive behavior plan should be . . . presented to [her] for [her] review prior to its implementation.”

The District informed OCR that the Student is not currently enrolled in the District. The District noted that it is required by state law to create a District Curriculum Accommodation Plan (DCAP) to “address the needs of children whose behavior may interfere with learning, or who do not qualify for special education services under” the Individuals with Disabilities Education Act (IDEA), “regardless of their disability status.”<sup>7</sup> The District’s DCAP lists “Behavior Plans” and “Transitional Support Room” as examples of “[s]upport services that are available to students through general education[,] including services to address the needs of students whose behavior may interfere with learning.”

According to the District, the Student’s “behavior plans were drafted by staff who had knowledge of the Student and worked with him throughout the school day, were based on data collected from those staff members, and were individually tailored to meet his specific needs.” It added that “as the Student’s behavior continued to escalate despite various behavior plans and he needed additional support beyond that provided to all students, appropriate and comprehensive evaluations were conducted and additional behavior plans were developed and implemented.”

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<sup>6</sup> Although the FBA completed on XXX X, XXXX does not reference the Point Plan, it does conclude that “[i]t is imperative that the school and the family work together in holding [the Student] accountable,” but “this does not appear to be happening, which is having a negative impact on” the Student, whose “behaviors [are] escalat[ing].” The Student’s discipline log for the XXXX-XXXX school year indicates that he was suspended for XX school days and found responsible for XX disciplinary incidents during the school year, XXXX XXXX XXX XXXXX XXXXXXXX in his school. The Complainant alleged that the District failed to conduct a manifestation determination for the Student during the XXXX-XXXX school year. The documentation provided by the District does not indicate that the District considered the need to conduct a manifestation determination for the Student once he was suspended for 10 cumulative school days over the course of the school year.

<sup>7</sup> See Mass. Gen. Laws ch. 71 § 38Q1/2.

In its response to OCR, however, the District did not reference the provision in the Student's then-effective Section 504 plan calling for a "[p]ositive behavior plan/success chart as needed," nor did it explain how that provision was developed or whether that provision was considered when the District implemented a behavior plan for the Student pursuant to the DCAP. The documentation provided by the District also provides no indication that the District explained to the Complainant whether the Point Plan was being imposed pursuant to the Student's Section 504 Plan or the DCAP.

According to the District, "any and all consequences the Student served were consequences all students – regardless of their disability status – would receive if their behavior warranted it." The District informed OCR that the Student was suspended from the XXX for behavior unrelated to the Point Plan during the XXXX-XXXX school year, but OCR is not aware of any instance in which the Student received XXXXXXXXXX (and was consequently restricted in his ability to XXXX XXX XXX) as a result of failing to earn sufficient points on his Point Plan. Although OCR has not reviewed any contemporaneous documentation regarding the District requiring the Student to earn the opportunity to use a XXXXXX – which is not a consequence referenced in the Point Plan – the District's attorney informed OCR that the Student

had significant behaviors in the hallway because generally it was an unstructured environment for him. He often had his hands on other students, he would run or act unsafely, and he was loud and disruptive to other classes. This is all outlined in his discipline log. The District worked on several behavioral interventions over a significant period of time regarding his behaviors in the hallway. However, it [sic] was unsuccessful and his behaviors were more often than not unsafe for himself and others. Because of this, the District decided to move his homeroom to the TSR room, as outlined in the Student Handbook and done for all students with behavioral issues, regardless of their disability status. In doing so, he was assigned a desk instead of a XXXXXX for his belongings. . . [S]tudents are not entitled to XXXXXXs if they cannot act appropriately when using their XXXXXX. . . If a Student is not behaving appropriately when using their XXXXXX, then the District has the right to take the XXXXXX away, as occurred here. Towards the end of the school year, the Student earned his right to return to homeroom and again had a XXXXXX assigned to him. This is the procedure for all students, not just this Student.

The District maintains that the Student was not denied a FAPE and was not treated differently on the basis of disability. OCR has not analyzed information regarding how the District may have treated similarly situated students without disabilities who engaged in conduct comparable to the Student's during the XXXX-XXXX school year.

### Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to each qualified student with a disability in its jurisdiction. An appropriate education is regular or special education and related aids and services that are

designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. Implementation of an IEP developed in accordance with the IDEA is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

In investigating a denial of a FAPE under Section 504, OCR first looks at the services to be provided as written in a student's plan or as otherwise agreed to by the student's team. If OCR finds that a district has not implemented a student's plan in whole or in part, it will examine the extent and nature of the missed services, the reason for the missed services, and any efforts by the district to compensate for the missed services in order to determine whether this failure resulted in a denial of a FAPE.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to reevaluate a student with a disability before any significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the district may discipline the student in the same manner as it disciplines students without disabilities. If a school district finds that the student's disability caused the misconduct, the district may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student's current educational placement.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and ensure that each student with a disability is educated with peers without disabilities to the maximum extent appropriate to the needs of the student with a disability.

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes 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. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions

affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

### Resolution

OCR has identified issues that require further investigation prior to making a compliance determination. First, the evidence reviewed to date does not indicate whether the District determined whether use of the Point Plan was necessary to meet the Student's individual educational needs as adequately as the needs of students without disabilities are met, and if so, whether the District ensured that the Point Plan was developed (1) by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, (2) by drawing upon information from a variety of sources, and (3) concurrent with notice to the Complainant of her Section 504 procedural safeguards relating to the Point Plan.<sup>8</sup> To the extent that the Point Plan was developed pursuant to the DCAP rather than the Student's Section 504 plan, OCR has not yet determined whether the District may have imposed certain consequences on the Student pursuant to the Point Plan while not imposing similar consequences on students without disabilities who engaged in similar conduct. Additionally, the evidence reviewed to date does not indicate that the District conducted a manifestation determination upon subjecting the Student to a series of short-term disciplinary exclusions that added up to more than 10 days and that may have created a pattern of exclusions resulting in a significant change in placement. Finally, the evidence reviewed to date indicates that the District mistakenly informed the Complainant that teachers and other persons in a care giving capacity are not legally permitted to refer students for special education evaluations.

### Conclusion

As noted above, 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 and OCR determined that a voluntary resolution is appropriate.<sup>9</sup> Subsequent discussions between

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<sup>8</sup> Both the DCAP and the Student's Section 504 Plan reference a "behavior plan." The evidence reviewed to date does not indicate that the District informed the Complainant which authority justified imposition of the Point Plan, nor does it indicate whether the Point Plan, which relied primarily on XXXXX XXXXXXXX and XXXXXXXXXXXX as motivators, was consistent with the Student's Section 504 Plan that called for a "[p]ositive behavior plan/success chart as needed."

<sup>9</sup> The *Case Processing Manual* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the complaint. 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.

Sincerely,

/s/

Timothy Mattson  
Compliance Team Leader

Enclosure

cc: Colby C. Brunt, Esq. (*by email*: CBrunt@SCMLLP.COM)