



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 7, 2020

Superintendent Joel D. Boyd  
[superintendent@lowell.k12.ma.us](mailto:superintendent@lowell.k12.ma.us)

Re: Complaint No. 01-18-1061  
Lowell Public Schools

Dear Superintendent Joel D. Boyd:

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 Lowell Public Schools (District). The Complainant alleged that the District discriminated against her child (Student) on the basis of disability. Specifically, the complaint alleged that since XXXXX, the District used the wrong standard in evaluating whether the Student needs special education or related services and relatedly, wrongly substituted an Individual Health Care Plan (IHCP), without any procedural safeguards, for the Student's Section 504 plan. 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. Section 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. Section 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 education system, OCR has jurisdiction pursuant to Section 504 and Title II.

Because OCR determined that it has jurisdiction and that the complaint was timely filed, OCR opened the following legal issue for investigation:

Whether the District used the wrong standard in evaluating whether the Student needs special education or related Section 504 services before making a placement determination, and wrongly substituted an Individual Health Care Plan for the Student's Section 504 plan, in violation of 34 C.F.R. §§ 104.35(a) and (b).

During the investigation, OCR reviewed documents provided by the Complainant and the District, and interviewed the Complainant. Before OCR completed its investigation, the District expressed a willingness to resolve the complaint on February 4, 2020.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

### Summary of Preliminary Investigation

The District provided OCR with two Section 504 plans for the Student, one of which stated it was in effect from XXXXX to XXXXX and the other from XXXXX to XXXXX. Both plans indicated that the Student had the following disabilities: XXXXX, XXXXX, XXXXX, and XXXXX.<sup>1</sup> According to the Complainant, at the start of Section 504 team meeting on XXXXX, the team made a determination that the Student no longer qualified for a Section 504 plan and would instead be placed on an IHCP. At the time of the filing of this OCR complaint in XXXXX, the Student was in XXXXX grade.

The District acknowledges that it issued Section 504 plans to the Student for several years until XXXXX, when the Section 504 team terminated her Section 504 plan. The District explained to OCR that “there were no evaluations conducted due to the fact that there were no educational accommodations in the previous 504 – only medical/nursing responses.” The District reviewed the Student’s academic progress, attendance history and a report by the school nurse regarding her presentation and utilization of nursing services due to her disability. The District further told OCR that the Section 504 team had “appropriately” terminated the Student’s Section 504 plan as “[h]er 504 had historically addressed health concerns, with no learning accommodations, and her health concerns had never risen to the ‘substantially impacts one or more major life activities’ standard.”

The District sent a letter to the Complainant on XXXXX stating that the Student “no longer requires an accommodation plan under Section 504” and the decision had been “based on the review of the materials that were before us at the meeting, in addition to the fact that [the Student]’s medical conditions can be appropriately monitored and addressed” under an IHCP.

The District told OCR that the Student had been provided a Section 504 plan for two reasons: her parents’ “advocacy and insistence” and a District-wide allergy policy. The District explained that in August 2001, it had adopted a severe allergy policy which directed Section 504 coordinators at every school in the District to identify children with allergies and, with parental permission, conduct a Section 504 team meeting and draft a Section 504 plan. The District told OCR that “[i]n response to this policy, every student in the district with an allergy received a 504.” In July 2015, the District replaced that policy with another policy, entitled “Life Threatening Allergic Reactions and Epi-Pen Policy” (New Policy). The District provided OCR a copy of the New Policy. It required that when a student with life-threatening allergies is identified, a “‘multidisciplinary/504 allergy team’ will determine if the life-threatening allergy requires additional accommodations beyond the IHCP and may refer the student to the Section 504 team to determine eligibility for accommodations.” In August 2015, the District also sent notices to the parents of all students who had Section 504 plans due to allergies stating that “[i]f your child is currently on a 504 plan for a life threatening allergy, the 504 Plan will continue until his/her yearly review at which time the multidisciplinary 504 Allergy Team will meet and

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<sup>1</sup> XXXXX are not listed in Student’s Section 504 plans, though this may be an erroneous omission. In her OCR complaint, the Complainant wrote that the Section 504 plan was intended to address the Student’s XXXXX, and the District provided OCR with a Section 504 medical form, signed by the Student’s physician, concerning the Student’s XXXXX, and XXXXX was also listed as among the Student’s disabilities on the District’s “504 Eligibility Determination Worksheet” dated XXXXX.

make recommendations for the Individual Health Care Plan (IHCP).” The notice did not at all address students with non-life threatening allergies who had been provided Section 504 plans.

The District told OCR that at the start of the XXXXX school year, “it was just easier to allow [the Student] to continue to have a 504, with the best time for re-evaluating the situation to be when [the Student] transitioned into high school.” In further explanation, the District noted that the Student’s parents had made many complaints and demands over the years, and they may have found it easier to accept the Student’s transition from a Section 504 plan to an IHCP “when they perceived [the Student] to have the cognitive and self-advocacy skills to navigate high school.” The District also stressed that the Student was a “top student,” as reflected in her grades, standardized test scores, and admission to two selective District high school programs.

The District held a Section 504 team meeting for the Student on XXXXX. Later that day, District counsel emailed the Student’s parents due to her understanding that they were “a bit shaken” by the decision to terminate the Student’s Section 504 plan and instead address the Student’s needs through an IHCP. District counsel explained to them that when the New Policy was instituted, “the majority of students in the city whose health issues were allergies and/or asthma were placed on Individualized Health Care Plans at their schools.” Regarding the Student, counsel stated that she “would venture to guess that some members of the team could have foreseen or now assessed the transition from middle school to high school to be the most appropriate time to make the transition to the most appropriate type of plan (IHCP).” She noted that the Student had “not had any medical issues arise over the past several years, nor has there ever been an educational accommodation but rather only medical ones – and none of her medical issues has substantially impacted her learning.” Finally, District counsel wrote that if the Student “finds herself struggling at school as a result of any of her medical conditions, and requires learning accommodations, you can request that a 504/allergy Team be convened to determine eligibility.”

The District provided OCR with a “504 Eligibility Determination Worksheet,” dated XXXXX, listing the Student’s mental or physical impairments as XXXXX, XXXXX, XXXXX, XXXXX, and XXXXX. The District noted on the Worksheet that the Student’s prior Section 504 plan indicated that complications from or pain due to these impairments may affect the Student’s ability to access the curriculum. The District identified these impairments as mildly affecting the major life activities of XXXXX and XXXXX.<sup>2</sup> Handwritten comments on the Worksheet state that the Student’s “level of self-care allows her to access all aspects of the curriculum and she accesses the nurse when needed. As [the Student] has gotten older her visits to the nurse have greatly decreased. [The Student’s] academics haven’t been effected [sic] to the level she requires any accommodations. No attendance concerns. Student performing great in all areas.”

The District provided OCR with an IHCP for the Student, dated XXXXX. Under the heading “Life Threatening Allergy,” the District wrote “XXXXX,” and in the narrative section the IHCP states that the Student has a “history of XXXXX” and will be carrying XXXXX. The plan does not provide any information regarding evaluation methods used, the period in which the plan was to be in place, or procedural safeguards, if any. In an XXXXX email from the Complainant to

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<sup>2</sup> The degree of impairment was rated two (“Mild[ ]”) on a District-created scale of one to five; only impairments of four (“Substantial[ ]”) or five (“Extreme[ ]”) qualify a student for a Section 504 plan.

the District, the Complainant objected that she was not involved in the creation of the IHCP nor was she invited to participate in any meetings where it was discussed.

### 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. 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.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A school district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement, which may include discontinuing Section 504 services.

A qualified student with a disability under 34 C.F.R. § 104.3(j) and 28 C.F.R. § 35.108, is a student who (i) has a physical or mental impairment<sup>3</sup> that substantially limits one or more major life activities,<sup>4</sup> (ii) has a record of such impairment,<sup>5</sup> or (iii) is regarded as having such an impairment.<sup>6</sup>

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.

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<sup>3</sup> "Physical or mental impairment means (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." 34 C.F.R. § 104.3(j).

<sup>4</sup> "Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j). This list is not exclusive.

<sup>5</sup> "Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 34 C.F.R. § 104.3(j).

<sup>6</sup> "Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment." 34 C.F.R. § 104.3(j).

Additionally, in the event a District places a student on a health care plan, to determine whether a health care plan satisfies a school district's FAPE obligations under Section 504, OCR examines whether the school district complied with the procedural requirements of the Section 504 regulation with respect to evaluation, placement, and procedural safeguards.

### Analysis

OCR's investigation to date revealed that the Student's Section 504 plan was terminated on XXXXXXXX, at which time she was instead placed on an IHCP. The District provided conflicting information as to whether the Student was evaluated prior to terminating the Section 504 plan: the District stated the Student was not evaluated at that time, but provided documentation of a "504 Eligibility Determination Worksheet," dated XXXXXX.

OCR has preliminary concerns with the Section 504 eligibility standard the District applied. The data the District provided addressing the Student's eligibility under Section 504 consistently references the Student's academic performance and not needing educational accommodations. For instance, when making the decision to terminate the Student's Section 504 plan, the District stressed that the Student's academics had not been affected by her disabilities and that her prior Section 504 plan had not had any academic accommodations to access the curriculum but rather included only medical/nursing accommodations. This however is not the legal standard to determine Section 504 eligibility, and OCR is concerned that the District may not have applied the correct Section 504 eligibility standard in reevaluating the Student by requiring the Student to require academic accommodations in order to be deemed eligible. OCR is also concerned the District may mistakenly have required that the major life activity of learning must be substantially limited in order for a student to be eligible for services under Section 504, regardless of whether a student's disabilities substantially limit another major life activity. Students who achieve satisfactory, or even demonstrate above-average, academic performance may still have a disability that substantially limits a major life activity and be eligible for special education or related aids and services. Districts must consider all the potential major life activities that may be affected by the student's impairment, not just learning, and review facts concerning the condition, manner, and/or duration of a student's performance of a major life activity. OCR, however, has not interviewed District personnel to determine the eligibility standard it used.

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. Subsequent discussions between 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.

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,

Michelle Kalka  
Compliance Team Leader

Enclosure

Cc: JMosher-Canty@lowell.k12.ma.us