



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

December 26, 2018

Superintendent Frank Hackett
Via email: fhackett@braintreema.gov

Re: Complaint No. 01-18-1324
Braintree Public Schools

Dear Superintendent Hackett:

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 Braintree Public Schools (District). The Complainant alleged that the District discriminated against her son (Student) on the basis of disability. Specifically, the Complainant alleged that the District denied the Student a free appropriate public education (FAPE) by failing to implement the following provisions of his Individualized Education Program (IEP) since XXXXXX, 2018: direct instruction in phonics and word analysis skills using a multisensory reading program; specialized reading small group instruction provided by a reading specialist; occupational therapy (OT) services provided by an occupational therapist; and provision of OT services as specified in the Student's IEP on XXXXXX, 2018 and for three weeks in XXXXXX 2018 (Allegation 1). The Complainant also alleged that the District failed to ensure that an individual who was qualified to interpret evaluation data relating to the Student's OT needs participated in his IEP team meeting on XXXXXX, 2018 (Allegation 2).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) 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.

Because OCR determined that it had jurisdiction and that the allegations were timely filed, OCR opened the following legal issues for investigation:

- Whether the District failed to implement provisions of the Student's IEP since XXXXXX, 2018, specifically:
 - direct instruction in phonics and word analysis skills via a multisensory reading program;
 - specialized reading small group instruction provided by a reading specialist;
 - OT services provided by an occupational therapist; and
 - provision of OT services on XXXXXX, 2018 and for three weeks in XXXXXX 2018,and whether doing so denied the Student a FAPE, in violation of 34 C.F.R. §§ 104.33(a) and (b), and 28 C.F.R. § 35.130.

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

- Whether, in interpreting evaluation data and in making placement decisions for the Student, the District failed to ensure that such decisions were made by a group of persons, including persons knowledgeable about the meaning of evaluation data relating to the Student’s OT needs, in violation of 34 C.F.R. § 104.35(c)(3) and 28 C.F.R. § 35.130.

During the investigation, OCR reviewed documents provided by the Complainant and the District and interviewed the Complainant. 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), and OCR determined that such a resolution was appropriate.

Background

The Student’s last fully-accepted IEP covered the period from XXXXXX, 2017 through XXXXXX, 2018. His parents partially rejected the IEP proposed for the period covering XXXXXX, 2018 through XXXXXX, 2019. The IEP notes that, throughout the IEP term, the Student will receive “Specialized Reading Small Reading Specialist Group” instruction taught by a “Reading Specialist” three times per week for 30-minute sessions, as well as “Occupational Therapy Small Group” instruction taught by an “Occupational Therapist” two times per week for 30-minute sessions.¹ The IEP also includes the following “Specialized Reading” goal: “Given direct instruction in phonics and word analysis skills, [the Student] will read words from his multi-sensory reading program with 80% accuracy and spell them with 80% accuracy, as well as increase fluency by 8-10 or more words per minute, by the end of IEP period.”

The District informed OCR that “[Teacher A] provided the [Student] reading specialist . . . services.” It noted that [Teacher A] “is an Orton-Gillingham certified teacher since 2002 and is licensed by the Department of Elementary and Secondary Education [DESE].” The District provided OCR a letter from the South Shore Educational Collaborative confirming [Teacher A]’s completion of a “training provided by the Massachusetts General Hospital Reading Disabilities Unit” “in the Orton-Gillingham approach” “consist[ing] of a minimum of 100 hours of supervised practicum and 45 hours of lectures.” The District also provided a copy of [Teacher A]’s “unofficial license information” from DESE, which notes that she is licensed or endorsed as an “Elementary (1-6),” “Special Needs (PreK-9),” and “SEI” teacher, but not as a reading specialist.

The District informed OCR that “[Teacher B] was the Occupational Therapist providing services [to the Student] up to XXXXXX 2018. . . . She was replaced by [Teacher C] . . . , a Certified Occupational Therapy Assistant [COTA], whom [sic] is qualified to provide the services under the last accepted IEP. In June 2018, [Teacher C] became certified as an occupational therapist.” The District clarified that “[Teacher B] was out of work beginning XXXXXX, 2018 and the District hired a substitute COTA beginning on XXXXXX, 2018.” The District provided documentation indicating that Teacher B was licensed by the Board of Allied Health Professions as an Occupational Therapist on October 7, 1988. The District also provided documentation

¹ The IEP also notes that the District will provide an “Occupational Therapy Consult” by a “Certified Occupational Therapy Assistant.”

indicating that Teacher C was licensed by the Board of Allied Health Professions as an Occupational Therapist Assistant on February 2, 2015 and as an Occupational Therapist on June 8, 2018.

On XXXXXX, 2018, the Complainant wrote an email to the principal of the Student's school stating that "[Teacher B] (OT) had to have [the Student] back a bit early because he was being rude and disrespectful" during his OT session on XXXXXX, 2018, and he had also "miss[ed] approximately 3 weeks of occupational therapy services this year . . . because his therapist was out on XXXXXX leave & there and there was no coverage for her."

The District informed OCR that "[t]here was no evaluation data related to OT services that required interpretation at the [Student's] XXXXXX, 2018 IEP Team Meeting. [Teacher C], a Certified Occupational Therapist Assistant attended this meeting and provided a progress update on [the Student]." The District provided OCR a copy of the attendance sheet for the Student's XXXXXX, 2018 IEP annual review meeting. The sheet indicates that Teacher C, but no other occupational therapist, attended this meeting. Minutes from the meeting state that the type of meeting was a "review of specialized reading and OT," and the portion of the notes related to the Student's OT services state: "working on handwriting and sensory," "increased postural control," "In class – [the Student] needs to move between different types of seats," "Recommend tasks that require him to cross midline."

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a FAPE to students with disabilities. 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 Individuals with Disabilities Education Act 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.

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.

Analysis of Evidence Obtained to Date

DESE has specified the requirements for licensure as a reading specialist. *See* 603 Mass. Code Regs. 7.04(3)(b)(2), -(4)(j); *id.* 7.07(2). The Massachusetts Board of Allied Health Professions has promulgated regulations providing that “[a]dequate supervision of occupational therapy assistants” “requires, at a minimum, that a supervising occupational therapist” “provide initial evaluation,” “interpret available information concerning the individual under care,” “develop plan of care, including long and short term goals,” and “direct and supervise” “occupational therapy assistants” “in delegated tasks,” among other obligations. 259 Mass. Code Regs. 3.02(2). DESE likewise distinguishes between licensed occupational therapists and COTAs, *see, e.g.*, 603 Mass. Code Regs. 10.07(6)(c), (f) (noting that the Commonwealth of Massachusetts will reimburse school districts for services specified on an eligible student’s IEP that are provided by a licensed occupational therapist, but not by a COTA unless he or she is supervised by a licensed occupational therapist), and the District distinguished between occupational therapists and COTAs in the Student’s own IEP.

The evidence reviewed to date indicates that the individual providing the Student “Specialized Reading Small Group” instruction since XXXXXX, 2018 may not have been licensed as a “Reading Specialist,” as required by the Student’s IEP. The evidence also indicates that the District may have failed to provide the Student “Occupational Therapy Small Group” instruction taught by an “Occupational Therapist” two times per week for 30-minute sessions between XXXXXX, 2018 and XXXXXX, 2018, and may have failed to provide the Student a full 30-minute OT session on XXXXXX, 2018, as required by the Student’s IEP. Finally, the evidence indicates that the COTA who attended the Student’s XXXXXX, 2018 IEP annual review meeting may not have been qualified to “interpret available information concerning the individual under care”² and “develop [a] plan of care, including long and short term goals,” for the Student. OCR has not made any determination at this time as to whether all the services required by the Student’s IEP were implemented or, if not, whether any failure to implement resulted in a denial of a FAPE.

Conclusion

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.

² Although the District argues that “[t]here was no evaluation data related to OT services that required interpretation at the XXXXXX, 2018 IEP Team Meeting,” the notes from that meeting indicated that the COTA made recommendations for the Student’s care based on her observations of the Student during his OT sessions. Observations are relevant evaluation data.

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.

If you have any questions, you may contact Paul Easton at (617) 289-0008 or by e-mail at Paul.Easton@ed.gov.

Sincerely,

/s/ Michelle Kalka
Michelle Kalka
Compliance Team Leader

Enclosure

Cc: Joshua R. Coleman (jcoleman@mlmlawfirm.com)