



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

May 28, 2021

Dr. Julie Kukenberger
Superintendent
Melrose Public Schools
By email: jkukenberger@melroseschools.com

Re: Complaint No. 01-19-1160
Melrose Public Schools

Dear Superintendent Kukenberger:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint we received against Melrose Public Schools (District). The complaint alleged that the District failed to ensure that the Student was receiving a free appropriate public education (FAPE) during the 2018-2019 school year when her educational needs changed as a result of bullying (Allegation 1). The complaint further alleged that the District failed to provide FAPE by not implementing the Student's Section 504 plan and its incorporated health care plan with respect to contacting the Complainant when the Student was experiencing symptoms of her XXXXXX XXXXXXXXX (Allegation 2).

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 school system, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During the investigation, OCR reviewed documents provided by the Complainant and the District, and interviewed the Complainant and District personnel. As explained below, prior to OCR completing its investigation of Allegation 1, the District expressed a willingness to resolve this allegation by taking the steps set out in the enclosed Resolution Agreement (Agreement). With respect to Allegation 2, OCR found insufficient evidence to support this allegation for the reasons discussed below.

Allegation 1

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

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(Student E) had talked earlier in the day about telling the Student to XXXX XXX XXXXX XXXXX, and that Student E repeated it to the Student at dismissal. The District provided Students D and E with reprimands and contacted their parents.

- The Student reported on XXXXXXXX XXXX XXXXX, that another student (Student C) kept telling her that XXX XXXXXX XXXXXXXXXXXX XX X XXXXXXXXXXX XXXXXXXX. District personnel intervened and provided a reminder to Student C about appropriate behavior, and Student C apologized to the Student. District personnel informed the Complainant about the incident and stated that informal check-ins with the Student had been taking place, and a more structured format was being created for check-in and check-out times.
- The Student informed her teacher that on XXXXXXXX XXX XXXXX, Student E was XX XXX XXXXX XX XXX XXXXX and that the Student told Student E to stop, but “he may have not.”⁴

On XXXXXXXX XX XXXXX, the Complainant sent the District an email reporting that students were subjecting the Student to repeated bullying. District personnel referred the report for investigation that same day, and notified the Complainant by letter on XXXXXXXX XXX XXXXX, that the District had initiated a bullying investigation. The District then conducted a bullying investigation under state law regarding the above-referenced incidents involving Students A through E.⁵

In its XXXXXXXX XXX letter to the Complainant, the District also indicated that it had implemented interim measures consisting of “student check-ins with administration and counselor availability.” The Complainant responded the same day in an email stating that these measures were XXXXXXXX XXXXXXXXXXX XX XXXX XX XXX XXXXXXXXXXX XXXXXXXX XXX XXXX.

The documentation reflects that during the course of the District’s investigation, the Complainant/Student reported additional incidents, as follows:

- On XXXXXXXX XXX XXXX, Student D was XXXXXXXX XXX XXXXXXXXXXXX XXXX XX XXXXX XXXXX and stopped when the Student told her to stop. The same day, Student D was XXXXXXXX XXXXXXXXXXXX XX XXXX XXXXXXXXXXX XXXX XX XXXXXXX, and told Student E to do it, which Student E did. The Student reported this to District personnel, who told the students to sit apart.
- On XXXXX XX XXXXX, Student D XXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX XXXX XXXXXXXXXXX XXXXXXXXXXXX XXX XXX XX XXXXXXXXXXXX XXX XXXX.

⁴ On XXXXX XX XXXX, the Complainant also reported this same incident.

⁵ Massachusetts General Laws, c. 71, Section 37O (“Bullying Prevention and Intervention Act”).

convened an IEP team meeting and developed an IEP for the Student effective XXXX XX XXXXXX, based on her XXXXXXXX XXXXXXXX. The IEP provided for: XXXXXXXXXXXX XXX XXXXXX XXXXXX XXXX XXXXXXXX XXXXXXXXXXXX XXXXXX XX XXXXXX XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXXXXXX X XXXXXX XXXXXX XX XXXXXX XX XXXX XX XXXXXXXX XX XXXXXX XXX XXXXXXXXXXXX XXX XXXXXX XX XXXXXXXXXXXX XXXX XXXXXXXX XXXXXXXX XXXXXXXX. District personnel told OCR that at the meeting to develop the IEP, the team discussed that the Student was the target of bullying related to her disability, and that she was in need of further XXXXXXXXXXXX XX XXXXXXXXXXXXXXXX XXXXXX, as her disability impacted XXX XXXXXXXX XX XXXXXXXX XXX XXX XXX XXX XXXXXXXXXXXX XXXXXXXX.

Analysis

The evidence obtained to date suggested that the District may have been on notice that the Student’s needs may have changed as a result of bullying based on information provided by the Complainant from October 2018 through February 2019, concerning several incidents and changes in the Student’s behavior. While the District convened a Section 504 team meeting for the Student in XXXXXXXX XXXX, the meeting occurred prior to the final determination that bullying had occurred, and the evidence suggested that it was a “routine” meeting that did not address the impact on the Student of any bullying issues reported thus far. In the investigation to date, the evidence has not established that the Section 504 team otherwise assessed the impact of the bullying on the Student’s receipt of FAPE during the 2018-2019 school year.

Further, while the District initiated an IEP evaluation during the bullying investigation, OCR was unable to determine based on the evidence obtained to date that the IEP team considered the impact of the bullying on the Student’s receipt of FAPE, including after the District made an investigative determination in XXXXXX XXXX that two students had subjected the Student to bullying.⁸ At the IEP meeting in XXX XXXX, the IEP team appeared to have focused on XXXXXXXX XXX XXXXXXXX XXXXXXXXXXXXXXXX XXXXXXX XXX XXX XXXXXXXX XX XXXXXXXXXXXXXXXXXXXX XXXXXXXX, and does not appear to have addressed XXX XXXXXXXXXXXX XXXXXXXX XX XXX XXXXXXXX XX XXX XXXXXXXX noted in portions of the evaluations. Based on the above, the evidence obtained to date does not establish that the District specifically determined whether the Student’s needs had changed such that she was no longer receiving FAPE and if so, whether additional or different services were needed to address her needs. In addition, OCR was unable to conclude, based on the evidence obtained to date, that the District considered services other than those placing the onus on the Student to avoid or handle the bullying.

Prior to the conclusion of OCR’s investigation, the District expressed an interest in resolving Allegation 1, and OCR determined that a voluntary resolution of this allegation was appropriate.

Allegation 2

⁸ OCR noted that roughly two months elapsed between when the District determined that bullying had occurred XXXXXXX XX XXXXXXX and when the IEP Team met in XXX XXXX and that for a portion of this time, the Student was XX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXX XXXXXXX.

Legal Standard

As previously stated, school districts are required to provide FAPE to students with disabilities pursuant to the Section 504 regulation, at 34 C.F.R. § 104.33, and the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii). 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.

Findings of Fact

The Student’s revised Section 504 plan implemented on XXXXXXXX XX XXXX, stated that “[t]here is a [health]care plan with XXX XXXXXX; however, if she is XXXXXXXX she needs to go to XXX XXXXXX immediately.”⁹ The District provided OCR with a copy of the Student’s health care plan, which provided the following instructions for when the Student had a XXXXXX: XXXXX XXXXX XXXXX XX XXXXXXX XXXXXXX XXXXX XXXXXXXXXXXX XXX XXX XXXXX XXXX XXXXXXXXXXX XX XXXXXXXXXXXX XXXX XXX XXXXXXXX XXX XX XXX XXXXXXXXXXXX XXXXXXXXXXX XXXX XXXXXXXX XX XXXXXXXX XX XXXX XXXXXXXXXXX XXXXXXX XX XXXXXXX XXX XXXX XXX XX XXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX. The Complainant informed OCR she had not received a copy of the written health care plan until after OCR’s investigation commenced. The Complainant stated that she believed that XXX XXXXXXX XXXXX would call her if the Student had a XXXXXXXX XXXXXXXX XXX XXXX XXXX XX XXXXXXXX.

The Complainant asserted to OCR that on XXXXX XXX XXXX, the XXXXXXXX XXXXX failed to do so, even though the Student was XXXXXXXXXXX XXX XX XXXXXXXX, and the Student needed hospital treatment XX XXXX XXX XXXXXXXX.¹⁰ The Complainant sent an email to District personnel on XXXXX XXX XXXX stating that XXX XXXXXXXXXXX XXXX XXX XXXXXXXXXXXX XX XXXXX XXX XX XXXXXXXX XXXXXXX XXXXXXXXXXXX. The XXXXXXXX XXXXXXXX responded by email the same day, stating that the Student had come in with a XXXXXXXXXXXX that was XXXXXXX XXXXXXX XX XXXXXXX XXXX XX XXXX XXXXXXXXXXX XXX XXXXXXXXXXX XXX XXXXXXXX XXX XXX XX XXXXXXXXXXX XXXXXXXXXXX XXX XXX XXX XX X XXXXXXXX XXX. The District provided a copy of the XXXXXXX XXXXXXXX log including an entry for XXXXX XXX XXXXXXX XXXX XXXX XX XXXXXXXXXXX, which reflected that the Student XXXXXXX XXXX XXXX XXXXX XXXXXXXXXXXX XXXX XXXX XXXXXXX XXXX XX XXXXXXXXXXX XXXX XXXXXXXXXXX XXX XXXX XXXXXXXXXXX XXXXX XXXX XXXX XXXX XXXX XXXX XX XXXXXXXX XXXX XXXXXXXX XXX XXX XXXXXXX XXXXXXX XXXX XXXXXXX XXXXXXX

⁹ The revised Section 504 plan stated that Student has XXXXXXXXXXXXXXXXXXXX XXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXXX.”

¹⁰ While the evidence did not indicate that any dispute existed between the Complainant and the District regarding the contents of the health care plan, the copy of the plan provided by the District to OCR was undated, and the evidence did not indicate how or when it was provided to the Complainant. OCR will provide technical assistance to the District regarding this issue.

XXXXXXXX XX XX XXX XXXXX XX XXXX X XXXXX XXXXXXXX. The log further stated that the XXXXX XXXXX “[c]alled [the Complainant] when XXXX XXXXXXXX XXXXXXX XXXXXXXXXX XXXXX.”¹¹

The Complainant also asserted to OCR that the XXXXXXX XXXXXXX admitted she had not notified the Complainant of the Student’s XXXXXXX sooner because she was busy with other students at the time. However, the evidence did not support the Complainant’s assertion. Rather, the XXXXXXX XXXXXXX stated in her email of XXXXX XXXX XXXX, that the Student had also visited twice that day for XXXXXXX XXXXX, but “because of the volume of students I was helping when you came in to get [the Student], I did not get to tell you about her whole day, just the XXXXXXX part, which was foremost in my mind.” The evidence did not otherwise indicate that the XXXXXXX XXXXXXX had not contacted the Complainant earlier about the Student’s XXXXXXX because she was occupied with XXXXXXX other students.

On XXXXX XXX XXXX, the Complainant sent another email to District personnel stating that the Student was home from the hospital and that her XXXXXXX XXX XXXXXXXXXX XXXXX XXX XXXXXXXXXX. The Complainant further stated that XXX XXXXXXXXXX XXXX XXXXXXXXXX XX XXX XXXX XXX XXXXXXXXXX XXX XXXX XXXXXXXXXX XXXXXXX XXX XXXXXXXXXX XX XXXXXXXXXX XXXXXXX XXX X XXX XXX XXXXXXX XXXXXXX XXXXX XX XXXX XXXX XXXX XXXXXXXXXX. The Complainant subsequently sent an email to District personnel on XXXXX XXX XXXXXXX, stating that the Student was XXXXXXX XX XXXXXXXXXX upon dismissal that day, and a XXXXX XXXXXXXXXX XXX XXXX XX XXXXXXX XXX XXXXXXXXXX XXXXXXXXXX

Analysis

OCR determined that the Student’s health care plan, which was referenced by her Section 504 plan, required the District to contact the Complainant if the Student’s XXXXXXXXXX XXXXXXX XXXXXXX XXXX XX XXXXXXX. OCR determined that the evidence did not substantiate the Complainant’s assertion that the XXXXXXX XXXXXXX failed to contact her when the Student XXX X XXXXXXXXXX XXXXXXXXXX XXX XX XXXXXXX XX XXXXX XXX XXXX. Specifically, the XXXXXXX XXXXXXX log entry indicated that XXXX XXX XXXXXXXXXX XX XX XXXXX, the Student experienced XXX XXXXX XXXXXXX XXXXXXXXXX XXXXXXXXXX XX XXXXX XXXXXXXXXX XXXX XX XXXXXXXXXX XXXX XX XXXXX XXXXXXXXXX XXXXXXXXXX X XXXXXXXXXX XXXXXXXXXX XXXXXXX, which prompted the XXXXXXX XXXXXXX to contact the Complainant XXXX XX XXX XXX XXXXXXXXXX XX XXX XXXXXXX XXX. The XXXXXXX XXXXXXXXXX email to the Complainant on XXXXXXX XXX XXXXXXX, was consistent with the information recorded in her log. This information suggests that neither XXXXXXX XXXXXXXXXX XXXXXXX XXXXXXX XXXX XX XXXXXXXXXX XXX XXXX XXXXXXXXXX XXXXXXXXXX XXX XXX XXXXXXXXXX, the XXXXXXX XXXXXXX contacted the Complainant as required by the Student’s Section 504 plan.

¹¹ The XXXXXXX XXXXXXX was XXXXXXXXXX XXXX XXX XXXXXXXXXX XX XXX XXXXXXXXXX at the time of OCR’s investigation, and she declined OCR’s request for an interview.

OCR did not identify any other evidence suggesting that the District failed to comply with the provision in the Student's health care plan. In addition, OCR found no evidence to substantiate the Complainant's assertion that the XXXXXX XXXXX neglected to contact the Complainant regarding the Student's XXXXXXXXXXX because she was busy treating other students. Based on the above, OCR determined that the evidence did not substantiate that on XXXX XXX XXXX, the District failed to follow the provision in the Student's health care plan relating to her XXXXXXXX XXXXXXXX. Accordingly, OCR determined that the preponderance of the evidence did not support a conclusion that the District denied the Student FAPE by failing to comply with her health care plan, as referenced by her Section 504 plan.

Conclusion

With respect to Allegation 2, OCR determined that the evidence was insufficient to substantiate this allegation under Section 303(a) of OCR's *Case Processing Manual*.

With respect to Allegation 1, on May 27, 2021, the District voluntarily agreed to implement the enclosed Agreement under Section 302 of OCR's *Case Processing Manual*, which commits the District to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the District is designed to resolve the issues of noncompliance. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the District deemed compliant when the District enters into an agreement that, fully performed, will remedy the identified areas of noncompliance. OCR will monitor closely the District's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information if necessary to determine whether the District has fulfilled the terms of the Agreement. Once the District has satisfied the commitments under the Agreement, OCR will close the case. As stated in the Agreement entered into by the District on May 27, 2021, if the District fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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. OCR would like to make you aware that individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

The complainant has a right to appeal OCR's determination regarding Allegation 2 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information described here was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s)

would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

Please be advised that the District may 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. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Sincerely,

/s/

Meighan A.F. McCrea
Compliance Team Leader

Enclosure