



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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October 18, 2023

Superintendent Jill Geiser
By email: kroussos@yahoo.com

Re: Complaint No. 01-22-1443
Belmont Public Schools

Dear Superintendent Geiser:

This letter advises you of the outcome of the U.S. Department of Education, Office for Civil Rights (OCR) investigation of the Belmont Public Schools (District). OCR opened an investigation after receiving a complaint alleging that the District discriminated against the Complainant's son (the Student) and other students at the [redacted content] school in the District on the basis of disability. Specifically, the complaint alleges that:

1. The District denied the Student and other students with life-threatening allergies a free appropriate public education (FAPE) by failing to follow the procedural requirements under Section 504;
2. The District denied students with life-threatening allergies an equal opportunity to benefit from the District's programs, services, and activities by failing to providing support on field trips and in before/after school programs;
3. The District denied a FAPE and effective communication to students with hearing impairments at the [redacted content] school during the [redacted content] school year;
4. The District failed to follow the procedural requirements of Section 504 when it removed [redacted content] or otherwise unilaterally modified the Student's Section 504 Plan during the [redacted content] school year; and
5. The District failed to adopt and publish grievance procedures that provide for the prompt and equitable response to complaints of discrimination.

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 U.S. Department of Education. 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 U.S. Department of Education. Because the District

receives federal financial assistance from the U.S. Department of Education and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

As part of its investigation, OCR reviewed the District's Section 504 policies and procedures, individual student files from the [redacted content] school, and extensive email correspondence provided by the Complainant and the District. OCR also interviewed the Complainant and the District's Director of Student Services.

As explained further below, before OCR completed its investigation, the District entered into the enclosed resolution agreement (Agreement) that OCR will monitor to ensure the District's compliance with the Agreement's terms and with Section 504, Title II, and their implementing regulation.

Applicable Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a 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. As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. (See 28 C.F.R. §35.103.)

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 school 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 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

Likewise, to provide a FAPE to a student with an allergy-related disability and meet the standards referenced above, a school district must have a plan to meet the student's individualized needs. A health care plan (HCP) may comply with the provisions of Section 504, provided that the school district complies with the procedural requirements of the Section 504 regulation with respect to evaluation, placement, and procedural safeguards.

In addition to the requirement to provide a FAPE, the Title II regulation, at 28 C.F.R. § 35.160, further requires school districts to ensure that communication with students with hearing, vision, or speech disabilities is as effective as communication with students without disabilities. To do this, school districts must provide appropriate auxiliary aids and services where necessary to provide effective communication so that students with disabilities have an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of the district. Title II requires public schools to give primary consideration to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student. A school district is not required to provide a particular auxiliary aid or service if the district can demonstrate that doing so would fundamentally alter the nature of a service, program, or activity, or that it would be an undue financial and administrative burden. However, the district still has an obligation to provide an effective auxiliary aid or service to the maximum extent possible.

In addition, the Section 504 regulation, at 34 C.F.R. § 104.37, requires school districts to afford students with disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities. Furthermore, school districts must ensure that students with disabilities participate in nonacademic and extracurricular services and activities with students without disabilities to the maximum extent appropriate to the needs of each student with a disability. A school district that offers physical education courses or athletics must provide students with disabilities an equal opportunity to participate. OCR interprets the Title II regulation to provide the same protections as Section 504.

When a school district has sufficient information that a student with a disability requires reasonable modifications to participate in an athletic or extracurricular activity, the district must take steps to determine whether it could provide a reasonable modification that would allow the student the opportunity to participate without fundamentally altering the nature of the activity (e.g., by altering an essential aspect of the activity or game or giving the student an unfair playing advantage). One way of meeting this obligation is to hold a meeting with a group of persons knowledgeable about the student to decide whether there are any reasonable modifications or aids and services that could be provided to the student in the extracurricular athletic context.

Finally, the Section 504 regulation, at 34 C.F.R. § 104.7(b), requires a district that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public school districts that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR considers a number of factors in evaluating whether a district's grievance procedures comply with the requirements of Section 504 and Title II, including whether the procedures provide for the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of

the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Findings of Fact

During the [redacted content] school year, the Student, who has a life-threatening allergy (LTA) [redacted content] and [redacted content] hearing loss [redacted content] and on a Section 504 Plan. The Student attended the District's [redacted content].

The Complainant provided OCR with various iterations of the Student's Section 504 plan dating back to [redacted content] that either did or did not specify the Student's LTA. For example, the Section 504 plan from [redacted content], when the Student was in [redacted content] school, referenced the Student's LTA and necessary accommodations. The Section 504 plan from [redacted content], when the Student entered [redacted content] school, only specified the Student's hearing loss as the disability category, not the Student's LTA, and simply referenced in "Other Information" that the Student was also on a HCP. The Complainant told OCR that she was not provided a copy of the [redacted content] 504 Plan until the [redacted content], at which time she learned that the District had removed the Student's LTA from his 504 Plan and placed it into a HCP instead.

OCR reviewed email correspondence from the [redacted content] school year between the Complainant and District staff documenting confusion over which version of the Student's Section 504 plan was applicable at the time, along with the Complainant's surprise and disagreement with the District's decision to remove provisions related to the Student's LTA from the 504 plan and move those provisions into an HCP. For example, on [redacted content], the Assistant Principal emailed the Complainant and explained that the Nurse had a different protocol for health accommodations at the [redacted content] school, and that all allergy-specific accommodations went on a HCP while referencing the plan on the Section 504 plan. After several more emails on the topic, the Director of Student Services (Director) responded to explain that his understanding from the Nurse was that the severity of the allergy warranted a HCP, and that the Student's LTA was "primarily a medical issue involved here, not an educational access one." He further explained that Section "504 plans typically provide the daily routine steps and responses that need to be put in place to ensure educational access."

Regarding the student's hearing-related needs, the District agreed to conduct an evaluation by [redacted content] to assess the Student's hearing assistive technology (HAT) needs prior to the start of the [redacted content] school year. In [redacted content], the Section 504 team, including the Complainant, met to discuss, amongst other things, including information about the Student's LTA expressly in the Section 504 plan. The Section 504 plan dated for the [redacted content] school year incorporated two accommodations for the Student's LTA and listed ten accommodations for hearing loss. In addition, the Student's HCP for that year included detailed information about the Student's LTA [redacted content], the requirement that any teacher encountering the student must have Allergy Awareness Training, and steps to take if [redacted content].

The Complainant, however, told OCR that this iteration of the HCP had taken out protocols for field trips, unbeknownst to her, after the team meeting. OCR observed in the documentation

provided by both parties that neither the Section 504 plan nor the HCP for the [redacted content] school year addressed the Student's LTA or hearing loss for field trips or extracurricular activities.

As to the apparent confusion and dispute over the final version of the Section 504 plan for the [redacted content] school year, the Director informed OCR that generally administrators would ensure that finalized plans are disseminated, and that there are designated staff responsible for these tasks at the [redacted content]. He acknowledged, however, that the [redacted content] school experienced challenges with these tasks due to significant staff and administrator turnover. Regarding the parent's concern that the Student's LTA provisions were addressed in the HCP versus 504 Plan, the Director explained that at that time he asked the Nurse why the provisions relating to the Student's LTA were taken out of the Section 504 Plan. The Nurse's response, according to the Director, was that certain health-related issues were more appropriately addressed on a HCP. The Director indicated that his own view was that if accommodations were related to a disability, they should fall under a Section 504 plan. He acknowledged that school nurses would oversee the HCPs, and thus the development of a HCP would not undergo the same process as a Section 504 plan, such as a team meeting or notice of procedural safeguards.

Email correspondence between the Complainant and the District demonstrates that throughout the [redacted content] school year, the Complainant continued to express concerns that neither the Student's LTA nor hearing loss disabilities were being appropriately handled at the [redacted content] school. Specifically, she complained that the Student had not been appropriately assessed [redacted content] as required by his 504 Plan and that the FM system in many of his classrooms was not functioning appropriately. Regarding his LTA, she asserted that the Student lacked support for his LTA for field trips and during extracurricular activities, causing him to miss some field trips and requiring a family member to be present during extracurricular activities after school in case the Student [redacted content] and needed [redacted content].

On [redacted content], the Complainant filed a complaint with the Massachusetts Department of Elementary and Secondary Education's Problem Resolution Service (PRS) asserting, amongst other claims, that the District had failed to implement the Student's 504 Plan. In part, PRS concluded that the FM system in the Student's classrooms had not always functioned properly and ordered the District to provide a working FM system for the Student prior to the [redacted content] school year. Furthermore, the District's response to PRS indicated that there may have been other students with hearing impairments in two of the Student's classes that used the same FM systems that did not always function properly for several months. The Director informed OCR that they have replaced the FM systems at the [redacted content] school and confirmed that they were all currently functioning. He stated, however, that the District has not convened Section 504 or IEP team meetings to consider whether compensatory services may be required for the Student or the other students in the impacted classrooms with hearing loss due to the lack of functioning FM equipment.

OCR reviewed case files of students who had LTAs or hearing impairments at the [redacted content] school. Although the Student whose parent filed this complaint had a Section 504 plan, most students with allergies only had an HCP and did not have a Section 504 plan. According to data provided by the District for one school year, over 100 students were identified with an

allergy and had an HCP; of those students, 18 were identified as having an LTA, but only [redacted content] students were identified as having a Section 504 plan. Similarly, for the approximately 15 students with hearing impairments, most students who required the use of assistive technology only had an HCP; only 7 students had a 504 Plan or IEP. Of these, none of the 504 plans nor IEPs addressed the provision of hearing assistive technology outside of the classroom setting, such as on field trips or during extracurricular activities. The Director told to OCR that that his expectation was that supports or accommodations for field trips and extracurricular activities should be addressed through the 504 or IEP team process, and then the team would communicate student needs to coaches or other staff involved with extracurricular activities.

The District's Disability Forms and Grievance Procedures

In addition to case file review, OCR reviewed the District's form documentation used at the [redacted content] school as part of the eligibility process. These materials distinguish the Section 504 plan from an IEP, in that "[Section 504 a]ccommodations [are] offered by a regular education teacher within the classroom"; an IEP provides for "[s]pecially designed instruction by a specially trained educator outside of the classroom."

The District also provided OCR with two different documents identified as its 504 Grievance Procedure. The two documents both address disability discrimination claims, but they are not consistent with each other. The Uniform Complaint Procedures for Harassment and Discrimination Claims describes an investigation that will occur within 30 days of a complaint, while the Student Related Section 504 Grievance Procedures describes a hearing that will occur within 20 days of the complaint. Neither of the procedures, or other information on the District website, make clear when someone should use one or the other procedure, or what factors determine which course of action the District will take upon receiving a complaint.

In addition, the District's 504 Grievance Procedures purports to govern disagreement over placement decisions. The documents, when read alongside the District's Notice of Procedural Safeguards, could be interpreted to mean that a parent or student must first go through the District's internal 504 Grievance Procedures before exercising their right to challenge a placement decision with the Massachusetts Bureau of Special Education Appeals.

Analysis

OCR has concerns regarding the District's treatment of the Student with respect to his LTA and hearing impairment, as well as other students with an LTA and/or hearing impairment, and also with the District's processes and practices with respect to students with disabilities.

First, OCR is concerned that the District may not have followed the procedural requirements under Section 504 for the Student and students in meeting their needs for their LTA and/or hearing impairments. As an initial matter, the District may have used HCPs instead of Section 504 plans or IEPs for students with hearing impairments or LTAs. Districts may use HCPs, so long as the development of those plans comport with the procedural requirements under Section 504. In this case, OCR has concerns that these plans were not developed in accordance with the requirements of 34 C.F.R. § 104.35, including for at least half of students with hearing

impairments at the [redacted content] school who were provided assistive technology services. In addition, OCR is concerned that these parents may not have received notice of procedural safeguards in accordance with 34 C.F.R. § 104.36.

The District may have also denied the Student and students with LTAs and hearing impairments an equal opportunity to benefit from the District's programs, services, and activities in before/after school programs. According to the District's own understanding, those accommodations would go through the Section 504 team process, and the team would communicate those needs to coaches or other staff involved in extracurricular activities. However, data from the [redacted content] school suggests that extracurriculars were not considered as part of the team process. OCR has concerns that those needs are not being met in extracurriculars at the [redacted content] school, where recent turnover has led to administrative challenges in communicating a student's finalized Section 504 plan.

In addition, the form documents and case files OCR reviewed raised concerns whether the District is providing a FAPE to the Student and other students with LTA and hearing impairments by accounting for related aids and services outside of the classroom, as required (e.g. assistive technology for hearing impairments on field trips and other times when the students were in a location other than their classrooms).

Furthermore, the District may have denied a FAPE and effective communication to the Student and other students with hearing impairments at the [redacted content] school year as a result of its malfunctioning FM amplification systems in two classrooms. The District admittedly did not have functioning FM equipment for several months, in classrooms that had several students with hearing impairments. Although the District has since represented that it replaced the equipment, the District has not considered whether compensatory services for those students may be required.

OCR also has concerns about the administration of Section 504 plans at the [redacted content] school due to staff and administrator turnover. As demonstrated by the general confusion over the final version of the Section 504 plan leading up to the school year in question for this complaint, parents may not have had been informed of the final placement decisions, and accordingly notice of procedural safeguards, to exercise their rights, as required 34 CFR 104.36.

Lastly, OCR has concerns that the District failed to adopt and publish grievance procedures that provide for the prompt and equitable response to complaints of discrimination, and that provide for an impartial hearing under 34 C.F.R. 104.36.

The District and Complainant have agreed to proceed with the assessment [redacted content] as indicated on the Student's 504 Plan and OCR will monitor the completion of this assessment.

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.

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 a 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 Tokufumi Noda
Compliance Team Leader

Enclosure

cc: [redacted content]