



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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REGION XV
MICHIGAN
OHIO

December 31, 2015

Wanda T. Lillis, Esq.
Associate Legal Counsel
Columbus City Schools
270 East State Street
Columbus, Ohio 43215

Re: OCR Docket #15-15-1266

Dear Ms. Lillis:

This letter is to inform you of the disposition of the above-referenced complaint, which was filed with the U.S. Department of Education's Office for Civil Rights (OCR) on April 29, 2015, against the Columbus City Schools (the District). The complaint alleged that the District discriminated against a student (the Student) on the basis of disability. Specifically, the complaint alleged that:

1. In the winter of 2014 and spring of 2015, the District failed to appropriately evaluate the Student for disability.
2. During the 2014-2015 school year, District staff harassed the Student on the basis of disability, including calling her derogatory names.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the District is subject to these laws. Accordingly, OCR had jurisdiction to investigate this complaint.

Because the regulation implementing Title II provides no greater protection than the Section 504 implementing regulation with respect to this case, OCR applied Section 504 standards. Based on the complaint allegations, OCR opened an investigation into the following legal issues:

- Whether the District failed to appropriately evaluate a student who, because of disability, needs or is believed to need special education or related services, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.35.
- Whether the District failed to provide a free appropriate public education (FAPE) to a qualified student with a disability in violation of Section 504's implementing regulation at 34 C.F.R. § 104.33.
- Whether a student was subjected to harassing conduct on the basis of her disability by District staff that was sufficiently severe, persistent, or pervasive to interfere with her ability to participate in or benefit from the District's educational programs, in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4.

After a careful review of the information obtained during the investigation, OCR determined that the District failed to timely evaluate the Student for disability and to provide the Student's parent with notice of its decision not to evaluate the Student following her request for an evaluation in XXXX 2014 and of her procedural safeguards, in violation of the Section 504 implementing regulation at 34 C.F.R. §§ 104.35(a) and 104.36. The District has submitted an agreement to resolve the compliance findings. OCR determined that the evidence is insufficient to support that District staff harassed the Student on the basis of disability in violation of Section 504. The bases for OCR's determinations are explained below.

Summary of OCR's Investigation

OCR investigated this complaint by interviewing the Complainant, the Student, and District staff with knowledge of the events at issue in the complaint. OCR also reviewed information and documentation provided by the District. Finally, OCR gave the Complainant an opportunity to respond to information provided by the District.

During the 2014-2015 school year, the Student was in seventh grade at the District's XXXXX XXXXX School (the School). The Student has attention deficit hyperactivity disorder (ADHD), XXXXXXXXXXXXXXXXXXXX.

- **Alleged Failure to Evaluate the Student for Disability**

The Complainant told OCR that she requested an IEP (Individualized Education Program) for the Student in writing sometime in the winter of 2014. In interviews, District witnesses confirmed that the Complainant expressed her concerns about the Student's academic progress and requested "IEP testing" at a XXXX 2014, parent-teacher conference. The School counselor said she spoke to the Complainant a few days after the conference to schedule an Intervention Assistance Team (IAT) meeting. The meeting took place on XXXX 2014.

District witnesses explained the School's IAT process and how it relates to the IEP/Section 504 evaluation process. The IAT process at the School has three tiers. The first tier is initiated by a teacher recommending a student who "needs support" in the classroom. The IAT team members, including the student's teachers and parents, meet to determine what interventions the student's

teachers will use to help the student. The team examines school records including attendance, behavior, grades, past statewide assessment data, notes from any previous IAT processes, and any other relevant information in the student's cumulative file. The team also considers any relevant information from the student's parent, which can include medical records. If the Tier 1 interventions do not work, the team moves to Tier 2, which involves more intense or multiple interventions. If the Tier 2 interventions do not work, the team either moves to Tier 3, meaning more intense interventions, or evaluates the student for an IEP or Section 504 plan. District witnesses said there are typically 6-8 weeks between the tiers, during which the team implements the interventions and monitors the student's progress. However, if a parent requests a special education evaluation, the District goes straight to Tier 3 of the IAT process.

District witnesses told OCR that IAT teams routinely ask about a student's disability during the IAT process; however, special education evaluation is separate from the IAT process. If a parent tells the District that a student has a disability, the District asks the parent to produce a diagnosis. If the parent cannot produce a diagnosis, the District will get a release from the parent to get the student's medical records.

District witnesses explained that the XXXX 2014, meeting with the Complainant was a Tier 3 IAT meeting. In attendance were the Complainant, three of the Student's teachers, the assistant principal of the School, the guidance counselor, and the school psychologist. District witnesses told OCR that, during the meeting, the Complainant expressed her concerns about the Student's performance at school and each teacher weighed in about the Student's academics and behavior. The team discussed at length, and then decided on the first interventions: a planner for the Student which the counselor was to monitor, and a reward system. One of the Student's teachers explained to OCR that the teacher in each of the Student's classes (reading, math, science, and social studies) was supposed to put work in her folder on Mondays for the Student to take home. The Student was supposed to bring the folder back on Friday. This teacher said that when she would ask the Student where the folder was the Student would shrug, say she did not have it, or give an excuse such as "it's in my locker." The teacher said she never "called [the Student] out" for not having the folder.

The District submitted handwritten notes from the XXXX 2014, IAT meeting. The notes stated that the Complainant raised a concern about the Student's "comprehension," and mentioned that the Student takes medication for her ADHD. The notes indicated that the Student's teachers stated that the Student was "not engaged, lethargic," and struggled with focus, study habits, completing work, behavior, executive function issues, and organization. One teacher noted concerns about the Student's reading level. The notes also include the comment, "504??" However, District witnesses told OCR that, after the December meeting, the IAT team did not think that the Student should be evaluated under Section 504.

One of the Student's teachers, who participated in the IAT process, said that the Student's behavior did not indicate ADHD. She said the behavior she would expect of a student with ADHD included fidgeting, not being able to concentrate at all, getting out of her seat, yelling out, running around the room, and never being able to complete an assignment. The teacher said the Student could do really well "when she wanted to," but she was often writing notes, putting her head down, and engaging in other "typical" seventh-grade behavior.

The teacher confirmed that the Student was in an intervention program for students who are behind in reading, called XXXX. She did not know whether the Student was placed in XXXX before or after the first IAT meeting. She said that, after attending XXXX, the Student's test scores improved and she was more fluent when reading out loud. The teacher also said that the Student had "informal" interventions in place after the first IAT meeting, including preferential seating, small group work, pairing with someone who would be able to help her, and never having to read aloud. She said that these interventions were "almost like a 504 plan without the paper."

With regard to the Complainant's XXXX 2014 request for a disability evaluation, the counselor, who is the School's building Section 504 coordinator, said there was no record of a written notice being issued to the Complainant regarding the team's decision not to conduct a disability evaluation. She stated OCR would have to ask the school psychologist about whether such a notice was issued. The school psychologist did not recall her participation in the XXXX 2014 IAT meeting.

The District held a follow-up IAT meeting on XXXX, 2015. The team discussed the Student's academic progress and behavior. District witnesses told OCR that the team was concerned about the Student's behavior. She was skipping class frequently and she had been disciplined multiple times since the previous IAT meeting. The team determined that the interventions had not been successful, and recommended referring the Student for school-based behavior counseling services. District witnesses said that during the meeting the Complainant expressed her frustration. They said the meeting was somewhat contentious. The counselor said the IAT team again determined that a Section 504 evaluation was not appropriate because the Student was "capable of focusing and completing her work when she wanted to." The District submitted a document entitled "Prior Written Notice to Parents," dated XXXX, 2015, stating:

...an evaluation could be completed, but the team determined it was not appropriate. It was explained to the parent that a student completing grade level work without assistance is not a student suspected of having an educational disability.

The District witnesses stated the school psychologist issued this notice, and the school psychologist indicated to OCR that this notice pertained to the team's decision regarding whether an IEP evaluation was appropriate; she did not recall any discussion about whether a Section 504 evaluation would be appropriate.

Regarding the school-based counseling services the team had determined to be appropriate for the next tier of intervention, the School counselor stated to OCR that the school-based counselor who would have provided the counseling services permanently left the School. The Complainant did not return signed consent to the School for other counseling services, so the services did not occur. There was no further IAT team involvement for the Student throughout the rest of the 2014-2015 school year.

The Complainant made a second request for an IEP, in writing, on XXXX, 2015. The District provided OCR with a copy of this request. The counselor told OCR that the Complainant gave the request to a school secretary, who gave it to the counselor as the facilitator of the IAT process. The counselor said she mentioned the request to the school psychologist, who said because the Student was already in the IAT process there was nothing to do. The counselor said she did not know whether any response was made to the Complainant.

The District was only able to provide partial documentation of the Student's disciplinary records for the 2014-2015 school year, but what was provided indicated the Student did not receive any formal discipline referrals at the School until XXXX 2015, after which she received a number of referrals through XXXX 2015 for conduct including walking out of class, disruption, and insubordination. She received a total of 24 days of out-of-school suspension during that time period. She finished the 2014-2015 school year with grades of D in XXXX, C- in XXXX, D- in XXXX, D in XXXX, D- in XXXX, and F in XXXX.

For the 2015-2016 school year, the IAT team took no action with the Student until the District held an IAT meeting on XXXX, 2015, which the Complainant attended by phone. At that point, the Student was receiving unsatisfactory interim grades in her science, English, and physical education courses, and teacher interim progress notes included "Pay attention in class," "Poor class attendance," "Missing homework assignments," and "attendance issues."

During the XXXX meeting, the team discussed evaluating the Student under Section 504. The school psychologist said that the Complainant was "on board" with the idea of developing a Section 504 plan. On XXXX, 2015, the Student's Section 504 team met to conduct an evaluation of the Student. The team included the counselor, the psychologist, the new assistant principal of the School, three of the Student's teachers, the District's legal counsel, and the parent. Documents submitted by the District show that the Complainant consented to the evaluation, and that the team members provided input, determined that the Student was eligible under Section 504 as a student with a disability, and created a draft Section 504 plan. The District provided the Complainant with notice of procedural safeguards at the meeting. The Section 504 team met again on XXXX, 2015, to finalize the Student's Section 504 plan. The District provided OCR with a copy of the final plan, which provides for preferential seating, organizational strategies, assignment modification, extended time on tests, and guided notes for any activities that require note-taking. Although the District stated to OCR the team was also determining appropriate compensatory education services for the time period from XXXX 2014 through XXXX 2015 when the Student was not evaluated or provided FAPE services, the District's documentation did not indicate that this occurred.

Also during OCR's investigation, the District provided some professional service day training in October 2015 to District personnel on Section 504, including to some School staff.

- **Alleged Harassment of the Student**

The Complainant alleged that District staff harassed the Student because of her disability.

As one example, the Complainant alleged that a teacher called the Student an “asshole” around XXXX of 2015. A one-page document submitted by the District indicated that, in XXXX 2015, the Student complained to her parents that “a teacher” had called her a curse word. Subsequently, the District’s documentation stated, “the school administrator” met with the teacher, the Student, and the Student’s parents on XXXX, 2015. This document, which the counselor said she prepared for the OCR investigation at the direction of the principal, said that “the allegation was not substantiated and the parents accepted the teacher’s account at the meeting’s conclusion.” The counselor told OCR that she had no knowledge of the situation at issue and that it was the principal who had handled the matter.

The principal told OCR that the Student had accused the teacher of saying “shit” in class. She said that one of the Student’s parents reported this to the school, and the principal held a meeting with the teacher and the Student’s parents. She stated the meeting was “very cordial” and the teacher said he had never used that word. She stated there were no further issues between the teacher and the Student. The teacher left the District before OCR opened its investigation, so OCR was not able to interview him about the incident.

The Student told OCR that the teacher called her an “asshole” on multiple occasions, including once during class when she and a friend were throwing a pencil at each other, and the friend almost hit the teacher with the pencil. The teacher said to her, “...you’re an asshole,” and the Student said, “I’m never an asshole,” and he said, “You’re acting like one.” She told him she would tell on him, and he said, “Go ahead, no one will believe you.” The Student then told the principal about this, and the principal said she would talk to the teacher, but she did not. The Complainant then called the principal, who scheduled a meeting with the principal, the teacher, the Student, and her parents. At the meeting, the teacher said that the Student never did work in his class and that he had never called her an “asshole.” The Student repeated at the meeting what had happened that day in class. The teacher said the Student had thrown pencils behind his head. The Student said he was lying and trying to get her in trouble. At the meeting, a District employee said the name-calling would not happen again. But, the Student told OCR, the teacher did call her an “asshole” again, around summertime, before school ended. The Student did not tell anyone at school about him calling her that again.

The Complainant also alleged that a different teacher called the Student “the XXXX” in front of other students, and did nothing when the students laughed. She said that the Student had told her this would happen regularly with the teacher. The Complainant stated that the School counselor runs a “girls group” at the School at lunchtime, and that the Student attends this group. She said that the group talks about things that are bothering them at school. She said the Student would be coming to class after attending the counselor’s group and that is when the teacher would say, “Oh, here comes the XXXX.” She did not know how the Student came to attend the counselor’s group at lunch.

The teacher told OCR that she did call the Student “the XXXX” on one occasion, when the Student was handing in work she had missed. She said the Student smiled and giggled when she said it. She said the other students in the class were working, so she did not think they heard her. The teacher said that, at the first IAT meeting in XXXX 2014, the Complainant confronted her about the incident. The teacher said she apologized to the Complainant and did not call the Student “the XXXX” again. She said she did not mean the nickname to be derogatory. When asked whether she had nicknames for other students, the teacher said yes. For example, she calls one male student “XXXX” because he has hair like a character in a book, or she might call a student “XXXX” if the student wants to read the part of XXXX in class. A child late to class she might call her “XXXX.” She said she never targets particular students with nicknames and usually comes up with them “on a whim.” She said “it’s just how she is.”

The counselor confirmed that the Student is one of a group of students who eat with her at lunch. She is able to come to the counselor’s office for lunch by earning tickets. It is not a formal group; the counselor offers her office to students who do not want to eat in the cafeteria at lunch. The counselor stated that the Student had never said anything to her about being called any name or nickname by teachers. The counselor said she was aware of the teacher calling the Student “XXXX” because the teacher had said during the XXXX 2015 IAT meeting she had called her that. The counselor said she thought it was the teacher’s attempt at humor, and that there was no mention at the IAT meeting of other students in the teacher’s class laughing at the Student.

The Student told OCR that during the 2014-2015 school year if she went to the school counselor the teacher would say, “Here comes little baby from the little baby club.” Or the teacher would call her “the XXXX” and the class would laugh at her, and then the Student would walk out of class. The Student said this was because she would eat lunch with the counselor because she does not like to eat in the cafeteria. She said the counselor would give her a pass to go to class and when she went to class the teacher would say those things to her. The Student said this happened every day. The other students would laugh every time the teacher said one of these things. The Student said the teacher did not know the reason why she was at the counselor’s office.

The Student said that at the end of the school year the teacher said to her, “See you in summer school,” and the Student told her, “No you won’t.” The Student said that this teacher only picked on her, not any other students. She said the teacher did not give any other students nicknames. When asked why the teacher targeted her, she said she did not know why. She added that the teacher never liked her and she never liked the teacher.

The Student said she had told the principal three different times about what the teacher was saying to her, but the principal just said to ignore her and then sent her back to class without doing anything. So the Student just stopped telling the principal about it. She said when she would come back to class from the principal’s office the teacher would say to her, “I hope you got suspended.” When asked if she was being sent to the principal’s office on these occasions or was going herself, the Student said she was going to the principal’s office to tell her what was happening with the teacher.

Applicable Legal Standards and Policy

- **Alleged Failure to Evaluate**

The Section 504 implementing regulation, at 34 C.F.R. § 104.33, requires a recipient school district to provide a free appropriate public education (FAPE) to each qualified student with a disability within the district's jurisdiction. For the purposes of this requirement, an appropriate education is defined as the provision of 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 based upon adherence to procedures that satisfy the setting, evaluation, placement, and procedural safeguards requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36. A student with a disability for purposes of FAPE is a student who has a mental or physical impairment that substantially limits one or more major life activities. 34 C.F.R. § 104.3(j)(1).

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a recipient, before taking any action with respect to the initial placement of a student with a disability in a regular or special education program or any subsequent significant change in placement to evaluate that student. Section 504 mandates that recipients afford children with disabilities meaningful access to an education. A violation of 34 C.F.R. §§ 104.33 and 104.35 can be found where a recipient has failed to ensure that qualified persons with disabilities are evaluated and provided access to meaningful educational services without unreasonable delay.

School districts may always use regular education intervention strategies to assist students with difficulties in school; however, Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.

Additionally, the regulation, at 34 C.F.R. § 104.36, requires recipient school districts to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

- **Alleged Disability Harassment**

The Section 504 implementing regulation, at 34 C.F.R. § 104.4, provides that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under a recipient's program or activity. The Title II regulation contains a similar prohibition at 28 C.F.R. § 35.130.

Disability harassment is a form of discrimination prohibited by Section 504 and Title II. Disability harassment under Section 504 or Title II is intimidation or abusive behavior toward a student because of disability that is so severe, pervasive, and/or persistent as to create a hostile

environment that interferes with or denies the student’s participation in a district’s education program or activities. When disability harassment limits or denies a student’s ability to participate in or benefit from a recipient’s programs, the recipient must respond by promptly investigating the incident and responding appropriately. Disability harassment that adversely affects an elementary or secondary student’s education may also be a denial of FAPE under Section 504 and Title II.

Analysis and Conclusions

- **Alleged Failure to Evaluate the Student**

The Complainant requested an evaluation of the Student based on her ADHD beginning in XXXX 2014. Instead of evaluating the Student under Section 504 or the Individuals with Disabilities Education Act (IDEA), the District held an IAT meeting in XXXX 2014 to discuss the Student’s academic struggles and implement intervention strategies. Notes from the December IAT meeting include the comment, “504??” However, District witnesses told OCR that the IAT team did not suspect that the Student had a disability because, although team members raised concerns about her comprehension, organization, attendance, and focus, when she turned in classwork it was grade-level. Further, when the first round of IAT interventions was unsuccessful, the team decided on a second round of IAT interventions instead of discussing whether the Student’s issues were possibly related to her impairment, and then did nothing further for the rest of the school year, including following through on interventions, despite the Student’s continued, documented struggles at school.

The Complainant again requested an evaluation of the Student in XXXX 2015, but the District did not respond to her request because she was already involved in the IAT process. The District did not conduct an evaluation of the Student until XXXX 2015, after OCR opened its investigation.

The evidence therefore supports a finding that the District failed to timely evaluate the Student, whom it suspected or should have suspected of having a disability, to determine whether she required services under Section 504, in violation of 34 C.F.R. § 104.35(a). The evidence further supports that the District violated 34 C.F.R. § 104.36 by failing to provide the Complainant with notice of its decision not to evaluate the Student for disability and of her procedural safeguards, following her request for an evaluation in XXXX 2014.

On December 21, 2015, the District provided OCR with the enclosed signed Agreement, which once implemented, will resolve OCR’s compliance findings. The Agreement requires the District to convene the Student’s Section 504 team to determine what compensatory education or other remedial services the Student requires for the time period when the District failed to evaluate the Student for disability under Section 504. The Agreement further requires that the Student’s Section 504 team conduct a manifestation determination to determine whether the Student’s conduct that resulted in her suspensions from XXXX 2015, to the date of the Agreement was the result of behavior related to her disability and, if so, determine what compensatory education or other remedial services the Student requires as a result of the suspensions. Based on the team’s decisions, the team will develop a written plan for providing the Student with the compensatory education or other remedial services deemed necessary. The

District will also provide select District staff and administrators with training on the requirements of Section 504, and implement a centralized tracking system for all disability evaluation requests under Section 504 and IDEA.

In light of the signed Agreement, OCR is closing its investigation of this allegation as of the date of this letter. OCR will, however, monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the complaint.

- **Alleged Disability Harassment of the Student**

The evidence OCR obtained during its investigation is insufficient to support a finding that the District discriminated against the Student on the basis of disability as the complaint alleged. The Complainant and the Student alleged that one of the Student's teachers called the Student an "asshole" during class, on at least one occasion during the 2014-2015 school year. The District stated that the teacher, a District administrator, and the Student's parents met to discuss this allegation in XXXX 2015, and the teacher denied the allegation. The teacher is no longer with the District, so OCR could not interview him about the allegation. Although the Complainant and the Student provided credible statements that the teacher called the Student this name during class at least one time, OCR obtained no evidence to suggest that this was related to the Student having a disability or being perceived as having a disability.

The Complainant and the Student further alleged that another teacher called the Student "the XXXX" in front of other students, who laughed at the Student. The Student also described other derogatory statements made to her by this teacher throughout the 2014-2015 school year. The teacher acknowledged calling the Student "the XXXX" on only one occasion, and asserted she did not mean it in a derogatory manner. She denied that other students laughed when she said it, and stated that the other students were working and did not hear her say it. She stated she regularly calls various students by nicknames that she intends to be humorous.

Although the teacher confirmed the parent's allegation that she called the Student "the XXXX," and the Student provided credible statements regarding ongoing derogatory comments made to her by the teacher throughout the school year, OCR found no evidence to support that the teacher's conduct was based on the Student having a disability. The Student said she did not know why the teacher called her this name, but stated that the teacher did not like her and she did not like the teacher.

Therefore, OCR finds that the evidence is insufficient to support the allegation of harassment on the basis of disability. Therefore, OCR has determined that there is insufficient evidence to support a finding of a violation under Section 504, as alleged, and is closing this allegation effective the date of this letter. However, name-calling by teachers and other potentially bullying behavior can lead to a denial of FAPE for the affected student. In this case, there is evidence that the Student's education was adversely affected by a teacher or teachers calling her names. The Student told OCR that, when her teacher called her "the XXXX," the other students would laugh and she would walk out of class. She said she felt that the teacher did not like her. She also told OCR that she complained to the School's principal several times about the teacher's behavior,

but said the principal did not do anything in response. However, OCR has determined that any potential effects of the teachers' behavior on the Student's receipt of a FAPE will be remedied by the compensatory education provision of the Agreement, described above.

- **Conclusion**

This concludes OCR's investigation of the complaint and 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file a complaint alleging such treatment.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

We look forward to receiving the District's first monitoring report by February 16, 2016. For questions about this letter or about implementation of the Agreement, please contact Traci Ext, Chief Attorney, who will be monitoring the District's implementation, by e-mail at Traci.Ext@ed.gov or by telephone at (216) 522-2671.

Sincerely,

Meena Morey Chandra
Director

Enclosure