



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

5 POST OFFICE SQUARE, 8TH FLOOR
BOSTON, MASSACHUSETTS 02109-3921

Superintendent Pia Durkin, Ph.D.
New Bedford Public Schools
455 County Street
New Bedford, MA 02740

Re: OCR Complaint No. 01-16-1153
New Bedford Public School District

Dear Superintendent Durkin:

This letter is to inform you that the U.S. Department of Education, Office for Civil Rights (OCR) is closing the investigative phase of the above-referenced complaint against the New Bedford Public School (District). The Complainant alleged that the District was on notice of his child's (Student) disability but failed to appropriately evaluate the Student for special education or related services before making a placement determination (Allegation 1), and, relatedly, that the District wrongly granted the Student an Individual Health Plan in lieu of a Section 504 Plan (Allegation 2). In addition, the Complainant also alleged that the District failed to provide him with a notice of procedural safeguards (Allegation 3). OCR is closing this complaint because, prior to OCR completing its investigation, the District entered into a voluntary resolution agreement (Agreement) that resolves the complaint allegations. A copy of the Agreement is enclosed.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104; and 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 on the basis of disability. The District is subject to the requirements of Section 504 because it receives Federal financial assistance from the U.S. Department of Education, and it is subject to the requirements of Title II because it is a public entity operating an elementary and secondary school system.

OCR opened the following legal issues for investigation:

- Whether the District failed to appropriately evaluate the Student for special education or related Section 504 services before making a placement determination, in violation of 34 C.F.R. §§ 104.35(a) and (b);
- Whether the District wrongly provided the Student with an Individual Health Care Plan instead of a qualifying Section 504 Plan, in violation of 34 C.F.R. §§ 104.35(b); and
- Whether the District failed to provide the Complainant with a notice of procedural safeguards, in violation of 34 C.F.R. § 104.36.

During the course of OCR's investigation, OCR reviewed and analyzed documentation provided by the Complainant and the District. OCR reviewed the District's data response including, the District's email correspondence; the Student's XXXX XXXX plans and logs; parent log; Individualized Education Program evaluation forms; psychological referral and assessment report; various notices to the parents; occupational therapy and speech/language evaluation; health plan policy; and a timeline of events provided by the District.

Legal Authority

With respect to Allegation 1, the regulation implementing Section 504, at 34 C.F.R. §§ 104.32 and 104.35(a), requires recipients to identify, locate, and conduct a free evaluation of any student who because of a disability needs special education or related services. A school district must conduct an evaluation before taking any action with respect to the student's initial placement, and before making any subsequent significant change in placement.¹

With respect to Allegations 2 and 3, while not specifically required by the Section 504 regulations, recipients often document which services they are providing to students pursuant to Section 504, that is, which placement the student is entitled to. Services provided pursuant to Section 504 are entitled to procedural protections guaranteed by Federal law, including certain due process rights. Specifically, the regulation implementing Section 504, at 34 C.F.R. § 104.36, requires recipients to establish and implement a system of procedural safeguards for parents to appeal actions regarding the identification, evaluation, or educational placement of students with disabilities who need or are believed to need special education or related services. According to 34 C.F.R. § 104.36, these "procedural safeguards" (or "due process rights") include notifying families about this due process system, allowing them to examine their child's records, affording them an impartial hearing with the opportunity for parents/guardians to participate and be represented by counsel, and providing them a review procedure.

Preliminary Investigation and Resolution

The Student received a diagnosis of XXXX and XXXX. During the 2015-16 school year, the family raised concerns to the District about the Student's XXXX issues.

Allegations 1 and 2

With respect to Allegations 1 and 2, the Complainant alleged that the District failed to appropriately conduct a Section 504 evaluation after the Student was found ineligible for an Individualized Education Program (IEP), despite being on notice of the Student's disability. OCR's investigation indicates that the District evaluated the Student for special education services under an IEP in XXXX, and concluded that the Student was not eligible for IEP services at that time. OCR's investigation also indicates that the Team discussed the possibility of placing the Student on a Section 504 Plan or a health plan. Correspondence from XXXX and XXXX indicate that the District conducted a Section 504 eligibility determination, but these materials were silent on whether the Student was actually eligible; instead, the Team announced that the Student would be placed on an Individualized Healthcare Plan (IHCP) to assist with his disability. Furthermore, OCR's investigation indicates that Team members may have applied an incorrect standard in determining whether the Student was eligible for Section 504 services, when correspondence indicates that at least one District staff person justified the Student's ineligibility under Section 504 because his "XXXX issue does not affect his academics."

Based on the foregoing, OCR found that the District did not place the Student on a Section 504 Plan, and may have applied an erroneous standard for eligibility. However, based on the evidence obtained to date, OCR had not yet made a compliance determination with respect to the District's actual standards for determining eligibility; whether the District would have found the Student eligible for a Section 504 Plan if it had followed the appropriate legal standards under Section 504; and the differences in Section 504 due process rights at the school, if any, between placing students on a Section 504 Plan versus an IHCP. The District requested to voluntarily resolve this matter before OCR could investigate these issues further.

Allegation 3

¹ "Placement" means whatever regular or special education, related aids and services, or supplementary aids and services the student needs, and the appropriate setting where the student is to receive those services. See 34 C.F.R. § 104.35(c)(4).

With respect to Allegation 3, the Complainant alleged that the District failed to provide a notice of procedural safeguards that clarified the Complainant's due process rights in the event of a dispute over the Student's eligibility for Section 504 services. OCR's investigation indicates that the District's paperwork reflects that the Complainant should have received a notice of procedural safeguards in XXXX, attached to the District's notice of proposed evaluation and initial referral. The District's paperwork from XXXX – when the Student was evaluated for IEP eligibility – likewise indicates that the Complainant should have previously received a notice of procedural safeguards (presumably referring to the XXXX notice). The Complainant disputes receiving any written notice of procedural safeguards.

Based on the foregoing, OCR found that the parties dispute whether the District provided a written notice of procedural safeguards to the Complainant. The District requested to voluntarily resolve this matter before OCR could determine whether such notice was actually provided to the Complainant.

Voluntary Resolution

After negotiations between OCR and the District, the District agreed to take a number of steps to resolve the complaint allegations and the preliminary concerns OCR identified in its investigation to date. These steps are set out in the Agreement (enclosed), signed by the District on September 1, 2016.

The District has specifically agreed to promptly convene a Section 504 evaluation meeting for the Student to determine the Student's eligibility for services under Section 504.

The District has also agreed to submit for OCR's review and approval new or revised standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education or related services. The policy will specifically address students with health-related concerns such as food allergies, asthma, diabetes, issues with bowel movements, and other physical or mental conditions which may impact major life activities. The standards and procedures specified in the policy will be applied to all registered students in the District. Relatedly, the District will ensure that its staff and administrators are trained under these Section 504 obligations.

The District has also agreed to issue a notice to parents/guardians in the School describing student rights and District responsibilities under Section 504, including contact information for the District's Section 504 Coordinator(s) should parents/guardians have questions/concerns.

Finally, the District has agreed to review all IHCPs in the School and to promptly initiate Section 504 evaluations for any and all such students who need or are believed to be in need of services under Section 504.

OCR finds that the resolution offered by the District is aligned with the Complainant's allegations and with information obtained by OCR. In addition, the resolution offered is consistent with Section 504 and Title II. Accordingly, we are closing this investigation as of the date of this letter. Consistent with our usual practice, OCR will monitor the District's implementation of the Agreement. OCR will close the monitoring of this matter, and will notify the parties in writing of the monitoring closure, once it determines that the District has satisfied the terms of the Agreement. The District has agreed to provide OCR with an initial monitoring report by October 11, 2016.

Conclusion

The matters addressed in this letter are not intended and should not be construed to cover any other issues regarding the District's compliance with the regulations implementing Section 504, Title II, or the other laws enforced by OCR that may exist but are not discussed here. This letter is a resolution letter issued by OCR to address an individual OCR case. Resolution letters contain fact-specific investigative findings and dispositions of individual cases. Resolution letters are not formal statements of OCR policy and they 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 note that the Complainant may have the right to file a private lawsuit regarding the matters raised in this case, whether or not OCR identified compliance concerns. Also, 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, OCR will seek to protect all personal information to the extent provided by law that, if released, could constitute an unwarranted invasion of privacy.

OCR thanks you and your staff for your cooperation in this matter. If you have any questions or concerns about the information contained in this letter, please feel free to contact Carla P. Moniz, Civil Rights Attorney at (617) 289-0047, or via email at Carla.Moniz@ed.gov.

Sincerely,

/s/ Ramzi Ajami

Ramzi Ajami
Compliance Team Leader

Enclosure