



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

December 13, 2017

Re: Complaint No. 01-16-1251
Manchester Essex Regional School District

Dear

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 the Manchester Essex Regional School District (the District). Hereinafter, you are referred to as the "Complainant." The Complainant alleged that the District discriminated against her daughter (the Student) on the basis of disability during the 2015-2016 school year.

Specifically, the Complainant alleged that:

- The District denied the Student a free appropriate public education (FAPE) by unreasonably delaying an evaluation of the Student and failing to determine whether the Student was a qualified individual with a disability who was in need of regular or special education and related aids and services designed to meet her individual educational needs as adequately as the needs of individuals without disabilities are met (Allegation 1).
- The District treated the Student differently based on disability by refusing to provide her with temporary home or hospital education services (home tutoring) to which she was entitled under state law in December 2015 (Allegation 2).
- The District retaliated against the Student by filing a Child Requiring Assistance (CRA) application in December 2015 after the Complainant repeatedly communicated her belief that the District had failed to provide the Student a FAPE since the 2012-2013 school year (Allegation 3).

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. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement

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

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

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.

During the course of its investigation, OCR reviewed documents provided by the Complainant and the District, interviewed the Complainant, and interviewed third parties.

OCR determined that at the beginning of the 2015-2016 school year, the Student was enrolled in the Manchester Essex Regional Middle School (School). While the Student had been evaluated for and denied special education for several years, the timely period for this OCR complaint began on November 22, 2015.

Allegation 1: Evaluation under Section 504

The Complainant alleged that the District denied the Student a FAPE by unreasonably delaying an evaluation of the Student and failing to determine whether the Student was a qualified individual with a disability under Section 504 who was in need of regular or special education and related aids and services designed to meet her individual educational needs as adequately as the needs of individuals without disabilities are met, in violation of 34 C.F.R. § 104.35 and 28 C.F.R. § 35.130.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities.

Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Massachusetts special education regulation at 603 CMR 28.05(1) explains that a District is obligated to provide an evaluation, convene a team meeting to review the evaluation data, determine whether a student requires special education, develop

an IEP, and provide the parents with copies of the IEP within “45 school working days.” More specifically, the regulation requires that a District complete evaluation assessments within “30 school working days” after receipt of parental consent for evaluation and ensure that summaries of such assessments are completed and available to parents at least two days prior to the team meeting.

Summary of Preliminary Investigation

As of the start of the timely period of this complaint, the District was in the process of evaluating the Student’s eligibility under Section 504. However, before the District completed the Student’s academic testing and the academic functional behavioral assessment that the Complainant consented to in October 2015, the District held a Team meeting on December 7, 2015 to review an evaluation of the Student conducted in January 2014 that had previously been considered by the Team. OCR is concerned that the District held a Team meeting on December 7, 2015 before the District had conducted its academic assessment of the Student on December 11, 2015.

Following this December 7, 2015 Team meeting, the District conducted at least one academic assessment (WIAT) of the Student on December 11, 2015. According to the District, the District planned to reconvene the Team in January 2016. However, on December 18, 2015, the Complainant notified the District that she was withdrawing the Student from the District and enrolling her in an online charter school. Thus, the Team meeting in January 2016 never occurred, and OCR does not have sufficient evidence at this time to determine whether the consented-to assessments were fully completed prior to the Student’s withdrawal from the District.

OCR would need to conduct additional interviews with the District’s Director of Student Services, and the District’s Team Chair to determine why a Team meeting was held on December 7, 2015 before the District had conducted any evaluative assessments for the Student. OCR also would need to conduct additional interviews with the Complainant, the District’s Director of Student Services, and the District’s Team Chair to determine when the Student’s other consented-to assessments occurred or were scheduled prior to December 18, 2015, and if there was a delay in scheduling and completing these assessments following the District’s receipt of the Complainant’s consent to these evaluations on October 27, 2015.

Lastly, OCR is concerned that the District does not have a publicly-available policy that describes the District’s procedures under Section 504 and Title II for determining whether a student is a qualified individual with a disability in need of regular or special education or related aids and services. Specifically, OCR reviewed various policies submitted by the District in response to OCR’s request for data, and none of these policies detail the District’s procedures for identifying students under Section 504 and Title II, evaluating those students, and determining their educational placement. OCR would need to receive additional information from the District and the District’s Director of Student Services to confirm that the District does not have any other policy documents currently in effect that include its written Section 504 and Title II procedures.

Allegation 2: Different Treatment

The Complainant alleged that the District treated the Student differently based on disability by refusing to provide her with home tutoring to which she was entitled under state law in December 2015, in violation of 34 C.F.R. § 104.4(b)(1)(i) and 28 C.F.R. § 35.130(b)(1)(i).

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the District's programs or activities on the basis of disability.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the District treated the Student less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the District had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the District is a pretext, or excuse, for unlawful discrimination.

Summary of Preliminary Investigation

On December 9, 2015, the District received a letter from the Student's doctor (Letter) and the doctor's "Statement for Temporary Home or Hospital Education" (Statement) on the form recommended by the Massachusetts Department of Elementary and Secondary Education. In his Statement, the doctor explained that the Student required educational services at home for more than fourteen days until "appropriate services are in place and [the Student] is capable of re-orienting to school." The doctor noted that the Student "is presently not psychologically able to attend school, due to severe anxiety." In his Statement, the doctor provided more information about the Student's ADHD, anxiety, and school refusal.

On December 15, 2015, the Director of Student Services rejected the request for home tutoring for the Student. In a letter, the Director of Student Services explained that the doctor's Statement did not satisfy the District's requirements for home tutoring. The Director of Student Services explained that the doctor's Statement provided "no end date for [the Student's] absence and relies on your perception of appropriate school resources as a primary benchmark for re-entry." The Director of Student Services also explained that home tutoring is "contraindicated" in cases of school refusal and the District cannot approve a request for home tutoring that it believes "would be detrimental to [the Student's] progress in returning to a school setting."

OCR would need to conduct additional interviews with the District's Director of Student Services to determine how the District handles similar requests for home tutoring from students with and without disabilities. In addition, OCR would need to gain a greater understanding of the efforts the District took prior to December 15, 2015 to communicate with the Complainant and the Student's doctor about the request for home tutoring and the information that was required under the District's policy.

Allegation 3: Retaliation

The Complainant alleged that the District retaliated against the Student by filing a Child Requiring Assistance (CRA) application in December 2015 after the Complainant repeatedly communicated her belief that the District had failed to provide the Student a FAPE since the 2012-2013 school year, in violation of 34 C.F.R. § 104.61 and 28 C.F.R. § 35.134.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

In analyzing an individual’s claim of retaliation against a recipient, OCR analyzes whether: (1) the recipient knew the individual engaged in a protected activity¹ or believed the individual might engage in a protected activity in the future; (2) the individual experienced an adverse action² caused by the recipient; and, (3) there is some evidence of a causal connection between the adverse action and the protected activity. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR next examines this reason to determine whether it is a pretext for retaliation, or whether the recipient had multiple motives (illegitimate, retaliatory reasons and legitimate, non-retaliatory reasons) for taking the adverse action. If OCR finds that the reason was pretextual, then OCR will make a finding of retaliation; conversely, if OCR finds that the recipient proffered a legitimate, non-retaliatory reason for the action at issue and that the reason was not pretextual, then OCR will find insufficient evidence of a violation.

Summary of Preliminary Investigation

The Complainant engaged in a protected activity when she requested a special education evaluation of the Student. This first occurred during the 2012-2013 school year, continued during the 2013-2014 and 2014-2015 school years, and occurred the final time on October 13, 2015. The Complainant believed that the District’s failure to provide the Student an IEP or 504 Plan during these school years denied the Student a FAPE and contributed to the Student’s increased anxiety during the 2015-2016 school year. As a result, OCR found that the evidence indicated that the Complainant engaged in various protected activities under Section 504 and Title II, and that the District was aware of these protected activities.

The District’s records further reflect that on December 4, 2015, the Principal filed a CRA truancy application in Essex County Juvenile Court. As a result of this CRA truancy application, the Student, her court-appointed attorney, the Complainant and her husband, and their attorney

¹ A “protected activity” is the exercise of a right that is protected under OCR’s non-discrimination laws.

² An adverse action is something that could deter a reasonable person from engaging in further protected activity.

attended a hearing on December 16, 2015. The Student and the Complainant's husband signed an agreement mandating that the Student "will attend school daily, on time and obey all rules" and "cooperate with the plan created on 12/16/15." As a result, OCR found that the evidence indicated that the District took an adverse action against the Complainant by filing a CRA truancy application against the Student.

The District filed its CRA truancy application against the Student in December 2015 while the District was scheduling special education evaluations for the Student, the Complainant was in frequent communication with the District about obtaining special education and related services for the Student, and the Student was frequently absent from school due to appointments, sickness, and school refusal. Because all of these actions occurred so close in time, OCR found that the evidence indicated that there was a causal connection between the Complainant's advocacy on behalf of the Student and the District's action in filing the CRA truancy application.

Having established a prima facie case of retaliation, OCR considers whether the District has a legitimate, non-retaliatory reason for its action or whether the District's proffered reason is a pretext, or excuse, for unlawful retaliation. The District argued in its data response that it initiated the CRA truancy application "solely in response to the Student's school refusal."

Massachusetts state law, M.G.L. c. 119, § 39E, explains that a district can initiate a CRA if a student "has willfully failed to attend school for more than 8 school days in a quarter." The School, however, divides the school year into trimesters. According to an archived version of the District's 2015-2016 school year calendar,³ the first trimester ended on November 20, 2015 and thus, the second trimester began on November 23, 2015. The District filed its CRA truancy application against the Student on December 4, 2015. Between November 23, 2015 and December 4, 2015, there were eight school days. Based on the Student's attendance records, during these eight school days, the Student was absent on five days and tardy on one day. Assuming that none of these days absent or tardy were excused, the Student had not been absent for the required number of days under state law for the District to file a CRA truancy application.

OCR would need to interview District staff with knowledge about whether any of the Student's absences and tardies were excused, as the email communication between the Complainant and the District appears to show that some of the Student's absences and tardies during this time period were due to illness, rather than school refusal, and the District's policy provides that students may be excused from school due to illness. In addition, OCR would need to conduct interviews with the Principal, who is now a former employee of the District, to determine why the Principal believed it was proper under state law to file a CRA truancy application when the Student had only been absent for five days in the trimester. Lastly, OCR would need to make a determination, based on interviews with and documentation provided by the District and the Complainant, whether the District's reasoning for filing a CRA truancy application against the Student was a pretext for unlawful discrimination or whether the District had multiple motives, rather than simply a misunderstanding of the law or a reasonable response to school refusal.

³ Available at: https://web.archive.org/web/20160222011035/http://www.mersd.org/Pages/MERSD_WebDocs/2015-2016%20District%20Calendar%20Post.pdf.

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. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will resolve the issues raised in the complaint. The terms of the Agreement are aligned with the complaint allegations and are consistent with the applicable laws and regulations. OCR will monitor the District's implementation of the Agreement and continue to do so until it has determined that the District has complied with the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening 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 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 Civil Rights Attorney Amy Fabiano at (617) 289-0007 or by e-mail at Amy.Fabiano@ed.gov.

Sincerely,



Meena Morey Chandra w/p AMM
Acting Regional Director

Enclosure