



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

February 5, 2018

Jenny Chou, Esq.
Kathleen Boundy, Esq.
Center for Law and Education
99 Chauncy Street, Suite 716
Boston, Massachusetts 02111

Rajan Sonik, Esq.
Massachusetts Law Reform Institute
99 Chauncy Street, Suite 500
Boston, Massachusetts 02111

Via Email: jennycchou@gmail.com; kboundy@cleweb.org; rsonik@mlri.org

Re: Complaint No. 01-15-1075
Boston Public Schools

Dear Attorneys Chou, Boundy, and Sonik:

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) that you filed against the Boston Public Schools (the District). The complaint, which you filed on behalf of a group of parents and students (Complainants), alleged discrimination on the bases of disability, race, color, and national origin. Specifically, you alleged that:

- the District’s “policies and practices regarding the identification and evaluation of students with a disability, have resulted in the discriminatory exclusion of eligible students with Sickle Cell Disease (SCD) who are disproportionately African American and Hispanic students”;
- the District’s failure to identify and evaluate students with SCD has resulted in a denial of access to “instructional programs, supportive and related services, and the range of accommodations that they need to enjoy the same opportunities to success as students without disabilities”; and
- the District has not notified parents of students with SCD of their rights under Section 504, including due process rights, and that the District has failed to notify parents whose first language is not English, of their rights in a language that they can understand.

Hereinafter, you will be referred to as “the Complainants.”

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

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

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 and its implementing regulation found at 34 C.F.R. Part 104 (Section 504), Title II of the Americans with Disabilities Act of 1990 and its implementing regulation found at 28 C.F.R. Part 35 (Title II), and Title VI of the Civil Rights Act of 1964 and its implementing regulation found at 34 C.F.R. Part 100 (Title VI). Section 504 and Title II prohibit discrimination based on disability and Title VI prohibits discrimination on the basis of race, color, or national origin. The District is subject to the requirements of Section 504 and Title VI because it receives Federal financial assistance from the Department, and it is subject to the requirements of Title II because it is a public entity that operates a public educational system.

Legal Standards

Section 504 & Title II

Identification and Evaluation

The Section 504 regulation, at 34 C.F.R. § 104.32, requires a school district to identify and locate students with disabilities annually, and take appropriate steps to notify students with disabilities and their parents or guardians of the district's duties. The Section 504 regulation, at 34 C.F.R. § 104.35(a), also 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. 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.

Free Appropriate Public Education (FAPE)

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. 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. Implementation of an Individualized Education Program (IEP) developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this

standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE to the same extent required under the Section 504 regulation.

Procedural Safeguards

The Section 504 regulation, at 34 C.F.R. § 104.36, requires that school districts establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of students with disabilities, a system of procedural safeguards that includes notice, an opportunity for parents to examine relevant records, an impartial hearing with an opportunity for participation by parents and representation by counsel, and a review procedure. Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

Title VI

Different Treatment & Disparate Impact

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person 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 race, color, or national origin.

The Title VI regulation further provides, at 34 C.F.R. § 100.3(b), that a recipient, in determining the types of services or other benefits which will be provided under a program, may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

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 of a different race, color, or national origin. 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.

Districts violate Title VI if they adopt facially neutral policies that have an unjustified, adverse disparate impact on students based on race, color, or national origin. *See* 34 C.F.R. § 100.3(b)(2). In determining whether a facially neutral policy or practice has an unjustified, adverse disparate impact that violates Title VI, OCR applies the following analysis:

- 1) Does the District have a facially neutral policy or practice that produces an adverse impact on students of a particular race, color, or national origin when compared to

other students? If yes, then OCR will proceed to step 2.

- 2) Can the District demonstrate that the policy or practice is necessary to meet an important educational goal? OCR considers both the importance of the educational goal and the tightness of the fit between the goal and the policy or practice employed to achieve it. If the policy or practice is not necessary to serve an important educational goal, OCR will find that the District has engaged in discrimination. If the policy or practice is necessary to serve an important educational goal, then OCR will proceed to step 3.
- 3) Are there comparably effective alternative policies or practices that would meet the District’s stated educational goal with less of a discriminatory effect on the disproportionately affected racial group; or, is the identified justification a pretext for discrimination? If the answer to either question is yes, then OCR will find that the District engaged in discrimination. If no, then OCR will likely not find sufficient evidence to determine that the District engaged in discrimination.

Parental Communication

The Title VI regulation, at 34 C.F.R. § 100.3(a) and (b), provides that a school district may not exclude persons from participation in its programs, deny them any service or the benefits of its programs, or subject them to different treatment on the basis of race, color, or national origin.

The Departmental Policy Memorandum issued on May 25, 1970, entitled “Identification of Discrimination and Denial of Services on the Basis of National Origin” (the May 1970 memorandum), 35 Fed. Reg. 11,595, clarifies OCR policy under Title VI on issues concerning the responsibility of schools to provide equal educational opportunity to limited English proficient (LEP) national origin minority students. The May 1970 memorandum states that school districts must adequately notify LEP national origin minority group parents of information that is called to the attention of other parents, and that such notice may have to be provided in a language other than English in order to be adequate.

Factual Background

During its investigation, OCR reviewed documents provided by the Complainants and the District, including, but not limited to: the District’s Section 504 policies and procedures, the District’s nursing staff lists for each school, the District’s Superintendent Circulars, staff training records, and documentation regarding Section 504 and IEP eligibility meetings for students with SCD.

The Complainants alleged that during the 2015-2016 school year, approximately 250 students with SCD were enrolled at the District, nearly all of whom were black and Hispanic. The Complainants stated that these students suffered physical pain, infections, anemia and fatigue, in addition to side effects from medications, resulting in difficulty concentrating while in school, and regular/periodic absences from school. The Complainants asserted that the District: failed to recognize SCD as a disability that substantially limits a major life activity; “misuse[d] [individualized health care plans]” rather than providing Section 504 plans for students with

SCD; did not identify a process or procedures for staff, parents, and other individuals to initiate referrals of students with SCD; failed to refer students with SCD for evaluations despite having information regarding their diagnoses and need for services; and failed to provide students with SCD with FAPE pursuant to Section 504 plans. In addition, the Complainants provided information regarding five students with SCD whom they asserted the District failed to appropriately identify and evaluate for services under Section 504. The Complainants alleged that because primarily black and Hispanic students are affected by SCD, these students were disparately impacted by the District's failure to consider these students' eligibility under Section 504. In addition, the Complainants alleged that the District failed to provide notice to parents/guardians of students with SCD regarding the District's duty to identify, locate and evaluate students with disabilities and provide FAPE, or their procedural rights under Section 504, including parents/guardians for whom English is not their primary language.

The District's initial response to OCR's data request indicated that there were 95 students enrolled in the District with SCD. Of these 95 students, 32 students had IEPs and 10 students had Section 504 plans. The data provided by the District indicates that 79.5% of the identified students with SCD were black, and 20.5% were Hispanic, with no students of other races. After receiving notice of the OCR complaint, the District took proactive steps to ensure compliance with Section 504 and Title VI. Specifically, the District has updated its website with information regarding SCD, made outreach to families, updated its online system for entering 504 plans, held numerous staff trainings on Section 504 and SCD, and has made significant efforts to evaluate all students with SCD for 504/IEP eligibility. The District provided additional data in December 2016 showing a 14% increase in the number of students with SCD covered by Section 504 and continuing efforts to evaluate students with SCD for Section 504 eligibility.

Based on the evidence obtained to date, OCR has not yet reached a determination as to whether the District failed to appropriately identify or evaluate students with SCD, resulting in a denial of FAPE to these students, and/or whether the District provided notice to parents/guardians (including LEP parents/guardians) regarding the District's Section 504 obligations and procedural safeguards. Further, the evidence obtained to date does not establish whether the District maintained any specific policies or practices that resulted in a failure to appropriately identify or evaluate students with SCD; accordingly, OCR did not reach a determination as to whether the District engaged in a policy or practice that had an unjustified, adverse disparate impact on black and Hispanic students.¹ To complete its investigation, OCR would need to obtain additional evidence regarding the implementation of its Section 504 policies and practices regarding students with SCD and notice provided to parents/guardians under Section 504, including LEP parents/guardians, by interviewing District staff, including nurses and Section 504 Coordinators, and obtaining any other relevant documentation.

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

¹ OCR has determined that none of the evidence gathered to date indicates that the District engaged in any intentional discrimination against students with SCD on the bases of race or national origin.

Agreement which, when fully implemented, will resolve the issues raised in the complaint. OCR determined that to the extent that the District is continuing to address the identification of and services for students with SCD, it will necessarily also address any disparate impact on the basis of race or national origin. 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 Senior Civil Rights Attorney Eric Olick at (617) 289-0021 or by e-mail at Eric.Olick@ed.gov. You may also contact Civil Rights Attorney Colleen Robinson at (617) 289-0063 or Colleen.Robinson@ed.gov.

Sincerely,

Meena Morey Chandra *w/p AMM*
Acting Regional Director

Enclosure