



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

33 ARCH STREET, SUITE 900  
BOSTON, MASSACHUSETTS 02110-1491

AUG 22 2008

ALSO VIA EMAIL TO: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

Re: Complaint No. 01-07-1188

Dear Mr. & Mrs. [REDACTED]

This letter is to inform you that the Office for Civil Rights (OCR) has completed its investigation into the above-referenced complaint. I want to apologize at the outset for the length of time it has taken us to complete this investigation. We greatly appreciate your family's patience throughout our investigation.

In your complaint, you alleged that your son (Student) was discriminated against, on the basis of his disability, by the Barnstable Public Schools (District). Specifically, you alleged that: (1) the District did not respond to your grievances that the Student's Section 504 Accommodation Plan (504 Plan) was not being implemented, and (2) the District did not implement the Student's 504 Plan, particularly in regards to accommodations designed to address the Student's behavior. For the reasons provided below, we found compliance concerns relating to these allegations, which the District has agreed to remedy in the enclosed Resolution Agreement.

OCR investigated this complaint because your allegations fall within our jurisdiction under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation found at 34 C.F.R. Part 104 (Section 504), and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation found at 28 C.F.R. Part 35 (Title II). Both Section 504 and Title II prohibit discrimination based on disability. The District is subject to the requirements of Section 504 because it is a recipient of 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 or secondary school system.

OCR investigated two issues:

- 1) Whether the District failed to promptly and equitably address your complaints that the District was not implementing the Student's 504 Plan, in violation of 34 C.F.R. Section 104.7(b) and 28 C.F.R Section 35.107(b); and

- 2) Whether the District denied the Student a free appropriate public education (FAPE) by failing to implement his 504 Plan, in violation of 34 C.F.R. Sections 104.33(a) and (b) and 28 C.F.R. Section 35.130.

In the course of our investigation, OCR reviewed documents provided by you and the District; we interviewed you, your son, your educational advocate and District staff; and, we listened to recordings of a series of meetings held in the spring of 2007 regarding your son.

### **ISSUE NO. 1**

Whether the District failed to promptly and equitably address your complaints that the District was not implementing the Student's 504 Plan, in violation of 34 C.F.R. Section 104.7(b) and 28 C.F.R. Section 35.107(b).

#### ***Legal Authority and Standards***

Section 504 and Title II require every entity covered by these laws (covered entity), such as the District, to respond promptly upon notice that discrimination based upon disability may have occurred, and further to act swiftly and effectively to end any such discrimination. In accordance with that obligation, the regulations implementing Section 504, at 34 C.F.R. §104.7(b), and Title II, at 28 C.F.R. Section 35.107(b), both require covered entities to adopt and implement grievance procedures that provide for the prompt and equitable resolution of complaints alleging discrimination on the basis of disability. Additionally, Title II specifically requires that grievance procedures be published.

In evaluating whether a covered entity's grievance procedure complies with the procedural requirements of Section 504 and Title II, OCR considers a number of factors. These include whether: (a) notice of the procedures is provided to students, employees, parents, and other interested parties, including where and with whom complaints may be filed; (b) the procedures apply to the full range of potential discriminatory actions covered by Section 504 and Title II; (c) the procedures provide for an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (d) the procedures have designated and reasonably prompt timeframes for major stages of the complaint process; and (e) the parties are provided notice of the outcome of the complaint. OCR determines whether a covered entity's grievance procedure provides for a prompt and equitable resolution of complaints by assessing the procedures as a whole. The absence of some factors, such as the failure to cover the full range of potential discriminatory actions, will make the procedure non-compliant, while the absence of other factors, such as timeframes, may not be a problem if the covered entity processes grievances promptly and the procedure itself does not contain steps that would serve as a bar to the timely processing of complaints.

In addition to the adoption of grievance procedures, OCR interprets 34 C.F.R. Section 104.7(b) and 28 C.F.R. Section 104.7(b) to require covered entities to respond timely, appropriately and effectively to information that is brought to their attention and that suggests that employees of the covered entities have engaged in discrimination. Covered entities have a duty to respond to such information regardless of whether they have formal grievance procedures, or the

information is formally filed as a complaint under the grievance procedures. OCR determines the adequacy of a covered entity's response to such information by assessing the timeliness and thoroughness of the covered entity's investigation of the information, the appropriateness of the conclusions reached based on the investigation, and the effectiveness of any remedies ordered by the covered entity.

Here, OCR initially assessed whether the District had a grievance procedure in place that met the requirements of Section 504 and Title II, and if so, whether the District followed its procedure with respect to the matters that you raised. If not, OCR would then assess how the District responded to your complaints, to determine whether the District acted promptly and effectively. In either case, a compliance determination is based on an assessment of whether you were afforded a process that was fair and timely.

### ***A. The District's Grievance Procedures***

#### ***Summary of Facts***

OCR reviewed two documents relating to the District's procedures for complaints alleging discrimination based upon disability. First, in response to OCR's request for a copy of the District's 504 Grievance procedures, the District provided a document entitled TITLE IX SECTION 504 PROCEDURES (*Procedures*). They provide that any employee who has been discriminated against in violation of Section 504 may file a complaint, in writing, with the Compliance Administrator, who is identified by name, address and telephone number in the *Procedures* (the person named is also the District's Equity Officer). The *Procedures* further provide that the Compliance Administrator will cause the complaint to be reviewed, and will respond, in writing, to the complainant within ten days of receiving it. The Compliance Administrator will also send a copy of his response to the Superintendent. If the complainant is not satisfied, he or she may appeal to the School Committee within sixty days of receiving the Compliance Administrator's findings.

When interviewed, some District staff told OCR that, if an individual wanted to file a grievance, they could ask district employees, who would direct the individual to the principal's office to obtain a copy of the *Procedures*. Other District staff were unaware that the District had specific procedures; when interviewed, these staff members expressed their belief that an individual could file a grievance simply by going to see the Equity Officer. Some District staff, including the Compliance Administrator and the District's attorney, stated that the *Procedures* were available online. OCR asked where to find the *Procedures* on the web, but District staff were not sure. OCR reviewed each page of the District's website and the Barnstable High School's (High School) website, but did not find any link to, or listing of, the *Procedures*.

During the course of the investigation, OCR learned that the Equity Officer had also directed you to the Student Handbook for Barnstable High School (*Handbook*) for procedures to file your concerns, and so OCR also considered it in our investigation. The *Handbook* provides a few different processes. First, under the "Procedure for Filing a Complaint," students who believe that they have been victims of sexual harassment or "that their civil rights" have been violated, are advised that they "should" take the following steps "to ensure effective and timely results:"

- (1) report any incident to their housemaster immediately;
- (2) keep written notes of all relevant matters and make at least 2 copies for reference;
- (3) file a complaint, in writing, with the Equity Officer within 24 hours of the incident so that important information will not be forgotten; and
- (4) make an appointment with the Equity Officer “to review” the complaint as soon as possible.

In another part of the Handbook titled "Investigation," which seems to deal particularly with harassment, students are told to report any incidents of harassment to the Principal immediately.

### *Analysis*

OCR assessed the two procedures that the District had in place to determine whether either met the requirements of Section 504 and Title II. OCR found that the *Procedures* had some elements that are important in order for a process to provide for an adequate response to grievances. Specifically, the *Procedure* had timeframes, identified the individual with whom a complaint should be filed, including his name, address and phone number, and stated that the complainant would be given notice of the response to the complaint. Though neither Section 504 nor Title II require this, the *Procedures* also provided for an appeal to the School Committee.

There were a number of problems with the *Procedures* and the Handbook that result in both procedures raising compliance problems under Section 504 and Title II. Specifically, neither process makes any reference to coverage of matters under Title II. The District, therefore, does not have Title II procedures. OCR further found that the District did not provide adequate notice of its grievance procedure under Section 504 to ensure that students, parents, employees and third parties knew how to file and what the process would be once they did so. The *Procedures* were not published or disseminated in any manner, and a number of staff believed the *Procedures* were only available upon request from the principal's office. In addition, many District staff were unaware of the *Procedures* and were unable to provide adequate information and direction to individuals seeking to file a grievance. Although District officials indicated to OCR that parents, students or third parties could use the *Procedures*, the *Procedures* are not clear as to who may, in fact, file. The *Procedures* only explicitly mention employees, so it appears that only employees may file complaints using this process. The Handbook also appears to be limited to covering complaints raised by students. While a district may have separate procedures covering employees, students and third parties, it must also have procedures that, when taken together, afford students, parents, employees and third parties access to a process to address any matter under Section 504 and Title II. Here, the *Procedures* and the Handbook do not meet this standard because the scope of coverage is unclear and neither process appears to be available to parents or third parties.

While the procedures in the Handbook are published and widely disseminated, so that they would meet some of the elements of notice required by Section 504 and Title II, OCR found that those procedures focus almost exclusively on harassment-based discrimination, so that individuals with other discrimination concerns may not feel that they can use this process to have their concerns addressed. Further, the procedures in the Handbook are not clear as to whom complaints should be made. At various steps in the process, students are told to go to the Equity

Officer, the principal or their housemasters, to report an incident. It is also unclear whether an investigation of a grievance is triggered and if so, at what stage. The procedures in the Handbook also call for reports to be made within 24 hours of the alleged incident; it is not clear whether this is intended to simply encourage prompt reporting, or whether this means that a report of potential discrimination that is made after 24 hours have elapsed will not be considered. While a covered entity may have timeframes for reporting incidents, and may encourage timely reporting, 24 hours is far too short a period within which to require an individual to file a complaint. The Handbook also does not provide for notice to the complainant of the outcome, which OCR generally considers to be an essential component of an effective procedure.

In addition, both the *Procedures* and the Handbook require complaints to be in writing. Covered entities are obligated under Section 504 and Title II to respond to notice of possible discrimination, regardless of whether a formal grievance is filed. As illustrated below in the discussion of the process afforded to you, requiring an individual to put a complaint in writing before a district responds to an allegation of discrimination may cause the district to fail to address possible discrimination in a timely and effective manner.

In sum, OCR found that, due to the problems identified above, neither the *Procedures* nor the Handbook meet the requirements of Section 504 and Title II.

## ***B. Your Complaints***

### ***Summary of Facts***

OCR next considered how the District responded to the complaints that you raised, to determine whether, even in the absence of appropriate grievance procedures, it nonetheless afforded you with a prompt and equitable resolution. To make this determination, OCR first sought to establish when you asked the District to investigate a potential violation of Section 504. We then looked at what actions the District took in response, and in what timeframe.

On October 31, 2006, during an individualized education plan (IEP) eligibility meeting, you expressed your concerns that the Student was being discriminated against on the basis of disability because, you felt, the Student's 504 Plan was not being implemented. You stated to the Team, which included the Equity Officer/ Compliance Administrator and the Student's guidance counselor, that you were specifically concerned that accommodations relating to communication for missing work, upcoming deadlines and misbehavior, were not being followed. The Guidance Counselor responded that a 504 Team meeting was better suited to address those concerns. You then requested a 504 Team meeting.

On November 8, 2006, you hand-delivered a letter to the Acting Vice-Principal in which you alleged that the District was violating Section 504; the letter was titled, "3 day OSS [out of school suspension]/ 504 Plan Violation." In it, you stated that you believed that the Student's "504 rights have been violated" because the District did not implement the portions of his 504 Plan that were designed to address the impulsivity and distractibility that characterized his disability, and that could lead the Student to act out when not addressed. You also faxed a copy of this letter, with additional documents, to the District's attorney.

On November 20, 2006, the District held the 504 meeting that you had requested on October 31. There, you again expressed concern that the District was not complying with Section 504 because, you alleged, key provisions of the Student's 504 Plan relating to communication with you were not being implemented. The Team responded that your concerns were "noted." The Team also agreed that the Student should be sent to the Equity Officer's office when the Student misbehaved, where positive behavior strategies would be emphasized.

You and the Equity Officer all told OCR that you verbally raised your concerns to the Equity Officer again in December 2006. He responded that you had to use a particular form to file a grievance alleging a violation of Section 504. He also stated that he could not handle any concerns relating to discipline, because the Principal handled those concerns. When OCR interviewed the Principal, she explained that she did address discipline issues, but that she did not handle Section 504 matters, even if they involved discipline. She said that the Equity Officer handled all Section 504 concerns.

You then filed a form on February 2, 2006, alleging that the District was not complying with Section 504, because it was targeting the Student for discipline in a manner that, you alleged, was inconsistent with his 504 Plan. On February 14, 2006, you followed up by requesting a status on your "formal complaint" from the Equity Officer via email. Subsequently, the Equity Officer saw you at the high school, and he verbally responded to your status request by telling you that you had used the wrong form, and by providing the form that he said should be used. You told OCR that in December, when you expressed your concerns to the Equity Officer, he had given you the form that you filed in February. The Equity Officer told OCR that he provided the appropriate forms to you in December; however, he said, you filed a different form in February instead. He also told OCR that you did not file a 504 grievance until March, and he further stated that he could not handle any issues relating to discipline, including issues involving disability discrimination and discipline; instead, any issues relating to discipline had to go through the Acting Principal.

On March 26, 2007, you filed again, using the new form, alleging, among other concerns, that the District was violating the Student's Section 504 rights, in addition to claiming violations including: "# 1 Harassment/overcharging/targeting[,] violation of Privacy Rights . . . [and] file abnormalities." You stated that since the beginning of school, staff had been harassing the Student and targeting him for discipline. You noted that teachers were not sending the Student to his guidance counselor for help, and that teachers were continually writing the Student up for behavior (as noted above, the Student's 504 team agreed in November that the Student should be sent to the Equity Officer to work on positive behavior strategies when the Student acted up). Additionally, you expressed that documents had been removed or replaced, abnormally, in the Student's file, after you began raising your concerns.

At a disciplinary appeal hearing on May 1, 2007, and at a Team Meeting on May 18, 2007, which were both attended by you and the Equity Officer, you again expressed your frustration that, for the entire year, you were not receiving updates about the Student's assignments, tests, or behavior as provided in the 504 Plan, and that the Student continued to be punished for misbehavior rather than having positive behavior strategies be used.

At the May 18, 2007 meeting, the Equity Officer stated that he believed the teachers were communicating with you regarding the Student's academic progress, through "edline," an on-line program by which teachers share information on student progress and grades. The Equity Officer stated that, because some of the Student's teachers used "edline," you should have the information contemplated by the accommodation that you receive weekly progress information. Echoing concerns that you had raised in meetings in October, November and January, you stated again that not all of the teachers used edline; that edline grouped assignments together for a general grade and therefore did not provide information about particular missing assignments; and that the teachers who did use edline did not always do so weekly, so that you might not learn of any problems until long after the problem had arisen and too late for the teacher to allow the Student to make up missing work. Your educational advocate noted that the plain language of the 504 Plan called for communication via telephone or email, not by edline.

At the same meeting, you asked the Equity Officer for a status of your complaint. According to a tape of the meeting, to which OCR listened, the Equity Officer first responded that you would have his response when you were done appealing the Student's discipline. Later in the same meeting, the Equity Officer stated that he would have a written response to you within 30 days. You asked whether that meant 30 days from when you filed or 30 days from "today." He responded, "30 days."

On May 24, 2007, the District sent you a written response to your March 26, 2007 grievance (Response), in which the District acknowledged that portions of the Student's 504 Plan had not been implemented. The Response, authored by the Equity Officer, stated that he had reviewed the Student's educational records and had spoken with you, the Student, the Student's housemasters, guidance counselors, BHS administrators, some of the Student's teachers and the District's attorney. From that information, the Equity Officer concluded that the District had not complied with the Student's 504 Plan in two ways: (1) that some teachers had not communicated weekly with you, as the Plan indicated, and (2) that positive behavior strategies were not used on a regular basis by BHS staff, due in part to the retirement of a housemaster who had worked with the Student the previous year.

The Response recommended prospective actions to address the lack of compliance, suggesting the "following corrective action to remedy non-compliance issues:"

- a. Teachers would communicate with the Student or his parents by sending emails to his Guidance Counselor on a weekly basis regarding academic performance or behavior infractions.
- b. Staff who teach or work with disabled students will receive information regarding specific disabilities of Section 504 and IEP students, which information will be determined by the Equity Officer and the Director of Student Services;
- c. Staff will receive state and Federal recommendations for positive behavioral strategies for working with students; and
- d. Conferences with parents about the Handbook's disciplinary policies specifically relating to out of school suspensions should be clarified.

