



Massachusetts Department of Elementary and Secondary Education

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February 28, 2023

Mary Skipper, Superintendent
Boston Public Schools
2300 Washington Street
Roxbury, MA 02119

Re: Intake PRS 8389
Student Name: [REDACTED]
Letter of Finding

Dear Superintendent Skipper:

The Problem Resolution System Office (PRS) at the Massachusetts Department of Elementary and Secondary Education (Department) received a statement of concern from Kimberly Winslow (Complainant) involving the Boston Public Schools (District) on [REDACTED]. As the Problem Resolution System (PRS) Specialists inquiring into this matter, I took the following steps:

- Reviewed the statement of concern and supporting documentation
- Spoke with the Complainant regarding the statement of concern
- Requested a Local Report from the District
- Reviewed the District's Local Report received on February 15, 2023
- Reviewed the Complainant's Response to the District's Local Report received on February 17, 2023
- Spoke with the District's Interim Superintendent of Special Education and Director of ABA Programs on February 21, 2023
- Reviewed relevant state and federal laws and regulations
- Consulted with other Problem Resolution System staff

The Department's review determined noncompliance. We are advising the District now of this finding, as well as of the required corrective action. The Complainant's concerns and a summary of the findings of our investigation follow.

PRS requested that you report on the following concerns and any systemic occurrences of them:

1. The Complainant alleged that the assessment reports on which the District based its finding of no eligibility at the student's initial evaluation meeting were inconsistent with regulatory requirements. She alleged they lacked specificity, were difficult to interpret, and did not offer explicit means of meeting the student's needs. The Complainant alleged noncompliance with 603 CMR 28.04(2)(c):

Reports of assessment results. Each person conducting an assessment shall summarize in writing the procedures employed, the results, and the diagnostic impression, and shall define in detail and in educationally relevant and common terms, the student's needs, offering explicit means of meeting them. The assessor may recommend appropriate types of placements, but shall not recommend specific classrooms or schools. Summaries of assessments shall be completed prior to discussion by the Team and, upon request, shall be made available to the parents at least two days in advance of the Team discussion at the meeting occurring pursuant to 603 CMR 28.05(1).

2. The Complainant alleged that the District arrived at an incorrect result when it determined that the pre-school aged student, who has been diagnosed with [REDACTED] was ineligible for special education. The Complainant alleged this incorrect result denied the student enrollment in a public pre-school where [REDACTED] could receive necessary educational services, [REDACTED]. The Complainant alleged noncompliance with 603 CMR 28.04(2)(a):

Initial Evaluation. Upon consent of a parent, the school district shall provide or arrange for the evaluation of the student by a multidisciplinary team within 30 school days. The assessments used shall be adapted to the age of the student and all testing shall meet the evaluation requirements set out in state and federal law. The school district shall ensure that appropriately credentialed and trained specialists administer all assessments.

(a) Required assessments.

1. *An assessment in all areas related to the suspected disability.*
2. *An educational assessment by a representative of the school district, including*
 - a. *a history of the student's educational progress in the general curriculum. Such assessment shall include information provided by a teacher(s) with current knowledge regarding the student's specific abilities in relation to learning standards of the Massachusetts Curriculum Frameworks and the district curriculum; and*

- b. *an assessment of the student's attention skills, participation behaviors, communication skills, memory, and social relations with groups, peers, and adults.*
- c. *The school district shall also thoroughly evaluate and provide a narrative description of the student's educational and developmental potential.*
- d. *When a child is being assessed to determine eligibility for services at age three, an observation of the child's interactions in the child's natural environment or early intervention program is strongly encouraged.*
- e. *For children who are receiving early intervention services, school districts are encouraged to use current and appropriate assessments from early intervention teams, whenever possible, to avoid duplicate testing.*

(b) Optional assessments. The Administrator of Special Education may recommend or a parent may request one or more of the following:

- 1. *A comprehensive health assessment by a physician that identifies medical problems or constraints that may affect the student's education. The school nurse may add additional relevant health information from the student's school health records.*
- 2. *A psychological assessment by a licensed school psychologist, licensed psychologist, or licensed educational psychologist, including an individual psychological examination.*
- 3. *A home assessment that may be conducted by a nurse, psychologist, social worker, guidance or adjustment counselor, or teacher and includes information on pertinent family history and home situation and may include a home visit, with the agreement of a parent.*

And 603 CMR 28.05(2)(a):

(a) Eligibility determination. The Team shall examine the evaluative data, including information provided by the parent, and make one of the following determinations:

- 1. *The student is eligible. If the student has one or more of the disabilities defined at 603 CMR 28.02(7) and if, as a result of the disability(ies), the student is unable to progress effectively in the general education program without the provision of specially designed instruction, or is unable to access the general curriculum without the provision of one or more related services, the Team shall determine that the student is eligible.*
 - a. *Consistent with state and federal special education law, the Team shall establish whether a student has a disability(ies) as defined in 603*

CMR 28.02(7), determine the type(s) of disability(ies) and shall ensure that the student's inability to progress is a result of the disability(ies) and not a result of an inability to meet the school discipline code, limited English proficiency, social maladjustment, or lack of instruction in reading or math.

- b. Once eligibility has been determined, the type of disability of the student shall not be used to provide a basis for labeling or stigmatizing the student. Additionally, the type of disability shall not define the needs of the student and shall in no way limit the services, programs, or inclusion opportunities provided to the student.*
 - c. If the Team determines that the student is an eligible student, the Team shall develop an individualized education program (IEP).*
- 2. The student is not eligible. If the Team determines that the student is not eligible, the Team chairperson shall record the reason for such finding, list the meeting participants, and provide written notice to the parent of their rights in accordance with federal requirements within ten days of the Team meeting.*

And also 34 C.F.R. § 300.101: Free appropriate public education (FAPE).

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in §300.530(d).

(b) FAPE for children beginning at age 3.

(1) Each State must ensure that—

(i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and

(ii) An IEP or an IFSP is in effect for the child by that date, in accordance with §300.323(b).

(2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) Children advancing from grade to grade.

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

CONCERNS AND FINDINGS

Allegation 1:

The student was evaluated [REDACTED] based on a referral from his parents and a member of his Early Intervention Team. [REDACTED]. The reason for referral was to determine his eligibility for special education. Prior to the District's evaluation, the student was diagnosed with [REDACTED]. He began receiving Early Intervention services in [REDACTED]

The District convened an IEP Team meeting on [REDACTED] to review the results, determine whether the student was eligible for special education, and, if appropriate, develop an IEP. The Complainant alleged that some of the reports on which the IEP Team relied to find the student ineligible for special education failed to comply with 603 CMR 28.04(2)(c), which requires that:

Reports of assessment results. Each person conducting an assessment shall summarize in writing the procedures employed, the results, and the diagnostic impression, and shall define in detail and in educationally relevant and common terms, the student's needs, offering explicit means of meeting them. The assessor may recommend appropriate types of placements, but shall not recommend specific classrooms or schools. Summaries of assessments shall be completed prior to discussion by the Team and, upon request, shall be made available to the parents at least two days in advance of the Team discussion at the meeting occurring pursuant to 603 CMR 28.05(1).

Specifically related to the assessment by the Early Childhood Liaison, the Complainant alleged that the report "did not define in detail and in educationally relevant and common terms, the student's needs and did not offer explicit (i.e., clear, specific, granular, not vague) means of meeting the student's needs. The assessment results were difficult to interpret, as the assessor did not report sub-domain scores, percentiles or age equivalents for skills on the Battelle."

The Department's review of the Early Childhood Liaison's report (ECL Report) determined that the evaluator described the procedures used and the results. Although the Complainant alleged that a failure to include sub-domain scores, percentiles or age equivalents is a violation, there is no requirement to include those specific data if the report meets the explicit requirements.

However, in this case, the ECL Report does not include sufficient information to understand the student's functioning, particularly in areas of need. For example, the quantitative data for the [REDACTED] indicates that the student's scores on the [REDACTED] show a [REDACTED] in that area. The description of [REDACTED] performance on that domain is a list of what the student does and does not do. While those are appropriate ways to work from a strengths-based perspective and write detailed goals, it does not provide the reader with an indication of which of the skills causes the student to score as delayed compared to his peers. The Department notes a similar pattern on the other domain areas.

The evaluator partially synthesizes the results in the form of a list of areas of strengths, weaknesses, and areas of need. The evaluator listed [REDACTED] as areas of need, but does not elaborate on the student's specific needs or offer means of meeting them. Also absent from the report is a diagnostic impression. Like the Results section, the Summary simply provides a list of details. Most notably, the last paragraph of the ECL report states that "...as well as any recommendations, will take place at the IEP meeting."

In its Local Report, the District's only response to this allegation was that the District does not generally report subdomain scores. As stated above, the Department agrees that reporting of subdomain scores or age/grade equivalents are not per se necessary in a report. However, the District offered no explanation to the Department or the Complainant as to what the evaluator did do to meet its obligations under 603 CMR 28.04(2)(c).

A Board-Certified Behavior Analyst (BCBA) conducted an Applied Behavior Analysis Evaluation (ABA Evaluation) that assessed the student's ability to independently demonstrate a variety of academic readiness skills, play and leisure skill, follow classroom routines, and participate in instructional activities. The BCBA used a tool called [REDACTED]

The Complainant alleged that report from the ABA Evaluation "did not define in detail and in educationally relevant and common terms, the student's needs and did not offer explicit means of meeting the student's needs. The assessment results were difficult to interpret, as the assessor did not report scores or percentiles on the Adaptive Behavior Skills Assessment scores."

The Department's review of the BCBA's report determined that the evaluator described the procedures used and the results, and [REDACTED] provided a comprehensive summary of [REDACTED] classroom observations. [REDACTED] synthesis of the observation and interview findings using the [REDACTED] appears to present a comprehensive picture of what the student and can and cannot do and what level of assistance [REDACTED] requires.

Similar to what is stated above related to the ECL Evaluation, there is no per se requirement to report numerical scores or percentiles, as the Complainant alleged. However, also like the ECL Evaluation, the ABA Evaluation does not present the findings in a way that enables the reader to understand the student's functioning in relation to expectations.

In its Local Report, the District responded to this allegation simply by stating that the [REDACTED] is a criterion-referenced measure not norm-referenced. Although this measure is not norm-referenced and, therefore, does not provide numerical scores, the evaluators still must explain the results in relation to expectations for the student. In a conversation with the Department on [REDACTED] [REDACTED] explained that educators interpreting these results use their understanding of expectations as part of their consideration, including, for example, that in some areas, a rating of Emerging might not suggest an area of concern for a student as young as this student. This type of reasoning, including professional judgment, is critical information for readers of the reports to have to understand the findings and fully participate in the IEP Team process of determining eligibility.

The student was evaluated by an Occupational Therapist across a variety of domains. The Complainant alleged that the report of that evaluation (OT Evaluation) did not offer explicit means of meeting the student's needs. The District did not refute this allegation in any way in its Local Report.

Overall, the Occupational Therapist concluded that, despite weaknesses in some areas, the student can access the curriculum and participate in the school environment without occupational therapy.

The Department agrees that many who have weaknesses in some areas do not qualify for services, when all skills and abilities are taken together in context. However, 603 CMR 28.04(2)(c) states in relevant part:

*Reports of assessment results. Each person conducting an assessment shall summarize in writing the procedures employed, the results, and **the diagnostic impression, and shall define in detail and in educationally relevant and common terms, the student's needs, offering explicit means of meeting them** [emphasis added]. The occupational therapist should have included in her report explicit means of meeting the student's needs in areas of weakness, which could include non-special education or related services.*

The Department finds that the District did not comply with 603 CMR 28.04(2)(c) as it applies to the Early Childhood Liaison's Evaluation, Applied Behavior Analysis Evaluation, and OT Evaluation.

Allegation 2:

At the initial eligibility meeting on [REDACTED], the IEP Team determined that the student was ineligible for special education. Specifically, as stated in the District’s Notice of its Refusal to Act (N2), the IEP Team determined that “at this time, [student] does not present with a disability that impacts his ability to make effective progress and does not require specially designed instruction and /or related services in order to access the general curriculum.” The Complainant alleged this is an incorrect outcome and it resulted in the denial of the student enrollment in a public pre-school where he could receive necessary educational services, including, but not limited to, access to neurotypical peers.

The District did not address this allegation in its Local Report narrative, meaning it did not dispute or acknowledge noncompliance in this area. The District provided some additional information via telephone in response to a Department in a follow-up telephone call.

[REDACTED]

[REDACTED]

The Complainant alleged in her response to the District’s Local Report that the first time the student’s parents had seen the Educational Assessment (Ed) A and B was when the District responded to the Department’s Request for Local Report. This allegation is supported by the District’s Notice of Refusal to Act (N2) in which the District described its reasons for determining the student ineligible for special education. In what is, in other ways, a very comprehensive N2, there is no mention of teacher input via the Ed A and Ed B or otherwise.

603 CMR 28.05(2)(a) requires that the IEP Team “*examine the evaluative data.*” The Department finds that the lack of provision of the Ed A and Ed B to the parents resulted in a flawed process in the following ways: (1) the District did not consider those reports in reaching its determination, as the N2 would suggest; and/or (2) the school team considered this information but did not provide to the parents, who are members of IEP Team, an opportunity to engage in the eligibility determination process with the same information as the school. This is especially notable because the information in the Ed A and Ed B contains the precise information – the student’s ability to make progress – over which the District and parents disagree.

In the [REDACTED] call with the Department, the Interim Assistant Superintendent for Special Education and the District's Assistant Director for ABA Programs provided some background and reasoning for why the information in the Ed A and Ed B assessments would not necessarily change the determination of the IEP Team. The IEP Team should have discussed that type of information, reasoning, and professional judgment.

The N2 stated that the student does not require specially designed instruction to make progress. On the [REDACTED] call, the Interim Assistant Superintendent for Special Education and the District's Assistant Director elaborated on this by stating that they believed the interventions the student may require are interventions that can be provided within general education and do not require a specially designed early childhood program.

603 CMR 28.05(2)(a) further requires *"If the Team determines that the student is not eligible, the Team chairperson shall record the reason for such finding, list the meeting participants, and provide written notice to the parent of their rights in accordance with federal requirements within ten days of the Team meeting."* The eligibility flow chart the District provided to the Department as part of its Local Report indicated that the IEP Team determined that the student did not have a disability, despite the student's diagnosis of [REDACTED]. The narrative on the flow chart included the following sentence "No disability at this time."

The Complainant asserted in her response to the District's Local Report that the student's parents were unaware of that aspect of the determination [REDACTED]

Therefore, the Department finds that the District did not comply with 603 CMR 28.05(2)(a).

CONCLUSIONS

The District did not comply with 603 CMR 28.04(2)(c) because the Early Childhood Liaison's Evaluation report lacked a diagnostic impression and did not define in detail and in educationally relevant and common terms the student's needs, offering explicit means of meeting them; the Applied Behavior Analysis Evaluation report did not define in detail and in educationally relevant and common terms the student's needs; and the Occupational Evaluation report lacked explicit means of meeting the student's needs.

The District complied with 603 CMR 28.04(2)(a) because it conducted all required and optional assessments.

The District did not comply with 603 CMR 28.05(2)(a) because the District did not provide the student's family with the Ed A and Ed B assessments and, therefore, did not consider those reports in reaching its determination and/or considered this information but did not provide the parents, who are members of IEP Team, an opportunity to engage in the eligibility determination process with the same information as the school.

CORRECTIVE ACTION THAT MUST BE IMPLEMENTED

1. Amend and provide to the Department and parent(s) the assessment reports as follows:
 - a. Add to the Early Childhood Liaison Evaluation report a diagnostic impression, the student's needs, and explicit means of meeting them, in educationally relevant and common terms.
 - b. Add to the ABA Evaluation report more information about how the results of the criterion-referenced assessment should be understood in the context of expected performance and in making an eligibility decision.
 - c. Add to the Occupational Therapy Evaluation report explicit means of meeting the student's needs in his areas of weakness.
2. Re-convene the student's IEP Team to discuss, at minimum:
 - a. The Ed A and Ed B assessments, including how they are being considered within the context of all evaluation results.
 - b. The detailed description of the student's needs and suggestions for meeting them that will be added to the evaluation reports.
 - c. The basis for determining that the student is making effective progress.
 - d. Consideration of the detailed suggestions for meeting the student's needs and whether those constitute specially designed instruction.
 - e. Eligibility for special education based on these points and other evaluation results.
3. Provide to the Department a signed attendance sheet, the IEP Team Summary, the eligibility flow chart, and either an IEP and Notice of Proposed School District Action (N1) or a Notice of Refusal to Act (N2), as applicable.
4. Review with the evaluators in this matter and the IEP Team chairperson the requirements under 603 CMR 28.04(2)(a), 603 CMR 28.04(2)(c) and 603 CMR 28.05(2)(a). Please provide the name and title of the reviewer, the date of review and the staff in attendance. A review through a virtual platform is acceptable.

Please provide the Department with the required Corrective Action Report pursuant to these findings **no later than April 3, 2023**. Please provide the Corrective Action Report to PRSCAP@mass.gov. A standard response form is enclosed for your use in responding to this request. **A copy of your Report must also be sent to the person who registered this complaint.**

Also note that for matters related to special education, the parties may seek mediation and/or a hearing through the Bureau of Special Education Appeals (BSEA) on the same issues addressed in this letter. Such a hearing, however, is a new proceeding and is not for the purposes of reviewing the Department's decision in this matter. Any order or decision issued by the BSEA on the issues raised in this complaint would be binding.

I would be pleased to provide further clarification of all information and requirements noted above if you find it necessary. Please email rachel.e.rosen@mass.gov or call (781) 338-3760.

Sincerely,



Rachel Rosen, PRS Specialist
Problem Resolution System Office



Dean Paolillo, PRS Supervisor
Problem Resolution System Office

CC:

Lauren Viviani, Interim Superintendent for Special Education, Boston Public Schools
Andreina Ferreira, BPS Coordinator



Enclosures:

Response Form