



July 20, 2011

By Fax and E-Mail: (202) 307-1197; Samuel.Bagenstos@usdoj.gov

Mr. Samuel Bagenstos
Principal Deputy Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Protection & Advocacy for
Persons with Developmental
Disabilities

Protection & Advocacy for
Individuals with Mental Illness

Protection & Advocacy of
Individual Rights

Protection & Advocacy for
Assistive Technology

Protection & Advocacy for
Individuals with
Traumatic Brain Injury

Protection & Advocacy for
Beneficiaries of Social Security

Protection & Advocacy for
Voting Accessibility

Re: Civil Rights Complaint against Montgomery Public Schools

Dear Mr. Bagenstos:

The Alabama Disabilities Advocacy Program (ADAP) brings this complaint alleging discrimination by Montgomery Public Schools (MPS) against students with mental impairments, in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 and 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of federal financial assistance; and Title II of the Americans with Disabilities Act of 1990 ("Title II"), 42 U.S.C. §§ 12131 et seq., and 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities.

JURISDICTION

MPS is a recipient of federal financial assistance and a public entity subject to Section 504 and Title II.

NATURE OF THE COMPLAINT

This complaint alleges widespread violations by MPS of the rights of children with mental impairments, specifically children with an "emotional disturbance."¹ MPS has discriminated against such children in violation of Section 504 and Title II by, among other ways, systemically failing to identify students with ED who may need special education or related services to receive a free appropriate public education; failing to serve such students in the regular education environment to the maximum extent appropriate; and denying these students equal educational opportunities.

THE UNIVERSITY OF
ALABAMA
FOUNDED 1831

500 Martha Parham West
Box 870395
Tuscaloosa, Alabama 35487-0395
(205)348-4928
(800)826-1675
FAX (205)348-3909
adap@adap.ua.edu
www.ADAP.net

¹ "Emotional disturbance" is defined at 34 C.F.R. §300.8(c)(4)(i).

MPS's systemic failures to identify and support students with ED have resulted in disastrous outcomes for students. These students are capable of learning and of earning a regular high school diploma; however, because of MPS's violations, they fall behind academically, often earning failing grades. Many of them are subjected to repeated disciplinary removals, including in-school and out-of-school suspensions, expulsions, undocumented "cool off" removals, and placements in alternative schools. Many are pushed into the juvenile justice system. These responses are misdirected and unlawful, deny students valuable instructional time, and promote segregation. This complaint seeks the Department's intervention to remedy these systemic problems.

Below we summarize MPS's legal violations. We have collected substantial evidence supporting this complaint, which we are happy to make available, including findings from three experts who have evaluated MPS's special education services for children with ED. We attach redacted due process complaints of several children whom these experts have evaluated or whose records they have reviewed.

VIOLATIONS OF SECTION 504 AND THE ADA

1. MPS Fails to Identify Children with ED.

MPS has a practice of failing to identify students with ED. *See* 34 C.F.R. § 104.32 (location and notification requirements). MPS staff systematically fail to refer students for evaluation for ED even in the face of strong evidence of disability. Similarly, MPS ignores repeated academic failures that may also signal the existence of ED. When ED is left unaddressed, children lose months or years of valuable education. Moreover, students' frustration and embarrassment over their academic failures can worsen their condition and aggravate their behaviors.

MPS also fails to involve parents in identifying students with ED. MPS does not solicit information from parents on whether their child may have ED. Parents are not aware of their right to request an evaluation or have their child identified as ED. *Id.* Even when parents affirmatively request evaluations and services, MPS often ignores their requests or responds only after inexcusable delays.²

2. MPS Fails to Develop Appropriate Plans for Children with ED.

MPS's Individualized Education Programs (IEPs) are inadequate to meet the basic educational and mental health needs of children with ED. In large part, this is the result of MPS's inability to deliver essential mental health services, as described in section 3 below.

² MPS has identified approximately 85 students as "emotionally disturbed." This figure does not represent all students with ED in MPS. The number of such students is at least 300 and possibly higher. The Surgeon General of the United States reports that between five and nine percent of children aged 9 to 17 have "serious emotional disorders." *See* U.S. Department of Health and Human Services, "Mental Health: A Report of the Surgeon General" at 46 (1999).

Substandard evaluations also contribute to MPS's inadequate IEPs. MPS's evaluations do not meaningfully identify the child's strengths and needs or the underlying causes of the child's behavior. Instead, evaluations mainly recite the results of a few standardized tools. Evaluations also suffer from MPS's failure to seek and incorporate parental insights about the child. See 34 C.F.R. § 104.35 (evaluations must seek information "from a variety of sources," including "social or cultural background" and "adaptive behavior..."). As a result, MPS often knows little about how the child behaves at home or in the community. Moreover, MPS staff often blame parents for their children's condition or behaviors, discouraging meaningful parental input. MPS recognizes its weakness in this area: its Strategic Plan for 2008-2013 identified a goal of "reduc[ing] barriers that make it difficult for parents, teachers, and administrators to interact..." a goal that it says it has achieved at only the 50 percent level.³

MPS's failure to conduct adequate behavioral assessments results in "behavior plans" that are cookie-cutter and shallow. MPS does not identify what triggers the child's behaviors, the purpose the behavior serves, or the strengths and interests that can be used to change behavior. As a result, MPS does not develop – and its teachers cannot implement – effective behavioral interventions in the classroom or elsewhere in school. Because neither parents nor students participate in developing behavior plans, MPS often is unable to identify incentives that would be effective for the child.

Neither IEPs nor behavior plans anticipate or include individualized strategies for responding to crises, and MPS staff are not trained in de-escalation and crisis intervention techniques. Neither IEPs nor behavior plans use extracurricular activities to support improved behavior and learning.

MPS's plans do not adequately prepare students for transitions from grade to grade, school to school, or other transitions that may affect their behavior.

MPS does not invite potential community partners, such as mental health, child welfare, or juvenile justice agencies, to participate in the school's planning for the child. Indeed, staff at partner agencies sometimes avoid contacting the child's school because they fear that the child would be stigmatized, and treated worse, if MPS learned of the other agency's involvement.

3. MPS Lacks Necessary Mental Health Services.

MPS fails to provide students with ED the related services they need to obtain a free and appropriate education. See 34 C.F.R. § 104.33 (requirement to provide FAPE "regardless of the nature or severity" of the student's disability). Students with ED, especially those with challenging conditions, require intensive related services, including direct behavioral interventions such as positive behavior supports and skills building; teacher coaching and training; coaching and training parents to support and complement services provided in school; mobilizing community resources; and coordinating with non-school providers,

³ "MPS Strategic Plan: Our Children, Our Community and Our Future 2008-2013," *available at* <http://sptracking.mps.k12.al.us/strategicplan/default.aspx> (last viewed June 20, 2011).

including providers in the mental health system. Students with ED need these services to progress in school and achieve at grade level.

MPS does not provide these essential interventions. MPS employs few if any staff trained to provide these services and it has no system for securing these services from private providers.⁴ The useful but limited help it has obtained from the Montgomery Area Mental Health Authority, pursuant to a federal grant, will likely end next spring.

As a result, MPS students with ED experience repeated academic failure, and at rates that significantly exceed students without ED. 34 C.F.R. § 104.4(b)(1)(iii) (schools may not provide individuals with disabilities with a “benefit, or service that is not as effective as that provided to others”); 28 C.F.R. § 35.130(b)(1)(iii) (same).⁵

4. MPS Segregates Students with ED.

MPS systematically removes children with ED from regular educational environments. *See* 34 C.F.R. § 104.34(a) (schools must educate students with disabilities in regular classroom setting to the maximum extent appropriate); 28 C.F.R. § 35.130(d) (services must be provided in “most integrated setting appropriate”). Often this occurs after MPS has failed for months or even years to respond to clear signs that the student has ED.

MPS does not respond to these students’ early academic failures by changing instructional methods or providing necessary mental health services. Instead of developing competent plans to get students with ED back on track, MPS punishes them for behavior that is plainly disability-related. Eventually, students with ED are removed from regular educational settings and their neighborhood schools. The “alternative” schools in which they are placed, like MPS’s neighborhood schools, are ill-equipped to meet their academic or mental health needs.⁶ When these placements predictably fail, MPS often places students on “homebound” status or turns to the juvenile justice system.

PROPOSED REMEDIES

MPS must develop adequate systems for providing a free and appropriate public education to students with ED.

⁵ *See also* 34 C.F.R. § 104.4(b)(2) (benefits and services must afford individuals with disabilities “equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person’s needs.”); 28 C.F.R. § 35.130(b)(1)(iii) (same).

⁶ MPS places children in alternative schools without meaningful consideration of whether they could be educated in regular classrooms or neighborhood schools if appropriate services were available. *See* 34 C.F.R. § 104.34(a) (public schools must evaluate students with disabilities “before taking any action with respect to ... any significant change in placement.”).

As a first step, the district must implement an effective approach to identifying students with ED, including soliciting and adequately responding to parental concerns and requests for evaluation. Multiple disciplinary sanctions, particularly in the case of younger children, are a potential indicator of ED as is falling behind academically. When a student, especially a younger student, has been repeatedly disciplined, or falls behind in school, MPS should examine whether the student has ED.

IEPs and behavior plans must be competently and individually tailored, addressing the child's academic and behavioral strengths and needs. Functional behavioral assessments should be conducted by trained personnel and should identify events that trigger positive as well as negative behavior. In addition, assessments should consider the impact of recent traumatic events. Parents and students should be involved in the assessment and in developing plans. Training is required to ensure MPS appropriately engages parents and students developing and implementing IEPs and behavior plans.

MPS must have the capacity to provide intensive mental health services to students with ED, including direct behavioral interventions, teacher coaching and training, and parent coaching and training, and it should take advantage of and coordinate with non-school providers and community resources. These interventions are Medicaid-reimbursable for a substantial portion of MPS's student population.

CONCLUSION

MPS discriminates against its students with ED, in violation of Section 504 and the ADA. It fails to provide children with ED a free and appropriate public education in the most integrated setting. MPS's legal violations result in serious harm, including academic failure and isolation from non-disabled peers. ADAP has been unable to negotiate with MPS a resolution to the issues raised in this Complaint.

Thank you for your attention to this complaint. We would be happy to provide additional information. Please contact Lewis Bossing at the Bazelon Center (lewisb@bazelon.org, 202- 467-5730 ext. 307) or Nancy Anderson at ADAP (nanderso@adap.ua.edu, 205-348-4928) with questions or requests for additional information.

Sincerely,

James Tucker
Nancy Anderson
Alabama Disabilities Advocacy Center
624 Bryant Drive
Tuscaloosa, AL 35487

Ira A. Burnim
Lewis Bossing
Julia Graff
Samantha Crane
Bazelon Center for Mental Health Law
1101 15th Street NW, Suite 1212
Washington, DC 20005

Counsel for ADAP