

## LEGAL MEMORANDUM

### ~~PROTECTED BY ATTORNEY-CLIENT PRIVILEGE~~

This redacted memorandum reflects a partial waiver of the attorney-client privilege. This waiver has been agreed to by a majority of the PCSD school board members for the purpose of informing the public, their constituents, of this important investigation. There is no intent to waive attorney-client privilege in any way beyond the non-redacted text contained in this memorandum at this time. However, it is the intent of Board to make all information uncovered in this investigation public, to the furthest extent allowed by law, at an appropriate time after this investigation is concluded.

---

Felicia Watson, School Board President

---

Doreen Clifford, School Board Vice President

---

Debra Long

---

Raymond Duncan

---

Randall Johnson

TO: PCSD School Board Members  
FROM: Todd J. Aldinger, Esq., PCSD Special Counsel  
DATED: November 15, 2017  
RE: Graduation Issues, Preliminary Report to the Board of Education

---

At a School Board Meeting on September 6, 2017, Dr. Ten Dyke, Director of Data Analysis and Accountability, gave a presentation regarding graduation rates, entitled "PCSD and PHS Cohorts." During her presentation, PCSD Board President, Dr. Felicia Watson, raised questions regarding information that she had recently received regarding Section 504 Safety Net accommodations that were granted in extremely close proximity to students' exams in June and August 2017. Board Vice-President Doreen Clifford raised additional questions about Appeals to Graduate with a Lower Score on a Regents Examination. Dr. Ten Dyke was instructed to follow up on these questions with Dr. Watson. In accordance with these instructions, Dr. Ten Dyke provided certain files regarding questionable graduations to Dr. Watson. At this point, by consensus of a majority of the board, Dr. Watson contacted me and expressed concern that students may have been improperly graduated in 2017. I was instructed to begin an inquiry into whether all students who graduated in 2017 were properly graduated. Dr. Watson instructed Dr. Ten Dyke to provide me with all the relevant files.

In early October, I was provided with a file containing information regarding questionable graduations. This file included (1) Section 504 meeting documents, along with transcripts and attendance details for those

students; (2) appeals to graduate with a lower score on a Regents exam, along with transcripts and attendance details for those students; and (3) transcripts of students who graduated with less than 22 credits. I proceeded to analyze these documents, research the applicable laws and regulations, confer anonymously with state and federal authorities, and meet with a number of witnesses and whistleblowers. While undertaking this investigation, numerous other issues regarding questionable graduations have also come to my attention. As such, this memorandum only represents a preliminary result of my inquiry.

In summary, through interviews and documents reviews, my investigation has uncovered more than forty (40) PCS D students who graduated under questionable circumstances in 2017. Below I detail my findings on each of the issues I have thoroughly examined at this point. I begin by laying out the legal background of the topic in question. Next, I summarize the issues I have uncovered relating to each topic. Finally, I analyze each specific student for which I have grounds for questioning the propriety of their graduation.

The next step that the Board should take in this process should be to provide this memorandum to the Superintendent, the High School Principal, and other relevant faculty. Those individuals should be asked to address each and every concern in this memorandum. If these concerns remain

unaddressed, then the Board should direct counsel to make the relevant reports to the relevant authorities and take other necessary actions.

### **1. Section 504**

Section 504 of The Rehabilitation Act of 1973 seeks to protect students with disabilities against discrimination by requiring public schools to provide eligible students reasonable and appropriate accommodations, so they may participate fully in school. Such accommodations are granted to an eligible student as part of a “Section 504 Plan” after a “Section 504 Committee” has a “Section 504 Meeting.” These accommodations are specific to the individual student; the law does not provide/allow for any accommodations to be given as blanket accommodations to all students with a Section 504 Plan. (See 34 CFR § 104.33[b])

New York State allows for a student’s Section 504 Plan to include, as a possible accommodation, eligibility for “Safety Net.” Safety Net allows for a low-pass option, where a score of 55-64 on required Regents examinations is deemed to meet testing requirements for a local diploma. (See 8 NYCRR § 100.5)

Section 504 Plans are meant to ensure that disabled students have necessary accommodations in order to have access to appropriate public education. Federal Law requires PCSD to “provide a free appropriate public education to each qualified handicapped person.” (34 CFR 104.33[a]). An appropriate education is defined to include “related aids and services that . . .

are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met.” (34 CFR 104.33[b]). Section 504 Plans may provide for aids and services such as:

- Highlighted textbooks
- Extended time on tests or assignments
- Peer assistance with note taking
- Frequent feedback
- Extra set of textbooks for home use
- Computer aided instruction
- Enlarged print
- Positive reinforcements
- Behavior intervention plans
- Rearranging class schedules
- Visual aids
- Preferred seating assignments
- Taping lectures
- Oral tests

As such, Section 504 Plans are clearly meant to further the education of the 504 designated individual. Thus, it is proper to put Section 504 Plans into effect as early as possible in a student’s education so they can take advantage of these accommodations for as much of their education as possible. Unreasonable and unnecessary delay in providing needed and appropriate accommodations may be interpreted as denying students their civil rights under Section 504.

#### A. Summary of Issues with Section 504 Meetings and Plans

Unfortunately PCSD seems to have used Section 504 Plans to grant the Safety Net low-pass option to marginal students at the last minute. For example, in 2017, students [REDACTED] were given Section 504 Plans the day before they took summer school finals after their senior year.

This allowed PCSD to graduate these students with the low-pass option, but necessarily limited any benefit the students received from their Section 504 Plans to testing accommodations for their last exam.

Even potentially more egregiously, students [REDACTED] all seemed to have received 504 Plans *after* the date of their last Regents examination, when it was clear that these students would not graduate unless they were able to take advantage of the low-pass option. When these students were given Section 504 Plans and qualified for Safety Net, they immediately were eligible to graduate and did so. In effect, these students were only granted the benefits of a Section 504 Plan after their entire secondary education was over. This runs contrary to the intent of Section 504, which requires PCSD to provide an “appropriate public education” to all students, regardless of disability or handicap. Reducing the required grade needed on exams to graduate, after the fact, cannot be reasonably interpreted as an action meant to aid in providing an “appropriate public education” as required by the regulations. It can only be interpreted as a means to graduate these students. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Additional evidence that certain Section 504 meetings were suspect can be seen from [REDACTED] mischaracterizing the attendance records of students being evaluated in Section 504 Meetings. In student [REDACTED] Section 504 eligibility meeting [REDACTED] is quoted as saying the student's attendance was good. In the 2016-2017 school year, this student was absent without excuse from first period 113 times, second period 67 times, third period 33 times, fourth period 46 times, fifth period 40 times, sixth period 39 times, seventh period 34 times, eighth period 46 times, and ninth period 36 times. [REDACTED] similarly is quoted as saying that student [REDACTED] attendance was good in that student's Section 504 eligibility meeting. In 2017, this student was absent without excuse from first period 77 times, second period 50 times, third period 51 times, fifth period 67 times, sixth period 53 times, seventh period 53 times, eighth period 52 times, and ninth period 59 times. It appears that neither of these two students complied with PCSD Attendance Policy 5100 for ANY of their classes in 2016-2017 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Further a member of the Section 504 Committee making the Section 504 eligibility determinations for students [REDACTED] indicated that he/she had to take [REDACTED] word for these students' attendance

because printed copies of attendance records were not provided at the Section 504 Meeting. There are other instances in the records indicating that Section 504 Meeting participants not having access to the full records of the student being evaluated. This may contradict the federal regulations promulgated under Section 504. Those making a Section 504 eligibility determination are required to “draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” (34 CFR 104.35[c]). The regulations also require PCS D to “establish procedures to ensure that information obtained from all such sources is documented and carefully considered.” (34 CFR 104.35[c]).

If students were given Section 504 Plans at the end of their academic careers *just* so they could graduate, that would be clearly inappropriate; however, it is arguably worse if these students actually had disabilities qualifying them under Section 504. Only instituting a Section 504 Plan at the very end of a truly disabled, Section 504-qualifying student’s academic career means that this student was deprived of receiving the benefits of Section 504 Plan accommodations during the vast majority of his/her academic career. This violates the regulations promulgated under Section 504, which require that PCS D “shall provide a free appropriate public education to each qualified handicapped person,” defines such “appropriate education” as “the provision of . . . education and related aids and services . . .

designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” (34 CFR 104.33[a], [b]). A handicapped person’s educational needs are not met as adequately as nonhandicapped persons when the handicapped person only receives education related aids and services days before their last ever high school exam, or even more egregiously, after their last exam.

Lastly, a Section 504 eligible student can only be graduated with the low-pass option if low-pass option is specifically granted as an accommodation in that student’s Section 504 Plan. The low-pass option is not automatically granted to every student with a Section 504 Plan because state and federal laws require that all accommodations be specific to each student. My review found this might not always have done. Witnesses reported that certain students were not specifically granted the Safety Net low-pass option; nevertheless, these same students appear to have been graduated utilizing the low-pass option.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Investigative Narrative for [REDACTED]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The image consists of a single, uniform black rectangle covering the entire area. There are no discernible features, text, or patterns.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## 2. Appeals to Graduate with a Lower Score on A Regents Examination

Students can graduate with exam scores lower than a 65 pursuant to an appropriate Appeal to Graduate with a Lower Score on A Regents Examination (“Appeal”). To qualify for such an Appeal, a student must meet the following criteria as set forth at 8 NYCRR 100.5(a)(7)(i)(a):

A student who first enters grade nine in September 2005 or thereafter and who fails, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

1. has scored within five points of the 65 passing score on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal;
2. provides evidence that he or she has received academic intervention services by the school in the subject area of the Regents examination under appeal;
3. has attained a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; **and**
4. is recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such examination. [emphasis added]

Slightly different criteria are set forth at set forth at 8 NYCRR 100.5(a)(7)(i)(c) for students with disabilities:

- c. A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section

200.1(zz) of this Title, and fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

1. has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and
2. has met the criteria specified in subclauses (2) - (4) of clause (a) of this subparagraph.

Thus, for both regular and special education students, these regulations require six separate criteria be met: (1) a student must at least twice attempt the Regents examination to be appealed; (2) a regular education student obtain a score of a 60-64 on the Regents examination to be appealed, and a special education student obtain a score of 52-54; (3) a student must obtain at least a 65 course average in the subject area of the Regents examination under appeal; (4) there must be evidence provided that the student has received academic intervention services by the school in the subject area of the Regents examination under appeal; (5) the student must have attained a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the school; and (6) the student must be recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such

examination. These separate criteria are conjoined by “ands;” therefore *the absence of any one of these criteria makes the student ineligible for an Appeal to Graduate with a Lower Score on A Regents Examination.*

“An appeal may be initiated by the student, the student's parent or guardian, or the student's teacher, and shall be submitted in a form prescribed by the commissioner to the student's school principal.” (8 NYCRR 100.5[a][7][ii]).

Once an appeal is initiated, state regulations require the school principal to “chair a standing committee comprised of three teachers (not to include the student's teacher in the subject area of the Regents examination under appeal) and two school administrators (one of whom shall be the school principal). The standing committee shall review an appeal within 10 school days of its receipt and make a recommendation to the school superintendent or, in the City School District of the City of New York, to the chancellor of the city school district or his/her designee, to accept or deny the appeal.” (8 NYCRR 100.5[a][7][iii]).

After the recommendation is made “[t]he school superintendent or, in the City School District of the City of New York, the chancellor of the city school district or his/her designee, shall make a final determination to accept or deny the appeal. The school superintendent or chancellor or chancellor's designee may interview the student making the appeal to determine that the student has demonstrated the knowledge and skills required under the State

learning standards in the subject area in question.” (8 NYCRR 100.5[a][7][iv]).

It is important to note that these regulations require the *Superintendent* (not the Superintendent’s designee) to sign-off on all appeals. Only the Chancellor of the New York City School District is permitted a designee.

A. Summary of Issues with Appeals to Graduate with a Lower Score on A Regents Examination

There are numerous issues with the 2017 Appeals to Graduate with a Lower Score on A Regents Examination. First, there appears to be students who were granted appeals who never attempted the examination to be appealed twice. Second, there appears to be students who were granted appeals who never obtained a 65% in the subject area of the Regents examination under appeal and so did not meet or exceed the required passing grade by the school. Third, it appears that numerous students were granted Appeals without *any* evidence that the student received academic intervention services by the school in the subject area of the Regents examination under appeal. Fourth, in 2017, it appears that all appeals were signed-off by an *Assistant Superintendent*, [REDACTED], not the *Superintendent*, as required by law.

**Investigative Narrative**



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

### **3. General Graduation Requirements**

Generally students are required to have obtained 22 credits to graduate. Unless an exception applies, these 22 credits must include 4 credits in English, 3 credits in math, 3 credits in science, 3 credits in social studies, and 2 credits in physical education. Additionally, a student must receive passing grades, over a 65%, on five regents examinations, unless they qualify for the 4+1 program.

#### **A. Summary of Issues with General Graduation Requirements**

In 2017 there appears to be: (1) instances of students graduating with less than 22 credits; (2) instances of students graduating without fulfilling the subject matter credit distribution requirements; and (3) instances of students graduating without receiving a passing grade on five regents examinations.

#### **B. Issues with Specific Students' General Graduation Requirements**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]