



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

February 15, 2018

Susan Viccaro
Superintendent
Newburyport Public Schools
70 Low Street
Newburyport, MA 01950

Via Email to: sviccaro@newburyport.k12.ma.us

Re: Complaint No. 01-14-1154
Newburyport Public Schools

Dear Superintendent Viccaro:

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) received against the Newburyport Public Schools (the District). The Complainant alleged that the District failed to timely and appropriately evaluate her son (Student) to determine whether he was eligible for special education services, and that the District failed to communicate with her in a language that she understands (XXXXXXXX) regarding special education decisions about the Student during the 2013-2014 school year. 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 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 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. OCR also enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. The District is subject to Section 504 and Title VI because it receives Federal financial assistance from the Department and it is subject to Title II because it is a public entity operating an education system.

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

Legal Standards

Section 504

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.¹ 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. While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student’s possible eligibility is recognized and the district conducts the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities. Timeframes imposed by the Individuals with Disabilities Education Act (IDEA) as well as state timelines for special education evaluations are helpful guidance in determining what is reasonable. The IDEA regulation, at 34 C.F.R. § 300.301(c)(1), requires that school districts complete evaluations within 60 days of receiving parental consent for the evaluation unless the state has established a different timeline, in which case evaluations must be completed within the timeline established by the state. Massachusetts state regulations require initial evaluations to be completed within 30 days of receipt of the parent’s written consent, and the entire process, including the team meeting, to be completed within 45 days of the parent’s consent (603 CMR 28.05).

Title VI

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. This policy concerning the need for effective communication with parents who do not speak English fluently has consistently been upheld by the courts and reiterated in subsequent OCR policy guidance.

¹ The requirements regarding FAPE, specifically described in the Section 504 regulations, are incorporated in the general non-discrimination provisions of the Title II regulation. Because Title II does not change the requirements of FAPE, this letter refers only to Section 504.

Factual Background

The Complainant's first language is XXXXXXXXXX. The Complainant alleged that the District's lack of communication with her in her first language hindered her ability to understand and make informed decisions during the Individualized Education Program (IEP) eligibility process. The Complainant reported to OCR that she was not provided with forms regarding the Student's IEP in XXXXXXXXXX, that she received no communication about the Student's IEP meeting in XXXXXXXXXX, and that she requested, but did not receive, translated notes from the Student's IEP meeting. The Complainant also raised concerns about the length of time it took for the Student to be evaluated for IEP eligibility.

During its investigation, OCR reviewed documents provided by the Complainant and the District, including, but not limited to: email communications between the Complainant and District staff, the Complainant's home language survey, the Student's report cards and progress reports, evaluations of the Student, and emails between District staff and a third-party vendor with regard to translation services.

Section 504—Evaluation

Based on the evidence gathered to date, OCR determined that the Student's evaluation for IEP eligibility was delayed. The documentation provided by the District shows that the initial referral from the Complainant was received on XXXXX XX, 2014. The District sent a consent packet to the Complainant on XXXXX XX, 2014. The Complainant accepted the proposed evaluations in full, and a notice was sent to the Complainant on XXXX X, 2014 regarding the date of the meeting (XXXXXXX XX, 2014). Ultimately, the team meeting was rescheduled multiple times and did not occur until XXXXXX XX, 2014, well beyond the 45-day time period required by IDEA. OCR has preliminary concerns about the amount of time it took the District to evaluate the Student. To make a compliance determination, OCR would need to investigate further to determine the reasons for the delay. The email documentation provided by the District indicates that the delay may have been due in part to the difficulty of arranging XXXXXXXXXX translation services. OCR would need to interview the School Psychologist to determine the reason(s) for the delay in conducting the initial evaluation, and to interview the Team Chair as to the reasons the meeting was rescheduled to determine how many days are attributable to the District.

Title VI—Parental Communication

The District asserted that when the Complainant first enrolled her son in the school, she stated that she preferred to use English to communicate. The District reported to OCR that requests for translation and interpretation are handled on a case-by-case basis. OCR reviewed the home language survey that was given to the Complainant upon enrollment, and in response to the question "Would you prefer oral and written communication from the School in English or your home language?" the Complainant wrote "yes." The "yes" is crossed out and replaced with "no." This ambiguous response could indicate confusion on the part of the Complainant. OCR also reviewed the IEP forms, ELL Progress Reports, Report Cards, and other evaluations

conducted of the Student. OCR determined that all of the evaluations were translated into XXXXXXXXXX, and some additional documents were translated as well.

OCR has preliminary concerns about the District's use of the home language survey and about the District's lack of a policy for translation. OCR would need to conduct multiple interviews to make a compliance determination, including an interview of the staff member who conducted the home language survey (if a staff member assisted) to determine what (if any) conversation was had with the Complainant. OCR would also need to investigate whether report cards and other essential information were translated, and whether an interpreter was used for communication of other essential information.

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 Agreement which, when fully implemented, will resolve the issues raised in the complaint.² 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.

² On November 7, 2017, prior to entering Section 302 negotiations with OCR, the District engaged in proactive staff-wide training on Section 504, which addressed OCR's concerns about the delayed evaluation.

If you have any questions, please contact Civil Rights Attorney Colleen Robinson at (617) 289-0063 or by e-mail at Colleen.Robinson@ed.gov.

Sincerely,

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

Enclosure

cc: Alina Kantor Nir, Esq.