



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

June 8, 2020

Dana Eaton
Superintendent
Brentwood Union School District
255 Guthrie Lane
Brentwood, California 94513

(In reply, please refer to case no. 09-15-1540.)

Dear Superintendent Eaton:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has reached a determination in the above-referenced complaint against the Brentwood Union School District (District). The Complainant alleged that the District discriminated against students based on race and disability. OCR initiated an investigation of the following issue:

Whether the District is denying African-American students who are disabled or are suspected of being disabled a free appropriate public education (FAPE) and is discriminating against them based on race by not accurately recording their racial classification and administering standardized intelligence tests which have not been validated to assess African American students.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance. OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination based on disability in programs and activities operated by recipients of federal financial assistance. In addition, OCR enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination based on disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Title VI, Section 504, Title II, and the implementing regulations.

OCR began investigating this complaint by reviewing documents provided by the Complainant and the District, and by interviewing the Complainant. Based on this information, OCR identified a compliance concern. The District has signed a voluntary Resolution Agreement to fully resolve that concern without a full investigation. This letter summarizes the relevant facts, the applicable legal standards, and OCR's determination.

Facts

When a student enrolls in the District, the student's parent or guardian has the option of reporting the student's race(s) on the enrollment form. The enrollment form lists a number of racial categories, including African American. The Director of Student Services, along with numerous clerical personnel, subsequently transfer that information to various electronic database systems, including the system used by the District's Special Education Department (Special Education Database).

The District is part of the Contra Costa Special Education Local Plan Area (SELPA). The SELPA Procedures Guide (Guide) section on assessment states that a district must assess a student prior to initial placement in special education and whenever there is any significant change in the student's special education placement. The Guide requires testing and assessment materials and procedures to be selected and administered so as not to be racially discriminatory. The Guide states that assessments must be validated for the specific purposes for which they are used and must be tailored to assess specific areas of educational need, not merely to provide a single general intelligence quotient. The Guide notes that alternative means of intellectual assessment must be documented for African American students and standard intelligence testing must not be administered to these students.

The SELPA has a guidance document entitled *Test Analysis for use with African American Students in California (Test Analysis)* that speech and language providers use to evaluate appropriate tests for assessing African American students. The *Test Analysis* lists several tests that should not be administered to these students because the tests directly or indirectly purport to measure intelligence. The list includes the Weschler Intelligence Scale for Children (WISC).

The District's Administrative Regulation (AR) 6164.4 governs the Identification and Evaluation of Individuals for Special Education. It provides, in part, that assessments and other evaluation materials must be selected and administered so as not to be discriminatory based on race and must be used for the purposes for which the assessments or measures are valid and reliable. AR 6164.4 also states that the assessments and other evaluation materials must be tailored to assess specific areas of educational need and not merely designed to provide a single general intelligence quotient.

The District provided OCR a list of assessment instruments that it considers to be standardized intelligence tests and that it does not use to assess or reassess whether African American students are eligible for special education services. This list includes the WISC and the Expressive One-Word Picture Vocabulary Test (EOWPVT).

The Complainant identified one student, Student D, who is Hispanic and African American and to whom the District administered a standardized intelligence test in assessing his eligibility for special education or related services. Student D's parents filed for a due process hearing with the Office of Administrative Hearings (OAH). The October XX, 2015 OAH decision noted that Student D's mother enrolled him in the District in 2008 and reported that he is Hispanic and African American on his enrollment form. However, the District's Special Education Database only identified the student as Hispanic. In assessing Student D for special education eligibility in 2013, the psychologist said she administered the WISC because she had been unaware that Student D is also African American. The OAH decision stated that Student D was reassessed in 2015 by a different psychologist who discovered that Student D is also African American. That psychologist then used alternate methods to assess Student D's intellectual ability; however, he referred to the 2013 WISC results in his report for historical purposes. After a full hearing, the Administrative Law Judge (ALJ) concluded that the District had denied Student D a FAPE by including the results of the WISC given in 2013 into the assessment it conducted in 2015. As a remedy, the ALJ ordered the District to seal the WISC test results and amend both the 2013 and 2015 assessments to remove references to those scores.

OCR obtained from the District a listing of all students whom it had evaluated or reevaluated for special education or related services during the 2014-15 and 2015-16 school years up until April 19, 2016, the race of each student listed in the District's Special Education Database, and a copy of each student's enrollment form. OCR reviewed this information for all students designated as African American on the enrollment form, in the Special Education Database, or both. OCR found an additional 18 students with discrepancies between the enrollment form and the Special Education Database or who had incomplete entries on the Database. Of these 18 students, the District had administered the WISC to two students and the EOWPVT to one.

Analysis

Issue: Whether the District is denying African-American students who are disabled or are suspected of being disabled a FAPE and is discriminating against them based on race by not accurately recording their racial classification and administering standardized intelligence tests which have not been validated to assess African American students.

Legal Standard

Under the Title VI regulations, at 34 C.F.R. § 100.3(a) and (b), a school district may not treat individuals differently based on race regarding any aspect of services, benefits, or opportunities it provides. Section (b)(1) states that a school district may not, directly or through contractual or other arrangements, on the basis of race, (ii) provide any services, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others; or (v) treat an individual differently in determining whether he or she satisfies any admission, enrollment, eligibility or other requirement which must be met to receive any service, financial aid, or other benefit.

Under the Section 504 regulations, at 34 C.F.R. § 104.33, public school districts are required to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Section 104.35(a) requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Pursuant to 34 C.F.R. § 104.35(b), tests and other evaluation materials must be valid for the purpose for which they are being used; and tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient.

The Appendix to the Section 504 regulations states that 34 C.F.R. § 104.35(b) establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being disabled, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. It states that this portion of the regulation was aimed primarily at the abuses in the placement process that resulted from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests. It also notes that this provision is intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests.

OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Determination

Based on the evidence summarized above, OCR identified a compliance concern that the District's method(s) of documenting students' racial classification is not consistently accurate and may result in the District assessing whether African American students are disabled and in need of special education or related services by administering testing instruments that are not considered to be valid for that population according to the District and its SELPA. The facts show that during the 2014-15 school year and part of the 2015-16 school year there were discrepancies or incomplete information between the racial classification information contained in enrollment forms and the Special Education Database for 19 students whose enrollment forms included a designation of African American. As a probable result, the District administered standardized intelligence testing instruments that it and its SELPA consider inappropriate for African American students to four such students in assessing their eligibility for special education or related services due to disability.

Conclusion

OCR informed the District of its determination and it agreed to fully resolve the identified compliance concern through a voluntary Resolution Agreement. The District agreed to conduct a self-review of its system for documenting special education student racial classification information from April 2016 to date. For any student still enrolled in the District who was identified as African American during the OCR investigation or through the self-review process and to whom the District administered standardized intelligence tests, the District will offer to expunge the standardized intelligence testing information, reassess the student with a valid testing instrument(s), and hold an IEP meeting to discuss any additional special education or related service needs. In addition, the District agreed to: implement modifications to its procedures and practices to ensure the accurate and complete transfer of racial classification information; issue a guidance memorandum to all personnel responsible for ensuring that the modified system is implemented with fidelity; and issue a guidance memorandum to all personnel responsible for assessing and/or reassessing students' eligibility for special education or related services.

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter and notifying the Complainant concurrently. When fully implemented, the Resolution Agreement is intended to address the complaint issues. OCR will monitor the implementation of the Resolution Agreement until the District complies with the terms of the Resolution Agreement. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issue other than that 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.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint with OCR alleging such treatment.

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, it will seek to protect, to the extent provided by the law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation extended by you and your staff during the investigation. If you have any questions regarding this letter, please contact me at (415) 486-5555.

Sincerely,

/s/

Joseph Wheeler
Team Leader

Cc: Jeff P. Weiss, Director of Special Education