



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

February 24, 2016

Trisha Dellis
Superintendent
Nevada City Elementary School District
800 Hoover Lane
Nevada City, CA 95959

(In reply, please refer to case # 09-15-1575.)

Dear Superintendent Dellis:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Nevada City Elementary School District (District). The Complainant¹ alleged that the District discriminated against the Student on the basis of disability. Specifically, OCR investigated whether the District failed to provide the Student with a free, appropriate public education (FAPE) by failing to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education or related services because of a disability.

OCR investigated this complaint pursuant to its authority under Section 504 of the Rehabilitation Act of 1973 (Section 504), and Title II of the Americans with Disabilities Act of 1990, as amended (Title II). Section 504 and its implementing regulation prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II and its implementing regulation prohibit discrimination on the basis of disability by public entities. The District receives Department funds, is a public education system, and is therefore subject to the requirements of Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. After careful review of the information gathered in the investigation, we concluded that the District did violate Section 504 and Title II with regard to the issue OCR investigated. The legal standards, facts gathered, and the reasons for our determinations are summarized below.

¹ OCR notified the District of the identity of the Complainant and the Student when the investigation began, and we are withholding names from this letter to protect personal privacy.

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

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts 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. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

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. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner.² Under section 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Under subsection (c) of the same, placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

Factual Findings

The following facts are relevant to OCR's analysis.

- The Complainant is a court-appointed education rights holder for the Student, who is in foster care. The Student's Social Worker from Solano County Child Welfare Services placed the Student at a California certified non-public school (the School), where he arrived with an existing IEP. The Complainant stated to OCR that the Student's placement at the School started October 2, 2014. The District listed the Student's district of residence on his IEPs as the Nevada City Elementary School District.

² Dear Colleague Letter: English Learner Students and Limited English Parents (jointly issued by the OCR & U.S. Department of Justice) (January 17, 2015).

- The School's website describes its residential treatment program as providing services for children requiring Level 14 services to address students' severe emotional, behavioral and educational problems.
- The District stated that an IEP meeting was held for the Student on February 26, 2015, and the IEP developed included these services: Specialized Academic Instruction, 1,600 minutes/week; individual counseling, 60 minutes/month; Extended School Year, and a Behavior Support Plan to address a series of behavior incidents.
- The District stated that during the February 26, 2015 IEP meeting, the team discussed the Student's need for a triennial re-evaluation and IEP meeting, and the possible need for new assessments. It stated that it developed an assessment plan that the Complainant signed and dated March 10, 2015, which it received back from the Complainant on March 16, 2015.
- The District's Administrative Regulation 6164.4 provides that once testing of a student is completed, and other evaluation materials gathered, an IEP team meeting that includes the parent/guardian or his/her representative shall be scheduled pursuant to Education Code §56341. At this meeting, the team shall determine whether or not the student is a student with disabilities, as defined in Education Code §56026, and shall discuss the evaluation, the educational recommendations, and the reasons for the recommendations. If a determination is made that a student has a disability and needs special education and related services, an IEP shall be developed within a total time not to exceed 60 days, not counting days between the student's regular school sessions or terms or days of school vacation in excess of five school days, from the date of the receipt of the parent/guardian's consent for evaluation, unless the parent/guardian agrees, in writing, to an extension.
- Sixty calendar days from March 16, 2015 (tolled for school breaks) was Saturday, May 21, 2015.
- The Complainant stated to OCR that she communicated with the School several times after returning the consented assessment plan to the District to inquire about the assessments and a date for the IEP meeting, but that no IEP meeting was held before the end of the 2014-15 school year.
- The Student's academic testing was conducted on April 13, 2015, and the Psychological assessment by a District psychologist was conducted on April 29, 2015. The District told OCR that some of the delay was caused by the Student's high level of anxiety making testing efforts difficult, and requiring three different assessment meeting dates.
- From April 29, 2015, when all of the assessments for the Student were completed, until 15 business days later, May 20, 2015, there is no evidence of any communication about scheduling the IEP meeting. On May 20, 2015, the School

Administrative Clerk emailed the Complainant asking to schedule the triennial IEP meeting, and suggested June 2, 2015 as a possible date.

- The Complainant replied May 20, 2015 by email to the Clerk, stating she was not available June 2, and would be available starting June 16, 2015. The Clerk responded by email the next day that she would use this information to coordinate scheduling an IEP meeting for the Student.
- There is no evidence that anyone communicated about scheduling the Student's triennial IEP meeting for the 26 business days between May 21, and June 28, 2015. The Complainant and School Administrative Clerk emailed each other on June 28, and 29, 2015 about scheduling the meeting. During the next 54 business days (between June 29, and September 14, 2015) there is no evidence of any communication between the parties.
- Once email communication between the Complainant and the School resumed September 14, 2015, the Complainant informed the School of her plan to be on vacation from September 18, 2015 until October 5, 2015, or 11 business days.
- The Student's triennial IEP meeting was held on November 17, 2015. November 17, 2015 is 246 calendar days, or 171 business days from March 16, 2015, the date the District received the consented assessment plan.
- Services in the Student's November 17, 2015 IEP included Specialized Academic Instruction, 1,600 minutes/week; individual counseling, 120 minutes/month, plus group counseling; parent counseling, 120 minutes/month; Extended School Year (same), and a Behavior Intervention Plan. The IEP reflects additional behavioral incidents and increases in the severity of such incidents. Even though the triennial IEP included a "Behavior Intervention Plan," instead of the previous IEP's "Behavior Support Plan," notes from the November 17, 2015 IEP meeting stated that the Intervention Specialist told the IEP team that she considered the two to be essentially the same.
- The notes page from the Student's November 17, 2015 IEP included information that the School gave a seven-day notice to the District to find another placement. The Complainant told OCR that the Student's last day at the School was December 29, 2015. She stated that his Social Worker moved the Student to another residential location in Southern California, where he was supposed to attend a local County Office of Education school.

Analysis

While OCR does not enforce the IDEA, it may take into consideration the timeframes provided by the IDEA regulations for guidance in determining whether districts have timely conducted an evaluation of a student. The requirement in the IDEA regulations

that a district hold an IEP meeting within 60 calendar days after receipt of a signed assessment plan serves as such a guideline.

When the School Administrative Assistant offered June 2, 2015 as the first date for the Student's triennial IEP meeting, the 60-calendar-day period was already exceeded by seven business days. Considering the Student's low level of cooperation with the necessary educational and psychological assessments, such a delay might have been justified had the District held the IEP meeting on or around June 2, 2015. However, the District did not hold the meeting until November 17, 2015. OCR found that during the delay, the Complainant was unavailable to attend an IEP meeting over an 11-business day period, as well as on other individual days proposed for the meeting. OCR also found that during the delay, there were large gaps in communication by the District about scheduling the IEP meeting. The burden under Section 504 and Title II remains on the District to have timely evaluated the Student and held the IEP meeting, and the evidence supports a conclusion that the District was not diligent in discharging that burden. As such, OCR found that the District failed to timely evaluate the Student in violation of Section 504 and Title II.

The District's offer of FAPE in the Student's November 17, 2015 IEP doubled the amount of counseling services for the Student. The District's delay in holding the meeting for 246 calendar, or 171 business, days after receiving the consented assessment plan, for which no reasonable or legitimate nondiscriminatory reason was presented to OCR by the District, resulted in the Student not receiving twice the individual counseling services during that period that he otherwise would have received without the delay, thereby denying him a FAPE, in violation of Section 504, Title II, and their implementing regulations.

The District, without admitting any violation of federal law, voluntarily agreed to enter into the enclosed Resolution Agreement with OCR to resolve the complaint. Under the terms of the Resolution Agreement, the District will create a fund to pay for counseling services for the Student, and it will designate an employee to act as a liaison with the Complainant to assist with coordination of the provision of these additional individual counseling services for the Student.

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 issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. 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, 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 another complaint

alleging such treatment. Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the District is in compliance with Section 504 and Title II, and their implementing regulations at issue in the case. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

If you have any questions regarding this letter, please contact staff attorney David Christensen at (415) 486-5554, or me at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Enclosure

CC: Scott Holbrook, District Counsel (*via electronic copy only*)