



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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REGION XV
MICHIGAN
OHIO

July 21, 2021

Via E-mail Only to [redacted]

Susan Oppenheimer, Esq.
Senior Attorney
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215

Re: OCR Docket No. 15-19-1137

Dear Ms. Oppenheimer:

This letter is to notify you of the disposition of the above-referenced complaint filed on January 2, 2019, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Pickerington Local School District (the District) alleging that the District discriminated based on national origin and disability. Specifically, the complaint alleged that the District's [redacted] School has refused to evaluate English learner (EL) students who have been in the U.S. for less than three years for special education services. The complaint also alleged that the District has failed to provide information related to EL students and other school-related matters (e.g., EL progress reports, documents related to special education, and weekly newsletters) to limited English proficient (LEP) parents in a language they can understand.

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. OCR also enforces 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, which prohibit discrimination on the basis of disability by recipients of federal financial assistance. OCR also 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, which prohibit discrimination on the basis of disability by public entities. As a recipient of federal financial assistance from the Department and as a public entity the District is subject to these laws. Therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation of the following legal issues:

- whether the District failed to timely conduct an evaluation of students who, because of disability, needs or is believed to need, special education or related services, in violation of Section 504's implementing regulation at 34 C.F.R. § 104.35; and

- whether the District directly or through contractual or other arrangements, on the ground of national origin, excluded persons from participation in their programs, denied them any service or the benefits of their programs, or subjected them to separate treatment, in violation of Title VI's implementing regulation at 34 C.F.R. § 100.3(a) and (b).

Applicable Legal Standards

Section 504's implementing regulation, at 34 C.F.R. § 104.35, requires a recipient that operates a public elementary or secondary education program or activity to timely conduct an evaluation of students who, because of disability, needs or is believed to need, special education or related services. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.36, requires recipient districts to establish and implement, with respect to actions regarding the identification, evaluation or educational placement of persons with disabilities, a system of procedural safeguards, including notice of these decisions to the parent or guardian, an opportunity for the parent or guardian to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

Section 504 defines a person with a disability as one who (i) has a mental or physical impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. Pursuant to Section 504 and Title II, as amended by the ADA Amendments Act of 2008, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulator, endocrine, and reproductive functions.

School districts must ensure that all EL students who may have a disability, like all other students who may have a disability and need services under Individuals with Disabilities Education Act (IDEA) or Section 504, are located, identified, and evaluated for special education and disability-related services in a timely manner. When conducting such evaluations, school districts must consider the English language proficiency of EL students in determining the appropriate assessments and other evaluation materials to be used. School districts must not identify or determine that EL students are students with disabilities because of their limited English language proficiency. Section 504 covers not only students with disabilities who have been found to be eligible for services under the IDEA but also students with disabilities who are not IDEA-eligible, but meet Section 504's broader definition of disability. Section 504 requires school districts to provide a free appropriate public education (FAPE) to qualified students with disabilities in a school district's jurisdiction, regardless of the nature or severity of the student's disability. Section 504 evaluations of EL students must measure whether an EL student has a disability and not reflect the student's lack of proficiency in English. When administering written or oral evaluations to determine whether an EL student has a disability under Section 504, school districts must administer those evaluations in an appropriate language to avoid misclassification.

Intervention strategies must not deny or delay evaluation of students suspected of having a disability. If a school district believes a student has a disability and because of the disability needs special education or related aids and services, then Section 504 requires the school district to conduct a preplacement evaluation of that student. School districts violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected. School districts run afoul of the Section 504 obligation to evaluate for disability and need for special education or related services when they:

- 1) rigidly insist on first implementing interventions before conducting an evaluation, or that each tier of a multi-tiered model of intervention must be implemented first, regardless of whether or not a disability is suspected and there are needs based on the disability; or
- 2) categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.

Interventions can be implemented as part of the school district's overall preplacement evaluation of the student, so long as the interventions yield data that satisfy the Section 504 regulation concerning evaluation materials, and do not delay the completion of the evaluation. 34 C.F.R. § 104.35(b). Once a student has been identified as having a disability, the school must then determine what, if any, regular or special education and related aids and services the student needs because of the disability. If the Section 504 team believes an intervention strategy would be effective in addressing the student's needs, then the district could consider including those interventions as part of the student's Section 504 plan.

Title VI's implementing regulation, at 34 C.F.R. § 100.3(a), provides that no person shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which Title VI applies. The Title VI's implementing regulation, at 34 C.F.R. § 100.3(b)(1)(i) and (iv), prohibits recipients from, on the basis of race, color, or national origin, denying an individual any service, financial aid, or other benefit provided under the program, or restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under its program. 34 C.F.R. § 100.3(b)(2) provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

The OCR 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)¹, 35 Fed. Reg. 11,595, articulates OCR policy under Title VI on issues concerning the responsibility of school districts to provide equal educational opportunity to LEP students. The May 1970 Memorandum states, in part: "Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take

¹ <https://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html>.

affirmative steps to rectify the language deficiency in order to open its instructional program to these students." The May 1970 Memorandum, as affirmed by the U.S. Supreme Court in *Lau v. Nichols*, 414 U.S. 563 (1974), continues to provide the legal standards for OCR's Title VI policy concerning discrimination on the basis of national origin against LEP students and parents. In adopting the May 1970 Memorandum, the Supreme Court ruled, in *Lau v. Nichols*, that placing LEP students in a regular program taught in English when they were unable to participate meaningfully in that program because of their limited English proficiency constituted discrimination on the basis of national origin in violation of Title VI.

With respect to the allegation involving effective notice to parents, the May 25, 1970, Memorandum also provides that school districts must adequately notify 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. Further, OCR considers the issue of meaningful communication with LEP parents in a manner consistent with Executive Order 13166, "Improving Access for Persons with Limited-English Proficiency," issued August 11, 2000 (Executive Order 13166). The U.S. Department of Justice (DOJ) on June, 18, 2002, issued "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited-English Proficient Persons," which provides specific guidance about the method and manner (including translation and interpretation) for delivering information to LEP individuals in a timely and effective manner.

School districts have an obligation to ensure meaningful communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any program, service, or activity of a school district that is called to the attention of non-LEP parents. At the school and district levels, this essential information includes but is not limited to information regarding: language assistance programs, special education and related services, Individualized Education Program (IEP) meetings, grievance procedures, notices of nondiscrimination, student discipline policies and procedures, registration and enrollment, report cards, requests for parent permission for student participation in district or school activities, parent-teacher conferences, parent handbooks, gifted and talented programs, magnet and charter schools, and any other school and program choice options..

School districts also must develop and implement a process for determining whether parents are LEP and what their language needs are. School districts must provide language assistance to LEP parents effectively with appropriate, competent staff or outside resources. It may not be sufficient for the staff merely to be bilingual. School districts should ensure that interpreters and translators have knowledge in both languages of any specialized terms or concepts to be used in the communication at issue. In addition, school districts should ensure that interpreters and translators are trained on the role of an interpreter and translator, the ethics of interpreting and translating, and the need to maintain confidentiality.

OCR investigates issues concerning school district communication with LEP parents by considering, among other things, whether the school district: (a) develops and implements a process for determining whether parents are LEP, and evaluates the language needs of these LEP parents; (b) provides language assistance to parents or guardians who indicate they require such

assistance; (c) ensures that LEP parents have adequate notice of and meaningful access to information about all school district programs, services, and activities; and (d) provides free qualified language assistance services to LEP parents.

OCR’s Investigation to Date

During its investigation to date, OCR reviewed information provided by the Complainant and the District and information publicly available on the District’s website. OCR also interviewed the Complainant and District witnesses.

According to the District’s website, the District is the 15th largest public school district in Ohio, operating two high schools, two junior high schools, three middle schools, seven elementary schools, a preschool, and an alternative school, and educating nearly 10,600 students each year.² The District’s student enrollment is: American Indian/Alaskan Native: 0.2%; Asian/Pacific Islander: 3.7%; Black/non-Hispanic: 24.5%; Hispanic: 5.1%; Multiracial: 7.8%; White, non-Hispanic: 58.6%; Students with disabilities: 14.7%; Economically disadvantaged: 25.2%; and English learners: 3.3%. The District’s website states that it is “home to nearly 500 English Learners (ELs) speaking more than 57 languages.”³

- **Alleged refusal to evaluate certain EL students for special education services**

The complaint alleged that the District’s [redacted] School (the School) has refused to evaluate EL students who have been in the U.S. for less than three years for special education services. The District denied this allegation and provided documentation including: a list of EL students who attended the School during the 2015-2016 through 2018-2019 school years; copies of documentation for certain of these students who were referred for evaluation or receiving placement and services through IEPs during each school year; and documentation related to its EL and special education programs.

After reviewing the information obtained to date, OCR identified concerns regarding the District’s obligation to timely evaluate its students under Section 504; since 2015, the District has not evaluated any EL students under Section 504 at the School. For example, while the District’s “English Learner Handbook” (EL handbook) specifically requires a timely evaluation of an EL student when the District suspects a student has a disability, the information obtained showed that the District refused a request to evaluate an EL student (Student 1) who arrived in the U.S. in [redacted] under IDEA in [redacted] despite receiving information about this student’s behavioral concerns and medical diagnosis (e.g., [redacted]). It did not appear that disability under Section 504 was considered by the District at that time in reviewing Student 1’s information. The District evaluated Student 1 under IDEA only in [redacted] when it then identified him as a student with [redacted]. The information also showed that the District refused a request to complete an initial evaluation for another EL student (Student 2) in the U.S. less than three years but instead modified his response to intervention (RTI) services to focus on his reading deficits. The District said that it was difficult to rule out his English proficiency as a factor in his performance at that time. Student 2 was eventually evaluated and found eligible,

² <https://www.pickerington.k12.oh.us/at-a-glance/> (last accessed May 10, 2021).

³ <https://www.pickerington.k12.oh.us/english-language-learners/> (last accessed May 10, 2021).

but OCR’s review of his records showed that Student 2 had always struggled with learning and was retained in the [redacted] grade in his native country, and specifically had difficulty in reading and understanding the sounds of words when trying to learn to read in his native language. The evidence indicated that, after these students had been in the U.S. about three years, the District evaluated them, identified them as students with a disability, and provided them services pursuant to an IEP. In addition, the EL handbook indicates that a student “not making progress in school” is the standard by which a disability might be suspected, which is more limited than Section 504’s definition of disability.

Although the EL Handbook does contain information compliant with Section 504 and Title VI, such as that disability evaluations may not be delayed because of a student’s limited English language proficiency or the student’s participation in a language instruction educational program, the District uses a Special Education Evaluation Matrix for ELs document in determining when to evaluate an EL student. This document contains standards that appear to conflict with the District’s other policies and procedures, is not based on Section 504’s definition of disability, and appears to require interventions before evaluation. In addition, the evidence suggested that it is the District’s usual practice, for any student (EL or not) struggling academically, to use RTI prior to identifying a student or evaluating students for disability. A District witness indicated that a parent may request an evaluation, but if no interventions were put in place the District may put interventions in place first. The District’s “Students With Disabilities” web page⁴ implies this practice as, regarding “Evaluation,” it states that “Each building operates under an intervention model to help determine if a student should be evaluated. All buildings are using RTI to help provide individual learning experiences in the form of classroom and small group interventions.” The evidence also indicated lack of understanding among some District staff at the time they were interviewed of the definition of disability under Section 504 and when a Section 504 evaluation would be appropriate, for any student.

- **Alleged failure to provide information related to EL students and other school-related matters to LEP parents in a language they can understand**

The complaint alleged that the District did not provide information related to EL students and other school-related matters (e.g., EL progress reports, documents related to special education, and weekly newsletters) to LEP parents in a language they can understand. The District denied this allegation and provided various documentation, including but not limited to: a copy of the sample LEP roster created by a teacher; a list of interpreter services requested for and provided to LEP parents for special education related meetings (e.g., IEP meetings) from 2017 to 2019; a list of interpreter services requested and provided during the 2018-2019 school year; and a copy of several translated materials. The District also provided information regarding languages served by the EL department in the District. From this information, the top five high-incidence languages other than English at the District included Spanish (22%), Nepali (12%), Arabic (7%), Amharic (6%) and Oromo (5%) as of the 2018-2019 school year.

The information obtained to date raises concerns regarding the District’s practice of providing language assistance to LEP parents, and indicated the District may not provide LEP parents with adequate notice of and meaningful access to information about school district programs, services

⁴ <https://www.pickerington.k12.oh.us/special-education/> (last accessed May 10, 2021).

and activities. The District indicated that it identifies LEP parents by having them complete its “Language Usage Survey” online as part of its registration process and that all information regarding the District’s programs and services provided in its website can be translated into other languages through the web-based automated translation program (Google Translate) which is embedded in the District’s website. However, at the time of OCR’s review of the District’s website, certain documents or information available on its website (e.g., the District’s online registration web page, “Section 504 Parent Information and Rights,” “Section 504 Grievance Procedures,” the EL handbook, 2019-2020 student handbooks, gifted services forms, weekly newsletters, board policies) could not be translated through its web-based translation program as these documents were provided in separate links. Furthermore, OCR has concerns that the District did not provide notice and a process that meaningfully informs LEP parents that they can request language assistance regarding the District’s programs, services, and activities and how they can request such assistance, in a language they can understand.

The information obtained to date also indicates that the District may not have a centralized source to provide District staff with information regarding LEP parents’ language assistance needs at the building- and district-level. While the District indicated that it collects LEP parents’ language assistance needs during students’ registration process, such information did not appear to be centralized or readily accessible by District staff at the time of OCR’s review, and a witness told OCR that they would need to go back to the EL teacher to find out whether a student’s parent is LEP and would need language assistance.

Furthermore, the information to date indicates that the District does not have a process to identify what documents are essential or vital documents that need to be professionally translated. The information indicated that the District was working on identifying such documents but that in the interim such determination is left up to the EL teacher who needs to communicate information. While the District provides an interpreter to LEP parents during IEP meetings, the District indicated that no written translation of Section 504 plans or IEPs has been provided as no LEP parents ever asked for such translations; as noted above, however, the information OCR obtained indicated that the District may not have informed LEP parents such translation services were available. The information also did not suggest that information regarding Section 504 parental rights related to the District (e.g., the District’s impartial due process request) was provided to LEP parents in a language they can understand. The information indicated that certain notices (e.g., Prior Written Notice) were translated by the web-based translation program and the District did not indicate that it had a process to ensure whether essential information has been accurately translated and conveys the meaning of the source document when using such automated translation program. In addition to raising a concern under Title VI about communication to LEP parents, this also raises a concern under Section 504 as to whether LEP parents of students with disabilities or suspected of having disabilities are receiving the notice and access to other procedural safeguards required by the Section 504 regulation.

Voluntary Resolution and Conclusion

Under Section 302 of OCR’s *Case Processing Manual*, allegations under investigation may be resolved at any time when, prior to the issuance of a final investigative determination, the recipient expresses an interest in resolving the allegations and OCR determines that it is

appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. In this case, the District expressed an interest in resolving the allegations prior to the conclusion of OCR's investigation and OCR determined resolution was appropriate based on its concerns as discussed above. On July 19, 2021, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address all of the allegations in the complaint. OCR will monitor the implementation of the Resolution Agreement.

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. 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, OCR 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.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR looks forward to receiving the District's first monitoring report by August 31, 2021. For questions about implementation of the Agreement, please contact Ms. Suwan Park. She will be overseeing the monitoring and can be reached by telephone at (216) 522-4972 or by e-mail at Suwan.Park@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-2669, or by e-mail at Chandra.Baldwin@ed.gov.

Sincerely,

/s/

Chandra Baldwin
Acting Team Leader

Enclosure