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February 3, 2023

Office for Civil Rights, Boston
U.S. Department of Education
8th Floor
5 Post Office Square
Boston, MA 02109-3921

To Whom It May Concern:

Enclosed please find a class civil rights complaint pursuant to Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability.

This complaint is brought by [REDACTED], on behalf of her minor son, [REDACTED] (JPP) and a class of all similarly situated children and families, by and through their attorneys Veronika Kot, Esq. at Rhode Island Legal Services, and Ellen Saideman, Esq., Cooperating Counsel, ACLU RI.

Very truly yours,

Veronika Kot
Staff Attorney, RILS

/s/ Ellen Saideman
Ellen Saideman
Cooperating Counsel,
ACLU Foundation of RI

COMPLAINANTS

This complaint is brought by [REDACTED], on her own behalf and on behalf of her minor son, [REDACTED] (JPP), and a class of all similarly situated children and families, by and through their attorneys Veronika Kot, Esq. at Rhode Island Legal Services, and Ellen Saideman, Cooperating Counsel, ACLU Foundation of Rhode Island.

CONTACT INFORMATION

Rhode Island Legal Services, (RILS), 56 Pine Street, Providence, RI 02903, tel. (401) 274-2652, (x 164), Veronika Kot, Esq., vkot@rils.org; and the Rhode Island American Civil Liberties Union (RI-ACLU), Ellen Saideman, Esq., 7 Henry Drive, Barrington, RI 02806, tel. (401) 258-7276, esaideman@yahoo.com.

INJURED PERSON(S)

The class of injured persons consists of all children with disabilities or with suspected disabilities residing within the Providence School District and their parents or guardians.

INSTITUTION AGAINST WHOM COMPLAINT IS BROUGHT

This class complaint is brought against the Providence School District, located at 797 Westminster Street, Providence, RI, 02903. The main number is (401) 456-9100.

THE DISCRIMINATORY ACTS

Grounds for the complaint are as follows:

The Providence School District has admitted that it has failed to maintain and /or cannot locate evaluation and test protocols (with personally identifiable information) for JPP. JPP is a child with special needs who resides in Providence and is receiving services pursuant to an Individualized Education Program (IEP) under the Individuals with Disabilities Education Act (IDEA). As such, he is also protected under 504 of the Rehabilitation Act of 1973.

In addition to misplacing or destroying JPP's evaluation protocols, on information and belief, Providence also lacks a written policy and/or routine and continuous staff training regarding the maintenance of such protocols for all children who are being evaluated as required by Section 504 of the Rehabilitation Act and/or the Individuals with Disabilities Education Act (IDEA), to determine whether they are children with disabilities and/or to determine the services to which they are entitled because of their disabilities. ¹

¹ Children protected by the IDEA are also protected by Section 504. Conversely, one way of meeting 504 requirements is to demonstrate compliance with IDEA.

The test protocols at issue include but are not limited to answer sheets, raw data, and other evaluative evidence which contains the answers of children or the notes and observations of evaluators, that are collected in the context of the mandated evaluation process, and which form the basis of evaluation reports. These evaluation reports, in turn, are the basis on which a child's eligibility for services and the nature of services provided are determined.

Timeline and Events

1. The Providence School District conducted a number of screens and evaluations for JPP during the 2021-2022 and 2020-2021 school years.
2. Rhode Island Legal Services counsel for ██████████, JPP's mother, repeatedly requested all student records for JPP, including evaluations and underlying data and protocols. When these were only partially provided, she sent a formal records request letter in June of 2022. (Exhibit 1) Again the response was partial and unclear. Some records were provided multiple times, others not at all.
3. On September 1, 2022, Rhode Island Legal Services (RILS) counsel for Ms. ██████████ filed a special education complaint with the Rhode Island Department of Education (RIDE) requesting that the student records not yet provided be provided in full or that the absence of any such required records be clearly stated. (Exhibit 2) RILS also requested that, if the District admits that it has failed to maintain such records, the District be ordered to conduct training to ensure compliance in the future. As alleged in that special education complaint, the records sought and not yet provided were: 1) IEP progress reports after November, 2021; 2) protocols and underlying data supporting the district's evaluations; 3) Ortiz-Matrix records (a kind of protocol) for one of the evaluations, mentioned in the evaluation but not provided or explained; and 4) progress monitoring data required to be collected pursuant to the IEP that should then have served to support objective quarterly progress monitoring toward IEP goals and objectives.
4. The Providence School District on September 26, 2022, filed a brief response **admitting that it did not have any of the still outstanding requested documents (including the protocols).** (Exhibit 3).
5. After investigation, the RIDE issued its decision (Exhibit 4). That decision resolved the issues regarding IEP progress reports and requested evidence that the IEP had been implemented.
6. However, with regard to test protocols, RIDE stated that protocols are not within its purview and suggested that the OCR might be a better venue for a complaint related to the failure to maintain and/or produce them.²

² See Exhibit 4, last page: "RIDE does not disagree that parents should be provided access to these protocols although, this investigation is that of Ms. Kot's filed special education written state complaint under the IDEA, not an OCR Complaint."

This complaint is NOT an appeal from RIDE’s decision. **As RIDE explicitly did not make a legal ruling on the matter concerning protocols and suggested instead that the issue might be better brought to OCR, this complaint pursues the matter of protocols before the OCR.**³

Legal violations:

This complaint is brought pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 34 C.F.R. Part 104 and Title II of the Americans with Disabilities Act of 1990 and its implementing regulations found at 28 C.F.R. Part 35, both of which prohibit discrimination based on disability.

The School District is subject to 504 because it receives federal funding from the Department, and it is subject to Title II because it is a public entity that operates an elementary and secondary educational system.

Specifically, the District violated JPP’s right to a Free Appropriate Public Education (FAPE) (and, on information and belief, the rights of other similarly situated students) by failing to establish and/or follow procedures to ensure that protocols and evaluation data and other information utilized in making placement decision for students is documented. **in violation of 34 C.F.R. Section 104.35(c)(2).** The documents need to be available to parents, as they are members of the IEP team and need access to the records to participate in the placement decision. 34 C.F.R. Section 104.35(c)(3).

In addition, the District denied JPP’s parent/ guardian (and on information and belief the parents and guardians of similarly situated students) procedural safeguards by denying her/them an opportunity to examine relevant records regarding the identification and evaluation of students for special instruction or related service **in violation of 34 C.F.R Section 104.36.**

In previous decisions, OCR has ruled that evaluation protocols are records that must be “documented” – i.e., maintained -- and that the failure to maintain them violates 504 regulations and impedes parental access to their children’s records and full participation in decisions regarding eligibility or services. OCR has ruled that parents are entitled to have access to these records to form independent judgments about the accuracy of school evaluations, and that access requires maintenance of such records. *See authorities cited below. See also Exhibit 5, OCR Settlement with RI’s Pawtucket School District (addressing this very issue).*

The regulations implementing Section 504 of the Rehabilitation Act require agencies operating public elementary and secondary education programs to establish standards and procedures for

³ Simultaneously to this complaint, Rhode Island Legal Services and the ACLU of RI have filed with OSEP a request for clarification of the scope of federal regulations regarding the production of student records of children protected by the IDEA and 504, in light of some of the determinations made by the Rhode Island Department of Education (RIDE) in response to our client’s initial special education complaint. This OCR Complaint is limited to the issue of access to evaluation protocols.

the evaluation and placement of handicapped individuals. They further require such agencies, within the context of evaluations, to “establish procedures to ensure that information obtained from all such sources is documented and carefully considered.” 34 C.F.R. 104.35(c)(2).

In addition, procedures must include an opportunity for parents/guardians to examine relevant records. 34 C.F.R. 104.36.

The Office of Civil Rights has ruled that the failure to maintain test protocols after completion of children’s evaluation reports denies parents access to relevant educational records that are used to formulate educational programming decisions regarding their children, and as such violates these regulations. *See, e.g., St. Charles (IL) Community. Sch. Dist. #303*, 17 EHLR 18 (August 1990) (ordering corrective action where policy of protocol destruction deprived parents of right to full access to their children’s records used to formulate educational programming and therefore to assess the appropriateness of the programming.) *See also Clovis Unified. Sch. Dist.*, 102 LRP 10454 (CA OAH 2002) (lack of protocols renders test validity suspect and impedes parents’ ability to analyze education benefits at issue in hearing); *Birmingham v. Board of Education* 28 IDELR 407 (Ala. May 1998) (test protocols are part of education record to which parents must be provided access.); *Allegheny (PA) Intermediate Unit 20* IDELR 563 (July 1993) (raw data, relevant notes, and other test protocols are “relevant records” within the meaning of 504 regulations and must be provided “when parents request full copies of their child’s records”).

In other words, the parental right to equal participation in decisions regarding services received by their children requires access to their records including evaluation protocols, and access requires the “documenting” or maintenance of such records.

For all of these reasons we are requesting 1) a full investigation of the failure of the Providence School District to maintain testing and evaluation protocols in JPP’s case and also more generally with regard to all similarly situated children with disabilities or suspected disabilities, and 2) appropriate corrective action as described below.

THE IMPORTANCE OF EVALUATION PROTOCOLS FOR STUDENTS, PARENTS AND GUARDIANS

As repeatedly recognized by OCR, evaluation protocols are critically important parts of student records, and parents and guardians must have equal access to them in order to be equal participants in the process of developing their child’s Individualized Education Program or 504 Plan.

Since evaluations are the basis on which a child’s individual programming and services are built, it is critical that they be accurate. Protocols identifiable to the student are the documentation that demonstrates that an evaluation was in fact correctly administered and scored and that the report summarizing a child’s needs is in fact correct. For this reason, it is important that there be full transparency regarding such protocols. This is only possible, of course, if such documentation is routinely maintained and made available to parents and guardians.

CORRECTIVE ACTION REQUESTED

Claimants seek the following relief:

- 1) An order requiring the Providence School District to immediately produce any written policy and procedure regarding maintenance, in student files, of testing and evaluation protocols for children with disabilities or suspected disabilities protected by Section 504 or the IDEA.
- 2) If an adequate policy exists and is produced, an order requiring prompt training of all staff responsible for implementing such policies in order to ensure consistent implementation in all cases in the future, subject to OCR oversight and scheduling. Proof of compliance should be shared with the OCR and claimants.
- 3) If no policy exists or if the policy does not require maintenance, in student files, of testing and evaluation protocols for children with disabilities or suspected disabilities and does not provide for training of staff in the policy, an order requiring prompt development of such a policy, to be approved by OCR, and training of all staff responsible for implementing such policies, subject to OCR oversight and scheduling. Proof of compliance should be shared with the OCR and claimants.
- 4) An order prohibiting the Providence School District from using evaluations where protocols have been mislaid, lost, or destroyed illegally if a parent or guardian objects to their use. Parents or guardians should be informed in writing of the loss or destruction of these documents and of their option to obtain a re-evaluation.

AVAILABILITY OF ADDITIONAL INFORMATION

██████████, the parent of minor JPP, is willing to share her own and her child's names and relevant records for purposes of OCR's investigation.

Respectfully submitted,

/s/ Veronika Kot

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