



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION III
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September 26, 2017

IN RESPONSE, PLEASE REFER TO: 03135001

Dr. Mark A. Manchin, Superintendent
Harrison County Schools
445 W. Main Street
P. O. Box 1370
Clarksburg, WV 26301-1370

Dear Dr. Manchin:

This is to advise you of the outcome of the compliance review that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) initiated on June 3, 2013 against the Harrison County Schools (the District). The compliance review examined whether the District discriminates against students with disabilities by establishing standards or programs that result in excluding qualified students with disabilities from participating in its Gifted and Talented Education (GATE) program, Advanced Placement (AP), honors, and other high-level courses.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity that receives Federal financial assistance from the Department and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance and a public entity, the District is subject to these laws.

Before OCR completed its investigation concerning this compliance review, the District expressed a willingness to resolve the review 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.

Legal Standards

The regulations implementing Section 504 at 34 C.F.R. § 104.4(a) and (b), and Title II at 28 C.F.R. § 35.130(a), provide, in pertinent part, that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of the services,

programs, or activities of the recipient or public entity, or otherwise be subjected to discrimination under any program or activity of the recipient or public entity. The regulations prohibit recipients from: (a) denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (b) affording a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (c) providing a qualified individual with a disability with an aid, benefit, or service that is not as effective as that provided to others; (d) providing different or separate aid, benefits, or services to disabled persons or to any class of disabled persons unless such action is necessary to provide a qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others; (e) aiding or perpetuating discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipients program or activity; (f) denying a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or (g) otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. § 104.4(b)(i)-(vii); 28 C.F.R. § 35.130(b)(1)(i)-(vii).

In determining whether a recipient subjected students to different treatment on the basis of disability in violation of Section 504 and Title II, OCR looks to whether there were any apparent differences in the treatment of similarly situated students on the basis of disability. If different treatment is found, OCR evaluates the recipient's explanation for any differences in the treatment of similarly situated students to determine if the explanation is a legitimate, nondiscriminatory explanation and whether it is merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the students in a manner that was consistent with its established policies and procedures and whether there is any other evidence of discrimination based on disability.

In addition, a recipient violates Section 504 and Title II when it evenhandedly implements facially neutral policies or practices that have a disproportionate and unjustified effect on students with disabilities; this form of discrimination is known as disparate impact. Specifically, the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(4) prohibits recipients from utilizing criteria or methods of administration that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to persons with disabilities. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(3) includes similar requirements.

In general, the Title II regulations do not provide greater protection than the applicable Section 504 regulations. Therefore, in accordance with the Title II regulation at 28 C.F.R. § 35.103, OCR applied the Section 504 standards in examining the issues raised in this compliance review.

Investigation to Date

Background

According to the 2011 CRDC data, the District enrolled 11,253 students, of whom 2,525 students (22.4%) were identified as having a disability. The 2011 CRDC data reflects that the District had 333 students in the gifted program (none of whom had disabilities) and 330 students were enrolled in AP courses (none of whom had a disability). In consideration of this and other data, OCR opened a compliance review concerning the participation of students with disabilities in the District's gifted program and honors, AP, and college-level classes.

The District's Gifted Program

OCR's investigation established that gifted services in West Virginia schools are governed by state law, State Policy 2419 entitled "Regulation for the Education of Students with Exceptionalities." The District follows State Policy 2419 in its identification of students for gifted services and provision of those services, and its written policies and procedures concerning the gifted program refer to and comport with State Policy 2419. State Policy 2419 specifies that eligibility for gifted services in West Virginia is based on a three-pronged assessment, with each factor defined in the state policy as follows:

- (1) intellectual ability: general intellectual ability score at the 97th percentile rank or higher on a comprehensive test of intellectual ability in consideration of 1.0 standard error of measurement;
- (2) academic achievement: at least one of the four core curriculum areas of academic achievement at the 90th percentile rank or higher as measured by an individual standardized achievement test; and
- (3) the need for specially designed instruction: may include enrichment of the content emphasizing the development of higher-level thinking, including critical thinking, creative thinking, and problem solving skills and/or acceleration of content while the student remains in the chronologically appropriate grade.

Pursuant to State Policy 2419, students who qualify for and receive gifted services are classified as having an area of "exceptionality" – giftedness – in the same way that students with a disability are deemed to have an area of "exceptionality," and are provided those services in accordance with an individualized education plan (IEP). District witnesses reported making accommodations for students with a disability during testing to determine eligibility for gifted services, and indicated that accommodations have been made to allow students with a disability equal access to gifted classes.

OCR learned that beginning at the point of enrollment, the District uses the statewide West Virginia Education Information System (WVEIS) to maintain information about each student, including whether the student has an area of "exceptionality." District administrators explained that the WVEIS requires school districts in West Virginia to select one "primary" area of exceptionality for each student and does not permit school districts to designate more than one

area of exceptionality in the system (for example, a disability and giftedness, or more than one disability). In other words, a student in West Virginia who is receiving services both for being gifted and for having a disability would be labeled in WVEIS as “gifted,” or as having a disability (whatever disability that is), and could not be identified in the system as receiving services for both exceptionalities. In interviews with OCR, District witnesses expressed the view that the WVEIS reporting system, and its requirement that only one area of exceptionality may be selected for each student, may account for what appears to be a lack of representation of students with disabilities in the gifted program, as reported in the CRDC data, because the District pulled data from WVEIS for its CRDC reports.

The District’s AP, Honors and other High Level Courses

There is no District-wide policy or procedure governing the eligibility and selection/assignment of students in AP, honors and other high-level courses. In addition, there is no District-wide testing or assessment for placement in those courses, or District-wide forms for the identification, evaluation and placement of students in the classes. Each school sets its own criteria for placement in AP and honors course, including for prerequisites. However, District witnesses reported that despite the stated prerequisites, students are permitted to register for those classes, as a practical matter, without having taken all the prerequisites. High school students work with counselors at each of the District’s five high schools to select their courses, and each high school varies in its practices for publishing information about AP and honors-level courses in their handbook and/or school website.

The District has a relationship with local universities, which offer high school students in the District the opportunity to earn college credit for certain classes, for which students also receive credit from their high schools. Placement in the college-level dual credit courses is determined by the entrance criteria set by the respective universities.

In individual interviews with OCR, District teachers and administrators expressed the belief students with disabilities were treated the same as students without disabilities in registering for those classes, and that they were aware of students with disabilities who had taken such classes.

Resolution Agreement

Under OCR procedures, a compliance review may be resolved before the conclusion of an investigation if a recipient asks to resolve the compliance review by signing a voluntary resolution agreement. The provisions of the agreement must be aligned with the issues investigated and be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of a recipient, nor does it constitute a determination by OCR of any violation of our regulations. Consistent with OCR’s procedures, the District requested to resolve the issues in this compliance review through a voluntary resolution agreement, which was executed on September 11, 2017.

Accordingly, OCR is concluding its investigation of this compliance review. A copy of the signed Agreement is enclosed. As is our standard practice, OCR will monitor the District’s implementation of the Agreement.

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.

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, or participates in an OCR proceeding. 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.

We appreciate the District's cooperation in the resolution of this compliance review. In particular, we would like to thank Wendy Imperial and Donna Hage for their assistance during OCR's investigation. If you have any questions, please contact Lucy Glasson, the OCR attorney assigned to this complaint, at 215-656-8533 or lucy.glasson@ed.gov.

Sincerely,

/s/

Beth Gellman-Beer
Team Leader

Enclosure

cc: Susan Llewellyn Deniker, Esq.