



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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MARYLAND  
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**November 3, 2015**

**IN RESPONSE, PLEASE REFER TO: 03151196**

Dr. Stephen L. Pruitt  
Commissioner of Education  
Office of the Commissioner of Education  
500 Mero Street, 1st Floor CPT  
Frankfort, KY 40601

Dear Dr. Pruitt:

This is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation and reached a determination in the above-referenced complaint against the Kentucky Department of Education (KDE). OCR investigated whether KDE discriminates against students with disabilities who need accommodations on state-wide assessments, by requiring the students to request these accommodations during the state assessment in order to receive them.

OCR enforces Section 504 of the Rehabilitation Act of 1973, 29. U.S.C. § 794 and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 (ADA) and its implementing regulation, at 28 C.F.R. Part 35, over complaints alleging discrimination on the basis of disability that are filed against public entities. As a recipient of Federal financial assistance and a public entity, KDE is subject to the provisions of Section 504, the ADA, and their implementing regulations.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination in this complaint, OCR reviewed documentation provided by KDE in response to OCR's request for data. OCR also spoke with individuals within KDE's Office of Assessment and Accountability to determine how applicable state regulations were implemented. Based on this information, OCR has determined that there is sufficient evidence to establish that KDE regulation 703 KAR 5:070 discriminates against students with disabilities

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who need accommodations on state-wide assessments. The basis for OCR’s determination is set forth below.

### **Applicable Legal Standard**

The Section 504 regulation, at 34 C.F.R. Section 104.4(a), prohibits a qualified individual with a disability from being excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. The Title II regulation, at 28 C.F.R. Section 35.130(a) and (b), has similar prohibitions.

In addition, the Section 504 regulation at Section 104.4(b)(1)(i)(ii) and (iii) states that a recipient may not: (i) deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford an 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; and (iii) provide a qualified individual with a disability with an aid, benefit, or service that is not as effective as that provided to others.

The Section 504 regulation at 34 C.F.R. Section 104.33(a), requires recipients to provide a free appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient’s jurisdiction. As defined by Section 104.33(b), FAPE is the provision of regular or special education and related aids and services that are designed to meet the unique needs of qualified individuals with disabilities as adequately as the needs of individuals without disabilities are met and (ii) are based upon adherence to procedures that satisfy the requirements of § 104.34, § 104.35, and § 104.36.

The Department’s September 27, 1997, Dear Colleague Letter regarding statewide assessments states that the individualized determinations of whether a student will participate in a particular assessment, and what accommodations, if any, that are appropriate should be addressed through the individualized education program (IEP) process or other evaluation and placement process and included in either the student’s IEP or Section 504 plan. Section 504 and Title II require that students with disabilities must be provided with appropriate test accommodations, where necessary.

### **Facts Established by the Investigation**

In its response to OCR’s data request, KDE cited regulation 703 KAR 5:070, which states that testing accommodations must meet the following conditions:

“Be student initiated, not teacher initiated. Student initiated means the decision whether or not to use accommodations must be up to the student. School staff must make available to the student accommodations used consistently as part of routine instruction and classroom assessment, but may not instruct their students on when to use accommodations. Proctors may review with the student the accommodations in

their IEP, 504 Plan or Program Services Plan (PSP), remind students that proctors are there to provide the accommodations, and revisit this information at the beginning of each test session. The teacher may ask the student if he or she would like to use their accommodations. It is considered student initiated if the student responds in an affirmative or negative manner, as students also have the right to decline the use of an accommodation. If a student has adult-provided accommodations (e.g., reader, scribe) or assistive technology, the adult or technology shall be in the testing room prior to testing and shall remain there during the testing period. Student initiated applies to assistive technology and interpreter (when these accommodations are not the student's primary mode of communication), manipulatives, reader, scribe, calculator, paraphrasing, and extended time. Students initiation is not required for behavior modification."

OCR interviewed staff at KDE who affirmed to OCR that KDE requires students with disabilities, who require accommodations, as specified in an IEP or Section 504 plan, to initiate requests for accommodations during the statewide tests in order to receive them. This is applicable to all students, regardless of age or grade level.

KDE asserts that it provides regular training to school districts regarding the administration of state-wide assessments, including the provision of accommodations to students with disabilities. KDE's training materials indicate that "students may be reminded before each testing section what accommodations they are allowed to use and directed to let the proctor know when they decide they need one."

### **Legal Analysis**

OCR finds that the KDE Regulation 703 KAR 5:070 violates Section 504 and Title II of the ADA in that it fails to provide students with disabilities equal access to the statewide assessment and creates an undue burden for these students. The KDE regulation is more restrictive than Section 504 and Title II and denies students with disabilities, for whom specific accommodations for the assessment have been identified as necessary, a FAPE. Under Section 504, it is the recipient's responsibility to ensure that the services, including testing accommodations, that have been determined necessary are provided to the student. Thus, placing the burden on a student to initiate that right in order to receive necessary accommodations violates Section 504 and Title II.

For these reasons, based on a preponderance of the evidence, OCR finds sufficient evidence to conclude that KDE's policy and practice of requiring students with disabilities to initiate requests for accommodations during state-wide assessments in order to receive them violates the Section 504 regulation, at 34 C.F.R. Sections 104.4(a) and (b)(1)(i)(ii) and (iii) and 104.33, and the Title II regulation, at 28 C.F.R. 35.130(a) and (b). KDE has agreed to address these compliance concerns by entering into the enclosed agreement with OCR.

Consistent with our usual practice, OCR will monitor the implementation of the Agreement until we have determined that KDE is in compliance with the regulations implementing Section 504 and Title II with respect to the concerns identified in this investigation.

This concludes OCR's investigation of the complaint and should not be interpreted to address the KDE'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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that KDE may not harass, coerce, intimidate, or discriminate against any individual because she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant 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.

If you have any questions or concerns, please contact Dannelle Walker, Team Attorney, by telephone at (215) 656-5711, or by email at: [dannelle.walker@ed.gov](mailto:dannelle.walker@ed.gov).

Sincerely,

/s/

Melissa M. Corbin  
Team Leader  
Philadelphia Office