



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

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September 13, 2016

X
Interim State Superintendent
Alabama State Department of Education
50 North Ripley Street
P.O. Box 302101
Montgomery, Alabama 36104

Re: OCR Complaint #04-16-1224
Letter of Resolution

Dear X:

This letter is to notify you of the determination of the U.S. Department of Education (Department), Office for Civil Rights (OCR), regarding the resolution of the above-referenced complaint filed with our office on March 10, 2016, against the Alabama State Department of Education (ALSDE), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that, on February 26, 2016, the ALSDE denied her daughter (Student) the reader accommodation for the ACT Aspire examination because the Student's reading level was not at least two grade levels below her fifth grade level.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. Section 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department. OCR also applied Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. Sections 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public educational institutions. Because the ALSDE is a recipient of Federal financial assistance from the Department and a public entity, it is subject to these regulations.

OCR investigated the following legal issue:

Whether the ALSDE discriminated against the Student on the basis of disability by denying her the reader accommodation for the ACT Aspire because her reading level was not at least two grade levels below her enrollment grade, in non-compliance with the Section 504 implementing regulation at 34 C.F.R. § 104.4 and the Title II implementing regulation at 28 C.F.R. § 35.130.

During its investigation, OCR reviewed and analyzed relevant documents submitted by both the Complainant and the ALSDE. OCR also interviewed the Complainant and the Education Specialist at the ALSDE's Office of Student Learning, Student Assessment Section, who revised the reader accommodation policy at issue (Education Specialist). Based on its investigation, OCR has determined that the ALSDE's current policy regarding the reader accommodation for the ACT Aspire is in violation of Section 504 and Title II. We set forth below the factual and legal bases for our determination.

A. Legal Standards

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) states that no qualified person with a disability shall, on the basis of disability, be 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. Pursuant to 34 C.F.R. § 104.4(b)(1)(i), (ii), and (vii), a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) afford a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; or (vii) otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The Title II implementing regulation at 28 C.F.R. § 35.130(a) and (b)(1)(i), (ii), and (vii) provide similar protections to a qualified person with a disability.

Both statutes define a "person with a disability" as any person who (i) has a physical or mental impairment which 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. 34 C.F.R. § 104.3(j); 28 C.F.R. § 35.104. With respect to the first prong of the definition of "person with a disability," the statutes define a "physical or mental impairment" as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Both statutes define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The Americans with Disabilities Act (ADA) Amendments Act of 2008 (Amendments Act) requires the definition of "disability" to be construed broadly. For example, the Amendments Act added additional examples of "major life activities," such as reading, concentrating, thinking, and communicating. In addition, the Amendments Act specifies that an impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting. The Amendments Act clarified that in determining whether a person has a substantially limiting impairment so as to qualify as a person with a disability, the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses, should not be considered. Mitigating measures include, but are not limited to, medications, prosthetic devices,

assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment. Finally, pursuant to the Amendments Act, the extent of a school district's obligation to make reasonable modifications is fact-dependent and requires a case-by-case analysis.

B. Findings of Fact and Legal Analysis

The ALSDE's Office of Student Learning, Student Assessment Section, is responsible for the coordination, development, and implementation of the State of Alabama's testing program. One such standardized test overseen by the Student Assessment Section is the ACT Aspire. According to ACT, Inc., the developer of the ACT Aspire, this examination is a "standards-based system of assessments to monitor progress toward college and career readiness from grade 3 through early high school" and is aligned with the ACT College Readiness Benchmarks. The ACT Aspire has five content areas available for administration: English, reading, writing, math, and science. The examination may be administered either online or via paper-and-pencil. (<http://www.discoveractaspire.org/schools>, last visited 8/23/16)

The Education Specialist explained to OCR during her interview that, in the State of Alabama, the ACT Aspire is administered each spring to students in grades 3-8 and 10. Students in grades 3-8 are required to take the reading and math content areas. Students in grades 5 and 7 are required to take a third content area, science (in addition to reading and math). Students in tenth grade must take all five content areas. Additionally, school districts in the state have the discretion to add additional content areas to the minimum required testing areas for grades 3-8.

The Education Specialist also informed OCR that the ACT Aspire is most commonly administered in the state as an online test, instead of a paper-and-pencil test. Only in infrequent situations in which a school system does not have the resources to administer the test on the computer or in which a paper-and-pencil test is required to accommodate a student's disability is it administered as a paper-and-pencil test. Prior to the administration of the ACT Aspire, each school district creates an online Personal Needs Profile (PNP) for each student who requires accommodations during the test and selects the specific accommodations and accessibility features for the student to use during the ACT Aspire, including the reader accommodation. The AL DOE does not approve these accommodations. When the student logs into the ACT Aspire, any accommodations or accessibility features selected by the school district for him or her to use during the test, including the reader accommodation, would appear on the screen. If the student is taking an online test, he or she would wear headphones to utilize the read-aloud accommodation (text-to-speech). The student can select the portions of the test to be read aloud to him or her. If a student is taking the ACT Aspire via paper-and-pencil, a human reader would be provided for the student. For both online and paper-and-pencil administrations of the ACT Aspire, the reader accommodation is typically granted in conjunction with extended time to complete the test.

According to ACT, Inc., the reader accommodation (whether text-to-speech or human reader) is permitted for only the writing, math, and science content areas of the ACT Aspire. ACT, Inc. explains that “[w]hen there is clear evidence of student need and when the specific procedures specified below [relating to proper test administration] are carefully followed, this support does not compromise the assessment of mathematics, science, or writing skills being tested.” The student may request that any portion of the math, science, and writing content areas be reread as often as necessary within the time allowed for that test. However, the reader accommodation is not permitted for any student during the ACT Aspire English or reading tests. (*Accessibility User’s Guide* (Spring 2016 Testing), published by ACT, Inc.)

The ALSDE’s ACT Aspire reader accommodation policy at issue in this case became effective in November 2015. The Education Specialist explained to OCR that, prior to November 2015, the ALSDE did not have a formal written policy regarding the reader accommodation for the ACT Aspire. She explained that the unwritten policy consisted of verbal trainings to IEP teams and Section 504 teams. During these trainings, the ALSDE typically advised school districts that a student could qualify for the reader accommodation for the ACT Aspire if: he or she has a disability; he or she has a Section 504 plan or IEP; there is a justification for the reader accommodation; the student has practiced using the reader accommodation consistently; the reader accommodation has been successful for the student; and the student has been struggling in reading and is reading below grade level (although this is not defined and subject to the interpretation of the student’s own Section 504 team or IEP team).

The Education Specialist explained to OCR that the ALSDE’s Student Assessment Section decided to modify the ACT Aspire reader accommodation policy, which became effective in November 2015, for several reasons. She informed OCR that observations of the use of the reader accommodation during state assessments and discussions about the reader accommodation with colleagues at national conferences and at the local level showed that the reader accommodation was being misused and prescribed to many students who did not actually require it for the ACT Aspire. The goal of the policy revision was to ensure that students who received the reader accommodation had a true need for it.

The Education Specialist confirmed to OCR that the ACT Aspire reader accommodation policy was modified in November 2015 to add the following language:

Reader (Read-Aloud) Accommodation

The use of a Reader may be provided for a student who has a documented reading disability that is two or more grade-levels below the student's enrollment grade and that severely limits the student from decoding at any level of difficulty.

Criteria for a read-aloud accommodation:

- Documented reading disability
- Reading two or more grade-levels below current enrollment grade
- Justification (proof of success)

The deficit should be addressed throughout the student's IEP or 504 Plan, and the student should be working toward mastery of those deficit skills. The criteria for determining the use of a Reader shall not be solely dependent upon the student's grade level performance or his/her cognitive ability.

(Education Specialist's "*Accessibility and Accommodations*" PowerPoint, P. 5, top slide)

The Education Specialist explained to OCR how the following portions of the revised policy should be interpreted:

1. "Two or more grade-levels below the student's enrollment grade" – The interpretation of this phrase is left to the discretion of the student's Section 504/IEP team.
2. "Severely limits the student from decoding at any level of difficulty" – The student's documentation should show a reading disability. However, this phrase does not literally mean that the student cannot decode at any level. The interpretation is left to the Section 504/IEP team's discretion. The student need not even be diagnosed with a reading disability.
3. "Justification (proof of success)" – The Section 504/IEP team must show that the student has used the reader accommodation before and that it has worked for the student (as defined by the team). Essentially, the student's use of the reader accommodation must have a positive outcome.
4. "The student should be working toward mastery of those deficit skills" – The student's Section 504 plan or IEP should show that the areas of deficit are being addressed instructionally.

5. “The criteria for determining the use of a Reader shall not be solely dependent upon the student’s grade level performance or his/her cognitive ability” – The student’s Section 504/IEP team merely needs to show the student’s need for a reader. The decision is not based on one criterion, but on the student’s entire situation.

At the time of the filing of this complaint, the Student was an 11-year-old fifth grader at X School (School) in the X School District (District) in Alabama. According to the Complainant, the Student was diagnosed with [X – REDACTED] and received her first Section 504 plan [X – REDACTED]. The Complainant advised OCR that the Student did not receive any accommodations for the third grade ACT Aspire but received the following accommodations for the fourth grade ACT Aspire: (1) small group testing; (2) extended time (triple); and (3) reader (English Text Audio for Sighted). According to the Complainant, the Student’s fifth grade Section 504 plan, dated X, granted her the same accommodations for the fifth grade ACT Aspire until the ALSDE revised the reader accommodation policy in November 2015.

The Education Specialist informed OCR that in February 2016, the District’s Instructional Coordinator for Federal Programs and Testing (Instructional Coordinator) called the ALSDE’s Student Assessment Section for clarification regarding the Student’s request for the reader accommodation in light of the policy revision. At the request of the Student Assessment Section, the Instructional Coordinator forwarded documents relating to the Student’s academic performance and test results to the office for review.

The Education Specialist explained to OCR that she personally had a telephone conversation with the Instructional Coordinator regarding the Student’s request for the reader accommodation. The Education Specialist, along with her colleagues at the Student Assessment Section, also reviewed the entire packet of information forwarded by the District in support of the Student’s request for the reader accommodation, including her Section 504 plan, standardized test scores, and classroom grades. Upon the completion of her review of the Student’s file and at the request of the Instructional Coordinator for a written decision, on February 26, 2016, the Education Specialist sent an e-mail to the Instructional Coordinator, stating, in relevant part, “The student does not qualify for the read-aloud accommodation for ACT Aspire....Evidence does not support that the student is reading two or more grade levels below.” The Complainant confirmed to OCR that the Student was previously reading at two grade levels below her enrollment grade but is currently reading at grade level.

Based on a thorough review of all of the evidence in this case, OCR finds that the ALSDE’s November 2015 reader accommodation policy fails to comply with Section 504 and Title II. Specifically, OCR determines that the requirements that a student’s reading disability be “two or more grade-levels below the student’s enrollment grade” and “severely limit the student from decoding at any level of difficulty” create a bright-line rule that eliminates the individualized assessment by the Student’s Section 504 team or IEP team as to whether a student with a disability requires the reader accommodation for the ACT Aspire. Under the Amendments Act, a school district’s obligation to make reasonable modifications for a student with a disability, including for standardized tests, is fact-dependent and requires a case-by-case analysis. As written, the current ACT Aspire reader accommodation policy automatically disqualifies a student from receiving the reader accommodation if his or her reading disability is not at least

two grade-levels below his or her enrollment grade and does not severely limit him or her from decoding at any level of difficulty. By eviscerating the student's Section 504/IEP team's responsibility to make the accommodation decision on an individualized basis, the policy fails to comply with Section 504 and Title II.

C. Conclusion

The ALSDE has entered into the enclosed Resolution Agreement (Agreement) to remedy the non-compliance issue in this complaint and, when fully implemented, will resolve this issue. The Agreement requires the ALSDE to revise its November 2015 ACT Aspire reader accommodation policy to comply with the requirements of Section 504 and Title II. It also requires the ALSDE to implement, publish, and notify all necessary parties of the revised policy once it has been approved by OCR.

OCR will closely monitor the ALSDE's implementation of the Agreement to ensure that it is fully implemented and that the ALSDE is in compliance with the statutes and regulations at issue in this case. If the ALSDE fails to fully implement this Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II. The Complainant may file a private suit in federal court whether or not OCR found a violation.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. This letter should not be interpreted to address the ALSDE'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 ALSDE 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 Complainant or other individual may file a complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. If we receive 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.

OCR is committed to a high-quality resolution of every case. If you have any questions regarding this letter, please contact Vahn Wagner, Senior Attorney, at (404) 974-9392 or the undersigned at (404) 974-9366.

Sincerely,

Virgil Hollis
Compliance Team Leader

Enclosure (Signed Resolution Agreement)

cc: X, Esq. (w/ encl.)