



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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March 27, 2018

Dr. Todd Gray
Superintendent
School District of Waukesha
222 Maple Avenue
Waukesha, WI 53186

RE: OCR Docket No. 05-16-7082

Dear Dr. Gray:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the School District of Waukesha (District). The Complainant alleges the District discriminated against her daughter (Student A) on the basis of disability XXXXX when, on September 8, 2016, the District denied her request for a reasonable modification to its transportation policy, asking the District to provide Student A with transportation so she could attend XXXXXXXX (School).

OCR is responsible for enforcing 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, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department and public entities, respectively. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to the requirements of Section 504 and Title II. Therefore, OCR has jurisdiction over this complaint.

During its investigation, OCR reviewed documents from both parties, spoke with the Complainant's advocate, and interviewed three District staff members. OCR determined, using the preponderance of the evidence standard, that the District did not conduct an appropriate analysis of the Complainant's request for a reasonable modification to the District's transportation policy as required by Title II.

The reasons for this determination are set forth below.

Applicable Legal Standard

The regulation implementing Title II at 28 C.F.R. § 35.130(a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

subjected to discrimination by any such entity. The regulation implementing Section 504 at 34 C.F.R. § 104.4(a) provides, in relevant part, that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity that receives Federal financial assistance from the Department.¹

Definitions:

Title II defines “qualified individual with a disability” as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104.

With respect to elementary and secondary educational services, the Section 504 implementing regulation defines a person with a disability as any person who (1) has a physical or mental impairment which substantially limits one of more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 34 C.F.R. § 104.3(j)(1). “Major life activities” include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 34 C.F.R. § 104.3(j)(2)(ii). The regulations identify “qualified” as a person (1) of an age during which persons without disabilities are provided such services, (2) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (3) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. § 104.3(l)(2).

Reasonable Modifications:

The regulation implementing Title II at 28 C.F.R. § 35.130(b)(7) requires a public entity to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

In determining whether a reasonable modification is legally required, the recipient/public entity must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the recipient/public entity must allow it unless doing so would fundamentally alter the nature of the service, program, or activity. Even if a specific modification would constitute a fundamental alteration, the recipient/public entity is still required to determine if other modifications might be available. However, a recipient/public

¹ When both Section 504 and Title II are applicable, OCR applies the law providing the greater protection of the individual with disabilities.

entity is not required to make modifications that would result in an undue administrative or financial burden.

Title II/Section 504 Coordinator:

The Title II and Section 504 implementing regulations at 28 C.F.R. § 35.107(a) and 34 C.F.R. § 104.7(a) require a recipient to designate at least one person to coordinate its efforts to comply with Title II and Section 504, including investigating complaints alleging disability discrimination. The recipient is required to identify this person in its nondiscrimination notice and to make available to all interested individuals the name (or title), office address, and telephone number of the designated employee or employees. 28 C.F.R. § 35.107(a).

Notice of Nondiscrimination:

The regulation implementing Title II at 28 C.F.R. § 35.106 requires each recipient to make available to applicants, participants, beneficiaries, and other interested persons information regarding the implementing regulation and its applicability to services, programs, or activities of the public entity, and make such information available to them in such a manner as the head of the entity finds necessary to apprise them of the protections against discrimination based on disability.

The regulation implementing Section 504 at 34 C.F.R. § 104.8 generally requires recipients of federal financial assistance from the Department to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees, that they do not discriminate on the basis of disability in their programs and activities, including in employment and in admission. The regulations require the notification to include the identity of the responsible employee designated to coordinate the recipient's efforts to comply with Section 504. This information is to be included in recruitment materials and publications containing general information that it makes available to participants, beneficiaries, applicants, or employees.

Grievance Procedure:

The regulations implementing Title II and Section 504 at 28 C.F.R. § 35.107(b) and 34 C.F.R. § 104.7(b) generally require the recipient to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited under Title II or Section 504.

District Policies and Procedures

During OCR's interviews, the Deputy Superintendent informed OCR that the District began reviewing its policies and procedures in June 2016 and revised its policies and procedures,

including its nondiscrimination policies and procedures. Updated policies and procedures were adopted in February 2017, during OCR's investigation.

Notice of Nondiscrimination / Designation of Title II/Section 504 Coordinator

At the time the complaint was filed, the District's notice of nondiscrimination did not comply with Title II and Section 504, specifically 28 C.F.R. § 35.107(a) and 34 C.F.R. § 104.8. The District provided a copy of a "Pupil Non-Discrimination" statement that was published in the local newspaper on August 25, 2016. The notice stated the District prohibits discrimination against pupils on various bases, and referenced School Board policies 5131.1 and 5131.1G as providing direction to students, district staff, volunteers and community members regarding pupil nondiscrimination. The Pupil Non-Discrimination statement stated that a person may file a complaint regarding pupil discrimination with the Superintendent, and provided an address, but not a telephone number for the Superintendent. The notice did not address discrimination against individuals other than pupils. The notice did not indicate that an individual may contact the Superintendent (or any other person) with questions about the policies.

In addition, the District had a "Pupil Non-Discrimination" policy (5131.1), which the District reported was posted online. This document stated the Superintendent will provide annual notice to the public regarding the name and address of the employee designated to handle complaints regarding pupil discrimination. This policy itself did not provide a name, address, or telephone number for the designated employee(s).

At that time, the District also had a "Section 504" policy (6170), adopted on July 8, 2015. This document identified the Assistant Superintendent of Student Services as the employee coordinating the District's efforts to comply with Section 504, and provided a telephone number, but not an address.

The District's updated grievance/complaint procedures, "Section 504/ADA Prohibition against Discrimination Based on Disability" policy (2260.01), which were adopted February 8, 2017, designate the Assistant Superintendent for Human Resources and the Deputy Superintendent as the District's Section 504 Compliance Officers/ADA Coordinators. This policy includes the office address and telephone number of both individuals. Although the policy is referenced in the Elementary School Student Handbook, it refers the reader to the Superintendent to file a complaint, not the two contacts cited in the policy. Also, the High School Student Handbook references 2260.01 but refers the reader to the policy prohibiting harassment rather than the grievance/complaint procedure.

The District did not identify an updated notice of nondiscrimination, or provide any evidence that it has included a compliant notice of nondiscrimination in recruitment materials and publications containing general information that the District makes available to participants, beneficiaries, applicants, or employees.

Grievance Procedures

- Procedures in effect at the time the complaint was filed

The District's grievance policy 5131.1G, entitled "Guidelines and Complaint Procedure for Pupil Non-Discrimination," which was effective from the time the complaint was filed until February 8, 2017, did not comply with Section 504 and Title II. The policy stated the District does not discriminate against students on various bases, including disability. The policy stated that District staff and volunteers may not discriminate against pupils, but did not indicate that the procedures apply to complaints alleging harassment carried out by employees, other students, or third parties. According to the policy, a person who believes that a pupil has been discriminated against could file a written complaint with the superintendent or designee. The complaint recipient would acknowledge receipt of the complaint within 45 days, and investigate and make a determination within 90 days. The procedures did not indicate what the investigation entailed, whether both parties were allowed to provide evidence and witnesses, whether the parties received written notice of the outcome of the complaint, or an assurance that the District would take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. The District did not provide OCR with a grievance procedure for non-pupil discrimination complaints that was effective prior to the District-wide policy and procedure updates.

- Procedures in effect as of February 8, 2017

The District adopted new grievance procedures on February 8, 2017, including distinct procedures for complaints made by/on behalf of students and those made by staff/employees. The new grievance procedures are located on the District's website. To access these procedures, an individual is required to open a separate website from a link within the "Board of Education" tab on the website.

Student policies and complaint procedures

The District's "Nondiscrimination and Access to Equal Educational Opportunities" policy (2260) states the Board does not discriminate on various bases, including disability, in any of its student programs and activities, and is committed to equal employment opportunity in its employment policies and practices as they relate to students. The policy includes procedures that encourage students, parents, and all other members of the School District community to report violations of the nondiscrimination policy to a teacher or administrator, who shall file it with the District's compliance officer. The District's "Section 504/ADA Prohibition against Discrimination based on Disability" policy (2260.01) specifically addresses discrimination based on disability under Title II and Section 504.

Both policies 2260 and 2260.01 state that the compliance officer will investigate the complaint, including interviewing the complainant, respondent, and witnesses that may

reasonably be expected to have information relevant to the allegations, as well as considering evidence presented by the complainant, respondent, or others. Both policies 2260 and 2260.01 designate a reasonably prompt timeframe for the complaint process. Under both, absent extenuating circumstances, the compliance officer will initiate an investigation within five business days of receiving the complaint and will complete the investigation within fifteen calendar days of receiving the complaint. At the conclusion of the investigation, the compliance officer will prepare a written report to the Superintendent,² who will issue a final determination or request further investigation within ten business days after receiving the report. Any additional investigation must be completed within ten business days. The procedures provide for a written determination to be delivered to the complainant, but are silent as to whether the determination is provided to the respondent. The procedures provide that the complainant may appeal to the State Superintendent of Public Instruction, but do not allow for an appeal by the respondent.

Transportation:

The District's website states that the District provides transportation to approximately 6500 regular education students and 400 special education students, attending both public and private schools. The District provides transportation to students through a third party vendor bus company. During the 2016-17 school year, the District provided transportation³ for approximately 600 students to fourteen different private schools.

The District has approximately 110 different bus routes. All eligible public school students at the elementary and middle school levels are routed on buses. Eligible public high school students submit a transportation request form notifying the transportation office that they would like to be routed on a bus. All students attending private/parochial schools are required to request transportation. According to the Deputy Superintendent and the Transportation Coordinator, bus routes are adjusted regularly (at least once a week) without a cost to the District, unless the District is required to add a new bus route.

The District provided OCR with Policy 3541, entitled "Student Transportation," as the District's policy regarding transportation of District students.⁴ The transportation policy describes the eligibility requirements for District transportation:

Resident students shall be eligible to be transported to public elementary, middle or high schools if the primary residence is two or more miles from the school to which the district has assigned them. Resident students living two or more miles from the private schools they attend are also eligible for

² The policies do not specify a timeframe in which this report is to be completed.

³ Some of these students were provided transportation through a "parent contract" instead of a bus service.

⁴ Student Transportation Policy 3541 was adopted in May 1971, and last amended November 11, 2015.

transportation, provided the private school attended has an established attendance area ...⁵

The policy further states: “Other students are eligible for transportation only if such service is required by state law or has been approved by action of the School Board Finance and Facilities (F&F) Committee.” The policy goes on to state: “All matters concerning student transportation shall be referred to the designee. Transportation issues shall be resolved administratively, if possible. Matters unresolved at the administrative level shall be referred the F&F Committee for final resolution.” The policy does not identify the designee.

The District updated its transportation policy on February 8, 2017, and District policy 8600 replaced District policy 3541. The current transportation policy states: “It is the policy of the Board of Education to provide transportation for those students, of any age, whose distance from their school makes this service necessary within the limitations established by State law and the regulations of the Department of Public Instruction or other appropriate agency.” The transportation policy includes, in relevant part, the same eligibility requirements for student transportation to private and public schools as the previous policy, and requires transportation issues to be resolved administratively, if possible, and to be referred to the F&F Committee for final resolution if unresolved. The new policy differs slightly from the old policy in that it directs transportation matters to be referred to the transportation office instead of the “designee.”

The District asserts that it does not provide transportation to any student who lives less than two miles from the private school s/he attended. The Deputy Superintendent referred to these students as “non-eligible” students. However, the District provides transportation to students who attend public schools and live less than two miles from their public school of attendance if it was determined necessary as part of the student’s Individualized Education Program or Section 504 Plan. The District also provides transportation to students who live less than two miles from their school if their route to school has been deemed “unusually hazardous” and the hazard is unable to be removed.

In addition, the District offers a “Pay-to-Ride” program for students who do not qualify for transportation under the District transportation policy. This program allows students to purchase an available seat on an existing bus route, and to access the bus from previously designated bus stops, and is subject to availability on the assigned bus. The fee per semester for a single child is \$130.00. The Deputy Superintendent informed OCR that he believes hundreds of students access transportation through the Pay-to-Ride program. The Deputy Superintendent told OCR although that everyone has to pay something, the cost to for the Pay-to-Ride program is determined by income level and that for some students the cost is reduced.

⁵ These eligibility requirements appear to be derived from the requirements of Wisconsin Statute Section 121.54.

Facts

Student A lives in the District's attendance area. She has XXXXXXXX. The District developed a Section 504 Plan for Student A when she was enrolled in a District school. The Section 504 Plan provides multiple intervention strategies "to assist [Student A] with XXXXX including modified activities, extra time when necessary when passing between classes, and transportation to and from school.

For the 2015-16 school year, Student A attended Waukesha XXXXX School, a public XXXX school in the District. Although Student A's Section 504 Plan included transportation, Student A did not utilize transportation from the District during the 2015-16 school year. Before the start of the 2016-17 school year, a request was made that the District provide Student A with transportation to the school Student A planned to attend for the 2016-17 school year, XXXXXX XXXXXXXX in the District. The District denied this request because Student A does not meet the eligibility requirements for transportation to a private school under the District's transportation policy. The District's transportation policy states that resident students living two or more miles from the private schools they attend are eligible for transportation, and Student A lives XX miles from XXXX School. Therefore, the District determined that Student A was not eligible for transportation services.

According to the District, after it denied Student A's transportation request, an advocate on behalf of Student A left a message with the Director of Special Education requesting transportation on behalf of Student A and her parent. The Deputy Superintendent responded and informed the advocate of the District's decision to deny Student A's request for transportation. The Deputy Superintendent provided Student A's advocate with a telephone number for the District's attorney and the advocate informed the Deputy Superintendent that she would be filing a complaint with OCR.

Via a letter to the Deputy Superintendent dated September 1, 2016, the advocate requested a reasonable modification to the District's two-mile requirement and for the District to provide Student A with transportation to XXXXXXXX School. The letter states that Student A has a physical disability and lives XX miles from XXXXXXXX School, but due to her XXXX disability, she is unable to XXXXX to and from school on a daily basis. The letter states that the District is required to transport students with disabilities under Wisconsin Code Section 115.76.

The District denied Student A's request in a letter from the Deputy Superintendent dated September 8, 2016. The Deputy Superintendent informed OCR that he made the determination regarding whether the District would grant Student A's request for a reasonable modification to the transportation policy. He stated that Student A's original request for transportation was considered a general transportation request, and although Student A had a Section 504 Plan, he denied the request because the District does not have an obligation under Section 504 to provide transportation to a parochial school.

The Deputy Superintendent informed OCR that he subsequently treated Student A's request as an accommodation request, after her advocate reached out to the District. The Deputy Superintendent informed OCR that in analyzing Student A's request for a reasonable modification, he considered that Student A lived less than two miles from XXXXX, and because the District does not provide transportation to students who live less than two miles from their school, he determined she was not transportation eligible. Therefore, the Deputy Superintendent denied Student A's request for a reasonable modification to the transportation policy.

He stated that a determination of the cost to the District to provide transportation to Student A was not part of his decision, and that his decision to deny Student A's transportation request was based solely on the two-mile eligibility requirement and the fact that the District is not obligated to provide Section 504 services to students who attend parochial schools. The Deputy Superintendent informed OCR that he did not refer the issue to the F&F Committee for final resolution. He stated that only students who are "transportation eligible" are referred to the F&F Committee.⁶

The Deputy Superintendent did not determine whether Student A's address was on the route for an already established bus route, or on a bus route going to XXXXX School. He did not know whether the District provides transportation to any students who reside in the same XXXX as Student A. He did not consider whether alternative modifications were available. The Deputy Superintendent did not provide information about the Pay-to-Ride program to Student A or the Complainant at the time of the request.⁷

On March 26, 2018, the District and Complainant agreed upon a transportation plan that provides transportation for Student A while she remains a resident of the District and attends the School. The plan provides for a bus stop on the Pay-to-Ride program that is accessible to Student A for morning transportation, provision of city bus pass at no charge for afternoon transportation and reimbursement for prior transportation costs.

Analysis

For the reasons described above OCR determined that the District's nondiscrimination notice and Section 504 complaint procedures are not compliant with Title II and Section 504, specifically 28 C.F.R. § 35.107(a) and 34 C.F.R. § 104.8.

OCR further determined that, until recently, the District violated Section 504 by failing to make reasonable modifications in policies, practices, or procedures that were necessary to avoid discriminating against Student A on the basis of disability. The District asserted that it

⁶ The District's Transportation Policy does not state that only "transportation eligible" students should be referred to the F & F Committee. The Policy provides that matters that are "unresolved" at the administrative level should be referred to the Committee.

⁷ Student A requires a modification to the Pay-to-Ride program as the previously established bus stops are XXX XXXXX.

is not required under Title II or Section 504 to modify its transportation policies and procedures to provide transportation to Student A. In a September 8, 2016, letter to Student A's parent, the District stated that it was providing "equivalent transportation services" to disabled and nondisabled students. However, the Complainant requested a reasonable modification to the District's transportation policy to allow Student A to access transportation to the private school she attended. The District's obligation not to treat Student A, a student with a disability, differently than students without disabilities is distinct from its obligation to make reasonable modifications to its policies, practices, and procedures when necessary to avoid discrimination.

In a follow-up letter to OCR, the District stated that the Wisconsin school transportation statute does not require the District to provide transportation to a private school student who lives less than two miles from the private school. This fact is not disputed. There is no dispute as to whether Student A meets the requirements under the District's transportation policy, as written, which is based on the Wisconsin state statute. Student A lives less than two miles away from the private school she is attending. If Student A met the two-mile requirement identified in the policy, she would not need to request a modification to the policy, as she would be categorically eligible for transportation.

The District additionally stated that its policy is nondiscriminatory and provides equal access because the District's policy of providing transportation only to private school students who reside two or more miles from the private schools they attend is neither discriminatory on its face, nor in its effect. The issue in this complaint is not whether the District's transportation policy is discriminatory on its face or in its effect. Student A requested a reasonable modification to a nondiscriminatory policy, which is distinct under Title II and Section 504 from a policy that is facially neutral, but has a discriminatory effect.

The sole issue in this complaint is whether the District properly considered Student A's request for a reasonable modification to its transportation policy, a policy that provides transportation to students with and without disabilities, and to students that attend both public and private schools.

In this case, Student A is a qualified person with a disability under Title II and Section 504, as she meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the District. She is a student who resides in the District, is school-aged, and has a disability, and therefore is eligible to receive services from and participate in programs or activities provided by the District. Her attendance at a private school in the District does not change the fact that she is a qualified person with a disability under the statutes. Student A requested a reasonable modification to the District's transportation policy, which triggers the District's obligation to conduct an appropriate analysis of the reasonable modification request, pursuant to Title II and Section 504.

The District failed to analyze properly Student A's request for a reasonable modification to its transportation policy. The District Deputy Superintendent stated that Student A did not meet the basic eligibility requirements for transportation. The District did not take any further steps to address Student A's request for a reasonable modification to its transportation policy that states a student must reside more than two miles away from the school he or she is attending to be eligible for transportation.

Until recently, the District did not engage in an individualized inquiry to determine whether the modification is necessary. Although the Deputy Superintendent stated in his interview with OCR that he considered modifying the two-mile rule to be a "fundamental alteration" to the program, he did not articulate an acceptable basis for how or why the transportation program would be fundamentally altered by accommodating Student A's request to modify the two-mile requirement. Even if the Deputy Superintendent had proposed a legitimate fundamental alteration to the program, there is no evidence that the District then determined if other modifications might be available. Finally, the Deputy Superintendent stated he did not consider the financial burden on the District, if the District were to grant Student A's request.

The District did not properly analyze Student A's request for a reasonable modification to its transportation policy. Based on the evidence gathered during OCR's investigation, OCR did not find evidence that Student A's request would result in a fundamental alteration to the nature of the program, service or activity, or that granting Student A's request would result in an undue financial or administrative burden on the District.

The District has recently engaged in the interactive process and on March 26, 2018, reached an agreement as to reimbursement for past costs and future provision of transportation for Student A.

Conclusion

Based on the information provided by the Complainant, the District, and gathered during OCR's investigation, OCR finds that the District violated Title II when, until recently, it did not conduct an appropriate analysis of the Complainant's request for a reasonable modification to the District's transportation policy and failed to have an appropriate nondiscrimination notice and complaint procedure. On March 23, 2018 the District signed the enclosed resolution agreement that is aligned with the violations identified by OCR's investigation and with the issues investigated, and is consistent with the applicable regulations and legal standards. OCR will monitor this 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.

The 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 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 privacy.

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

If you have any questions regarding this letter, please contact me at (312) 730-1593 or by email at Dawn.Matthias@ed.gov.

Sincerely,

Dawn R. Matthias
Team Leader

Enclosure

cc: Alana M. Leffler via email