



UNITED STATES DEPARTMENT OF EDUCATION  
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1244 SPEER BLVD, SUITE 310  
DENVER, CO 80204-3582

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January 17, 2018

Mr. Mike Hyatt, Superintendent  
Gallup-McKinley County Schools  
640 South Boardman  
PO Box 1318  
Gallup, New Mexico 87305

Mr. Christopher Ruzzkowski  
Acting Secretary of Education  
New Mexico Public Education Department  
300 Don Gaspar Avenue  
Santa Fe, New Mexico 87501

Sent via email to: [mhyatt@gmcs.k12.nm.us](mailto:mhyatt@gmcs.k12.nm.us)  
[cruszkowski@state.nm.us](mailto:cruszkowski@state.nm.us)

Re: **Gallup-McKinley County Schools**  
OCR Case Number: 08-17-1302

**New Mexico Public Education Department**  
OCR Case Number: 08-17-1303

Dear Superintendent Hyatt and Acting Secretary Ruzzkowski:

This letter is to inform you of the disposition of the above-referenced complaint, filed on April 28, 2017, against the Gallup-McKinley County Schools (District) and the New Mexico Public Education Department (NMPED), alleging discrimination on the basis of disability. Specifically, the complainant alleges that the District unilaterally changed the Individual Education Programs (IEPs) of students with disabilities in the District, without opportunity for the decisions to be considered by the full IEP team including parents, based on a requirement by the NMPED limiting the use of calculators and text to speech to 1% or less in PARCC (Partnership for Assessment of Readiness for College and Careers) testing during Spring 2017.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education (Department); and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District and NMPED are subject to these laws and regulations. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

During the investigation of this complaint, OCR requested and received data from the District, and also communicated with District staff, including the Assistant Superintendent and Director of Exceptional Student Services, as well as the Assessment Coordinator for NMPED. The data we reviewed included policies and procedures the District uses regarding the provision of accommodations to students with disabilities for PARCC testing; the District's policies and procedures for making changes to student IEPs and 504 Plans, including accommodations

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(calculators for the non-calculator portion of the test and English Language Arts (ELA) text to speech) for PARCC testing; a power point presentation from NMPED regarding its guidelines for PARCC accommodations; a list of all students who received calculators and/or text to speech as accommodations for Spring 2017 PARCC testing; and a list of all students whose IEPs or Section 504 Plans were changed to remove calculators and/or text to speech as accommodations for Spring 2017 PARCC testing.

***Legal Standard/Regulatory Authority***

**34 C.F.R. § 104.4 Discrimination prohibited**

(a) General. 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

**104.33 Free appropriate public education**

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of non-disabled persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Individuals with Disabilities Education Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

**104.35 Evaluation and placement**

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

*Facts and Analysis*

OCR confirmed that public school students in New Mexico, including students with disabilities in the District, take the standardized PARCC test each year in certain grades, including middle and high school. We also confirmed that NMPED provided training for Special Education Directors in winter 2016 on PARCC testing best practices and accommodations for students with disabilities. Included in that presentation was a Power Point slide which indicated that for the English Language Arts (ELA) text to speech and use of a calculator on non-calculator sections, an audit may be initiated if over 1% of students are receiving the accommodation.

*Case Number 08-17-1303 – NMPED:*

OCR first considered whether NMPED had a requirement limiting calculator use and text to speech as accommodations to 1% of students or less. OCR confirmed that the NMPED State Assessment Coordinator (State Coordinator) emailed two schools in the District during the spring 2017 PARCC testing window stating they had been flagged because more than 1% of their students were receiving the testing accommodation of calculator use on the non-calculator portion of the PARCC test. The State Coordinator explained to OCR that she did not intend to indicate that NMPED had a requirement that only a certain percentage of students with disabilities were allowed these accommodations because that would be illegal. Rather, schools that had more than 3-4% of students with calculator accommodations had been automatically flagged, and the email was to notify them to make sure that only eligible students received the accommodations, which meant students with these accommodations in their IEPs. The State Coordinator stated that whether a student receives these testing accommodations is based on the exclusive and individualized determination of the IEP team, and not based on a particular percentage deemed by NMPED or any other entity. She confirmed that no school or District that had more than 1% of students with these accommodations had been audited and that no test results had been invalidated.

Based on the evidence, OCR finds NMPED does not have a requirement limiting the use of calculators or text to speech for students with disabilities for PARCC testing to 1% of students or less. Rather, a group of persons knowledgeable about the child, specifically the IEP team, makes the eligibility determination. Therefore, we find insufficient evidence that NMPED discriminated as alleged in OCR Complaint No. 08-17-1303, and are closing this complaint effective the date of this letter.

*Case Number 08-17-1302 – the District:*

OCR also considered whether the District unilaterally changed the Individual Education Programs (IEPs) of students with disabilities in the District, without opportunity for the decisions to be considered by the full IEP team including parents, based on its belief that NMPED had a requirement limiting the use of calculators and text to speech to 1% or less in PARCC testing during Spring 2017.

Through discussions with the District, OCR confirmed that the District believed that NMPED did have a requirement limiting the use of calculators and text to speech as accommodations to 1% or less, because of the Power Point slide and the emails. As a consequence, in a very short time frame, the District special education staff held IEP meetings for all students with either of

these accommodations for PARCC testing, which included a few hundred students. The District confirmed that as a result of the IEP meetings, many students' IEPs were changed to remove these accommodations. The District contends that all meetings were properly convened and included the appropriate IEP team members, including parents, and that it did not consider the 1% requirement in making its determinations, but rather made each determination on an individualized basis.

However, during the course of our investigation and prior to its conclusion, the District informed OCR that it wished to voluntarily resolve the complaint allegations. After considering the additional information needed for OCR to conduct a complete investigation, including reviews of all IEPs for those students for whom the accommodations were removed and conducting interviews with District staff and IEP team members to determine whether a group of knowledgeable persons including parents, made the changes to each of the IEPs or whether they were changed unilaterally, we determined that a voluntary resolution agreement was appropriate. Therefore, prior to OCR making any findings regarding the District, the District signed an Agreement which, when fully implemented, will address the issues raised in the complaint.

In accordance with Section 302 of OCR's *Case Processing Manual* (CPM), the provisions of the Agreement signed by the District on December 20, 2017 are aligned with the complaint allegations and the information obtained during OCR's processing of this case, and consistent with the applicable regulations. Therefore, OCR is closing the complaint investigation for 08-17-1302 effective the date of this letter. OCR, however, will actively monitor the District's implementation of the Agreement until the District fulfills the terms of the Agreement and is in compliance with the statutes and regulations at issue in this case. If the District fails to implement the Agreement as specified, OCR may initiate administrative or judicial proceedings as described in the Agreement or resume its investigation of the initial allegations. A copy of the Agreement is enclosed.

### ***Conclusion***

This concludes OCR's investigation of these complaints and should not be interpreted to address the District's or State'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 these two individual OCR cases. 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 or State 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. In addition, the Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 protect personal information to the extent provided by law.

Page 5 of 5 – Mr. Hyatt and Mr. Ruszkowski

We thank you for your cooperation in this matter, especially xxxx and xxxx of the District, and xxxx of NMPED. If you have any questions, you may contact xxxx, the Attorney assigned to this case, at xxxx or by email at xxxx.

Sincerely,

/s/

Thomas M. Rock  
Supervisory General Attorney

Enclosure: Signed Resolution Agreement

cc (without enclosure): Ms. Pauletta White, Assistant Superintendent, Gallup-McKinley  
Dawn E. Mastalir, General Counsel, NMPED