



Office of Student Services & Special Education

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To: Ms. Betsy Devos, Secretary of Education
U.S. Department of Education

From: Joe Koch, Deputy Superintendent
School District of Waukesha

Date: September 19, 2017

Docket Number: ED-2017-OS-0074

On behalf of the School District of Waukesha, I am writing in response to your request for input on federal regulations that may be appropriate for repeal, replacement, or modification. In particular, the District would like to comment on two issues relating to the regulations which implement Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. Part 104).

1. The FAPE Requirement Should Be Repealed

34 C.F.R. § 104.33(a) requires school districts to provide “a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.” 34 C.F.R. § 104(33)(b) defines an “appropriate education” as “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

The Individuals with Disabilities Education Act also requires school districts to provide a free appropriate education (FAPE) to students with disabilities, and school districts receive federal funding under the IDEA for this purpose. Despite the affirmative obligation to provide FAPE under Section 504, however, school districts do not receive federal funding under Section 504. This is true despite the fact that the definition of disability is broader under Section 504, which results in more students being covered by Section 504 than the IDEA. Congress intended Section 504 to be a nondiscrimination statute; Congress cannot have intended Section 504 to require the provision of regular or special education aids and services designed to meet the individual needs of students with disabilities without providing federal funding to the school districts.

For the above reasons, we propose that the FAPE requirement of the Section 504 regulations be repealed. If the FAPE requirement is not repealed, then federal aid should be provided to school districts under Section 504.

2. Compliance with State Law Should Be Taken Into Account

The Section 504 Regulations should be modified to take compliance with state law into account. For example, Section 121.54(2) of the Wisconsin Statutes – General Transportation – requires public school

districts to “provide transportation to and from the school a pupil attends for each pupil residing in the school district who attends any elementary grade, including kindergarten, or high school grade at a private school located 2 miles or more from the pupil’s residence, if such private school is a school within whose attendance area the pupil resides and is situated within the school district or not more than 5 miles beyond the boundaries of the school district measured along with usually traveled route.” Section 121.54(2) does not require a public school district to provide transportation to a public school student who resides less than two miles from the private school. Waukesha School Board Policy 8600 is consistent with Section 121.54(2).

A complaint was recently filed against the District alleging that the District discriminated against a student with a disability by not providing the student with transportation. The student lived less than 2 miles from the school she attended. She was ineligible for transportation not by reason of her disability, but because she lived less than 2 miles from her school of attendance. The District would not have provided transportation to a student without a disability who lived at the same address and who attended the same school; therefore, the student had the same access to the District’s transportation services as students without disabilities had. The Department of Public Instruction agreed with the District’s interpretation.

The Office for Civil Rights began an investigation into the complaint, and considerable District time and resources were spent responding to the complaint and cooperating with the investigation, which included several District employees being interviewed by the OCR investigators. The investigators seemed to believe that the District’s denial of transportation may constitute discrimination on the basis of disability, despite the fact that students without disabilities would not be eligible for transportation, and the fact that such an interpretation would impose an affirmative obligation on school districts without providing federal aid. It our understanding that the investigation is still ongoing.

We propose that the Section 504 Regulations be modified so that in the event that an individual believes that a covered entity’s compliance with state law results in the individual being discriminated against, the discrimination complaint should be directed to the State Educational Agency instead of the Local Educational Agency. A school district should not be penalized for complying with state law.

Please do not hesitate to contact me at jkoch@waukesha.k12.wi.us if you have any questions. Thank you for your consideration of the School District of Waukesha’s input.