



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

September 26, 2023

By email only to [dshelley@spotsylvania.k12.va.us](mailto:dshelley@spotsylvania.k12.va.us)

Dawn Shelley  
11804 Duck Circle  
Spotsylvania, VA 22553

Re: Case No. 11-23-4044  
Virginia Department of Education

Dear Ms. Shelley:

This letter is to advise you of the outcome of the investigation that the U.S. Department of Education, Office for Civil Rights (OCR) conducted of the complaint filed against the Virginia Department of Education, which we will refer to as the VDOE. You alleged that VDOE discriminated against students with disabilities by excluding some students with auditory disabilities from taking the Standard of Learning reading and writing stand-alone field test assessment for the 2022-2023 school year. For the remainder of this letter, you will be referred to as the Complainant.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive federal financial assistance. Because the VDOE receives federal financial assistance from the Department of Education and is a public entity, so OCR has jurisdiction over it pursuant to Section 504 and Title II.

During the investigation, OCR reviewed documents provided by the Complainant and the VDOE. Before OCR completed its investigation, the VDOE expressed interest in resolving the allegation pursuant to Section 302 of OCR's *Case Processing Manual*, which states that allegations may be resolved prior to OCR making a determination if the school expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

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

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### **Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under a school's programs or activities on the basis of disability.

The Section 504 regulation, at 34 C.F.R. § 104.33(a), also requires school districts to provide a free appropriate public education (FAPE) to each qualified student with a disability who is in the school district's jurisdiction. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504's procedural requirements. As a general rule, because Title II provides no less protection than Section 504, violations of Section 504 also constitute violations of Title II. 28 C.F.R. § 35.103.

### **Facts**

One way that Virginia assesses its students is through Standards of Learning (SOL) tests in reading and writing. In developing these tests, the VDOE occasionally has students take a "stand-alone field test" to assess its validity before finalizing it. While these tests do not officially count on a student's record, they are given in real-life testing conditions and help determine what types of questions and format the finalized SOL will include. In 2022, the VDOE developed a new stand-alone field test for Virginia students in grades 5 and 8, as well as students taking the end-of-year course for the first time, as part of its SOL reading and writing tests. All Virginia school divisions administered this field test to its students in those grades in the spring of 2023. The stand-alone field test asked students to read a nonfiction passage based on history or science and answer four to six questions about the passage. It also presented students with a writing prompt based on the passage. The VDOE planned to use "deidentified data" from the stand-alone field test to determine the "viability of the passages and items and the prompts for future test administration," and to develop training materials for scoring any future implemented prompts. The results from the stand-alone field test were not reported or included in student records.

The VDOE acknowledged that it did not provide the stand-alone field test in paper, Braille, large print, or audio formats. As a result, students with disabilities requiring these accommodations did not participate in the stand-alone field test. However, the VDOE provided a read-aloud accommodation to students who required an audio accommodation unless the student's Individualized Education Program (IEP) or Section 504 team determined that the accommodation was not an appropriate alternative. In those cases, students also did not participate in the stand-alone field test. The VDOE informed OCR that approximately 5,000 students throughout Virginia did not participate in the stand-alone field test and that, for some, this was because the read-aloud accommodation was not appropriate for the students' individualized needs. According to the VDOE, accommodations such as Braille, large print, audio accommodations, and paper versions will be available for future field tests.

### **Analysis**

Based on the information obtained to date, OCR determined that the VDOE excluded some students with auditory and visual disabilities – particularly those for whom a read-aloud format did not serve as an appropriate accommodation – from participating in the stand-alone field test in spring 2023. OCR is concerned that this may not have accurately measured the performance of students with these types of disabilities and that the VDOE may not have accounted for how such students may have performed in its assessment of the validity of the stand-alone test. OCR is additionally concerned that the VDOE may have denied these students with the opportunity to take what could potentially amount to a practice exam in real-life testing conditions.

On September 25, 2023, the VDOE agreed to implement the enclosed Resolution Agreement, which, when fully implemented, will address the evidence obtained and the allegation investigated. OCR will monitor the VDOE's implementation of the agreement until the VDOE is in compliance with the terms of the agreement and the statute and regulation at issue.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the VDOE'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. OCR would like to make you aware that individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the VDOE must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint against the VDOE with OCR.

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, OCR will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Amy Fellenbaum and Naomi Rodriguez, the OCR attorneys assigned to this complaint, at [amy.fellenbaum@ed.gov](mailto:amy.fellenbaum@ed.gov) and [naomi.rodriguez@ed.gov](mailto:naomi.rodriguez@ed.gov).

Sincerely,

Jennifer Barmon  
Team Leader, Team III  
District of Columbia Office  
Office for Civil Rights

Enclosure