



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

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REGION XV
MICHIGAN
OHIO

June 22, 2015

Timothy J. Haynes, Esq.
First Assistant Attorney General
Health, Education & Family Services Division
State of Michigan, Office of the Attorney General
Post Office Box 30758
Lansing, Michigan 48909

Re: OCR Docket #15-14-1110

Dear Mr. Haynes:

This letter concerns the disposition of the above-referenced complaint, which was filed on February 18, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR) against the Michigan Department of Education (MDE) alleging discrimination on the basis of disability. Specifically, the complaint alleged that an MDE web page, located at http://michigan.gov/mde/0,4615,7-140-6530_6598-321773--,00.html, was inaccessible to persons with disabilities during February 2014.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 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, 42 U.S.C. § 12131 *et seq.*, 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 by public entities, respectively. As a recipient of federal financial assistance from the Department and as a public entity, MDE is subject to these laws. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following legal issues:

- whether MDE, on the basis of disability, excluded qualified persons with disabilities from participation in, denied them the benefits of, or otherwise subjected them to discrimination in its programs and activities based on disability, in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.4 and 104.22, and the regulation implementing Title II at 28 C.F.R. § 35.130; and

- whether MDE failed to take appropriate steps to ensure that communications with participants and members of the public with disabilities are as effective as communications with others, in violation of 28 C.F.R. § 35.160.

During the investigation, OCR interviewed the Complainant and reviewed information submitted by the Complainant. OCR also assessed whether the web page was accessible to users of assistive technology and, specifically, whether the websites permit persons with disabilities to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner as persons without disabilities. OCR also interviewed individuals with responsibilities within MDE for developing the content of the web page in question and administering the MDE portion of the state website. Based on its investigation, OCR finds the evidence is sufficient to support a violation of Section 504 and Title II because the MDE website in question was not accessible to individuals with vision impairments and MDE does not provide a notice of nondiscrimination on its website. The basis for this determination is discussed below.

Summary of OCR's Investigation

- **Background**

MDE maintains a dedicated section of the state of Michigan's public facing website www.Michigan.gov. In early 2014, MDE's Office of Special Education (OSE) proposed changes to the Michigan Administrative Rules for Special Education (MARSE) through the state's rule promulgation process. The MARSE are the implementing rules for federal and state law for special education in Michigan. For all rules subject to the full state rule promulgation process, a public notice and opportunity for public comment are required. In order to meet these requirements, OSE developed a web page, hosted on the MDE website, which described the rulemaking process and proposed changes and also provided information on how members of the public could submit comments on the proposed changes. The web page contained links to stream a number of videos, hosted through a third-party website, and documents in portable document format (pdf). In addition, the web page provided information about two public hearings on the proposed changes, an address to which public comments could be mailed, and a link to an online public comment forum, also hosted through a third-party website. The public comment period on the proposed changes to the MARSE lasted from mid-February until mid-March 2014. Approximately two weeks into the public comment period, the web page was modified to include information on how to submit comments by e-mail.

The web page itself was located on the MDE website (<http://www.michigan.gov/mde>) under "News & Publications" through a link titled "Public Notices;" the page, when active, could be found through an internal MDE search or via an external search engine. The web page was no longer publicly accessible once the public comment period ended; however, for the purposes of OCR's investigation, MDE restored the web page, but with inactive links and a note that the public comment period had ended. The web page was laid out to include elements that are consistent across all MDE pages, including the header, left hand navigation menu, and footer; the header and footer were also consistent

with the layout of the state website, Michigan.gov. OCR noted that the footer contained active links titled “Compliance” and “Policies” as well as links to the home page of Michigan.gov and the MDE home page.

The web page included an overview section with a brief explanation of the purpose of the page and links to four sections containing more detailed information that appeared further down the page. Users therefore could explore content by clicking on the links or by scrolling to access the four sections, including the following:

- **Rule Promulgation Process.** This section contained a video and a two sentence text description that the video explained the rulemaking process, and that a user could access the video by clicking the “play” button that appeared as an icon over it or by selecting the link below it, which would prompt the video to open in a new screen.
- **Proposed Rule Changes.** This section contained three pdf documents, with each title hyperlinked to the document, followed by the text descriptor “pdf” in brackets and a short explanation of the document content. The documents included a redlined version of the existing rule, a summary document explaining the changes, and a copy of the “regulatory impact statement” form submitted as a required part of the state rulemaking process to highlight and explain the proposed changes.
- **Videos.** This section broke out the proposed changes into four topic areas, and utilized videos to explain the changes. All videos were hosted through the third-party website Vimeo. This section included text to introduce each video, as well as a hyperlinked title for each video which included a notation of the length of the video in brackets.
- **Public Comment for Proposed Rule Changes.** This section provided information regarding how to provide public comments and the deadline for doing so (March 13, 2014), also as a required part of the rulemaking process. One method for providing public comment included an online submission tool that was hyperlinked to where it was hosted on third-party website Survey Gizmo.

The web page itself contained little content regarding the proposed changes. The page concluded with an italicized note that comments would not be accepted by fax, but that, as amended approximately halfway through the comment period, members of the public unable to utilize any of the methods for providing public comment could submit comments by e-mail to mde-ose-public-comment@michigan.gov by the same March deadline and that any such comments had to include the citizen’s name.

- **Web-Accessibility Policies and Training**

MDE reported to OCR that MDE's website uses a statewide content management system and that the Michigan Department of Technology, Management and Budget (DTMB) is responsible for setting policies and implementing technical requirements within the content management system. MDE provided OCR with a copy of the State of Michigan Accessibility Policy (the Accessibility Policy), and indicated that it is linked at the bottom of all pages on the state and MDE website; MDE also provided a copy of the State of Michigan Look and Feel Standards (Look and Feel Standards) that also includes accessibility requirements.

OCR confirmed that a user could reach the accessibility policy by selecting "Policies" from the footer of the MDE web page. Labeled "Michigan Policies," the accessibility policy informs visitors that the state has attempted to design the Michigan.gov website to be accessible by everyone through conformance to the Americans with Disabilities Act (ADA) and the Priority 1 Level Checkpoints of the World Wide Web Consortium (W3C) Web Content Accessibility Guidelines 1.0. The Accessibility Policy also asserts that, as part of a commitment to accessibility, efforts have been made to ensure compatibility of the website with common technologies utilized by the adaptive community, including by testing for compliance with screen magnification software, screen-reading software, and text-only browsers. In addition, the policy articulates a commitment to future compliance testing. The policy, however, provides no specifics as to the frequency of any testing, identification of responsible parties, or requirements or timetables for correction should accessibility concerns be discovered.

The accessibility policy also invites users who encounter difficulties accessing information on any web page to inform administrators about the accessibility issue via a hyperlinked "Contact us." The policy assures that administrators will "try to provide the information in an alternate format or make the necessary improvements to make the information accessible." OCR noted that the state of Michigan page that pops up from the hyperlink is titled "Report Technical Issues or Error Messages," and requires a user to copy and paste the complete address of the problem page and additionally requires the completion of nine fields, including full name, address, state, zip code, phone number and e-mail address, a text description of the "services the user is having trouble with," and a text description of how the user navigated to the page with the error. In addition, the page notifies the user that it may take up to five days for someone to respond, though a user is required to check a box after completing the fields if they indeed wish to be contacted. Prior to submitting the form, the user must also "add five plus ten" and type the answer in a final field for spam protection. The page offers no other way to contact either an administrator of the state of Michigan or MDE regarding an accessibility concern, should a user have difficulty completing the form or require more immediate assistance.

The accessibility policy also references and links to the statewide Look and Feel Standards. These standards provide guidance on page layout, usability and formatting, accessibility and ADA compliance, among other topics, but no further guidance for site

administrators in monitoring websites under their purview for possible compliance or accessibility issues. The introduction to the Look and Feel Standards speaks specifically of communicating “important architecture design and development standards to IT project managers and web design teams,” and the standards stress the importance of educating development staff on the standards and accessible design requirements. The standards also reference eMichigan Web Development, an office under the DTMB that provides services to support agencies in developing and maintaining Michigan.gov websites, as available to answer questions as necessary.

The accessibility section provides an overview of Section 508, discusses various disabilities and related tools creators should consider to enable access, highlights ADA requirements for access as well as noting common accessibility concerns and specific page elements where proper coding is particularly important. This section also specifically discusses the issue of pdf accessibility and website accessibility testing tools. The Accessibility and ADA Compliance section explains that the Michigan.gov Content Management Application has built-in accessibility compliance features to reduce the number of compliance errors, but cautions that site administrators should be well versed in the legal standards and able to spot potential compliance concerns. The section also states that compliance reports run monthly on all Michigan.gov websites but provides no additional information as to the process for addressing any issues identified in the monthly compliance reports. It is further unclear how these multiple layers of review should coordinate to ensure both the structure and content of pages of the Michigan.gov site, and specifically, the MDE site, are accessible.

The MDE web administrator told OCR that the Look and Feel Standards apply to the development of the content management system with respect to the State website, and that such work is undertaken only by the DTMB. The web administrator explained that he neither creates the broader architecture nor the content for the MDE website; rather, individuals within MDE are assigned roles as content creators and content editors. He is responsible for providing general support to MDE staff and for providing general training on the content management system the MDE site uses. He explained that he “approves” the uploading of content, but merely on the level of process—he does not review any content on the page and does not verify the accessibility of information developed by staff with rights to create or edit content. He explained that additionally, when a new section needs to be created for the MDE site or when the configuration of a section needs to be changed, he is then responsible for any such “taxonomy” change.

OCR also interviewed a content editor who worked on the MDE web page, the Director of the Center for Education Networking (CEN) (a grant-funded Mandated Activities Project of the MDE that provides communications support). She explained that she creates content and has rights to upload it to the MDE website. She stated that her role as a content creator does not entail specific responsibility for testing for or ensuring that such content is accessible; further, the request for proposal describing the responsibilities

of the CEN, does not specify any responsibility related to accessibility for the organization. The content editor was not familiar with the Look and Feel Standards and had not received any training from MDE with regard to website accessibility in her time working with MDE.

OCR asked the content editor how a member of the public who experienced any difficulty accessing the MDE web page in question could have reported a problem or requested assistance. The content editor explained that the individual could have contacted OSE directly through its 800 number; however, she acknowledged that neither this 800 number nor other contact information was included on the web page itself and that the state did not expect her to include information regarding accessibility support in pages she has contributed to in the past.

OCR's review of the MDE website, including its accessibility policy, disclosed that the website does not include any information or notice to the public that MDE does not discriminate on the basis of disability, nor does it provide information regarding the identity and contact information for the responsible employee designated to coordinate MDE's efforts to comply with Section 504 and Title II. The MDE website does include a web page titled "Compliance," with the following "Statement of Compliance with Federal Law": "The [MDE] complies with all Federal laws and regulations prohibiting discrimination, and with all requirements of the U.S. Department of Education and U.S. Department of Agriculture." The compliance web page also includes a specific notice of MDE's compliance with Title IX that identifies an individual with responsibilities related to Title IX compliance activities.

- **Accessibility of Web Page and Elements**

OCR had the accessibility of the MDE web page in question reviewed and evaluated using Section 508 standards as guidelines. OCR found no apparent accessibility issues on the web page itself, and the assessment indicated it should have been fully accessible to users of assistive technology, including users of screen readers, speech recognition software, and keyboards. Likewise, the public comment forum survey appeared to be technically well-crafted and also accessible to users of assistive technology. OCR did, however, identify technical deficiencies with both the video and pdf elements of the web page.

- Videos

Ensuring the accessibility of videos includes consideration of a number of elements, including whether a video should be posted to the website or streamed, how the video will be captioned, and how the video should be coded. For example, videos must have captioning synchronized with the audio and must be "verbatim" of spoken words. Ensuring access to the control panel of a video is also critical. Videos with a control

panel that can only be seen when a user's mouse hovers over the area at the bottom of the video may prevent keyboard users from seeing or interacting with such controls. Furthermore, if the buttons on the control panel are not properly identified, users of assistive technology cannot operate the controls.

OSE collaborated with CEN to develop the videos used on the MDE web page to explain the proposed changes to the MARSE. The videos were hosted on a third-party site, Vimeo, but the staff of CEN oversaw the content and structure of the video files. OCR recognizes that MDE was attempting to provide information regarding changes to the MARSE in a variety of visual formats, which is important to those who have limited literacy, are challenged by extended detailed reading, or are otherwise restricted. OCR's review revealed, however, that, while the videos were properly captioned, because the buttons were not labeled not all users of assistive technology could access them. For instance, a screen reader user would not be able to find the play button. Keyboard users and speech recognition users could also find the buttons on some of the videos inaccessible. OCR noted that on the web page users were notified in text of the option to either click the "play" button that appeared on the icon for the video or to select the link below the video, which would prompt the video to open in a new screen; however, because the button labeling is part of the file itself, even opening the video in a new screen would not allow a user with assistive technology to access the video.

- PDF documents

Documents in pdf format or other image-based formats are often not accessible to people who are blind and who use screen readers and to people with low vision who use text enlargement programs or different color and font settings to read computer displays. The pdf format is designed specifically to prevent modification by viewers of the document content. As such, a document author may specify accessibility permissions; for example, an author can specify that no part of an accessible pdf is to be copied, printed, extracted, commented on, or edited. This setting can interfere with the user of a screen reader's ability to read the documents. Screen readers must be able to copy or extract the document's text to convert it to speech. An author may embed text into pdf documents that have been created from images (e.g. scanned documents). Assistive technology cannot interpret such image-only documents. Therefore, authors must ensure documents contain embedded text for accessibility either by converting from an electronic source or applying optical character recognition. Finally, an author may label structure tags for accessibility. Tags provide the underlying technical structure, so assistive technology can correctly interpret the content within a document. A document without tags is not accessible; however, it is not enough for tags to be present. In order to be effective, tags must correctly identify the visual layout of the document because these tags indicate the document structure. Tags identify the type of content (e.g. figure, heading, paragraph, or list) and the correct reading order of content on the page.

OCR reviewed three pdf files for accessibility, titled "Proposed Rule Changes," "Summary of Changes," and "Regulatory Impact Statement." All three documents were correctly set to allow access with assistive technology and contained embedded text for

conversion to speech. None of the documents, however, contained structure tags for accessibility; thus, a person using screen reading software would not be able to identify that document

Applicable Regulatory Requirements

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides 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. In this usage, “program or activity” encompasses a broad variety of operations associated with the receipt of federal financial assistance from the Department, including all operations of a local education agency or a college or university, as well as all of the operations of department, agency, or other instrumentality of a state or local government or the entity of such a state or local government that distributes such assistance and each such department or agency to which the assistance is extended. The regulation implementing Section 504, at 34 C.F.R. § 104.4(b), further prohibits discrimination on the basis of disability in the provision of any aid, benefit, or service, directly or through contractual, licensing, or other arrangements. A recipient may not deny a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service; 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; provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others; or 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 regulation implementing Title II, at 28 C.F.R. § 35.130, has similar requirements. Additionally, the regulation implementing Title II has specific requirements for communication, which, in pertinent part, require that public entities take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a)(1). Entities subject to Title II are required to provide equally effective communication, regardless of the medium chosen for their communication. Communication includes the transfer of information and encompasses information conveyed through computer-related applications and online environments.

OCR and the U.S. Department of Justice, Civil Rights Division, issued a Dear Colleague Letter on June 29, 2010 (June 2010 DCL), on access to emerging technologies for individuals with disabilities. OCR then issued another Dear Colleague Letter on May 26, 2011 (May 2011 DCL), along with a questions and answers document (FAQ), in follow-up to the June 2010 DCL. The FAQ clarifies that students with disabilities, especially visual impairments, are to be afforded “the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students.” The FAQ also clarifies that an accommodation or modification that is available only at certain times will not be considered “equally effective and equally integrated” where other

students have access to the same information at any time and any location, as is the case with a website or other online content. The May 2011 DCL states that online programs are also covered and stresses the importance of planning to ensure accessibility from the outset.

While the May 2011 DCL and FAQ focused primarily on electronic book readers, the principles articulated in the documents apply to all forms of information technology. Though the DCL and FAQ discussed students as the affected population, recipients and public entities must ensure equal access to the educational benefits and opportunities afforded by the technology and equal treatment in the use of the technology for individuals with disabilities in any populations the recipient engages with its programs or activities, including students and members of the public.

In addition, the regulation implementing Section 504, at 34 C.F.R. § 104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the regulation; the regulation implementing Title II contains a similar provision at 28 C.F.R. § 35.107(a). The regulation implementing Section 504, at 34 C.F.R. § 104.8(a), provides that a recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of Section 504. The notification is required to state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification must also include an identification of the responsible employee designated pursuant to 34 C.F.R. § 104.7(a). The regulation implementing Title II contains a similar notice requirement for public entities at 28 C.F.R. § 35.106. The regulation implementing Section 504, at 34 C.F.R. § 104.8(b), states that if a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include the notice of nondiscrimination in those materials or publications. The regulation implementing Title II contains a similar requirement at 28 C.F.R. § 35.106.

Analysis and Conclusion

As OCR's investigation revealed, the web page developed to elicit public comment on OSE's proposed changes to the MARSE was not accessible. Videos lacked control tags to ensure that persons who use screen readers or a keyboard to access web-based information would have access to the videos. Furthermore, because the pdf documents also lacked critical tagging information, these same individuals would not have been able to access the text-based presentation of the information regarding the proposed rule changes. As neither of the formats in which MDE presented the information on its web

page was accessible to individuals with disabilities who utilize certain assistive technologies, MDE constructively denied such individuals the opportunity to access information regarding the proposed rule changes and therefore denied them the ability to participate in or benefit from the aid, benefit, or service of the MDE website.

OCR further found that, for users who may have encountered the problematic web page elements, the website provided no clear mechanism for reporting the problem or requesting assistance, nor did it provide contact information for OSE; the Michigan.gov portal for reporting concerns suggests by its title, “Report Technical Issues or Error Messages,” that this mechanism is for reporting technical concerns, not for requesting an accommodation. OCR’s investigation revealed additional deficits in that MDE does not operate any content monitoring system to ensure posted content meets accessibility standards and failed to clearly assign the task of ensuring accessibility to any specific staff; in addition, MDE does not properly train content creators and editors, which may have contributed to the problems OCR identified with this web page.

Based on the foregoing, OCR finds that there is sufficient evidence to support that MDE failed to provide qualified persons with disabilities the same opportunity to participate in or benefit from its program as others in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.4 and failed to ensure that its communications with members of the public with disabilities via its website were effective, constructively denying them an equal opportunity to participate in, and enjoy the benefits of, its program in violation of the Title II regulation at 28 C.F.R. § 35.160.

In addition, as described above, the only notice of nondiscrimination OCR was able to locate on MDE’s website does not mention Section 504 or Title II and does not specify that MDE does not discriminate on the basis of disability; therefore, OCR also finds the evidence sufficient to support that MDE is in violation of 34 C.F.R. §§ 104.8 and 28 C.F.R. §§ 35.106. The notice also does not identify a staff person designated to coordinate MDE’s compliance with Section 504 and Title II, in violation of 34 C.F.R. §§ 104.7(a) and 104.8, and 28 C.F.R. §§ 35.106 and 35.107(a).

Resolution

To resolve the above compliance findings, MDE submitted the enclosed resolution agreement (the Agreement) on June 5, 2015. Under the terms of the Agreement, MDE will develop and publish an appropriate notice of nondiscrimination on its website pursuant to Section 504 at 34 C.F.R. § 104.8 and Title II at 28 C.F.R. § 35.106; designate one or more persons to coordinate its efforts to comply with Section 504 and Title II with respect to its website, including but not limited to its website accessibility, and identify the person(s) in its website and in its notice of nondiscrimination consistent with 34 C.F.R. § 104.8 and 28 C.F.R. § 35.106. In addition, MDE will develop, adopt, and provide notice of a web accessibility policy and will also develop an implementation and remediation plan to ensure adherence to the policy that will provide for periodic review of its website to identify and ameliorate any accessibility problems. Once OCR has

reviewed and approved the policy and plan, and annually thereafter, MDE will provide training to staff responsible for content development. MDE will provide OCR with reports describing its efforts to comply with its web accessibility policy and plan; including information documenting any compliance issues discovered and corrective action taken. OCR will monitor the implementation of the agreement.

Conclusion

This concludes OCR's investigation of the complaint and should not be interpreted to address MDE'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 MDE 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 harmed individual may file another complaint alleging such treatment. The Complainant may 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. 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 personal privacy.

OCR appreciates the cooperation of MDE and other State of Michigan employees during the investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, please contact Mr. Donald S. Yarab, Supervisory Attorney/Team Leader, at (216) 522-7634. For questions about execution of the Agreement, please contact Ms. Sarah Poppleton, who will be monitoring MDE's implementation, by e-mail at Sarah.Poppleton@ed.gov or by telephone at (216) 522-2674. We look forward to receiving MDE's first monitoring report by July 5, 2015.

Sincerely,



Meena Morey Chandra
Director

Enclosure