



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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November 21, 2016

Dr. Stan Scheer  
Superintendent  
Thompson School District R2-J  
800 South Taft Avenue  
Loveland, Colorado 80537

Re: Thompson School District  
Case Number: 08-16-1230

Dear Superintendent Scheer:

We are writing to advise you of the resolution of the above-referenced complaint that was filed with our office against Thompson School District (District). The Complainant alleged that the District discriminated on the basis of disability. Specifically, the Complainant alleged that the District failed to properly implement her son's (Student) individualized education program (IEP) as it relates to speech-related services. Additionally, the Complainant alleged the District treated disabled students, including the Student, differently by withholding acceptance of disabled students' applications through the Schools of Choice/Open Enrollment process until 2 to 3 months after non-disabled students were notified of the decisions on their applications.

We investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 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 from the 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 is subject to these laws and regulations.

Our investigation established that the District (1) failed to properly implement the Student's IEP as it relates to speech-related services, and (2) treated disabled students, including the Student, differently by withholding acceptance of disabled students' applications through the Schools of Choice/Open Enrollment process until 2 to 3 months after non-disabled students were notified of the decisions on their applications. Upon being advised of this finding, the District voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed original of the agreement is enclosed with this letter.

During our investigation, we interviewed the Complainant and District staff. We also reviewed documents submitted by the Complainant and District. The reasons for our conclusion are set forth in this letter.

## **Factual Findings**

Student was an Early Childhood Education (ECE) student at the District for the 2015-16 School Year. Student has a disability and had an IEP, which provided for, in relevant part, XXX minutes per XXX of direct services and XXX minutes per XXX of indirect services from a Speech-Language Pathologist (SLP). The District does not dispute that it did not provide all services owed to the Student under these provisions of his IEP. The District concedes that the Student's SLP was on maternity leave between August XXX and November XXX, 2015, during which time there was a lapse in SLP services because the District was not able to hire a replacement for the duration of this maternity leave. The District acknowledges that it therefore owes the Student, and other students, compensatory SLP services. The District calculates that it owes the Student 180 minutes of compensatory services. OCR concludes that it owes Student at least 180 minutes of compensatory services, and may also owe other students compensatory services.

On or about the beginning of November 2015, the Complainant applied to participate in the District's open enrollment program and submitted paperwork to enroll the Student in her school of choice, Loveland Classical School (LCS). Whereas non-disabled students participating in the open enrollment program generally are notified whether they have been admitted within a week or two of their application, the Student – and other students with disabilities – are not. Instead of a wait of a week or two as is the case for their non-disabled peers, students with disabilities who have either an IEP or a Section 504 Plan are categorically treated differently. Students with disabilities must wait several months, until the Spring (generally between January and May, but perhaps longer depending on individual circumstances) to be notified of an admission decision. The District asserted that this delay is limited to ECE students and the reason for the delay is because all ECE students have a “transition” meeting in the Spring, at which time the transition to Kindergarten is discussed. For ECE students with an IEP, these transition meetings also involve a discussion of the level of services the student will require in Kindergarten, and an updating of the IEP. The District's stated reason for holding these meetings in the Spring is that a great amount of growth occurs in ECE students in the few months before Kindergarten, so the District wants to ensure it has “current” information when considering each student.

It is not until after this transition meeting is held in the Spring for each student with an IEP that the school of choice considers that student's application. After the Spring transition meeting, and the updated IEP, staff from the District and the school of choice meet and determine whether the school can meet the student's needs. If a student's regularly scheduled annual IEP meeting is held before December, a new transition/annual meeting is nevertheless scheduled between January and the end of the school year. In this case, the Student had an IEP dated XXX, 2015, which required a minimal amount of speech and occupational therapy services per month. The Complainant applied to the open enrollment program by early November, within days of that IEP. The District nevertheless delayed a decision on admission (over the doubts of school staff, as explained below). The District did not provide a specific reason for the delay, other than that there are many children to consider and its goal is to have all transition meetings completed by the end of the school year. Ultimately, the Student was not notified of acceptance until mid-April, and at least five other students were subjected to a similar delay in acceptance at LCS.

Though the District asserts that only ECE students are subjected to this delay, only two of the six students whose acceptance at LCS was delayed were entering Kindergarten. The other four students were entering XXX, XXX, XXX, and XXX grades.

A student's status after application to the open enrollment program, but before the IEP team determines whether he or she can be admitted, is not a conditional acceptance. All three District witnesses confirmed this; the District's School of Choice/Open Enrollment policies do not outline any type of a conditional acceptance process; and the District's contract with LCS provides, in relevant part, "*Prior to the decision to admit or deny admission, a screening team . . . will review the IEP or 504 Plan*" (emphasis added). The District's open enrollment process is similar at New Vision, its only other charter school. Furthermore, the District does not have a clear process for communicating its open enrollment process, and the categorical delay for students with disabilities, to parent-applicants. The Complainant only received information about the delay, and the reason being the need to review Student's IEP in the Spring, after much discussion and request for assistance from LCS staff, who in turn communicated with the District. In fact, LCS staff questioned whether this delay was necessary and the District staff insisted on it. Neither the District witnesses, nor District policies, provided any clarity on the delay itself or who is to communicate with parent-applicants about it.

During the delay between application and admission in the District's open enrollment program, families of students with disabilities are also denied the opportunity to plan for the next school year and participate in any activities held by the school for incoming Kindergarten students, such as orientation. The District's Executive Director of Student Support Services stated that it is possible that open enrollment could fill up during this delay period; indeed, New Vision charter school has a lengthy waiting list. If denied at LCS, a student would also experience a disadvantage (in terms of decreased priority) in finding an alternative school.

## **Analysis**

### **Allegation 1: Failure to Implement the Student's IEP as it Relates to Speech-Related Services**

The regulation implementing Section 504 at 34 C.F.R. § 104.33 requires recipients that operate a public elementary or secondary education program or activity to provide a free appropriate public education to each student with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the student's disability. Section 504 defines a student with a disability as a student who has a physical or mental impairment that substantially limits a major life activity. Section 504 defines "appropriate education" as the provision of regular or special education and related aid and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting this regulatory requirement. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

The Complainant alleged that the District failed to implement the Student's IEP as it relates to speech-related services, because he had received no speech services at all for the 2015-16 School Year. It is undisputed that Student had an IEP, which provides for, in relevant part, XXX minutes per XXX of direct services and XXX minutes per month of XXX services from an SLP. It is also undisputed that the District did not provide all services owed to the Student under these provisions of his IEP. This is because, at a minimum and as the District concedes, the Student's SLP was on maternity leave between August XXX and November XXX, 2015, during which time there was a lapse in SLP services because the District was not able to hire a replacement for the duration of this maternity leave. The District acknowledges that it therefore owes the Student, and other students, compensatory SLP services. The District calculates that it owes the Student 180 minutes of compensatory services. Because the District concedes that it owes the Student at the very least 180 minutes of compensatory services, we conclude that the District failed to properly implement the Student's IEP. We further note that the District concedes that it owes other students compensatory services because of the SLP's absence, and the resolution agreement in this case will remedy this compliance concern.

#### Allegation 2: Treatment of Students with Disabilities in the Open Enrollment Process

Under the Section 504 regulations, at 34 C.F.R. §104.4(a) and (b), no qualified individual 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. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service; afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; or limit a qualified disabled individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

Here, there is evidence that the District treated students with disabilities differently than non-disabled individuals under similar circumstances, namely, in the administration of its open enrollment program. Though the District asserts that students with IEPs are conditionally accepted to their school of choice based on the outcome of a lottery and pending review of the IEP, the evidence does not support this assertion. All three District witnesses unequivocally stated that when an ECE student with an IEP applies for open enrollment, his or her IEP must be

reviewed by an IEP team during the Spring, and the student's status in the interim is not a conditional acceptance. Those witnesses also all stated that the review process can take several months and occurs in tandem with the student's transition meeting in the Spring. Documents, including emails from District staff, also confirm that acceptance is not conditional. The District's open enrollment data showed that at least six students seeking to enroll at LCS experienced this delay in acceptance, and were not accepted until March or April, despite submitting applications months earlier. That same data also showed that the delay is not limited to ECE students – of the six whose acceptance at LCS was delayed, only two were entering Kindergarten, and the remaining four were entering XXX, XXX, XXX, and XXX grades. Further, the District's School of Choice/Open Enrollment policies do not outline any type of conditional acceptance process. In addition, the District's contract with LCS provides, in relevant part, "*Prior to the decision to admit or deny admission, a screening team . . . will review the IEP or 504 Plan*" (emphasis added). The District's open enrollment process is similar at New Vision, its only other charter school. While Section 504 and Title II permit a District to perform an individualized assessment on a student who applies through an open enrollment program, the timing of that assessment is problematic here. This evidence establishes that the District, in its administration of its open enrollment program, categorically and expressly treats students with disabilities differently than non-disabled students, by imposing a delay of several months on their admission decision.

Next, the District's treatment of students with disabilities has resulted in the denial or limitation of services, benefits, or opportunities of the District's open enrollment program. Students with disabilities are provided a limited opportunity to participate in the District's open enrollment program. Unlike their non-disabled peers, who receive an admission decision within a week or two of application, the District categorically imposes on students with disabilities a delay of several months on their admission decision. The District also fails to provide a clear explanation to parent-applicants of students with disabilities that there will be a delay in that decision, or of the reasons for that delay. As was the case with Complainant, parents-applicants of students with disabilities are left to wonder while non-disabled students are accepted within a week or two of application, and their student is treated differently. The District's delay also denies parent-applicants of students with disabilities the opportunity to plan for the next school year and participate in any activities held by the school for incoming Kindergarten students, such as orientation. The District's Executive Director of Student Support Services stated that it is possible that open enrollment could fill up during this delay period, and that the delay could last to the end of the school year in May, or even beyond depending on individual circumstances; indeed, New Vision charter school has a lengthy waiting list. If denied at LCS, a student would also experience a disadvantage (in terms of decreased priority) in finding an alternative school.

Though the District asserts that it has a legitimate, nondiscriminatory reason for this difference, *i.e.*, that students with IEPs are conditionally accepted to their school of choice based on the outcome of a lottery and pending review of the IEP, OCR concludes that this assertion is not supported by the evidence. As outlined previously, documents, including emails from District staff and the District's contract with LCS and all District witnesses unequivocally confirm that acceptance is not conditional. Because the evidence contradicts the District's reason for its different treatment, that reason is a pretext for discrimination. Furthermore, in interviews, all District witnesses contended that the delay is only limited to ECE students. However, the

District's data contravenes this contention. Of the six students with disabilities whose acceptance at LCS was delayed, only two were entering Kindergarten and the remaining four were entering XXX, XXX, XXX, and XXX grades. Because the evidence also contradicts this reason for the District's different treatment, that reason is a pretext for discrimination.

OCR therefore concludes that the preponderance of the evidence establishes that the District's actions were based on disability, and that the District has subjected students with disabilities to unlawful different treatment in violation of Section 504 and Title II.

In the alternative, under 34 C.F.R. §104.4(b)(4) a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that: (i) have the effect of subjecting qualified disabled individuals to discrimination on the basis of disability; or (ii) have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity for individuals with disabilities. The Title II regulations contain a similar provision applicable to public entities, at 28 C.F.R. §35.130(b)(3).

In this type of case, OCR must establish whether there has been a disproportionate denial of opportunity to benefit from a program and determine if this is due to a neutral policy, process, or practice. If a disproportionate denial can be established, we assess whether the evidence establishes that the recipient's policy, process or practice is educationally necessary. Even if the policy, procedure, or practice is determined to be necessary, discrimination may still be occurring if there is a less discriminatory alternative that the recipient does not use that would meet the recipient's important educational goal.

Here, for the reasons outlined previously (the delay itself, the lack of clarity provided to parent-applicants, and the missed opportunities during the delay), we conclude that the District's categorical different treatment of students with disabilities is a disproportionate denial of opportunity to benefit from the District's open enrollment program when compared to the District's treatment of non-disabled students. Again, we emphasize that while Section 504 and Title II permit a District to perform an individualized assessment on a student who applies through an open enrollment program, the timing of that assessment is problematic here.

We next assess whether the delay in admission decision is educationally necessary. The District has offered two explanations for the delay. First, the District has suggested that the delay is immaterial because students with IEPs are actually conditionally accepted to their school of choice based on the outcome of a lottery and pending review of the IEP. As described previously, the evidence does not support this assertion. Because this conditional acceptance does not in fact occur, it cannot be an educationally necessary element of the District's open enrollment program. Second, the District has asserted that the delay is limited only to ECE students, because it must wait until Spring transition meetings to be able to consider the great amount of growth that occurs in ECE students in the few months before Kindergarten. As described previously, the evidence does not support this assertion either. Of the six students with disabilities whose acceptance at LCS was delayed, only two were entering Kindergarten, and the remaining four were entering XXX, XXX, XXX, and XXX grades. Because the delay is not in fact limited to ECE students, it can also not be an educationally necessary element of the District's open enrollment program. Therefore, we find that there is no educationally necessary

reason for the District's categorical different treatment of students with disabilities in its open enrollment program. Furthermore, even if there were an educationally necessary reason for the District's different treatment, OCR's investigation established that LCS administrators questioned whether the delay was necessary, but District staff insisted on imposing it. The fact that school administrators themselves did not deem the delay necessary indicates that there is a less discriminatory alternative to the District's categorical delay in admission for students with disabilities.

Accordingly, in the alternative, we conclude that the preponderance of the evidence establishes that the District's methods of administration for its open enrollment program violated Section 504 and Title II.

### **Conclusion**

As noted previously, the District voluntarily entered into an agreement with OCR to resolve these issues. We thank the District for voluntarily entering into an Agreement to resolve these issues. OCR is closing the investigative phase of this case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and will send a letter to the District, copied to the Complainant, stating that this case is closed.

When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports demonstrating that the terms of the Agreement have been fulfilled. We will provide written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues listed previously and should not be interpreted as a determination of the District's compliance or noncompliance with Title II, Section 504, or any other federal law in any other respect.

This letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation you and your staff and counsel extended to us during the investigation of this case. If you have any questions, please contact XXX, Attorney, at XXX, or me at XXX.

Sincerely,

XXX  
Supervisory General Attorney  
Denver Enforcement Office

Enclosure – Resolution Agreement

cc (w/enclosure): XXX, counsel for District  
cc (w/o enclosure): Honorable Katy Anthes - CDE