



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

March 23, 2023

Via E-mail Only to: XXXXX

XXXXX XXXXX XXXXX, XXXXX
Giarmarco, Mullins & Horton, P.C.
101 West Big Beaver Road
Troy, Michigan 48084-5280

Re: OCR Docket No. 15-20-1331

Dear XXXXX XXXXX:

This letter is to notify you of the disposition of the above-referenced complaint filed on XXXXX XXXXX, XXXXX, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Birmingham Public Schools (the District) alleging that the District discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged that from XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX the District did not fully provide the Student with XXXXX XXXXX XXXXX XXXXX, XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX required by the Student's Individualized Education Program (IEP).

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 by recipients of 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 on the basis of disability by public entities. As a recipient of federal financial assistance from the Department and as a public entity the District is subject to these laws. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation of the following legal issue: whether the District failed to provide a qualified student with a disability with a free appropriate public education (FAPE) in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.33.

During its investigation to date, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District staff. Based on this information, OCR determined that there is a cause for concern that the District violated Section 504 and Title II with respect to the complaint allegations. However, prior to the completion of OCR's investigation, the District signed the attached resolution agreement, which, once implemented,

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On August 25, 2020, the program supervisor e-mailed program staff informing them that the District would begin the 2020-2021 school year in a virtual format. She stated in the e-mail that, as a special educator, she was “aware that a remote start to the school does not provide our students with the same educational opportunities as in-person learning.” She noted that “in-person learning is extremely important for certain populations” and that the District was engaged in ongoing discussions “around face-to-face opportunities.” The program supervisor acknowledged to OCR that some of the Student’s IEP goals were not reproducible in a virtual environment.

XXXXX – PARAGRAPH REMOVED - XXXXX

XXXXX – PARAGRAPH REMOVED - XXXXX

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- **Extended School Year**

With respect to extended school year (ESY) services, the Complainant said that, after the conclusion of the school year, the Student XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. XXXXX – SENTENCE REMOVED - XXXXX. XXXXX XXXXX XXXXX XXXXX, IEP, which addressed the XXXXX XXXXX XXXXX (the year prior to the summer at issue in this complaint), stated that the Student would receive XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

The Student’s IEP team met on XXXXX XXXXX XXXXX, to determine whether and how much ESY the Student needed for the XXXXX XXXXX XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. XXXXX – SENTENCE REMOVED – XXXXX.

XXXXX - PARAGRAPH REMOVED - XXXXX

During XXXXX XXXXX XXXXX XXXXX, the Student participated in a XXXXX XXXXX XXXXX ESY, which consisted of XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. Thus, the Student received XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. The teacher said that the amount of ESY services each student received was determined based on each student’s individual needs, and that she could not recall the amount of ESY services other students received. However, she stated that other students had the same ESY schedule as the Student in the XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

XXXXX – PARAGRAPH REMOVED - XXXXX

The Complainant, in a follow-up interview, did not dispute that the District provided virtual services on the dates listed above. XXXXX – SENTENCE REMOVED – XXXXX. XXXXX – SENTENCE REMOVED – XXXXX. XXXXX – SENTENCE REMOVED – XXXXX.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires public school districts to provide a free appropriate public education (FAPE) to all qualified students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of 34 C.F.R. §§ 104.34-36. Districts are required to conduct an evaluation of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement. 34 C.F.R. § 104.35(a). Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2).

In interpreting evaluation data and in making placement decisions, a recipient school district must draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 104.35(c).

The Section 504 regulation, at 34 C.F.R. § 104.6(a), provides that when OCR finds that a district has discriminated against persons on the basis of disability, the district shall take such remedial action as OCR deems necessary to overcome the effects of the discrimination. Compensatory services are required to remedy any educational or other deficits that result from a student with a disability not receiving the evaluations or services to which they were entitled.

Voluntary Resolution

Based on OCR’s investigation to date, there is cause for concern that the District did not provide the Student with services consistent with IEP and thereby denied the Student a FAPE. There is also cause for concern that the other students in the classroom received reduced program services as well.¹

¹ See, e.g., U.S. Dep’t of Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, at 2 (Mar. 12, 2020) (“If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.”); see also U.S. Dep’t of Educ., *Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters*, at 13 (Sept. 2017) (“Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504.”); U.S. Dep’t of Educ., *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, at 3, 4 (Dec. 2009) (explaining that when a child did not receive services

First, the evidence obtained to date regarding the Student’s program services shows that after
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XXXXX XXXXX XXXXX. XXXXX – SENTENCE REMOVED - XXXXX. The District also
provided asynchronous videos instead of live instruction. XXXXX – SENTENCE REMOVED -
XXXXX. The Student’s IEPs throughout this time period, however, did not indicate that he
required fewer services. Moreover, the District acknowledged in documents and teacher
statements that it could not adequately provide some services to the Student and his classmates
when the District was virtual, including services XXXXX XXXXX XXXXX XXXXX XXXXX
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SENTENCE REMOVED - XXXXX. XXXXX – SENTENCE REMOVED - XXXXX. XXXXX
– SENTENCE REMOVED - XXXXX.

Second, there is cause for concern that the Student’s IEP team XXXXX XXXXX XXXXX
XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX
XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX
XXXXX XXXXX XXXXX XXXXX XXXXX. The IEP team’s decision is inconsistent with
the statement of the program supervisor to OCR that some of the Student’s IEP XXXXX
XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX. XXXXX – SENTENCE
REMOVED - XXXXX. XXXXX – SENTENCE REMOVED - XXXXX.

Finally, there is a cause for concern that the Student did not receive all XXXXX XXXXX
XXXXX XXXXX XXXXX services required by XXXXX IEP, XXXXX XXXXX XXXXX
XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

The District provided no evidence or indication that that the XXXXX XXXXX XXXXX
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XXXXX. XXXXX – SENTENCE REMOVED - XXXXX.

Under Section 302 of OCR’s *Case Processing Manual*, allegations under investigation may be
resolved at any time when, prior to the conclusion of the investigation, the recipient 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. In this case, the District expressed an interest in resolving the allegations prior to the
conclusion of OCR’s investigation and OCR determined resolution was appropriate. On March
23, 2023, the District signed the enclosed Resolution Agreement, which, when fully
implemented, will address all of the allegations in the complaint. OCR will monitor the
implementation of the Resolution Agreement.

during the H1N1 outbreak a district was required under the IDEA and Section 504 to “make a subsequent
individualized determination ... to decide whether a child with a disability requires compensatory education”).

This concludes OCR's investigation of the complaint and should not be interpreted to address the District'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 the District 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 individual may file another complaint alleging such treatment.

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, OCR 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.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR looks forward to receiving the District's first monitoring report by **April 30, 2023**. For questions about implementation of the Agreement, please contact OCR attorney Ann Millette, who will be overseeing the monitoring. Ms. Millette can be reached by telephone at (216) 52279 or by e-mail at Ann.Millette@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-2667, or by e-mail at Brenda.Redmond@ed.gov.

Sincerely,

/S/

Brenda Redmond
Supervisory Attorney/Team Leader

Enclosure