

UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

REGION XV MICHIGAN OHIO

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

May 5, 2022

Via E-mail Only to ewalz@thrunlaw.com

Ms. Erin H. Walz, Esq. Thrun Law Firm, P.C. P.O. Box 2575 East Lansing, Michigan 48826

Re: OCR Docket No. 15-21-1005

Dear Ms. Walz:

This letter is to notify you of the disposition of the above-referenced complaint filed on XXXXX, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Rochester Community School District alleging that the District discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged that:

- 1. From XXXXX to the end of the XXXXX school year, and from XXXXX, to XXXXX, the District denied the Student a free appropriate public education (FAPE) by not providing the full amount of XXXXX XXXXX XXXXX XXXXX and XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX required by XXXXX Individualized Education Program (IEP);
- 2. from XXXXX, to the end of the XXXXX school year, and from XXXXX to XXXXX, the District denied the Student a FAPE by not providing the Student's parent with XXXXX XXXXX XXXXX, as required by the Student's IEP; and

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.

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

<u>www.ed.gov</u>

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Based on the complaint allegations, OCR opened an investigation of the following legal issues:

- 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; and
- whether the District, on the basis of disability, excluded a student from participation in, denied a student the benefits of, or otherwise subjected a student to discrimination in its programs and activities based on the student's disability in violation of the regulation implementing Section 504 at 34 C.F.R. § 104.4, and the regulation implementing Title II at 28 C.F.R. § 35.130.

To conduct its investigation, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District staff. OCR also attempted to conduct interviews with additional District staff members. However, those witnesses were not made available to OCR.

After carefully considering all of the information obtained during the investigation, OCR found that there is sufficient evidence to conclude that the District did not provide the Student with a free appropriate public education (FAPE), as required by the Section 504 implementing regulation at 34 C.F.R. § 104.33; and that the District treated the Student differently than similarly-situated students without disabilities, and did not have a legitimate, nondiscriminatory reason for the different treatment, in violation of Section 504 and Title II.

Facts

During the XXXXX school year, the Student attended the XXXXX grade at the District, and during the XXXXX school year, the Student was in the XXXXX grade. The Student was identified as a student with a disability, and had been receiving related services pursuant to XXXXX Individualized Education Program (IEP). The information reviewed indicates that the IEP in effect from XXXXX to the end of the XXXXX school year, and from XXXXX to XXXXX was the Student's XXXXX, 20XX IEP amendment.

Allegations #1 and 2 – Alleged Denial of FAPE

A. Complainant's allegations

The Complainant alleged that, from XXXXX when the school went to a virtual setting, to the end of the XXXXX school year, and from the start of the XXXXX school year to XXXXX the District did not provide the Student with the amount of XXXXX and XXXXX XXXXX XXXXX XXXXX required by XXXXX IEP. The Complainant said that the District provided varying amounts of those services during those time periods, and always in a virtual setting, but

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always less than was required by the Student's IEP. The Complainant told OCR that the Student's XXXXX XXXXX services normally consisted of XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX According to the Complainant, XXXXX paid out-of-pocket for additional XXXXX XXXXX for the Student over XXXXX XXXXX XXXXX to help get the Student caught up.

With respect to the XXXXX XXXXX XXXXX XXXXX, the Complainant told OCR that, from XXXXX to the end of the XXXXX school year, the Student received XXX XXXXX XXXXX with the XXXXX XXXXX, and that otherwise, the XXXXX XXXXX e-mailed an assignment to the Student about once per week, but did not provide direct services. The Complainant told OCR that most of the assignments the XXXXX XXXXX e-mailed were XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX assignments, such as XXXXX XXXXX XXXXX XXXXX XXXXX that instructed the Student XXXXX XXXXX XXXXX XXXXX XXXXX

For the XXXXX school year, the Complainant alleged that the Student did not receive any of the services provided for in XXXXX IEP, including XXXXX XXXXX XXXXX XXXXX, until late XXXXX or early XXXXX XXXXX. The Complainant told OCR that, from early XXXXX XXXXX XXXXX to XXXXX the Student worked with the XXXXX XXXXX virtually once per week for 20 to 30 minutes to XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX.

B. District's response to allegations

The District, through counsel, provided its response to all of the allegations.

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The District's data included another service log which describes the amount of both XXXXX XXXXX and XXXXX XXXXX services provided to the Student from XXXXX, to XXXXX. That log states that no XXXXX XXXXX XXXXX services were provided during XXXXX XXXXX.

Regarding the time period of XXXXX to XXXXX XXXXX, the amount of XXXXX services the Complainant alleged were provided to the Student met the minimum amount of services required by the Student's IEP.

As such, the District's data indicates that, from XXXXX, to the end of the XXXXX school year, and during XXXXX, the Student received fewer XXXXX XXXXX XXXXX services than XXXXX IEP required. The District's data and the Complainant's assertions to OCR both indicate that, from XXXXX XXXXX through XXXXX, the Student received the amount of XXXXX XXXXX XXXXX XXXXX required by XXXXX IEP.

With respect to XXXXX XXXXX XXXXX, the District's data did not include a log of XXXXX XXXXX provided to the Student from XXXXX to XXXXX.

XXXXX – LIST REMOVED - XXXXX

In summary, the District's data indicates the following regarding allegations ## 1 and 2:

XXXXX – LIST REMOVED – XXXXX

Allegation #3 – Alleged Different Treatment

A. Complainant's allegations

The Complainant said that, at the start of the XXXXX school year, the District gave families two options regarding how they received their academic services: the first option was a "Virtual Campus" option (Virtual Campus), in which a student would receive virtual instruction regardless of whether the District ultimately was able to offer in-person instruction to students. The second option was the "temporary remote" option (Temporary Remote), in which a student would receive remote instruction unless and until the District was able to offer in-person services, at which time the student would receive in-person services.

XXXXX - PARAGRAPH REMOVED - XXXXX

B. Data Response and other evidence

The school XXXXX XXXXX XXXXX responded to the Complainant on XXXXX following consultation "with the rest of the team...", and stated:

XXXXX – PARAGRAPH REMOVED - XXXXX

XXXXX – PARAGRAPH REMOVED - XXXXX XXXX – PARAGRAPH REMOVED - XXXXX XXXXX – PARAGRAPH REMOVED - XXXXX XXXXX – PARAGRAPH REMOVED - XXXXX XXXXX – PARAGRAPH REMOVED - XXXXX

Legal Standard

The Section 504 implementing regulation, 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 that receives or benefits from Federal financial assistance. The Title II implementing regulation contains a similar provision, at 28 C.F.R. § 35.130(a). In investigating an allegation of disability discrimination under a different treatment theory, OCR first will determine whether the recipient treated the individual with a disability differently than a similarly situated individual without a disability. If so, OCR will determine whether the recipient had a legitimate, nondiscriminatory reason for the difference in treatment and if so, whether that reason was a pretext for discrimination.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free and appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's disability. An appropriate education for purposes of FAPE is defined as the provision of 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 nondisabled students are met, and that are developed in accordance with Section 504's procedural requirements at 34 C.F.R. §§ 104.34 - 104.36 regarding educational setting, evaluation, placement, and procedural safeguards. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements.

OCR guidance provides that school districts' obligation to provide FAPE to each qualified individual with a disability remains in effect during the pendency of the COVID-19 pandemic. While a school district would not be required to provide services to students with disabilities while a district is closed and not providing any educational services to the general student population, OCR guidance provides that "Once school resumes, the school must return to providing special education and related services to students with disabilities in accordance with the student's IEP or, for students entitled to FAPE under Section 504, consistent with any plan developed to meet the requirements of Section 504." *See* U.S. Department of Education, Office for Civil Rights, "Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students," Mar. 16, 2020. <u>https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf</u>. To fulfill that obligation, the IEP team and other individuals responsible for ensuring that FAPE be provided pursuant to Section 504, "would be required to

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make an individualized determination as to whether compensatory services are needed under applicable standards and requirements." *See* U.S. Department of Education, "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," Mar. 12, 2020, <u>https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf</u>.

<u>Analysis</u>

Allegations ##1 and 2 – Alleged Denial of FAPE

OCR has determined that the District failed to provide the Student with a FAPE in accordance with the requirements of Section 504.

OCR has also determined that, with respect to allegation #2, the District failed to provide the Complainant with XXXXX XXXX as per the Student's IEP. XXXXX - SENTENCE REMOVED - XXXXX. The evidence provided by the District contains a document which shows some of the Student's XXXXX during the XXXXX and XXXXX school years. However, the District's data does not demonstrate whether, how, or when this, or any, XXXXX XXXXX was provided to the Complainant.

Therefore, based on the evidence OCR reviewed in this investigation, OCR finds that the District failed to provide the Student with the full amount of XXXXX XXXXX and XXXXX XXXXX XXXXX XXXXX required by XXXXX IEP, and failed to provide the Complainant with the XXXXX XXXXX required by XXXXX IEP, denying the Student a FAPE as required by Section 504.

Allegation #3 – Alleged Different Treatment

OCR has also determined that the District treated the Student differently than similarly-situated students without disabilities, and did not have a legitimate, nondiscriminatory reason for that difference in treatment.

¹ XXXXX – SENTENCE REMOVED - XXXXX

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XXXXX – PARAGRAPH REMOVED – XXXXX XXXXX – PARAGRAPH REMOVED – XXXXX

Therefore, based on the evidence OCR reviewed in this investigation, OCR finds that the District treated the Student differently than similarly-situated students without disabilities, and did not have a legitimate, nondiscriminatory reason for that difference in treatment, in violation of Section 504 and Title II.

On May 1, 2022, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address the violations in accordance with Section 504 and Title II. OCR will monitor the implementation of the Resolution Agreement.

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 May 13, 2022. For questions about implementation of the Agreement, please contact XXXXX XXXXX. XXXXX XXXXX will be overseeing the monitoring and can be reached by telephone at XXXXX or by e-

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mail at <u>XXXXX@ed.gov</u>. If you have questions about this letter, please contact me by telephone at (216) 522-2667, or by e-mail at <u>Brenda.Redmond@ed.gov</u>.

Sincerely,

/s/

Brenda Redmond Supervisory Attorney/Team Leader

Enclosure