



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

October 12, 2021

Via E-mail Only to [redacted]

John L. Miller, Esq.
Giarmarco, Mullins & Horton, P.C.
Tenth Floor Columbia Center
101 W. Big Beaver Road
Troy, Michigan 48084-5280

Re: OCR Docket Nos. 15-20-1346, 15-20-1351 & 15-21-1291

Dear Mr. Miller:

This letter is to notify you of the disposition of the above-referenced complaints filed respectively on September 2, 2020, September 8, 2020, and June 14, 2021, with the U.S. Department of Education, Office for Civil Rights (OCR), against Troy School District alleging that the district discriminated against a student (the Student) based on disability. Specifically, the Complainant alleged the following:

Complaint #15-20-1346:

1. the district did not provide the Student with [redacted] services as outlined in his Individualized Education Programs (IEPs) from [redacted], to [redacted];
2. the district did not provide the Student with access to educational instruction as outlined in his IEPs from [redacted], to [redacted], and beginning again at the start of the [redacted] school year;
3. [redacted]; and
4. [redacted].

Complaint #15-20-1351: the district did not provide the Student with direct [redacted] services, access to [redacted], and [redacted] included in his IEPs from [redacted], through the end of the [redacted] school year and beginning again at the start of the [redacted] school year.¹

Complaint #15-21-1291: from [redacted], to [redacted], the district did not provide the Student with the full amount of instructional minutes per week required by his IEP.

¹ As discussed above, the Complainant also clarified this allegation during the investigation when she clarified her allegation #1 of Complaint #15-20-1346.

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 of Education and as a public entity, the district is subject to these laws.

Based on the complaint allegations, OCR opened an investigation of the following legal issues to determine whether the district discriminated against the Student on the basis of disability:

- whether the district failed to provide a qualified student with a disability a free appropriate public education (FAPE), as required by the Section 504's implementing regulation at 34 C.F.R. § 104.33; and
- whether the district, on the basis of disability, excluded a qualified student from participation in, denied a student the benefits of, or otherwise subjected a student to discrimination in its programs and activities, 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.

During its investigation to date, OCR reviewed information provided by the Complainant and the district. OCR also interviewed the Complainant and district staff. Prior to the conclusion of OCR's investigation of these complaints, the district expressed its interest in resolving these complaints under Section 302 of OCR's *Case Processing Manual*. After careful review of the information obtained regarding allegations ##3-4 of OCR Docket #15-20-1346, OCR has determined that the evidence is insufficient to find that the district violated Section 504 and/or Title II, as alleged. Regarding the remaining allegations raised in OCR Docket #15-20-1346 and all allegations raised OCR Dockets ##15-20-1351 and 15-21-1291, OCR found compliance concerns and determined it to be appropriate to resolve these allegations under Section 302 of OCR's *Case Processing Manual*. The bases for OCR's determinations are explained below.

Applicable Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4(a), provides that 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 subject to discrimination under any program or activity which receives Federal financial assistance.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free 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, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>. 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 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, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

Background

The Student is a student with a disability who attends the district. The Student is identified as eligible for special education with the primary disability of [redacted]. [sentences redacted].

[paragraphs redacted]

Pursuant to the Student's [redacted], IEP, the Student received consultative [redacted] services for [redacted]. The IEP set forth that the [redacted] would work with the Student's teacher and classroom paraprofessionals regarding how to [redacted] during classroom instruction. The IEP also required the district to provide the Student with [redacted]. [sentences redacted]

In addition, the Student's IEP provided that he would receive direct [redacted] services for [redacted]. The IEPs stated that the [redacted] would primarily work directly with the Student but would occasionally work with staff regarding use of [redacted].

The Student's IEPs also provided that the Student receive direct [redacted] services for [redacted]. This amount was increased under the Student's [redacted] IEP to [redacted] sessions per month.

Due to the COVID-19 pandemic, beginning March 13, 2020, up through the end of the 2019-2020 school year, the Governor of Michigan issued a series of executive orders directing all schools to close their buildings and to suspend in-person instruction or services.²

² https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html (E.g., Executive Orders ## 2020-05 and 2020-35).

[paragraphs redacted]

Allegations ##3-4 of OCR Docket #15-20-1346

- **Summary of Investigation**

[paragraphs redacted]

- **Analysis and Conclusion**

[paragraphs redacted]

Based on the foregoing, regarding allegations ##3-4 of OCR Docket #15-20-1346, OCR finds that the evidence is insufficient to conclude that the district violated Section 504 and Title II, as alleged.

The Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information in this letter was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the district. The district has the option to submit to OCR a response to the appeal. The district must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the district.

Remaining Complaint Allegations

- **Summary of Investigation to Date**

- **OCR Docket #15-20-1346 (allegation #1) and #15-20-1351**

In OCR Docket ##15-20-1346 and 15-20-1351, the Complainant alleged that the district did not provide the Student with certain supplementary aids and services. Specifically, in OCR Docket #15-20-1346, the Complainant alleged that the district did not provide the Student with [redacted] services as outlined in his IEPs from [redacted], to [redacted]. In OCR Docket #15-20-1351, the Complainant alleged that the district did not provide the Student with direct [redacted] services, access to [redacted], and [redacted] from [redacted], through the end of the [redacted] school year and beginning again at the start of the [redacted] school year.

- [redacted] services and access to [redacted] device

The Complainant asserted that the [redacted] services required by the Student's IEP were not provided for the Student when the district was in the virtual setting, because a [redacted] did not work directly with the Student during those time periods. When OCR asked the Complainant why she believed the Student should receive direct [redacted] services when his IEP only

provided for consultative [redacted] services, the Complainant explained that during in-person learning, when the [redacted] consulted with the Student's teacher and paraprofessionals, the [redacted] conducted demonstrations with the Student [redacted]. The Complainant asserted that the Student was actually receiving direct service while the [redacted] was consulting with the teacher and paraprofessionals. In addition, the teacher and the paraprofessionals were not working with the Student regarding his [redacted] goal during virtual instruction, so the Complainant did not think the [redacted] was providing consultative services in the virtual setting. The Complainant said the [redacted] e-mailed her occasionally sharing her availability for a virtual meeting and that she could assist the Complainant with [redacted] activities with the Student at home. The Complainant said she did not work with the [redacted] because she did not feel that it was her responsibility to do [redacted] with the Student.

The district asserted to OCR that the required consultative [redacted] services were provided to the Student virtually. To support this position, the district provided OCR a copy of the [redacted]'s e-mail communications and service logs; however, the service logs only documented the consultative [redacted] services provided from [redacted], to [redacted], and did not cover the alleged period of [redacted]. The e-mail communications indicated that the [redacted] communicated with the Complainant and other district staff regarding the Student and asked the Complainant whether she would like to receive [redacted] services or not and how she could be of assistance to the Complainant during virtual instruction. The district's e-mail documentation also indicated that the [redacted] participated in a few of the special education teacher's virtual sessions with the Student. The teacher told OCR that the [redacted] joined her virtual sessions [redacted], to work with her and the Complainant on any concerns regarding the Student.

Regarding the Student's access to [redacted], the Complainant told OCR that, although the Student's IEP did not specifically require his use of [redacted], this was the only type of [redacted] device the Student had ever used at school. The Complainant added that [redacted] is the best device for the Student because it allowed him to [redacted]. When the district closed its school buildings and transitioned to virtual learning on [redacted], the Complainant requested the district send [redacted] for home use. In [redacted], the district informed the Complainant it was not feasible to send [redacted] home during virtual learning because no professional support was available. The Complainant did not agree with the district's position regarding lack of professional support, asserting she was very familiar with the operations of [redacted] and did not require any professional support to use it with the Student. Despite her repeated requests, the district refused to provide the equipment. This was confirmed in [redacted] e-mails between the Complainant and district staff provided by the district.

The district reported that the Complainant requested [redacted] for home use again on [redacted], and the district was eventually able to contract with the equipment vendor and provided the [redacted] to the Student for home use on [redacted], eight months after the Complainant initially requested it.

- [redacted] services

The Complainant alleged that the district did not provide the Student with [redacted] services while the district was operating in a virtual setting. The Complainant said that the Student's IEP contained [redacted] goal and the district expected her to work with the Student on [redacted],

which was not the same as having [redacted] directly work with him. The Complainant stated that [redacted] checked in with the Complainant virtually, but [redacted] did not engage with the Student. Instead, the [redacted] only responded to the Complainant's questions regarding whether the Complainant was doing things correctly with the Student.

The district maintained that it provided the Student with the requisite amount of [redacted] services virtually. In support of its position, the district provided copies of the [redacted]'s e-mail communications and copies of the [redacted] service log for [redacted]. The service log indicated that [redacted] sent the Complainant [redacted] e-mails providing the Complainant with her availability to meet virtually, offering to provide the Complainant with resources on [redacted] activities the Complainant could do with the Student at home, and providing research on equipment the Student needed to work on [redacted] at home. The service log also indicated that the [redacted] worked with the Complainant and Student virtually via Zoom for total of [redacted] minutes over [redacted] sessions in [redacted]. All of the virtual [redacted] sessions required the Complainant to be present. The log indicated that there were no virtual service sessions provided to the Student in [redacted].

The district also provided a copy of the teacher's messages to her classroom parents during [redacted]. On [redacted], the teacher sent a message notifying the parents that the [redacted] would regularly join the classroom virtual learning sessions on [redacted]. The teacher confirmed to OCR that the [redacted] generally joined the classroom virtual sessions weekly on [redacted], and she provided [redacted] services in virtual break-out rooms. However, the [redacted]'s log, as described above, did not indicate that the [redacted] joined the sessions weekly in [redacted].

- Direct [redacted] services

The Complainant alleged that no direct [redacted] services were provided to the Student while the district was operating in a virtual setting, because a [redacted] did not work directly with the Student during those time periods and did not provide any virtual sessions during this time period.

The district asserted that, to the extent that the Student's IEP provided for [redacted] services, such services were provided virtually, and provided a copy of the [redacted] logs for the [redacted]. The logs indicated that in [redacted] the [redacted] provided [redacted] sessions totaling [redacted] minutes of services to the Student virtually. She also conducted a consult session with the Complainant and a consult session with the teacher that month. In [redacted], the [redacted] provided [redacted] minutes of service total over [redacted] virtual sessions. In [redacted], the [redacted] provided one [redacted]-minute virtual session. The logs indicated that the Complainant was present for several of these sessions. The [redacted] also provided [redacted] minutes of virtual sessions to the Student during [redacted].

- [redacted]

The Complainant alleged that the Student did not have any [redacted] staff to provide [redacted] assistance to him while the district was operating in a virtual setting. The Complainant stated that in [redacted] she requested that the district provide the Student with [redacted] at home

during virtual learning but the district told her that providing in-home [redacted] for the Student was not possible due to the Governor-mandated shutdown. In [redacted], the Complainant made a second request for the district to provide the Student with [redacted] at home during virtual learning because the Governor-mandated shutdown had been lifted, but the district refused her request due to COVID-19 concerns.

The Complainant also told OCR that the [redacted] who joined virtual learning sessions with the teacher were not able to provide any [redacted] assistance to the Student when such assistance was required. The Complainant was expected to provide such assistance while the Student received virtual learning or services at home.

- **OCR Docket #15-20-1346 (allegation #2)**

Regarding allegation #2 of OCR Docket #15-20-1346, the Complainant alleged that the district did not provide the Student with access to educational instruction as outlined in his IEPs from [redacted], to [redacted], and beginning again at the start of the [redacted] school year. The Complainant acknowledged that after [redacted], the district provided the Student with virtual instruction but asserted that the Student did not receive any hands-on materials or educational services that he would normally have received in his classroom, such as [redacted]. The Complainant stated that without these materials and services he was not able to access instruction during this virtual period.

The district asserted that the Student received all materials necessary for instruction, [redacted] was provided virtually, and there was no issue in the Student's participation in these virtual sessions. The district also provided OCR with its documentation, including a copy of the Student's teacher's messages to the [redacted] parents [redacted], the Student's [redacted]'s service log, and other district communications to the parents.

District staff informed OCR that, in addition to the [redacted] the teacher made with educational materials for the Student to use at home, she also provided [redacted], the Student's [redacted] device, and [redacted] to the Complainant for the Student's use at home. Regarding [redacted], district staff stated that, while no one physically went to the Student's home, the [redacted] were always available during the virtual learning sessions to work with students and the Complainant was present to physically assist the Student for virtual instruction.

The district's information indicated that the Student, who was in a general education [redacted] class at the time, did not receive any access to this general education class while instruction was provided virtually. The information indicated that the Student was provided with materials related to his [redacted] class prepared by his [redacted] teacher to provide him with activities that were specifically geared to his abilities. However, it was expected that the Complainant would have to provide assistance to the Student related to these activities.

- **OCR Docket #15-21-1291**

In OCR Docket #15-21-1291, the Complainant alleged that from [redacted], to [redacted], the district did not provide the Student with the full amount of instructional minutes per week required by his IEP. The Complainant stated that the Student received between [redacted] and

[redacted] minutes of instruction per week at the [redacted] in both special and general education, when his IEP required him to receive [redacted] minutes of instruction. The Complainant stated that the district returned to in-person instruction using a hybrid attendance model with block scheduling that rotated every other week. [sentences redacted]. The Complainant stated that, because the Student did not receive the full amount of instruction time required in his IEP, he did not make adequate progress with his goals and objectives.

As described above, although the Student's IEP team had already put an IEP in place for him in [redacted] the team put a new IEP and CLP in place for the Student that called for significantly reduced instructional time, although the team indicated on the IEP that he did not require a shortened school day. The Complainant provided OCR with the Student's most recent IEP dated [redacted]. OCR reviewed the IEP and its amendments and confirmed the amount of instruction the Student is required to receive was restored to [redacted] minutes per week from [redacted].

- **Compliance concerns**

The evidence obtained to date raises a concern as to whether the Complainant was expected to provide [redacted] services to the Student and whether the Student had the necessary equipment to work toward the [redacted] goals in his IEP during the alleged period. The evidence does not suggest that the [redacted] provided the teacher and paraprofessionals the requisite amount of consultative [redacted]. The evidence also suggests that the Student did not have access to the [redacted] and the district did not provide him with the opportunity to [redacted] as required by his IEP during the alleged period.

The evidence also suggests that the Student did not receive the requisite amount of direct occupational therapy services in [redacted] his IEP team had determined to be necessary for FAPE. Additionally, although the Student's [redacted] required that the Student receive hands-on services provided by a trained therapist, the evidence suggests that during this timeframe of virtual learning these hands-on services were not provided to the Student. Instead, the Complainant was expected to provide hands-on services to the Student under the guidance of the [redacted]. The evidence also suggests that the Student did not receive the full amount of direct speech and language services required by his IEP in [redacted].

Furthermore, the evidence suggests that the Student's participation was not meaningful because he could not receive any hands-on [redacted] which his IEP team had determined was necessary for the Student to receive FAPE while he was participating at school. The evidence also suggests that the Complainant was expected to provide such assistance to the Student regardless of whether she was able to continuously provide hands-on assistance to the Student during the virtual sessions because of other family and professional obligations. Without the Complainant's support, the Student was not able to access the materials necessary for him to participate in the virtual sessions. The Student's IEP indicated that the Student required full physical and hands-on support for all his daily activities. Absent such support, it would be difficult for him to engage in any meaningful way in virtual learning activities.

The evidence also suggests that the district did not provide the Student with the requisite amount of educational instructional time set forth in his IEP. The Student did not receive the requisite amount of [redacted] minutes of instruction from [redacted] and did not receive any general

education instruction during this time period. The IEP team's significant reduction of the Student's placement and services in the [redacted] IEP for [redacted], when in [redacted] the team had put in place a different IEP already for the [redacted] school year, raises concern, in that the evidence does not suggest the Student's individualized circumstances related to his disability were the reason for this change. In fact, the IEP team reverted the Student to full-time instruction with the [redacted] IEP.

- **Voluntary Resolution**

Under Section 302 of OCR's *Case Processing Manual*, allegations under investigation may be resolved at any time when, prior to the issuance of a final investigative determination, 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 October 11, 2021, 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.

Conclusion

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 November 10, 2021. For questions about implementation of the Agreement, please contact Ms. Suwan Park. Ms. Park will be overseeing the monitoring and can be reached by telephone at (216) 522-4972 or by e-

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mail at Suwan.Park@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-4978, or by e-mail at Erin.Barker-Brown@ed.gov.

Sincerely,

/s/

Erin Barker-Brown
Acting Team Leader

Enclosure