

June 11, 2019

Jeffrey A. Pirozzolo  
Superintendent of Schools  
Auburn Enlarged City School District  
78 Thornton Avenue  
Auburn, New York 13021

Re: Case No. 02-19-1107  
Auburn Enlarged City School District

Dear Superintendent Pirozzolo:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Auburn Enlarged City School District (the District). The complainants alleged that the District discriminated against their son (the Student), on the basis of his disability, by failing to respond to complaints to the District, made on August 16 and November 27, 2018, that staff at the Student's out-of-district special education placement, XXXXXXXXXXXXXXXXXXXX XXXXXX (XXXXXX), failed to provide the Student with the related aids and services of extra time to complete class assignments; 1:1 support; and, repeated directions, as required by his Individualized Education Program (IEP), during school year 2017-2018.<sup>1</sup>

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department, and is a public elementary and secondary educational system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

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<sup>1</sup> The complainants also filed a complaint with OCR against XXXXXX (OCR Case No. 02-19-XXXX), which is currently under investigation. The complainants alleged that XXXXXX failed to implement the same provisions of the Student's IEP during school year 2017-2018; and, to respond to the reports they made to XXXXXX on August 16 and November 27, 2018, that XXXXXX had failed to provide the services required by the Student's IEP.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states 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 subjected to discrimination under any program or activity which receives or benefits from federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a), states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards, and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. The regulation implementing the ADA, at 28 C.F.R. § 35.107(b), contains a similar requirement for public entities.

OCR reviewed information that the complainants and the District submitted to OCR. OCR also interviewed the complainants and District staff. OCR made the following determinations.

During school year 2017-2018, the District classified the Student as a student with a disability based on his diagnosis of XXXXXX. Pursuant to the Student's IEPs dated March 28, 2017, July 20, 2017, January 29, 2018, and April 18, 2018, for school year 2017-2018, the District placed the Student in a special education program located within XXXXXX High School that was operated by XXXXX.<sup>2</sup> During school year 2017-2018, the Student was placed in XXXXXX special education classrooms for English, math, and social studies; and, a XXXXXX classroom for science.

The complainants filed a complaint against XXXXX with the New York State Education Department (NYSED) on XXX X, 2018, in which they alleged that: (1) XXXXX had failed to notify them of personnel changes related to the aides assigned to support the Student; (2) XXXXX staff had mistreated the Student; and, (3) XXXXX had failed to ensure that the Student's aides were informed of their responsibilities to implement the recommendations on the Student's IEP. NYSED dismissed the first two allegations for lack of jurisdiction; however, NYSED investigated the third allegation, which included a review of the Student's school records and interviews of several XXXXX special education teachers and aides.

NYSED issued its determination by letter dated XXXX X, 2018. NYSED determined that all of the XXXXX staff members stated that they had been informed of their responsibility to implement the Student's IEP, and confirmed having access to the Student's IEP during school years 2016-2017 and 2017-2018; however, NYSED's determination letter stated that XXXXX did not provide any documentary evidence that corroborated the assertions of their staff that they were aware of their responsibilities in implementing the Student's IEP. Therefore, NYSED sustained the

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<sup>2</sup> The regulation implementing Section 504, at 34 C.F.R. § 104.33(a), requires recipients to provide a free appropriate public education to each qualified individual with a disability in the recipient's jurisdiction. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met; and, are based upon adherence to the evaluation and placement procedures set forth in the regulation. Implementation of an IEP is one means of meeting this requirement.

complainant’s allegation that XXXXX failed to ensure that the Student’s aides were informed of their responsibility to implement the Student’s IEP; and, NYSED required XXXXX to take corrective action to remedy this issue.

Pursuant to a “Compliance Assurance Plan,” XXXXX was required to submit “a written procedure outlining how XXXXX will ensure special education teachers inform support staff of their responsibility to implement the recommendations on students’ IEPs”; and, a formal sign-off sheet that was to be used for each student with a disability. XXXXX was also required to provide the names and contact information of all staff assigned to work with the Student for school year 2018-2019; and, written evidence that support staff had been informed, prior to the implementation of the IEP, of their responsibility to implement the recommendations of the Student’s IEP, including the responsibility to provide specific accommodations, program modifications, supports and/or services for the student in accordance with the IEP.<sup>3</sup> Based on OCR’s review of the documentation provided, OCR determined that NYSED’s determination addressed whether aides were informed of their responsibilities to implement the recommendations on the Student’s IEP, but it did not include any findings that addressed whether the Student’s IEP was actually implemented during school years 2016-2017 and 2017-2018.

The complainants provided to OCR copies of letters dated August 16, 2018 (complaint 1), and November 27, 2018 (complaint 2), that their attorney subsequently sent to the District, in which they expressed concerns regarding the alleged improper implementation of the Student’s IEP by the Student’s special education teacher for school year 2016-2017 and part of school year 2017-2018 (teacher 1) and several teacher’s aides that worked with the Student during school years 2016-2017 and 2017-2018 (the aides). In their complaint filed with OCR, the complainants alleged that the District discriminated against the Student, on the basis of his disability, by failing to respond to complaints 1 and 2. OCR determined that the District has policies and procedures prohibiting discrimination on the basis of disability, which are published on the District’s website and describe the process for filing complaints alleging discrimination on the basis of disability.<sup>4</sup>

### *Complaint 1*

OCR determined that in complaint 1, dated August 16, 2018, among other issues, the complainants asserted that teacher 1 and the aides had not implemented the Student’s IEP during school year 2017-2018. Specifically, the complainants stated in complaint 1 that teacher 1 and the aides “had been rushing [the Student] to finish his work”; “[old] him not to ask questions and that they did not want to repeat questions”; and, that they were not “available to provide him with the 1:1 assistance that he needed” contrary to the requirements of the Student’s IEP, which provided for extra time, 1:1 support<sup>5</sup>, and repeated directions.

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<sup>3</sup> In a letter, dated September 24, 2018, NYSED notified the complainants and XXXXX that XXXXX had complied with the terms of the compliance assurance plan.

<sup>4</sup> See, <http://www.aecsd.education/districtpage.cfm?pageid=1454> (site last visited on May 29, 2019).

<sup>5</sup> The District asserted that the Student’s IEP did not provide for 1:1 support during school year 2017-2018; but noted that the Student’s Committee on Special Education added the assistance of a 2:1 aide to his IEP for school year 2018-2019. OCR determined that the Student’s IEP for school year 2017-2018 stated that the Student requires “individualized prompts,” individual testing, and the assistance of an aide during XXXX. While the Student’s IEP for school year 2017-2018 did not specifically provide for the service of a 1:1 aide, the District confirmed that it provided the Student with the assistance of several different aides during school year 2017-2018. Further, OCR understood the

The District’s Assistant Superintendent for Curriculum and Instruction (assistant superintendent) informed OCR that upon receipt of complaint 1, the District’s superintendent contacted one of the complainants and they discussed “everything that had occurred.” The assistant superintendent stated that she also reviewed the actions she and XXXXX staff previously took to respond to concerns that the complainants raised related to teacher 1 and the aides during school year 2017-2018.<sup>6</sup> The assistant superintendent stated that in addition to her discussion with the District’s superintendent, she contacted the Special Education Principal at XXXXX (the principal) to request that XXXXX comply with the complainants’ request that the aides no longer work with the Student.

The assistant superintendent acknowledged that she did not speak with any XXXXX staff in response to complaint 1, regarding their implementation of the Student’s IEP during school year 2017-2018; nor did she speak with the complainants and/or the Student regarding their allegation that the Student’s IEP had not been properly implemented. The assistant superintendent stated that she believed that further investigation of complaint 1 was unnecessary because the issues had previously been addressed as part of XXXXX’ response to the complaint that the complainants filed against XXXXX with the NYSED; however, as previously discussed, OCR determined that the NYSED investigation did not address whether XXXXX staff had implemented the Student’s IEP. In a letter to the complainants dated September 7, 2018, with respect to complaint 1, the District stated that it was “committed to seeing that the Student’s IEP is followed in all regards”; and, that the District would “work with [the] XXXXX so as to avoid contact between [the Student] and those aides.” OCR determined that the District did not take any further action in response to complaint 1.

### *Complaint 2*

OCR determined that in complaint 2, dated November 27, 2018, among other issues, the complainants specifically requested that the District and the XXXXX initiate their own investigation into the allegations concerning the improper implementation of the Student’s IEP. The assistant superintendent informed OCR that upon receipt of complaint 2, she again spoke with the District’s superintendent to discuss the actions already taken, including that XXXXX had reassigned the aides so that they were no longer assigned to assist the Student during school year 2018-2019. The assistant superintendent further stated that she then contacted XXXXX to verify that XXXXX had assigned a 1:1 aide to the Student for school year 2018-2019. The assistant superintendent acknowledged that in responding to complaint 2, she did not speak with any

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complainant’s allegation to relate to the provision of 1:1 support rather than the provision of a 1:1 aide. Therefore, for the purpose of OCR’s analysis, OCR presumed that the Student was entitled to 1:1 support from XXXXX staff during school year 2017-2018.

<sup>6</sup> The District provided documentation indicating that the assistant superintendent and/or XXXXX staff met with the complainants and/or the Student on thirteen occasions between July 11, 2017, and August 30, 2018, to discuss various topics, including the Student’s concerns relating to the alleged treatment by teacher 1 and the aides during school years 2016-2017 and 2017-2018. The assistant superintendent stated that during these meetings, the Student stated that teacher 1 and the aides “rushed him,” specifically during an incident in a cooking class; and, that the Student “never felt quick enough.” The Student also stated that XXXXX staff “made him nervous.” The assistant superintendent did not recall the Student specifically stating that he had not been provided with sufficient 1:1 support or that he was denied repeated directions. She further stated that during these meetings, neither the Student nor the complainants specifically alleged that the Student’s IEP had not been implemented.

XXXXX staff regarding implementation of the Student’s IEP during school year 2017-2018; nor did she speak with the complainants and/or the Student regarding the allegation that the Student’s IEP had not been properly implemented.

In a letter dated November 30, 2018, the District informed the complainants that it believed that the complainants had previously raised the same issues in a complaint to NYSED and that NYSED had investigated the issues. The District further stated that it believed that XXXXX had already remedied the issues; and, that the information the Student had previously shared with District and/or XXXXX staff revealed that there was “nothing to investigate.”<sup>7</sup> OCR determined that the District did not take any further action in response to complaint 2.

Based on the foregoing, OCR determined that the information the complainants provided in complaints 1 and 2 regarding the alleged improper implementation of the Student’s IEP constituted sufficient notice to the District of alleged disability discrimination which would be prohibited by Section 504 and ADA, to enable the District to respond to the complainants’ allegations. OCR determined that the District did not investigate the complainants’ allegations that the XXXXX failed to implement the Student’s IEP. The District did not attempt to clarify the complainants’ allegations, or provide the complainants with the opportunity to provide information in support of their allegations. The District also did not interview XXXXX staff regarding the allegations obtained in complaints 1 and 2, or otherwise obtain specific information responsive to the allegations. Moreover, to the extent that the District relied upon NYSED’s investigation, OCR determined that the documentation that the District submitted to OCR did not indicate that NYSED specifically investigated whether XXXXX staff implemented the Student’s IEP during school year 2017-2018. In addition, NYSED’s determination did not include any conclusions about the actual implementation of the Student’s IEP. Therefore, OCR determined that the NYSED’s investigation did not specifically address the complainant’s allegation in complaints 1 and 2.

Based on the foregoing, OCR determined that the District did not provide a prompt and equitable resolution of the complainant’s allegations of disability discrimination. On June 11, 2019, the District signed the enclosed Agreement to remedy the compliance issue identified in this investigation.<sup>8</sup> OCR will monitor the implementation of the Agreement. Upon the District’s satisfaction of the commitments made under the Agreement, OCR will close the case.

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

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<sup>7</sup> In its letter, the District also stated that if the complainants believed that if there was some other reason that the complainants wished to have another investigation, they could inform the District so that it could “proceed accordingly.” The District stated that the complainants never responded to the District’s letter of November 30, 2018.

<sup>8</sup> In its investigation of OCR Case No. 02-19-XXXX, OCR also investigated the complainant’s allegation that XXXXX staff failed to provide the Student with the related aids and services of extra time to complete class assignments; 1:1 support; and, repeated directions, as required by his IEP during school year 2017-2018. Therefore, OCR determined that it was not necessary to require the District to conduct an investigation of the complainants’ allegations in complaints 1 and 2 as part of the Agreement.

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 a 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, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding OCR's determination, please contact Joy M. Purcell, Senior Compliance Team Attorney, at (646) 428-3766 or [joy.purcell@ed.gov](mailto:joy.purcell@ed.gov); Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or [jessica.daye@ed.gov](mailto:jessica.daye@ed.gov); or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXX XXXXXXX, Esq.