



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION VIII

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July 15, 2020

Superintendent Raquel Reedy  
Albuquerque Public School District  
P.O. Box 25704  
Albuquerque, NM 87125-8864

Via email only to XXX@aps.edu

Re: Albuquerque Public School District  
OCR Case Number: 08-17-1196

Dear Superintendent Reedy,

OCR is notifying you of our decision in this case. The Complainant alleged that the Albuquerque Public School District (District) discriminated on the basis of disability. Specifically, the Complainant alleged that, during the Fall of 2016, the District excluded his daughter (Student) from participation in the Art Club, an after-school program at the XXX School (XXX) because of her disability. Additionally, the Complainant alleged that the District denied the Student's transfer to the La Cueva High School on the basis of disability for the 2017-2018 school year, in retaliation for his February 2017 complaint of discrimination.

OCR initiated an investigation of this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; 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. Individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. §104.61, which incorporates 34 C.F.R. §100.7(e), and 28 C.F.R. §35.134. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

In reaching a compliance determination regarding these issues, OCR reviewed documentation submitted by the Complainant and the District. OCR also interviewed the Complainant and several District employees.

*Legal Standard*

*Art Club*

**Whether the District discriminated in violation of 34 C.F.R. §104.4 and 34 C.F.R. §104.37 when the District excluded the Student from participation in the Art Club because of her disability.**

The regulations implementing Section 504 at 34 C.F.R. §104.4(a) provides that no qualified disabled person 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 assistance. The Title II regulations at 28 C.F.R. §35.130(a) contains a similar provision.

34 C.F.R. §104.37(a)(1) provides that a recipient must “provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.” Additionally, 34 C.F.R. §104.37(a)(2) defines nonacademic and extracurricular services and activities to include amongst other things “recreational activities” and “special interest groups or clubs sponsored by the recipients”.

Even if a recipient does not directly operate the program, but contracts or arranges with others to do so, the regulation at 34 C.F.R. §104.4, provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service, or otherwise limit qualified individuals with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. The regulation implementing the ADA, at 28 C.F.R. §35.130, contains a similar provision.

A school district that offers after school activities must do so in a manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that by doing so would be a fundamental alteration to its program or an undue financial and administrative burden. Districts must determine which modifications and aids and/or services are necessary for a student on a case-by case basis, making an individualized determination about the student’s needs. When making this determination, districts should consider the functional limitations of the student with a disability and how the modifications, aids or services address that limitation in a way that allows the student to access the extracurricular activity. Districts should engage in an interactive process with parents/guardian/students who request modifications, aids and/or services, and should give significant consideration to their requests, because the parents/guardians/students are most familiar with the disabilities at issue and can provide relevant information about what modifications, aids or services may be most effective.

*Retaliation*

**Whether the District retaliated in violation of 34 C.F.R. §104.61, which incorporates 34 C.F.R. §100.7(e), and 28 C.F.R. §35.134, when the District denied the Student's transfer request to La Cueva High School for the 2017-2018 school year in retaliation for the Complainant's February 2017 complaint.**

Section 504, at 34 C.F.R. § 104.61, and Title II, at 28 C.F.R. 35.134, incorporate the Title VI prohibition on retaliation. Title VI, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

- (1) an individual experienced an adverse action caused by the recipient;
- (2) the recipient knew that the individual or someone on behalf of the individual engaged in a protected activity or believed the individual or someone on behalf of the individual might engage in a protected activity in the future; and
- (3) there is some evidence of a causal connection between the adverse action and the protected activity.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

A protected activity is any action taken to further a right guaranteed by the statutes and regulations enforced by OCR or to express opposition to any practice made unlawful by the statutes and regulations enforced by OCR.

In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, or the recipient's deviation from established policies or practices.

If all the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

## *Findings of Fact & Legal Analysis*

### *Art Club*

#### Findings of Fact

During the 2015-2016 and 2016-2017 school years, XXX provided a variety of after-school programs (Programs) for students through the CSI in a partnership between XXX, the District, ABC Community School Partnership, and the City of Albuquerque. As part of the Programs, XXX provided Art Club and Best Buddies, along with many other options. Students attending XXX simply filled out a registration form and turn it in to designated officials, and if space was available participate in the activity. For the Art Club, space was limited and participation was first-come first-serve.

During the 2015-2016 and 2016-2017 school years, the Student attended XXX and had an Individualized Education Program (IEP) on the basis of multiple disabilities. During the 2016-2017 school year, the Student's IEP provided for the Student to be placed in the Special Education classroom for most of the day. It also states, "(Student) needs significant 1:1 or small group support, information presented a variety of ways, opportunities for multiple repetitions, and strategies to increase self-regulation and on-task behavior, as well as visual supports, social stories, and social skills training." The Student's IEP did not address after-school activities.

During the 2015-2016 school year, the Student participated in the Art Club and was provided an educational assistant (EA) as an accommodation.

XXX had a new principal (Principal) for the 2016-2017 school year.

On August 31, 2016, the Complainant submitted a registration form for the Student to participate in Best Buddies, but not the Art Club.

Prior to September 1<sup>st</sup>, the Complainant expressed an interest in the Student participating in Art Club for the 2016-2017 school year. During an interview with OCR, the Student's SPED classroom teacher acknowledged that the Complainant inquired about the Art Club and an EA sometime during the beginning of the 2016-2017 school year, which started in August. She explained that the Complainant was concerned with the Student's safety and did not want the Student to work alone in the Art Club. She acknowledged speaking with the Principal regarding an EA for the Art Club and that the Principal stated that it "sounded illegal" but that they would look into it. During an interview with OCR, the Principal stated that the SPED classroom teacher had inquired about an EA for the Art Club for the Student and that the Principal told the SPED classroom teacher that the school could not provide an EA for budgetary reasons.

On September 1<sup>st</sup>, the Principal emailed the District's Associate Superintendent for Special Education (Associate Superintendent) and stated, "We have a student who requires EA support all the time. Parents want student to go to Art Club after school and to Best Buddies with EA support. Those two programs are with city money. How does the EA get paid to do this?" The

Associate Superintendent responded that day, “Generally we do not pay for after school sponsored activities, this is not an IEP driven activity. Give me her name and I’ll look at the IEP. In general no we don’t pay for an EA for this.” In another email, she stated, “After school activities are not covered by an IEP. After school activities should never be put in an IEP. We do not provide payment for an EA for after school activities. It is not a denial of FAPE. So the answer is no.”

On September 1<sup>st</sup>, the SPED classroom teacher emailed the Complainant stating, “I have asked about an EA for art and Best Buddies, but I have received varying responses on whether or not we will be able to provide [Student] with an EA this year.”

Additionally, on September 1<sup>st</sup>, in an email to the Art Club teacher (Teacher), the Complainant expressed his interest in the Student participating in the Art Club with an EA as an accommodation. The Teacher responded that day, stating, “Art club was full as of yesterday – however, we will meet on the 20<sup>th</sup> and I’ll see if there are any drop outs.”

On September 15<sup>th</sup>, the Principal and the Complainant engaged in a phone call. In her interview with OCR, the Principal stated that she informed the Complainant in the phone call that she could not provide an EA for the Student for an after-school program, including the Art Club. The Principal explained that it would be illegal to take an EA from the regular school hours in order to assign the EA hours after school for the Art Club. She stated that the District assigned the school a certain number of EA’s and hours to meet the school’s legal obligations based upon the needs of students with IEPs at the school during the school day. She added that the previous year principal shifted a couple of EA’s hours from the school day in order to provide an EA for the after-school Art Club and that it was illegal.

Meanwhile, District staff continued to discuss internally its legal responsibilities in this situation as more District staff became involved. For example, in a September 22<sup>nd</sup> email from the District’s Community School Manager (Manager) to the District’s Principal Support for SPED (Principal Support), she stated, “[I]t was my understanding that if the school was running the program they had to provide ‘reasonable accommodations’ for the student to participate if they had a school day IEP, 504 plan, Health Plan.” In a September 26<sup>th</sup> email from the Principal Support, she stated, “[I]t looks like although this is **NOT an IEP issue** – there will need to be an assistant at the after school club with [Student] and if the school does not have the money to cover it – then it would have to be done with comp time situation.” Additionally, she stated, “I think that this EA service/coverage is something that the school DOES need to provide for now – until it can be looked at by community school partnerships/[Executive Director’s] Office/Grant Mgmt., etc. and more defined.” In response, the Assistant Superintendent emailed, “Perhaps [Executive Director] needs to be there as this is not a FAPE issue, this is more of an access issue. We don’t have legal obligation to provide after school support.” In an October 7<sup>th</sup> email from the Executive Director to the Principal, Principal Support, and another, she stated, “Does the student have an EA all day and is it 1:1 during the entire school day? What is the disability and how does it interfere with her activities of daily life? Can the Student *meaningfully* participate in the activities if there is a small group with an EA but not specifically 1:1 for the student?”

In the Executive Director's personal notes OCR obtained from the District, it states, "Currently, [Principal] expressed concerns about the student's ability to function in the art class describing that the student would need significant modifications to the activities even with 1:1 support." It additionally states, "In keeping with the regulations as I understand them, and because the student would require significant modifications to the planned program of activities; it was determined that the student would not be able to participate in art as her non-disabled peers with 1:1 assistance even though this support is not described in her IEP."

On October 17<sup>th</sup>, the Complainant submitted a new registration form for the Student to also participate in Art Club.

In an October 19<sup>th</sup> email from the Manager to the Complainant, she stated that the District's understanding is that the Student needed adult support only during "transitions." As a result, the District determined that it would have an adult walk the Student from her last class period to whatever club she registers for, and then to walk her from the club to the lobby area to meet whoever picks her up. Additionally, the activity leader would also be made aware that the Student required support transitioning to and from the restroom. With respect to the Art Club, she stated that it is full and would be available during the spring registration.<sup>1</sup> In response, the Complainant stated that the Student needed adult supervision and support at all times and not just during transitions. He explained that the Student has an EA with her all day at school, from the moment she reaches the school campus until she leaves the campus.

A phone meeting was scheduled for October 21<sup>st</sup> between the Complainant, the Principal, the Manager, and the Executive Director. During this conference call, the District repeated its position that they had reviewed the Student's IEP and that the IEP did not provide that the Student required an EA for the Art Club. Instead, they stated that the IEP only required the school to provide support during transitions, and as a result the school would provide support transitioning the Student before and after the Art Club. The Complainant argued that the Student required an EA full-time, that she had an EA full-time while in school for her safety, and that the IEP specified that she is to have an EA for electives. Regardless the District stated that the Student would only be supported during transitioning.

The District provided OCR with a copy of an attendance roster for the Art Club listing the students accepted into the club, the dates they were accepted<sup>2</sup>, and whether the students are students with disabilities. OCR notes that of the 35 students accepted into the Art Club, 10 of them are labelled as "SPED" and an additional 5 as having "health" issues. Additionally, OCR notes that the listing shows that most students were accepted on September 6, 2016, but that 2 additional students were accepted on September 13<sup>th</sup> and another 5 students were accepted on September 20<sup>th</sup>. The Principal confirmed the accuracy of OCR's interpretation of this information.

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<sup>1</sup> In several communications from different district staff to the Complainant, the Complainant was mistakenly informed that the Art Club would be available again in the spring. The Art Club was a year-round program and the Student was not able to participate the entire school year.

<sup>2</sup> In a follow up question, the Principal explained that "the dates are the first day students actually signed in to the program." The attendance roster does not indicate whether and when a student withdrew from the Art Club, and does not indicate the class size at any specific times.

### Legal Analysis

The Art Club was a program or activity provided by the District at XXX and was available for any XXX student to participate in. The Student was a qualified student to participate in the Programs, including the Art Club.

It is undisputed that the Complainant had not registered the Student for the Art Club on the Student's August 31, 2016, registration form. However, the facts show that no later than September 1<sup>st</sup>, the Complainant had made it clear to the District that the Student desired to participate in the Art Club. Also, as of September 1<sup>st</sup>, the Complainant expressed his concern with the Student's safe participation in the Art Club and that he desired to explore with the District ways for the Student to safely participate in the Art Club, especially with an EA.

The evidence also demonstrates that the District denied the Complainant's request for an EA and that it was communicated to the Complainant at least as early as September 1<sup>st</sup> and then again on September 15<sup>th</sup>. Additionally, at that time, the District offered no alternative accommodations and no assurance that the District would ensure that the Student would have equal access in the Art Club. Considering the Complainant's concerns for the Student's safety, OCR found that the District's denial of his accommodations request without engaging in an individual inquiry or offering an alternative accommodation or any type of assurance that the Student would have an equal opportunity to participate in the Art Club, was sufficient to cause the Complainant to not register the Student for the Art Club at that time. As the attendance roster demonstrates that students were accepted in the Art Club on September 13<sup>th</sup> and 20<sup>th</sup>, the District's denial effectively excluded the Student from participation in the Art Club.

As a result, OCR has found by a preponderance of the evidence that the District failed to ensure that the Student had an equal opportunity to participate in the Art Club because of her disability.<sup>3</sup>

*Transfer to La Cueva H.S.*

### Findings of Fact

The District has a transfer program<sup>4</sup> which allows District students to attend schools outside of their own attendance area boundaries. This program provides that students who reside in the district shall first be enrolled at the school designated to serve the students in the attendance area in which the students reside. Then students may apply for a transfer to attend a school outside of their attendance area, which is subject to space and program availability through the school year.

The Student resided within the boundaries of Zone 3, which includes Volcano Vista High School and Cibola High School. XXX High School was the Student's home school. XXX High School

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<sup>3</sup> As the District did not raise a fundamental alteration or an undue financial and administrative burden defense, OCR did not address it in this letter.

<sup>4</sup> <http://www.aps.edu/about-us/policies-and-procedural-directives/procedural-directives/j-students/students-attending-a-school-outside-their-attendance-boundaries> ; JFI Enrollment Priorities for Students Under the Open Enrollment Act.

has XXX (XXX) classrooms for XXX students. The Student's IEP required the Student to be placed in a XXX program. As a result, the nearest XXX classroom for the Student was at the XXX High School, which was in the Student's own attendance area boundary.

The Complainant applied for transfer of the Student to attend the La Cueva High School as a 9<sup>th</sup> grader for the 2017-2018 school year.

Throughout the Fall of 2016 and continuing into the Spring 2017, the Complainant continually advocated for and complained about the District's unwillingness to accommodate the Student in the Art Club. On February 2, 2016, the Complainant sent a letter to the District's Superintendent complaining that the District discriminated against the Student on the basis of her disabilities, including by not being willing to accommodate the Student in the Art Club. Two weeks later, on February 16<sup>th</sup>, the District sent the Complainant a denial of the transfer request for the Student to transfer to La Cueva High School for the 2017-2018 school year, on the basis that "space or program is currently not available."<sup>5</sup>

OCR interviewed the District's Principal Support Administrator (PSA), who supervised the XXX team. He explained that a student's IEP team determines which type of XXX classroom could best support the student's needs. He added that a student is assigned first to the school by the proximity their place of residence to the XXX classroom that is identified to best meet the student's needs. He noted that not all schools have XXX classrooms. The PSA additionally explained that when a request for transfer for a student whose IEP requires participation in the XXX classroom comes in, he looks at the XXX classroom XXX the student requires and at the space available at that XXX. When pushed to describe "space" or "capacity," the PSA explained that typically the District tries to keep capacity at around 6 to 8 students per class. He explained that transfers are not approved if the classroom is already at capacity (6), but that additional students may be added if it is the student's home school.

The PSA added that the Student's IEP during the time of the transfer request required the Student to enroll in a XXX XXX program, and that the Student's high school was XXX High School. Also, he stated that at the time of the denial of the Student's transfer request, space for the Student in the XXX classroom she required at LCHS was not available based upon the enrollment at that time. More specifically, LCHS was projected to have 5 classrooms for a total of 30 students.

Additionally, the District provided a spreadsheet demonstrating all of the students who applied for transfer to La Cueva H.S (LCHS) for the 2017-2018 school year, their grade for enrollment, whether the District accepted the transfer request, whether the student accepted the transfer, and the student's disability status. It shows that 145 students applied for transfer to LCHS. 15 transfer requests were denied on the basis that space was not available. Of all the applicants, 11 students had an IEP, 8 whom were accepted for transfer.

The Student's May 11, 2016, IEP indicates that the Student's parents proposed that the Student attend high school with her peer group from XXX. This proposal was rejected by the Student's IEP team on the basis that her IEP can be implemented at the Student's neighborhood high

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<sup>5</sup> Quote from the District's position statement.



school. The IEP team instructed the Student's parents to apply for transfer if they wish for the Student to attend a different high school.

### Legal Analysis

OCR first considered whether the District took an adverse action against the Student. OCR determined that the District took an adverse action when it denied the Student's transfer request to attend La Cueva High School. OCR next considered whether the Complainant engaged in a protected activity with the District. OCR determined the Complainant engaged in a protected activity for which the District had knowledge when the Complainant complained to the District's Superintendent on February 2, 2017, of disability discrimination regarding the District's alleged refusal to accommodate the Student in the Art Club. OCR then considered whether there was a causal connection between the protected activity and the adverse action, which may be inferred between the protected activity and the adverse action when there is a close temporal proximity. Because the alleged adverse action occurred shortly after the protected activity, OCR determined there was a causal connection between the adverse action and protected activity. As a result, OCR found that each of the three elements for a *prima facie* case of retaliation has been established.

OCR next determined whether the District had a legitimate non-retaliatory reason for its action. The District's explanation that there was no space available at LCHS in the XXX XXX program that the Student's IEP placed him in and that a XXX XXX program was offered in her neighborhood school, is a legitimate non-retaliatory reason for its action.

Finally, OCR next determined whether the District's action was pretextual. OCR notes that the District followed its policies. The Student's IEP determined the appropriate placement for the Student was in the XXX XXX classroom. Consistent with its policy, the Student was placed in the nearest high school with a XXX classroom that met the Student's needs. At the time of the denial of the student's transfer request, LCHS was projected to have an average of 6 students in each of the XXX classrooms, which was at capacity as described by the PSA. Additionally, the evidence demonstrates that the Student was not the only student denied a transfer to LCHS as more than ten percent of all transfer requests to LCHS were denied for similar capacity limitations.

In support of his assertion that the District's legitimate non-retaliatory reason was a pretext, the Complainant stated that the District accepted 3 students for transfer to LCHS who he believes are similarly situated but were treated differently than the Student. The Complainant identified each of the students by name. He explained that one of the students had been accepted for transfer the prior year and is one grade ahead of the Student. He described another student in the same grade as the Student as a "classmate" of the Student. The third student, he provided no further details.

The District confirmed that the 3 students the Complainant identified were approved for transfer to LCHS. Consistent with the Complainant's statement, the PSA confirmed that the first student had already been enrolled at LCHS the prior year, and was one grade ahead of the Student at the time of the Student's application for transfer. The second student the Complainant identified required XXX XXX, instead of XXX which the Student required. Finally, the PSA explained

that third student was not enrolled in a XXX classroom. OCR notes that none of the students the Complainant identified are similarly situated and their acceptance at LCSD is not sufficient evidence of pretext.

Based on the above, OCR determined that there is insufficient evidence that the District's action was pretextual. Thus, OCR determined that there is insufficient to find by the preponderance of the evidence that the District retaliated as alleged.

### *Conclusion*

The District voluntarily entered into an agreement with OCR to resolve the District's exclusion of the Student from the Art Club as alleged. 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 Case Number 08-17-1196 and will send a letter to the District, copied to you, stating that this case is closed.

The complainant has a right to appeal OCR's insufficient evidence determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information 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 recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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.

The District is prohibited from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation.

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.

In addition, the Department has developed guidance to support recipients, as well as the students, families, staff, and community served therein, through the unprecedented challenges faced by COVID-19. For more information, see the Department's [\*COVID-19 \("Coronavirus"\) Information and Resources for Schools and School Personnel\*](#). If you are in need of assistance from the Department or OCR as a result of COVID-19, please don't hesitate to reach out.

If you have any questions, please contact Michael Germano, Attorney and primary contact for this case, at (XXX) XXX-XXXX or by email at XXX@ed.gov, or me at (XXX) XXX-XXXX or by email at XXX@ed.gov.

Sincerely,

/S/

Michael D. Todd  
Supervisory Attorney  
Denver Enforcement Office

Enclosure – Resolution Agreement

Cc: XXX@aps.edu