



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 27, 2018

Mr. Randall Piper, Superintendent
Truth or Consequences Municipal Schools
180 North Date Street
Truth or Consequences, New Mexico 87901

Re: **Truth or Consequences Municipal Schools**
OCR Case Number: 08-18-1375

Dear Superintendent Piper:

We have completed our investigation stemming from a complaint against Truth or Consequences Municipal Schools ("District") alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District, at XXXX ("School"): (a) treated her son ("Student"), who has a disability and individualized education program (IEP), differently than students without disabilities in the provision of transportation; and (b) denied the Student a free appropriate public education (FAPE) by requiring him to leave school early in order to receive special transportation services.

Our investigation established, by a preponderance of the evidence, that the District discriminated as alleged. The reasons for our conclusion are set forth in this letter. Upon being advised of this finding, the District voluntarily agreed to enter into a resolution agreement to resolve the matter. A signed copy of the agreement is enclosed with this letter.

I. Legal Standard

a. Different Treatment

Under the Section 504 regulations, at 34 C.F.R. Section 104.4(a) and (b), 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 Federal financial assistance. The Title II regulations, at 28 C.F.R. Section 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. Section 104.4(b)(1) and 28 C.F.R. Section 35.130(b)(1), a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (a) deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service; (b) afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; or (c) provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, the Office for Civil Rights (OCR) looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the different treatment has resulted in the denial or limitation of services, benefits, or

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opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

b. Denial of FAPE

The Section 504 regulations, at 34 C.F.R. Section 104.33, require school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of Sections 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations, at 28 C.F.R. Sections 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Under 34 C.F.R. Section 104.37, a school district must provide non-academic services and activities, including transportation, in such manner as is necessary to afford students with disabilities an equal opportunity for participation.

II. Evidentiary Standard

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion as alleged.

III. Investigation

Our investigation focused on obtaining the evidence necessary to determine whether the District discriminated in violation of Section 504 and Title II. Specifically, our investigation consisted of: (a) requesting and reviewing documentary evidence from the Complainant and District; (b) interviewing the Complainant and the Student's advocate ("Advocate"); and (c) requesting and reviewing narrative responses from the District.

IV. Facts

a. Background

During the 2017-2018 school year (SY), the Student had an IEP and was in kindergarten at the School. The Student attends afterschool care at the AppleTree Education Center ("AppleTree"), a non-profit organization that provides comprehensive family support services.¹

¹ AppleTree, About Us, www.appletreeeducation.org/index.php/about-us/.

b. The Student's IEPs

i. XXXX

The Student's IEP, dated XXXX, indicated that the Student required transportation accommodations and modifications – specifically, a seatbelt, supervision, and preferred seating near the bus driver. The IEP noted, “[The Student] requires transportation due to his young age, need for supervision and communication needs.” The IEP also read, “[The Student] will ride the general education bus from Apple tree to school at the normal school morning time. He will ride the general education bus (XX) in the afternoon back to Apple tree.” The IEP also called for a total of XXXX hours of special education and related services per week – specifically:

- XXXX;
- XXXX;
- XXXX;
- XXXX;
- XXXX; and
- XXXX.

ii. XXXX

The Student's IEP team met again on XXXX. During the meeting, the team decided that the Student would receive special transportation, on Bus #XX, as a related service in the afternoon, while continuing to ride the “general education bus” to the School in the morning. The prior written notice (PWN) from that meeting read:

- “Provide General educational busing with accommodations (seat belt and specified seating – near the bus driver) for the school year 2017/2018 school year. [The Student] will ride the general education bus in the morning to school.”
- “[The Student] requires transportation due to his young age, need for supervision and communication needs. [The Student] does well riding the general education bus in the morning to school.”
- “Parent agreed for [the Student] to ride bus XX in the afternoon which leaves at 2:15. This change is due to safety concerns. Due to safety need and immediate change the parent did not receive 3 notices. Case manager did discuss the safety concerns and the transportation needs with the parent prior to the IEP.”
- “After trying positive behavior support on the bus ... [the Student] continues to display negative behaviors in the afternoon only on the regular bus. [The Student] will be riding bus #XX for the remainder of the school year in the afternoon due to safety concerns that he demonstrated on the regular bus.”
- “[The Student] will be accompanied by a [sic] adult that is CPR certified to attend all field trips with [the Student].”
- “XXXX-Parent was invited to attend IEP to change bus services in the afternoon from bus XX to bus XX. Parent was not in attendance.”
- “In person parent stated she could not make IEP, and gave her permission to conduct the IEP to change the transportation services as stated in the IEP. [The Student]'s am bus will remain the

same. Parent stated that she works and is unable to attend the IEP for bus change, but agreed to bus change for the afternoon.”

The IEP read:

[The Student] will ride the general education bus from Apple tree to school at the normal school morning time. He will ride the Special Education bus #XX to Apple tree in the afternoon due to inappropriate behaviors that are displayed only in the afternoon. He will ride this bus to help ensure safety. This student requires transportation with modifications. These modifications are preferred seating/seatbelt if necessary.

The special education and related services in the IEP remained the same.

iii. XXXX

The Student’s IEP team met again on XXXX, and continued special transportation in the afternoon and general transportation in the morning for the Student. The PWN from the meeting reads, “[The Student] rides bus XX in the afternoon for safety concerns. This bus has a seat belt and aide.” The special education and related services in the IEP remained the same, except the speech and language therapy, which was reduced from XX minutes per week to XX minutes per week.

iv. XXXX

Next, the Student’s IEP team met on XXXX. The team added special transportation in the mornings; so, the Student would ride Bus #XX in the morning and afternoon. The IEP read, “[The Student] will be riding bus #XX to and from school on a daily basis. He will require a seat belt, supervision, access to an aide to assist with his wants and needs and preferred seating. This is the best choice for [the Student] at this time due to safety concerns.” The PWN from the meeting read, “Special Transportation on bus XX from home to school in the mornings as early as 6:45 am beginning on XXXX. [T]his is the bus transportation that will best fit the parent and [Student] to get to school in the mornings.” The special education and related services in the IEP remained the same.

v. XXXX

Finally, the Student’s IEP team met on XXXX. The PWN from the meeting reads, in relevant part:

- “Parent called meeting to discuss transportation during field trips.”
- “IEP Team: Discussed options to be given for when bus XX is not available to transport [the Student] back home after a field trip. 1st option: parent will make arrangements to pick up/have [the Student] picked up following a field trip. 2nd option-Staff with training will transport [the Student] to Appletreee [sic]. 3rd option-SRO will transport him to Apple Tree.”
- “[The Student] will attend field trips with his peers. [The Student] will be accompanied by a [sic] adult that is CPR certified to attend all field trips with [the Student].”
- “[The Student] will ride general education bus to and from Summer School program. He will be seated up front with seat belt as needed.”

The following language was added to the transportation section of the IEP:

[The Student] will be riding bus #XX to and from school on a daily basis. He will require a seat belt, supervision, access to an aide to assist with his wants and needs and preferred seating. This is the best choice for [the Student] at this time due to safety concerns. During class field trips, [the Student] will ride the regular bus with his classmates with access to an adult, seated near the front of the bus and use of a seat belt as needed.

The special education and related services in the IEP remained the same.

c. Shortened School Day

At the School, the regular school day started at 8:15 a.m. and ended at 2:45 p.m. The Student's class is at recess from 2:00 p.m. to 2:30 p.m., and then students "clean up to go home" from 2:30 p.m. to 2:45 p.m. However, students with disabilities at the School who receive special transportation are taken to the bus at 2:10 p.m., and are picked up at the School by Bus #XX at 2:15 p.m. Therefore, their school day is approximately 35 minutes shorter than students who do not receive special transportation. Over the course of entire 180-day school year, the shortened school day amounts to approximately 6,300 minutes or 105 hours of missed time at school.

In its narrative response to OCR, the District offered the following explanation for the shortened school day:

The District operates one special needs bus, servicing the four in town schools and transporting our students throughout the county. ... In the afternoon, we pick up Elementary students first and after we load all wheelchairs and strollers, get students in car seats, buckled up; we are usually in route by 2:15-2:20. We then try to get Elementary students dropped off at home/daycare before we load middle and high school students with special needs. This bus does not just service a certain area of Truth or Consequences, it travels the whole school district area. We do this so students are not on the bus a lengthy time, to best meet all their needs.

d. Fieldtrip on XXXX

On XXX, the Student participated in a School fieldtrip to a movie theater with all XXXX students. The parent of each student signed a permission slip, which stated that students would be leaving the School at 12:30 p.m. and returning to the School at 2:30 p.m. When a teacher realized that the Student would be missing his regularly scheduled bus (Bus #XX), she called the School's Secretary and asked the Secretary to call the Complainant to see what she wanted to do with the Student regarding transportation. The Secretary called the Complainant and notified her of the situation. What happened next is in dispute.

i. The District's Version of the Facts

The Secretary offered the Complainant the following options: (1) the Secretary would watch the Student until the Complainant could pick him up; (2) the Secretary would call the Student's XXXX, who XXXX, to see if he could take the Student after school; or (3) an alternative proposed by the

Complainant. The Complainant said that she would call the Secretary back. The Complainant called the Secretary back and told her to have the teacher XXXX. The Secretary relayed the message to the teacher, who XXXX.

ii. The Complainant's Version of the Facts

The Secretary said that Bus #XX would be picking up the other elementary school students at the School who receive special transportation (those who did not go on the field trip), and therefore, could not pick up the Student at the theater. The Complainant explained that she could not pick up the Student because she was at work and that the Student's XXXX could not pick up the Student because he was leaving town for the weekend. The Complainant asked if the Student could ride the general education bus, which was going from the movie theater to AppleTree. The Secretary said "no" because the Student's IEP required special transportation.² The Secretary transferred the Complainant to the Transportation Department, but no one answered the phone. The Complainant called the Secretary back. The Secretary said that the Complainant needed to go pick up the Student at the movie theater or come up with another option. The Complainant asked if someone could XXXX. The Secretary relayed the request and a teacher walked the Student to the restaurant. The Complainant's boss was upset with her because of liability issues related to having a child in XXXX. The Complainant felt "terrible" and "embarrassed," and had to stay at work for an extra 20 minutes to finish her responsibilities.

V. Analysis

a. Different Treatment

In this case, the Student was treated differently than students without disabilities in his School. His school day ended at 2:10 p.m., whereas the school day for students without disabilities ended at 2:45 p.m. This different treatment resulted in the Student missing 35 minutes of schooling per day.

The District explained, as its nondiscriminatory reason for its different treatment of the Student, that it only has one special transportation bus for four schools. The District claimed that it must pick up the elementary school students who receive special transportation early in order to drop them off before picking up the middle and high school students who receive special transportation. Otherwise, the District argued, elementary school students would be on the bus for too long while the driver picked up the middle and high school students. The school day for middle and high school students ends at 3:20 p.m., and Bus #XX picks them up at 3:20 p.m. and 3:25 p.m., respectively.

We find that the District did not articulate a legitimate, nondiscriminatory reason for treating students with disabilities differently. Administrative convenience, scheduling problems, and budgetary constraints are not legitimate, nondiscriminatory reasons for treating the Student differently and depriving him of the same educational opportunity as students without disabilities to have a full school day.

² The District wrote, "At the IEP on XXXX the mom stated that she had asked the school secretary if her son could ride another bus to Apple Tree and she was told that he couldn't so she would need to come up with alternate transportation. The secretary said that mom might have asked this, she is not 100% percent sure, but that she would have told her he could not ride another bus because his IEP says he rides a specific bus with an aide due to his needs."

b. Denial of FAPE

The PWN from the Student's XXXX IEP team meeting reads, "[The Complainant] agreed for [the Student] to ride bus XX in the afternoon which leaves at 2:15." The Complainant was not present at the IEP team meeting, but the PWN read, "Case manager did discuss the safety concerns and the transportation needs with the [Complainant] prior to the IEP." The Complainant asserted to OCR that the District would no longer allow the Student to ride the general education bus, and thus, the Complainant was left with two choices: pick up the Student from the School herself at the end of the school day, or have the Student leave School early on Bus #XX.³ The Complainant explained that she chose the latter because XXXX.

Regardless, the shortened school day denied the Student FAPE. First, it was not designed to meet the individual needs of the Student; instead, it was the one and only default option. The precise nature of the transportation that a school must provide for a student with a disability depends on the unique needs of the child. Second, the District failed to provide the Student with – and failed to even discuss – transportation in a manner that was necessary to afford him an equal opportunity for participation in the full school day (*e.g.*, having a second special transportation vehicle).

c. Failure to Implement

The District failed to implement the Student's IEP on XXXX – the day of the field trip to the movie theater. The IEP effective on that date (dated XXXX) read, "[The Student] will be riding bus #XX to *and from school on a daily basis*" (emphasis added). Yet, on XXXX, the District did not provide the Student with special transportation at the end of the school day.

VI. Additional Issues Identified

During the course of our investigation, we identified two additional issues of concern: (a) the unavailability, during summer school, of special transportation for students with disabilities whose IEPs or Section 504 plans call for special transportation; and (b) disciplinary practices involving transportation in the summer school program that may violate behavioral intervention plans (BIPs). Although we did not fully investigate these issues, and therefore are not finding violations with respect to these issues, we have included information and technical assistance about these issues below.

a. Special Transportation for Summer School

i. Facts

The Student's IEP team had determined, at multiple meetings, including the one on XXXX, that the Student "require[d] transportation as a related service" and would continue "riding bus #XX to and from school on a daily basis." The IEP indicates that special transportation to and from school was needed to ensure his safety. However, the PWN from the XXXX meeting (notably, not the IEP itself, which is silent as to special transportation for the summer program) reads, "[The Student] will ride general education bus to and from Summer School program." Records from the XXXX team meeting do not indicate why the Student needed special transportation during the regular school year, but not during summer school.

³ The Advocate provided the same description.

The Complainant stated that, at the XXXX meeting, staff informed her “that summer school allows special ed students, but they only have general education transportation.” Therefore, we requested additional information from the District about whether special transportation is available for summer school. The District confirmed the complainant’s statement – responding:

[The Student] is riding the regular transportation to and from our summer program. *Special transportation is not available for the summer school.* This is an optional program that parents can enroll their children in. ... We did explain that because this is an optional program that special transportation would not be available, but that we would be willing to work with [the Complainant] so [the Student] could attend. So that is why regular bus services were offered which [the Complainant] seemed to agree with and appreciate. (Emphasis added)

ii. Technical Assistance

Regardless of whether summer program is optional or whether providing special transportation to summer school is administratively convenient, if a student’s IEP team determines that the summer program is necessary to provide the student with a FAPE and that the student needs special transportation to access and benefit from the summer program, then the District generally must provide the student with special transportation.

b. “Three Strikes” Discipline

i. Facts

The Complainant reported to OCR that, at the Student’s XXXX IEP team meeting, the School’s principal stated that the Student will be “treated on a 3 strikes you’re out basis” while riding regular transportation to summer school. Therefore, we requested additional information from the District about this assertion. The School’s principal responded, confirming the report:

When [the Complainant] showed interest in the summer program and we offered regular transportation I did say that [the Student] would follow the same bus rules as his peers. The consequences that we enforce are as follows: 1st referral-conference with the student about behavior and safety procedures and phone call to parent/guardian, 2nd referral-conference with student about behavior, safety procedures and phone call to parent/guardian about referral. 3rd bus referral- student conference, parent/guardian phone call- loss of bus privileges.”

The Student has a behavioral intervention plan (BIP), dated XXXX, which is the part of his IEP. The IEP specifies that a BIP “is needed to support [the Student] in the school setting[.]” The BIP specifies the behavioral intervention strategies and consequences that are to be used with the Student. The Student’s BIP not only focuses on positive reinforcement, but also lists the specific consequences for when the Student exhibits problematic behavior – specifically:

1st Occurrence: XXXX
 2nd Occurrence: XXXX
 3rd Occurrence: XXXX

ii. Technical Assistance

The strategies and consequences in a student's BIP may be inconsistent with the "three-strikes" practice. A "three-strikes" practice must not be applied to a student in a manner that supersedes and conflicts with that student's BIP.

VII. Conclusion

After reviewing the documentation, information, and facts uncovered in our investigation, OCR determined that the weight of the evidence shows the District discriminated against the Student on the basis of disability. Specifically, a preponderance of the evidence shows that the District: (a) treated the Student differently than students without disabilities in the provision of transportation, without a nondiscriminatory reason; (b) denied the Student FAPE by requiring him to leave School early in order to receive special transportation services; (c) failed to implement the Student's IEP on XXXX.

We thank the District for voluntarily entering into an agreement with OCR to resolve this issue. OCR is closing the investigative phase of this case effective the date of this letter.

The case is now in the monitoring phase. OCR will monitor implementation of this Agreement through periodic reports from the District demonstrating that the terms of the Agreement have been fulfilled. We will provide the District with written notice of any deficiencies regarding implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. The monitoring phase will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II, and their implementing regulations. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the District, copied to the Complainant, stating that this case is closed. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues above and should not be interpreted as a determination of the District's compliance or noncompliance with Section 504 or Title II or any other federal law in any other respect.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law. 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 investigation. 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, we will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for your attention to this matter and the District's cooperation. If you have any questions, please contact Jason Langberg, the attorney assigned to the case, at (XXX) XXX-XXXX or XXXX@XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

cc: XXXX, District's Special Education Director (XXXX)
XXXX, TCES/SEC Principal (XXXX)
Christopher N. Ruszkowski, New Mexico Secretary of Education