



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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September 27, 2019

Mr. Rico Munn, Superintendent  
Aurora Public Schools  
Educational Services Center 1  
15701 East First Avenue  
Aurora, Colorado 80011

via email only to XXXX

Re: **Aurora Public Schools**  
OCR Case 08-19-1469

Dear Superintendent Munn:

We write to inform you of the resolution of the above-referenced complaint, filed on August 19, 2019, with the Office for Civil Rights (OCR) of the U.S. Department of Education ("Department"), against Aurora Public Schools ("District"), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District: failed to implement her son's individualized education program (IEP) since the beginning of the 2019-2020 school year (SY); and unilaterally changed her son's placement before re-evaluating him.

We investigated the allegations pursuant to: Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and its implementing regulation, at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; and Title II of the Americans with Disabilities Act of 1990 ("Title II"), and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

We found a preponderance of evidence to support that the District discriminated as alleged. Upon being advised of the violation findings, the District entered into a Resolution Agreement ("Agreement") to resolve the matters. A signed copy of the Agreement is attached with this letter. The reasons for our conclusions are set forth in this letter.

## **I. LEGAL STANDARDS**

### **a. Free Appropriate Public Education**

The Section 504 regulations, at 34 C.F.R. Section 104.33, require school districts to provide a free appropriate public education (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 students without disabilities are met, and that are developed in accordance with the procedural requirements of Sections 104.34-36 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)-(iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

### **b. Implementation**

Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting the FAPE requirements. A school district's failure to implement an IEP is typically a violation of Section 504.

### **c. Evaluation**

Section 104.35(a) of the Section 504 regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under Section 104.35(b), tests and other evaluation materials must be administered by trained personnel, reliable, and valid for the purpose for which they are being used.

### **d. Placement**

Section 104.35(c) of the Section 504 regulations requires that placement decisions must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services. A procedure consistent with the IDEA is one means of meeting this requirement.

## **II. INVESTIGATION**

Our investigation focused on obtaining the evidence necessary to determine whether the District complied with these legal standards. Specifically, our investigation consisted of:

- requesting and reviewing documents and information from the Complainant and the District;
- interviewing the principal ("Principal"), the assistant principal ("Assistant Principal"), an exceptional student services (ESS) teacher ("ESS Teacher"), and a social studies teacher ("Teacher") at the Student's first school in the District ("School A");
- interviewing the autism center teacher ("Center Teacher") at the Student's second school in the

District ("School B"); and

- interviewing the ESS consultant for School A ("ESS Consultant A"); and
- interviewing the ESS consultant for School B ("ESS Consultant B").

### **III. 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 or is insufficient to support the conclusion.

### **IV. EVIDENCE**

During the 2018-2019 school year (SY), the Student was in XXXX grade at a school in XXXX ("School C"). He is a student with a disability and has an IEP, with Autism Spectrum Disorder as the primary area of eligibility.

On June 20, 2019, the Complainant enrolled the Student in XXXX grade in the District. On the "Student Registration Form," she marked "YES" for the question, "Is your student currently receiving special needs services?" We did not find any evidence that the District took any action based on the Complainant answering "YES" to the question. None of the District employees interviewed by OCR knew what, if anything, is typically done with a parent's or guardian's response to that question. The ESS Consultants said "nothing," to their knowledge, is done with the responses to that question.

On August 1, 2019, the Complainant registered the Student in School A, including providing a signed consent for release of records and checking "Yes" for the question, "Has your child ever received any kind of services in school? (Speech therapy, Special Education, etc.)." Underneath the question, she wrote, "Speech, OT & SPED."

On August 5, 2019, the Complainant attended back-to-school night at School A. School A staff learned, reportedly for the first time, that the Student had an IEP. Staff asked the Complainant to provide a copy of the Student's IEP.

August 6, 2019 was the first day of the 2018-2019 SY and the Student's first day attending school in the District and School A. The Complainant emailed the ESS Teacher to request a re-evaluation of the Student.

On August 6, 2019 or August 7, 2019, the ESS Teacher called School C to inquire about the Student and his records.

On August 8, 2019, a clerk at School A faxed a records request to School C.

On August 12, 2019, the Complainant attended a meeting at School A (primarily about the Student's twin brother). Staff at School A told the Complainant that they still did not have the Student's IEP. After the meeting, the Complainant emailed a copy of the Student's IEP to the ESS Teacher.

On August 13, 2019, the following took place:

- According to ESS Consultant A, she met with the District's ESS Program Director and the two of them decided that the Student would need to be moved to School B. The Complainant and Student live XX mile and a three-minute drive from School A; in contrast, they live XX to XX miles and XX to XX minutes, depending on the route taken and traffic, from School B.
- ESS Consultant A contacted the Complainant to notify her of the Student being moved to School B because School A does not have a self-contained setting;
- The Complainant told ESS Consultant A that the Student's IEP did not require a self-contained setting.
- According to ESS Consultant A, she and the ESS Program Director decided to not move the Student after all, until they could gain clarity about what the IEP required.
- The District's ESS Program Director told the ESS Secretary, via email, to request the Student's special education records from School C.
- According to ESS Consultant A, the ESS Secretary requested the records from School C.

On August 14, 2019, the ESS Secretary replied to the ESS Program Director, "Attached are the records we received from the previous school." According to ESS Consultant A, the District received the Student's records from School C. Evidence strongly suggests, however, that the District's central office staff never notified School A staff that the Student's records had been received from School C, even though the Student was still attending School A. For example: (a) threat assessment completed by School staff on August 19, 2019, reads, "Still waiting to receive previous school records;" (b) on August 19, 2019, a clerk at School A faxed a records request for the Student to School C; and (c) the ESS Teacher told OCR during an interview that the School never received the Student's records.

On August 15, 2019, ESS Consultant A emailed School C to request clarification about the Student's IEP.

On August 16, 2019, the ESS Teacher sent a consent for evaluation form to the Complainant for the re-evaluation of the Student. School C provided clarification to ESS Consultant A: "[The Student] was receiving the self-contained services daily; however, the minutes reflected on the IEP are how much time he received in the self-contained and general education setting weekly. [The Student] went to gen. ed. for science and social studies (225+225 = 450 min/weekly) and elective (205 min/weekly). All other time was in the self-contained setting."

On August 19, 2019, the following took place:

- ESS Consultant A met with the District's Director of Student Services and ESS Program Director, and the three of them decided that the Student's placement would be changed from School A to School B because School B has a center-based program.
- ESS Consultant A notified staff at School B that the Student would be attending School B the next day.
- ESS Consultant A notified the Complainant that: (a) the Student must attend School B the next day (*i.e.*, August 20, 2019); and (b) the Complainant would have to arrange transportation for the Student because it would take two to three weeks to arrange District transportation.
- ESS Consultant A: (a) submitted a transportation request for the Student to the District's Transportation Department; and (b) asked the District's transportation scheduling coordinator to expedite the request.

- At the request of the ESS Teacher, School A's clerk faxed a records request for the Student to School C. School C sent a return fax to School A's clerk, which read, "records for [the Student] was mailed on August 13, 2019 you should Received [sic] them this week."

On August 20, 2019, the following took place:

- No District transportation was available for the Student.
- The Complainant kept the Student home from school rather than taking him to School B.
- ESS Consultant A exchanged emails with ESS Consultant B to enroll and create a schedule for the Student at School B (after the beginning of the school day).
- ESS Consultant A and the ESS Teacher finalized the interim/transfer IEP for the Student.
- ESS Consultant A sent an interim/transfer IEP (dated August 20, 2019) and a copy of the District's procedural safeguards to the Complainant. A comparison of the pre- and post-August 20th IEPs appear below.

The prior written notice (PWN) for the August 20th IEP reads:

The [District] considered the parent's request to keep [the Student] at his home school of [School A] and not assign him to a center-based program. However, [the Student]'s IEP from his previous district requires self-contained programming and information from his previous teacher confirmed that [the Student] was self-contained. [School A] does not have center-based programming and would not be able to implement his IEP from the previous district. Therefore the district assigned [the Student] at [School B] where his IEP can be implemented through the Autism center-based program. Transportation will be provided for [the Student] since the district assigned him to a school that is not his home school.

[The District] considered keeping [the Student]'s IEP minutes exactly the same, however, due to the length of the school day in [the District], and the length of class blocks at [School B], slight adjustments were made to [the Student]'s IEP minutes. ... This resulted in a change of 2% to [the Student]'s Least Restrictive Environment, bumping him into the 40-79% setting code. The [District] team considered not making a change to his LRE, however, felt these services best reflected the intention of his previous IEP minutes, while also accounting for the lengthened school day in [the District], and the block scheduling at [School B].

Service	Location	School C Minutes per IEP	School A Minutes Provided	School B Minutes in IEP
Special education	Self-contained	1,115/wk.	0	1,223/wk.
Special education	General Education	655/wk.	0	880/wk.
Speech Therapy	Self-contained	120/mo.	0	120/mo.
Occupational Therapy (OT)	Self-contained	60/mo.	0	60/mo.
Speech Consultation	General Education	20/mo.	0	20/mo.
OT Consultation	General Education	30/mo.	0	30/mo.

On August 21, 2019 or August 22, 2019, the Complainant took the Student to School B for the first time.

The Center Teacher explained to OCR that the Student has been very resistant to participating in the center-based program at School B. She said that the Student regularly attempts to leave the self-contained classroom. In fact, School B and the Complainant recently completely an IEP amendment that allows the Student to spend less time in the center-based program, where he was less successful.

The Student will continue receiving separate transportation for the remainder of the 2019-2020 SY.

## **V. ANALYSIS**

### **A. FAILURE TO IMPLEMENT**

During the ten school days that the Student attended School A – August 6, 2019 to August 19, 2019 – he did not receive any special education services or related services; or the specific accommodations specified in his IEP.<sup>1</sup>

The District asserted that the Student's IEP was not implemented at School A because: (a) School A did not yet have the Student's IEP; and (b) School A does not have the service level the Student needed – *i.e.*, a self-contained classroom. School A does not provide pull out or self-contained special education services. However, the District had adequate notice that the Student had an IEP and an adequate opportunity to request the Student's IEP. The Complainant notified the District that the Student had an IEP on four occasions (June 20, 2019; August 1, 2019; August 5, 2019; and August 6, 2019) *before* the District requested the Student's special education records from School C. Forty-seven days elapsed between when the Complainant first notified the District on the "Student Registration Form" and the first day of the 2019-2020 SY. A week elapsed between when the Complainant registered the Student at School A and signed a release for records and when School A requested the Student's records for the first time. Then, School A did not send a second request until 11 days later.

The District was not relieved of its responsibility to implement the Student's IEP because it failed to obtain his special education records in a timely manner or because School A offers a limited continuum of special education services. Moreover, School A generally provides speech/language therapy and occupational therapy services, but did not provide such services for the Student. Therefore, we found a preponderance of evidence that the District denied the Student a FAPE by failing to implement his IEP from August 6, 2019 (the first day of the 2018-2019 SY) to August 19, 2019 – a total of ten school days.

### **B. PLACEMENT**

Before determining whether the District complied with the procedural requirements of Section 104.35 of the Section 504 regulations, we must first determine whether the District changed the Student's placement. We find that the District changed the Student's placement (not merely his location) based on the totality of considerations.

The District changed the Student's IEP. The amount of time he was to receive special education, increased by 333 minutes per week (or 18.8%). The percent of time he was to be in an educational

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<sup>1</sup> This was confirmed by the Social Studies Teacher, ESS Teacher, Principal.

setting without students without disabilities changed two to five percent.<sup>2</sup> Additionally, the Student was no longer able to ride the bus with students without disabilities (*i.e.*, his nonacademic transportation services became more restrictive) and had a significantly longer bus ride to and from school. Moreover, the Student has autism. Characteristics of autism spectrum disorder include: “resistance to environmental changes or changes in daily routines;” “significant difficulty establishing and maintaining social-emotional reciprocal relationships;” “significant difficulty ... developing and maintaining friendships;” and “seek[ing] consistency in environmental events to the point of exhibiting significant rigidity in routines and displays marked distress over changes in the routine.”<sup>3</sup> In this case, the Student experienced a sudden transition to an unfamiliar environment (*i.e.*, a new school), for the second time in two weeks, with a different schedule for transportation, different classes, different staff, and different peers (including being without his twin brother who is a student at School A). Finally, the Student went from general education classes for the entire school day at School A to general education classes for only approximately 40% of the school day at School B. The Student has reportedly struggled in the center-based program to which he was moved.

Since we found that the District changed the Student’s placement, we next ask whether the District followed the procedural requirements of Section 504, including: (a) conducting an evaluation before the change in placement; (b) drawing upon information from a variety of sources; and (c) ensuring that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

In this case, the District did not evaluate the Student before changing his placement; instead, the District began a re-evaluation of the Student *after* his placement was changed. Additionally, the District did not draw upon information from a variety of sources; instead, the District changed the Student’s placement based solely on the configuration of the District’s service delivery system (*i.e.*, having center-based programs at only two middle schools). Finally, the District did not ensure that the placement decision was made by a group of persons knowledgeable about the child and the placement options; instead, ESS Consultant A, the District’s Director of Student Services, and the ESS Program Director (none of whom know the Student) decided to change the placement, and only the ESS Consultant A and the ESS Teacher (who did not teach the Student) were involved in drafting the interim/transfer IEP. The Complainant was not involved; no staff at the school that was to receive the Student (“School B”) were involved; and none of the Student’s teachers at School A were involved.

Therefore, we found a preponderance of evidence that the District unilaterally changed the Student’s placement without first re-evaluating him.

## **VI. CONCLUSION**

We thank the District for being willing to voluntarily address the violations found. A copy of the signed Agreement is attached. When the Agreement is fully implemented, the issues will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding

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<sup>2</sup> The PWN specifies two percent, but an email from the ESS Teacher to ESS Consultant A read, “The old IEP says less than 40% but our calculator says it’s 47.38%.”

<sup>3</sup> Colorado Department of Education, “Rules for the Administration of the Exceptional Children’s Educational Act,” 2220-R-2.08(1).

implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. We will provide the Complainant with a copy of our monitoring letters. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR's investigation of this 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. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. 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.

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.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law.

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 the courtesy and cooperation that you and the District's staff extended to us during the investigation and resolution of this case. If you have any questions, please contact Jason Langberg, the attorney assigned to this complaint, at (XXX) XXX-XXXX or XXXX@XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez  
Supervisory General Attorney

Attachment: Resolution Agreement

cc (via email): Brandon Eyre, Attorney for the District (XXXX)  
Katy Anthes, Colorado Commissioner of Education