



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

May 1, 2020

Mr. Jerrett Perry, Superintendent
Alamogordo Public Schools
1211 Hawaii Avenue
Alamogordo, New Mexico 88310

via email only to XXXX@XXXX

Re: **Alamogordo Public Schools**
OCR Case 08-20-1267

Dear Superintendent Perry:

We write to inform you of the resolution of the above-referenced complaint, filed on February 24, 2020, with the Office for Civil Rights (OCR) of the U.S. Department of Education ("Department"), against Alamogordo Public Schools ("District"), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the District, at XXXX ("School"), failed to implement her daughter's individualized education program (IEP) on XXXX XX, 2019.

We investigated the allegation 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.

Prior to OCR issuing a final determination pursuant to Section 303 of our *Case Processing Manual* (CPM), the District expressed an interest in resolving the allegation pursuant to Section 302 of the CPM. OCR determined that it was appropriate to resolve the allegation because our investigation had identified issues that could be addressed through a resolution agreement. Therefore, on April 30, 2020, OCR sent the District a proposed resolution agreement ("Agreement"). On May 1, 2020, OCR received a signed Agreement from the District. The provisions of the Agreement are tied to the allegation and evidence obtained during the investigation, and are consistent with applicable regulations.

This letter details the applicable legal standard and the status of our investigation prior to receiving the District's request to enter into an agreement.

I. LEGAL STANDARDS

The Section 504 regulations, at 34 C.F.R. Section 104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. 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. Implementation

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

of an IEP developed in accordance with the procedural requirements of Section 504 is one means of meeting the FAPE requirement. Failure to implement a student's IEP may result in the student being denied a FAPE.

II. INVESTIGATION TO DATE

Our investigation focused on obtaining the evidence necessary to determine whether the District complied with Section 504 and Title II. Specifically, our investigation thus far consisted of requesting and reviewing documents and information from the Complainant and District.

III. EVIDENCE TO DATE

a. Background

During the 2019-2020 school year (SY), the Student was a XXXX-grade student with an IEP under the XXXX and XXXX areas of eligibility.

The accommodations section of the Student's IEP that was in place in XXXX 2019 (dated XXXX XX, 2019) read, in relevant part, "once student shows signs of frustration allow a safe haven for cool down period" and "follow BIP." The Student's BIP that was in place (dated XXXX XX, 2019) read, in relevant part, "She can request to leave the classroom to go to a designated safe haven." An amendment to the IEP (dated XXXX XX, 2019) noted, "BIP in place will transfer to high school." According to the District's narrative response, the "safe haven" was the School's "Best" classroom, which is "the special education classroom that provides support to students with deficits in behavior."

b. XXXX XX, 2019

On XXXX XX, 2019, the Student was late to her first period XXXX class. The class was co-taught by a general education teacher ("Gen. Ed. Teacher") and a special education teacher ("Sped. Teacher"). An educational assistant ("Educational Assistant") who intermittently assists students with disabilities in the class was also present.

i. Complainant's Version

Upon entering first period XXXX, the Student and Sped. Teacher engaged in a conversation, in front of other students, about the Student being late to class. The Student felt attacked and began to escalate. The Student asked to leave the classroom to regain her composure, but the Sped. Teacher denied the request. Regardless, the Student left the classroom.

After leaving the classroom, the Student called the Complainant on her cell phone to share what happened and calm down. Meanwhile, the Sped. Teacher notified the School's front office that the Student had left the classroom without permission. The front office dispatched security officers to locate the Student.

Three of the School's security liaisons ("Security Liaison 1," "Security Liaison 2," and "Security Liaison 3") ran into the Student in the hallway while the Student was still on the phone with the Complainant and walking back to the classroom. The Student was told by a security liaison that she would be going to the front office since she left class without permission. Security Liaisons 1 and 2 "escalated into a conflict."

According to the Student, Security Liaison 1 was “aggressive and in her personal space” and blocked the Student from using the classroom door. The Student also reported that she did not threaten or push Security Liaison 1.

ii. District’s Version¹

The Student was disruptive and appeared overwhelmed and frustrated. The Educational Assistant asked the Student if she wanted to go to her “safe haven,” but the Student refused. The Student continued to be disruptive. The Educational Assistant repeatedly asked the Student to go with her to the “safe haven,” but the Student continued to refuse. Finally, the Student said she would go to the front office.

The Student and Educational Assistant left the classroom at approximately XXXX a.m. They began walking toward the front office. The Student continued using vulgarity toward the Educational Assistant. The Student turned around and walked in the opposite direction, away from the Educational Assistant. The Educational Assistant lost sight of the Student. The Educational Assistant located a security liaison and told the liaison to radio for assistance. In accordance with the School’s established practice, security liaisons were dispatched throughout the campus to locate the Student.

Security Liaisons 1, 2, and 3 located the Student in the commons area of the campus. Security Liaison 1 told the Student to return to class, but the Student refused. Security Liaison 1 asked the Student to go to the front office with them, but the Student refused. Staff repeated that the Student needed to go to the front office. The Student agreed, but said that she needed to go to the classroom to get her backpack. The Educational Assistant said that she would get the Student’s backpack, but the Student said that she did not want the Educational Assistant to touch her belongings. The Student cursed and said that she had the Complainant on the phone. Security Liaison 1 told the Student that she would retrieve the backpack for the Student, but the Student cursed and said no.

When Security Liaison 1 and the Student arrived at the classroom, the Student was standing behind Security Liaison 1. The Student knocked on the classroom door. A student inside the classroom opened the door. The Student pushed Security Liaison 1 in the back. Security Liaison 1 turned around. The Student pushed Security Liaison 1 twice in the stomach. The Student threatened to hurt Security Liaison 1 if she did not move. Security Liaison 1 threatened to press charges against the Student. The Student said, “I don’t give a XXXX.”

Security Liaisons 2 and 3 took the Student to the front office. The School out-of-school suspended the Student for nine school days, pending an expulsion hearing and manifestation determination.²

¹ The facts in this section were derived from the District’s narrative response to OCR and written statements from: the School’s principal; the Student’s special education case manager; the Gen. Ed. Teacher, Sped. Teacher, and Educational Assistant; and Security Liaisons 1, 2, 3.

² District Regulation JK-RA (“Student Discipline”) states that a student may be “subject to disciplinary action” for leaving “class without permission or excuse.” The School’s “Student/Parent Handbook 2019-2020” reads, in relevant part, “Students leaving the classroom must have a hall pass in their possession. ... Students out of class without a hall pass or caught abusing the hall pass privilege will be subject to disciplinary action.”

c. Additional Facts

i. Student

On XXXX XX, 2019, Security Liaison 1 reported the incident to the Alamogordo Police Department (APD).

On XXXX XX, 2019, a manifestation determination meeting was held. The Student's IEP team determined that her conduct in question on XXXX XX, 2019: was related to her disability and no further disciplinary action was taken; and was not the direct result of the District's failure to implement the Student's IEP. Additionally, the team made numerous significant improvements to the Student's BIP.

On XXXX XX, 2019, an APD officer referred the Student to juvenile court for battery on school personnel (a fourth-degree felony) and interference with members of staff (a petty misdemeanor).

On or about XXXX XX, 2019, the Student was transferred to a different XXXX class.

On XXXX XX, 2019, the Student's IEP team met to review and revised the Student's IEP. The team dramatically increased the amount and types of special education services for the Student, which changed her placement to a more restrictive setting.

On XXXX XX, 2020, the Student's IEP team reviewed and revised the Student's IEP and BIP. The BIP now specifies:

- "Always speak to [the Student] using non-confrontational voice and a calm demeanor."
- "Provide frequent binary choices."
- "Give space when warning signs are presented."
- "Give the option to take a walk around the school if escalated or unhappy."
- "When assisting [the Student], to the greatest extent possible, do not walk behind her."
- "When [the Student] shows warning signs ... in a calm, non-confrontational manner, let her know that you are there to help her."
- "When [the Student] engages in defiance including aggression, back away from her and give her space and time to cool down. Suggest the use of pass to cool down. Check in with her once she is not aggressing and has had time to cool down. Continue assisting her at this point and developing solutions for what is bothering her. When [the Student] engages in verbal disruption, react to her in a calm manner and help her develop solutions."
- "Practice self-advocacy skills with [the Student] frequently throughout the day, [including] encouraging her to speak about anything that is bothering her before she to her 'boiling point,' asking to speak to a trusted adult, and asking to stay in a safe/quiet space to be alone and de-escalate."
- "Look for opportunities throughout the day where she can express her thoughts."

Other changes made for the Student from XXXX 2019 to XXXX 2020 included: (a) changing the Student's case manager and school psychologist; (b) changing the Student's "safe haven" location; and (c) developing a pass the Student can use when she needs to remove herself to the "safe haven" location to cool down.

ii. Other

According to the Student's case manager ("Case Manager"), sometime after XXXX XX, 2019, he shared a list of the students with disabilities who were on his caseload with the head of security (Security Liaison 1) to ensure that all security liaisons were aware of the students. The security liaisons were told that, if there was an incident involving any of the students, they should immediately contact the Case Manager.

The District also provided districtwide training to special education teachers and educational assistants on XXXX XX, 2019 and XXXX XX, 2020. The trainings included implementation of accommodations, modifications, and interventions, as well as the use and implementation of functional behavioral assessments (FBAs) and BIPs.

IV. CONCLUSION

We thank the District for being willing to voluntarily address the allegation raised by the Complainant. A copy of the signed Agreement is attached. 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 implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. We will inform the Complainant of the status of the monitoring, including providing the Complainant with copies of our monitoring responses. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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. We will provide the Complainant with a copy of our monitoring letters.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and it should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint 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, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for the courtesy and cooperation extended to us during the investigation and resolution of the 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

cc (via email): Kenneth Moore, Principal (XXXX@XXXX)
Lorie Gerkey, Attorney for the District (XXXX@XXXX)
Ryan Stewart, Secretary of Public Education (XXXX@XXXX)