



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII

ARIZONA
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March 10, 2022

Scott Elder, Superintendent
Albuquerque Public Schools
P.O. Box 25704
Albuquerque, NM 87125-0704

By email only to superintendent@aps.edu

Re: OCR Complaint No. 08-21-1417
Albuquerque Public Schools

Dear Superintendent Elder:

This letter is to advise you of the outcome of the complaint that the United States Department of Education (Department), Office for Civil Rights (OCR) received on September 2, 2021 against Albuquerque Public Schools (the District). The complaint alleged that the District discriminated against a Student on the basis of disability

Specifically, the Complainant alleged that the District failed to implement the Student's Individualized Education Program (IEP), which resulted in the denial of a free appropriate public education (FAPE). The Complainant alleged the following:

- the Student was repeatedly marked absent although he was at school;
- the Student was not taken to his elective classes;
- the Student did not receive language class;
- the Student's notebook was not updated;
- when transportation was initially provided, the Student was not helped off the bus;
- the District stopped providing transportation;
- the Student's school days were shortened: the Complainant was told to pick the Student up at 2:15 p.m. and then at 2:20 p.m. although the school day ends at 2:25 p.m.

The Complainant also alleges that the Student was not provided with water.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance. OCR also enforces Title II of the

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

Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

On October 12, 2021, we notified the District that OCR was opening an investigation of the above allegations. We also sent the District a data request. The District indicated that it would like to resolve the complaint through OCR's Facilitated Resolution Between the Parties (FRBP) process; however, the Complainant was not interested in pursuing complaint resolution through FRBP. The investigation continued, and the District provided the data requested by OCR. During a conversation with the District about the District's data response, the District expressed an interest in voluntarily resolving the complaint. Pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and when OCR has determined that identified concerns can be addressed through a voluntary resolution agreement. OCR has determined that the concerns identified during the course of the investigation can be addressed through a voluntary resolution agreement and that a voluntary resolution agreement is also an efficient way to resolve this complaint. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the voluntary Resolution Agreement (Agreement) in this case.

Legal Standards

Non-discriminatory Treatment of Students

Section 504 and the regulation at 34 CFR § 104.4(a) provide that no qualified person 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 Section 504 regulation at 34 C.F.R. § 104.43(a) provides that a qualified person with a disability may not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any postsecondary aids, benefits, or services.

Free Appropriate Public Education (FAPE)

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs

of non-disabled persons are met. The development and implementation of a Section 504 Plan is one means by which FAPE may be provided. 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 public schools to provide a FAPE at least to the same extent required under the Section 504 regulations.

In the context of providing a FAPE under Section 504, the regulations, at 34 C.F.R. §104.3(j), define an individual with a disability as any person who has a physical or mental impairment which substantially limits a major life activity. Under 34 C.F.R. §104.3(j)(2)(ii), major life activities include learning. The definition of disability under the Title II regulations, at 28 C.F.R. §35.104, is substantially the same. It is important to note that a student may have a physical or mental disorder that qualifies the student as a disabled individual requiring services under Section 504 and Title II even though the disorder does not meet the eligibility criteria for services under the Individuals with Disabilities Education Act (IDEA). The IDEA applies only to students who have specifically identified conditions. Section 504 and Title II apply to any student who has a physical or mental impairment that substantially limits a major life activity.

Investigation to Date

During the course of the investigation, OCR learned that the Student is a XXXX grade student at the District's XXXX School (the School). The Student is in the School's "Intensive Global Support Service 2" (IGS2) program, a district-level program designed to provide specialized instruction to students who demonstrate a need for more intensive support. Placement into IGS2 is decided through an IEP Team decision. The Student has an IEP for XXXX.

OCR's investigation included an interview of the Complainant; review of documents pertinent to the complaint allegations, including the Student's IEP, correspondence regarding the Student's needs from the School, the District, and the Complainant, the District's special education policies and procedures; and an interview of a District administrator.

Following the interviews and review of the submitted documentation, OCR learned the following:

- The Student's IEP states that the Student requires a bus with a wheelchair lift. The Student needs a bus with a wheelchair lift X – clause redacted - X. Providing bus transportation was particularly challenging for the School during the first semester of the 2021-22 school year. The School did not have enough special education buses, and the School's bus drivers did not know how to operate a bus with a wheelchair lift. The School hired a bus driver who knows how to operate a bus with a wheelchair lift, and the Student began taking the bus with a wheelchair lift starting January 4, 2022. The Student's parents provided transportation until January 4, 2022.

- The 2021-22 school year began on August 11, 2021, and School is in session from 7:25 a.m. to 2:25 p.m. The Complainant states that on August 26, 2021, a School Employee told the Complainant that the Student would be sent to the office if the Complainant did not pick the Student up at 2:15 p.m. and that the same School Employee told her on August 27, 2021 that the Student would be sent to the office if the Complainant did not pick the Student up at 2:20 p.m. A School Administrator talked with the School Employee. The School Employee is no longer assigned to work with the Student.
- The Complainant states that the Student's first IGS2 teacher said that there had not yet been time to read the Student's IEP. The IGS2 teacher is no longer assigned to work with the Student.

Based on this information, OCR noted concerns that the Student's IEP may not have been consistently implemented during the first semester of the 2021-22 school year.

During a meeting with OCR regarding the District's data response, the District expressed a willingness to voluntarily resolve the complaint.

Resolution

We note that the School voluntarily took actions to address several of the allegations, including the following: In October, 2021, the Student changed IGS2 classrooms. In October, 2021, the School began using daily tracking sheets to improve communications between the School and the Complainant regarding the Student's day. The daily tracking sheets list the Student's class schedule and include sections for notes regarding each class. The tracking sheets also include the following other sections: "Water Monitor," "Nutrition/XXXX Monitor," and "Bathroom Breaks."

On February 18, 2022, we sent the District a proposed Agreement. The District sent OCR the enclosed signed Agreement on March 9, 2022. When fully implemented, the Agreement will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information that was obtained during OCR's investigation, and the provisions of the Agreement are consistent with the applicable statutes and regulations. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, which may include enforcement actions.

OCR is closing the investigative phase of the case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of the case will be completed when OCR determines that the District has fulfilled all of the terms of the Agreement. When the monitoring

phase of the case is complete, OCR will close case number 08-21-1417 and will send a letter to the Complainant and to the District stating that the case is closed.

This letter sets forth OCR's determination in an individual 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.

Recipients of Federal funds are prohibited from intimidation, harassment, or retaliation against individuals filing a complaint with OCR and those participating in a complaint investigation. complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Please note the Complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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.

We thank the District for being willing to voluntarily address the allegations raised by the complaint. We appreciate the District's attention to this matter and the help of Heather Cowan, Mia Kern Lardy, and Laura Unklesbay. We look forward to working with the District to meet the terms of the Agreement.

If you have any questions, please contact XXXX, the OCR attorney assigned to this complaint, at XXX-XXX-XXXX or XXXX@XXXX.

Sincerely,

/s/

XXXX

Supervisory Attorney

Enclosure – Resolution Agreement

cc: Heather Cowan, APS (by email only)

District counsel (by email only)

Dr. Kurt Steinhaus, Secretary of Education, New Mexico Public Education Department (by email only and without enclosure)