



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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March 21, 2023

Mr. Scott Elder, Superintendent
Albuquerque Public Schools
P.O. Box 25704
Albuquerque, New Mexico 87125

sent via email only to superintendent@aps.edu

Re: **Albuquerque Public Schools**
OCR Case 08-22-1611

Dear Superintendent Elder:

This letter is to notify you of the disposition of the above-referenced case stemming from a complaint that was filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), on September 22, 2022. OCR opened an investigation to determine whether Albuquerque Public Schools (District) discriminated against students on the basis of disability.¹ Specifically, OCR investigated whether the District during the 2022-23 school year (SY), denied students with disabilities a free appropriate public education (FAPE) by:

1. failing to provide them with the special transportation services to which they were entitled in their individualized education programs (IEP) or Section 504 plan;
2. modifying their IEP or Section 504 plan to accommodate the District's driver shortage;
3. shortening their school day to accommodate the District's driver shortage; and,
4. causing them to miss school and services because of the District's driver shortage.

OCR conducted its investigation under Section 504 of the Rehabilitation Act of 1973 (Section 504), and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), and its implementing regulations, 28 C.F.R. Part 35, which prohibit discrimination based on disability in programs or activities receiving Federal financial assistance and public entities, respectively. As a recipient and public entity, the District is subject to Section 504, Title II, and their regulations.

During its investigation, OCR reviewed information provided by the District and interviewed the District's Associate Superintendent for Special Education. OCR found, by a preponderance of the evidence, that the District, during the 2022-23 school year (SY), denied students with disabilities a free appropriate public education (FAPE) by: (a) failing to provide them with the transportation services to which they were entitled in their individualized education programs (IEP) or Section 504 plan; (b) modifying their Individual Education Program (IEP) or Section

¹ On November 28, 2022, the Complainant informed OCR that the District resolved her individual allegation and requested to withdraw her OCR complaint. Per Section 110(k) of OCR's CPM, the investigation remained open because it raised systemic issues that warranted the continuation of the investigation.

504 plan to accommodate the District's driver shortage; (c) shortening their school day to accommodate the District's driver shortage; and (d) causing them to miss school and services because of the District's driver shortage.

Legal Standards

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 that 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, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires recipient public school districts to provide a free appropriate public education (FAPE) to all qualified 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 34 C.F.R. §§ 104.34-36. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. The educational and related services offered as a part of FAPE must also be provided without cost to the person with a disability or to his or her parents or guardian, except for those fees that are imposed on persons without disabilities or their parents or guardian. 34 C.F.R. § 104.33(c). Conversely, a recipient's failure to implement an IEP or Section 504 Plan may result in the denial of FAPE. 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 school districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Background

The District reported that 22% (approximately 16,000 students) of the District's enrollment is comprised of students who have disabilities. Approximately 3,060 students who have disabilities receive transportation as a related service in an IEP or Section 504 Plan. Additionally, the District reported that there are students who have disabilities and do not have transportation in their IEP or Section 504 Plan but rely on a school bus to attend school, like their general education peers.

The District explained that in May 2022, the transportation department began the pre-planning process to identify students with disabilities who would need transportation services during the 2022-23 SY. The District explained that when planning for student transportation in an upcoming school year, the transportation department considers many factors that may change the amount of transportation services needed from year to year. Examples of those factors include changes in students' needs, changes in students' addresses, student disenrollment, and new

student enrollment. To take those factors into account, the District reported that the transportation department encouraged each District school to submit transportation request forms for the 2022-23 SY. Those forms included which students needed transportation pursuant to an IEP or Section 504 Plan. The District also explained that prior to submitting the transportation request forms, each school consulted with parents regarding transportation preferences. The District further reported that there are students with disabilities who are entitled to receive transportation either through a Section 504 Plan or IEP or because of where they live, whose parents choose not to use the District's transportation services, for a variety of reasons. Those reasons include a preference to transport the student to and from school, students electing to participate in remote education, students attending schools of choice, and some students who drive themselves to school.

Findings of Fact

The District confirmed to OCR that the District's transportation department encountered a shortage of 28 school bus drivers at the start of the 2022-23 school year that impacted its ability to provide bus service to all students in the District. The District reported that despite its ongoing efforts to pre-plan for the number of students who need transportation services and a sufficient number of bus driver to meet those student's needs, a driver shortage resulted in the current school year. The District asserted that it has attempted to overcome this shortage by expanding its recruiting efforts out of state and offering competitive pay rates for drivers.

OCR learned that prior to the investigation, at the time that many bus drivers resigned, the District indeed began taking steps to support the efforts of schools to track and deliver special education and related services to students who were entitled to transportation pursuant to their IEP and Section 504 plan. The District reported that in collaboration with parents of students with disabilities, the District decided to re-route bus schedules to complete two drop-offs and/or two pick-ups for the same school on a given day. In the case of these "double runs," students arrive to school early or leave school late. The District explained that to accommodate these double runs, the school arranged for before and after school supervision of the students arriving early or leaving late.

The District further reported that in conjunction with the State of New Mexico's authorization for districts to use district-owned vehicles to transport students with disabilities for which drivers do not need a commercial driver's license, the District purchased five such vehicles and trained and employed an educational assistant to drive two students with special transportation needs to and from school using these District-owned vehicles. The District also reported that it is negotiating an agreement with its labor union to hire more staff/drivers for the same purpose. The District further reported that it is in the process of purchasing ten more vehicles to expand its ability to use these smaller vehicles to transport students with disabilities.

The District also reported that staff from the District's Exceptional Student District Support Department (ESDS) worked with school-based employees in their respective zones to identify and track students with transportation needs. The ESDS then shared that information with the District's executive leadership and transportation services through a real-time spreadsheet that details which students remained in need of special transportation. OCR also learned that in

spring 2022, the Associate Superintendent of Special Education (ASSE) created a task force that expanded in fall 2023 to include the ASSE, transportation department administrators, and ESDS staff. The task force meets at least once a month to address the immediate and long-term needs of students with disabilities who are not currently receiving transportation and develop long-term solutions for transporting students during the on-going driver shortage.

Allegation 1: The District failed to provide students with disabilities with the transportation services included in their IEP or Section 504 plan.

The District acknowledged that during the 2022-23 SY, the District denied FAPE to some students with disabilities who were entitled to transportation pursuant to their IEP and/or Section 504 Plan but who were not provided with transportation by the District. OCR's review identified approximately 428 students with disabilities who did not receive transportation services for at least one day at the beginning of the 2022-23 SY. The District reported that it is actively working to provide transportation services to approximately sixty students with disabilities who are still waiting to receive transportation. During our review, OCR learned that the average delay for transportation services for these students was one to three months.

The District asserted that since the start of the 2022-23 SY, it has worked with the family of each student who was impacted by the shortage of drivers to determine how to provide the student with transportation. However, the District reported that it has not conducted Section 504 or IEP meetings for every student with a disability that is entitled to transportation services to determine whether the student was denied FAPE and needed compensatory services or remedial measures. Through a review of school site spreadsheets, OCR identified 21 students with disabilities who are entitled to receive transportation services pursuant to an IEP or Section 504 Plan where teams determined that compensatory services were not required as a result of the bus driver shortage. OCR identified another 38 students out of the 428 students with disabilities, who were offered compensatory services due to the lack of transportation services that they were entitled to pursuant to their IEP or Section 504 Plan. The District described the compensatory or remedial services as parents agreeing to transport their student until the District could provide transportation services; providing students with remote work; no impact on grades or consequences for missed work; taking materials to student's homes; and providing virtual services.

OCR notes that the services that the District described as compensatory or remedial services appear to be service intended to mitigate the loss of ongoing instruction and not services intended to compensate students for a loss of FAPE or remedy a loss of FAPE. Therefore, the District would still need to determine whether these students require compensatory education or remedial services for any loss of FAPE due to a lack of transportation. For those students that the District reported were given remote work to compensate for the driver shortage, the District would need to determine whether the change to remote services was an IEP or Section 504 team decision or a unilateral change in placement in violation of Section 504. Thereby, requiring the District to assess whether the change in placement was appropriate and whether the students who were impacted by the change in placement require compensatory education or remedial services.

Allegation 2: The District modified IEPs and Section 504 Plans to accommodate the District's driver shortage.

During a review of the District spreadsheets for each school site, OCR identified twenty-two students who had their IEP or Section 504 plan modified during the 2022-23 SY. When OCR asked the District whether the student's plans were modified because of the driver shortage or whether the modification resulted in removal of transportation or some other change, the District's legal representative and ASSE stated that the District would need to review the IEPs and Section 504 Plans for those students to determine how many students were impacted and whether the modification of their plan was due to the bus driver shortage.

Allegation 3: The District shortened school days of students with disabilities to accommodate the driver shortage.

Similarly, during a review of the District's school site spreadsheets, OCR identified students who had a shortened school day due to the bus driver shortage. The District asserted that staff and administrators worked hard to offer remote services so that students would not have a shortened day. The ASSE stated that the District does not believe in shortening school days for any student, especially because of the bus driver shortage. The ASSE stated that if a student has a shortened day, the expectation is that the IEP team would meet to determine whether the day could be increased for a student. She stated that a shortened school day is not a day that the District supports for any reason, but if there is a shortened school day for any reason, then the IEP team meets regularly, approximately every four weeks, to work on a plan to lengthen the student's school day. The District reported that it would need to conduct a review of each student's IEP and Section 504 Plan to determine exactly how many students received a modified school day that shortened their in-person instruction because of transportation issues.

Allegation 4: The District's driver shortage denied students with disabilities FAPE when it caused those students to miss school due to a lack of transportation that resulted in a failure to implement their IEP and/or Section 504 Plan.

The District acknowledged that during the 2022-23 SY, some students with disabilities who were entitled to transportation pursuant to their IEP and/or Section 504 Plan missed at least one day of school due to the bus driver shortage. OCR's review of the school site spreadsheets identified approximately 282 students who missed at least one day of school to accommodate transportation driver routes, schedules, or availability due to the bus driver shortage. Based on this information, OCR determined that for at least one school day, the District failed to provide transportation services pursuant to an IEP or Section 504 Plans for approximately 282 students, which may have resulted in a denial of FAPE. The spreadsheets do not specify the number of school days that each student with a disability missed due to the shortage of bus drivers. The District maintains that it would need to conduct a review of each student's IEP and/or Section 504 plan to determine how many days of school that each student missed due to the bus driver shortage, to determine whether the missed school day(s) resulted in a denial of FAPE, and whether the student(s) is entitled compensatory services or remedial services due to the loss of FAPE.

Compliance Concern

The District reported that the bus driver shortage during the 2022-23 SY impacted all students who rely on transportation services to and from school. Based on this information, OCR has an additional concern that the bus driver shortage impacted students with disabilities who did not have transportation services in their IEP or Section 504 plan but rely on District transportation to get to and from school like their non-disabled peers. Therefore, the bus driver shortage may have caused these students to miss school days and educational services (e.g., speech therapy, occupational therapy, and etc.) that their IEP or Section 504 plans provided due to the bus driver shortage and resulted in a denial of FAPE. To address this concern, the District would need to conduct a review of the IEP or Section 504 Plan of each student with a disability who relies on District transportation services to access services pursuant to an IEP or Section Plan to determine whether those students missed days of school due to the bus driver shortage, whether the missed school day(s) resulted in a denial of FAPE, and whether the student is entitled compensatory services or remedial services due to the loss of FAPE.

Analysis and Conclusion

OCR found that due to the shortage of drivers, a denial of FAPE occurred when the District failed to provide transportation to students with disabilities who were entitled to transportation pursuant to their IEP and Section 504 plan. Additionally, based on OCR's findings, student's IEPs and Section 504 plans were modified, some student's school days were shortened, and some students missed school and special education or related services due to the bus driver shortage. OCR acknowledges that the District has convened a taskforce to overcome the bus driver shortage issue and taking active steps to prevent the driver shortage from reoccurring, as well as engaging in various discussions regarding compensatory services with some parents. However, the evidence reflects that the District did not convene an IEP or Section 504 team for each student to discuss whether the student was denied FAPE as a result of the District's transportation issues, and if so, to develop a plan to provide compensatory services or other remedial measures at District expense. Therefore, based upon a preponderance of evidence, OCR determined that although the District is addressing the on-going driver shortage, during the 2022-23 SY, some students with disabilities were denied FAPE when they did not receive transportation services that they were entitled to receive pursuant to their IEP and/or Section 504 Plan; had their IEP and/or Section 504 plan modified; had shortened school days; and missed at least one day of school and special education or related services, due to the driver shortage.

Upon being advised of the violation findings and compliance concerns, the District entered into a Resolution Agreement (Agreement) to resolve the matters. A signed copy of the Agreement is attached with this letter. When the Agreement is fully implemented, the issue will be resolved consistent with the requirements of Title VI and its implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. OCR 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. If the District fails to implement the Agreement, OCR will take appropriate action, as described in the Agreement.

This 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, stating that this case is closed.

This concludes OCR's investigation in this case 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. 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. Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Thank you for your cooperation in this matter. If you have any questions, please contact Rachel Phillips-Cox, the Senior Equal Opportunity Specialist assigned to this case, at 303-844-4559 or Rachel.phillips-cox@ed.gov.

Sincerely,

Daniel Contreras
Supervisory Attorney

Attachment: Resolution Agreement

cc (via email): Samantha Adams, District Legal Representative (sam@adamscrow.com)
Annitra Adler, Associate Superintendent for Special Education
(specialeddept@aps.edu)

w/o attachment:

Dr. Kurt Steinhaus, Secretary of Education, New Mexico Public Education
Department (kurt.steinhaus@state.nm.us)