



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION II

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VIRGIN ISLANDS

May 27, 2016

Rafael Roman Melendez  
Secretary of Education  
Puerto Rico Department of Education  
P. O. Box 190759  
San Juan, Puerto Rico 00919-0759

Re: Case No. 02-14-1062  
Puerto Rico Department of Education

Dear Secretary Melendez:

This is to advise you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the Puerto Rico Department of Education (PRDOE). The complainant alleged that the PRDOE discriminated against his son (the Student), on the basis of his disability, by failing to provide the Student with (a) adaptive physical education and (b) regular education integrated art classes, as prescribed by his Programa Educativo Individualizado (PEI)<sup>1</sup> during school year 2013-2014 (Allegation 1). Additionally, the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to appropriately reimburse the complainant for transporting the Student to and from his speech/language and occupational therapy sessions for school year 2013-2014 (Allegation 2). Further, the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide him with a pre-school disabled classroom at the XXXXXXXX School, as of January 14, 2014, that (a) provided the same amenities and services as his prior classroom, and (b) was of comparable quality to the classrooms provided to students without disabilities, (Allegation 3).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The PRDOE is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.33, requires recipients to provide a free, appropriate public education (FAPE) to each qualified individual with a disability who is in the recipient's jurisdiction. The provision of an appropriate education is the provision of regular or special education and related aids and services that are (i) designed to meet the individual educational needs of disabled students as adequately as the needs of non-disabled students are met; and (ii) based upon adherence to procedures that

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<sup>1</sup> An Individualized Education Program (IEP) is referred to as a PEI in Puerto Rico.

satisfy the evaluation and placement requirements of §§ 104.34, 104.35 and 104.36. The implementation of a PEI is one means of meeting this requirement.

In its investigation, OCR reviewed documentation that the complainant and the PRDOE submitted. OCR also conducted an onsite inspection of the classroom at the Judith A. Vivas School.

OCR determined that during school year 2013-2014, the Student was enrolled at the XXXXXXXXXX School (School 1) from August 2013 to January 2014; and at the XXXXXXXXXX School from January 2014 to May 2014 (School 2). OCR determined that the Student's PEI for school year 2013-2014 placed the Student in a special education class in regular education pre-school.

With respect to Allegation 1(a), the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide him with adaptive physical education as prescribed by his PEI during school year 2013-2014. The complainant asserted that the PRDOE failed to hire a new adaptive physical education teacher after the former teacher's contract was not renewed in May 2013. OCR determined that the Student's PEI for school year 2013-2014 required the PRDOE to provide the Student with adaptive physical education.

The PRDOE acknowledged that it did not provide an adaptive physical education teacher for the Student and other students at Schools 1 and 2 from in or around August 2013 through April 2014. The PRDOE informed OCR that it agreed to provide compensatory services to students, including the Student, in accordance with the specifications in their PEIs upon its hiring a new adaptive physical education therapist. The complainant acknowledged to OCR that as of April 10, 2014, the PRDOE began providing the Student with adaptive physical education therapies and with compensatory services pursuant to a Comité de Planificación y Ubicación (COMPU) meeting held on XXXXXXXX; however, the PRDOE did not provide any documentation establishing the frequency, duration, and/or dates of the adaptive physical education and compensatory services it provided the Student from in or around April 2014 through the end of school year 2013-2014. On May, 26, 2016, the PRDOE agreed to implement the enclosed resolution agreement, which addresses the compliance issues identified with respect to Allegation 1(a). OCR will monitor the implementation of the resolution agreement.

With respect to Allegation 1(b), the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide the Student with regular education integrated art classes, as prescribed by his PEI, during school year 2013-2014. OCR determined that the Student's PEI for school year 2013-2014 did not specify that the Student should receive art classes or services as related aids and/or services. Rather, the Student's PEI specified that the Student *could* participate with regular education students in the following activities and extracurriculars: art, music, dining, library, recess/playdays, and excursions.

OCR determined that for budgetary reasons, the PRDOE did not provide art classes or an art program for any of the students, non-disabled or disabled, at Schools 1 or 2; therefore, it was unable to integrate the Student with regular education students for art at School 1 from August 2013 to January 2014, or at School 2 from January 2014 to May 2014. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide the Student with regular education integrated art classes, as prescribed by his PEI, during school year 2013-2014. Accordingly, OCR will take no further action with regard to Allegation 1(b).

With respect to Allegation 2, the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to appropriately reimburse the complainant for transporting the Student to and from his speech/language and occupational therapy sessions at the rate established by the PRDOE headquarters

for school year 2013-2014.<sup>2</sup> The complainant acknowledged that the PRDOE reimbursed him at the rate established in a COMPU meeting, but asserted that a representative from the Puerto Rico Department of Public Works (DPW) informed him that the DPW's transportation database indicated that the PRDOE's reimbursement rates were based on public transportation routes that no longer exist in Ponce; there was no public vehicle that traveled the route from the Student's schools to the clinic where the Student received his therapies; and he should request reimbursement at the rate established for private car service.

OCR determined that the PRDOE's "Criteria for Eligibility for Transportation Services for Students with Disabilities" (Criteria for Eligibility) states that the decision about whether a student is eligible for the related service of transportation and the manner in which transportation is to be provided is determined by the COMPU during the meeting with the group of persons knowledgeable about the student's educational needs. PRDOE offers reimbursement of transportation costs via vouchers or public contractors. The Criteria for Eligibility further states that in determining eligibility for transportation and the method for providing such transportation, whether by parent voucher or private contractor, the COMPU should consider: (a) the need for transportation services; (b) the nature and severity of the disability; (c) the distances between the schools or centers of services and the student's home; (d) the public transportation available in the area, and (e) the capacity and availability of the parents to provide the necessary transportation. The need for transportation services will be considered when the COMPU is preparing the student's PEI. OCR determined that the PRDOE's policy for reimbursing parents for transportation, "Directives for Transportation of Special Education Students during school year 2013-2014" (Directives for Transportation), states that the daily rate to be paid to parents should be the rate established by the DPW as incorporated in the student's PEI. The Directives for Transportation further state that "under no circumstances will another rate be paid without written consultation with PRDOE's assistant secretary of special education services."

The PRDOE stated that in accordance with the PRODE's Criteria for Eligibility and Directives for Transportation, at a COMPU meeting held on XXXXXX, in which the complainant participated, the COMPU established a reimbursement rate for the complainant of XXXX total for daily transportation services to and from the Student's speech/language and occupational therapy sessions at a private clinic. The PRDOE further asserted that the agreed upon rate specified in the Student's PEI was the rate established by the DPW.

Based on the foregoing, OCR determined that the complainant's allegation amounts to a disagreement with the CSE regarding the appropriate rate of reimbursement for his transporting the Student to and from his speech/language and occupational therapy sessions during school year 2013-2014. It is OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons (such as the COMPU) convened for the purpose of determining the special education and related services to be provided in a student's educational program. Any disagreement between the complainant and the group should be addressed through a due process hearing. A due process hearing officer is empowered to review the appropriateness of an individualized education program developed by the group of knowledgeable persons. The complainant may exercise his right to due process by contacting the PRODE in writing. Accordingly, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3(a), the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide a pre-school disabled classroom at School 2 that provided the same services and amenities as the Student's classroom in School 1. The complainant asserted that beginning in

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<sup>2</sup> The complainant also alleged that the PRDOE paid him less than the public transportation route rate he was supposed to have received for school years 2011-2012 and 2012-2013; however, this allegation is untimely. OCR requires that complaints be filed within 180 days of the last alleged discriminatory act; and the complainant filed the instant complaint on November 25, 2013.

January 2014, the PRDOE transferred students from School 1 to School 2 because School 1 had structural deficiencies that made it unsafe. The complainant stated that at School 1, the students in the pre-school special education classroom, including the Student, were in a classroom with a bathroom, a shower, seemingly accessible toilets, a heating system and tiled floors (Classroom 1).<sup>3</sup> The complainant alleged that the principal of both schools was aware of the amenities in Classroom 1, and when the transfer to the pre-school disabled classroom at School 2 (Classroom 2) occurred, she did not prioritize to replicate these exact conditions in Classroom 2. The complainant asserted that Classroom 2 lacks an air conditioner and does not have a shower. The complainant further asserted that to use the shower, the pre-school students with disabilities had to walk 50-150 feet and use a shower shared by other students, which was difficult for the Student, who has xxxxxxxx. The complainant alleged that although Classroom 2 was more modern and larger than Classroom 1, it did not have the necessary amenities for the Student.

The Student's PEI, for school year 2013-2014, dated May 10, 2013, did not include any specifications or recommendations regarding the physical space of the Student's classroom. In particular, the PEI did not provide that the Student required a tile floor, air conditioning or an air purifier, or a bathroom and shower within the classroom. The complainant provided OCR with a letter dated XXXXXXXX, from the Student's XXXXXXXX addressed to School 2, stating that the Student required placement in a classroom with a tiled floor, an air conditioner, and an air purifier. The complainant informed OCR that he hand delivered the letter to the School 2 principal on or about February 24, 2015. The complainant stated that the principal accepted the letter but did not follow up with any actions to address the issues raised in the letter. OCR determined that the COMPU met on or about XXXXXXXXXX, and XXXXXXXXXX, to determine whether the Student required compensatory educational services and to develop a PEI for school year 2014-2015, respectively.

OCR determined that the meeting minutes and PEIs generated at those meetings do not reflect that the COMPU met in response to the principal of School 2's receiving the XXXX letter to determine whether these related aids/services were necessary for the Student; or that the complainant requested that the team discuss the XXXXXXXX recommendations. The complainant acknowledged that he did not raise the issue of the services recommended in the XXXXXXXX letter because the COMPU was focused on establishing the Student's placement at the appropriate school for the upcoming school year (2014-2015). OCR determined that the Student's PEI for school year 2014-2015 initially developed at the meeting on XXXXXXXXXXXX, also did not provide for any physical accommodations for the Student's classroom.

OCR visited Classroom 2 on May 27, 2014. OCR noted that Classroom 2, located on the first floor, was spacious, well equipped, had a bathroom with toilets and a changing area, and a smooth, slip resistant cement floor. OCR confirmed that neither Classroom 2 nor any other classroom in School 2 had air conditioning or a shower within the classrooms. Also, OCR confirmed that students needing to shower had to use the designated accessible bathroom on the first floor, where Classroom 2 was located. OCR noted that this designated accessible bathroom had several compliance concerns, which was addressed in a resolution agreement responsive to allegations in OCR Case No. 02-14-1010.

OCR determined that the complainant's request for modifications to Classroom 2, or for the Student's placement in a classroom with the specifications identified by the XXXXXXXX, constitutes a disagreement with the CSE about the Student's placement. As indicated above, OCR's policy is to refrain from determining the appropriateness of decisions made by a group of persons knowledgeable about the student's educational needs. A due process hearing officer is empowered to review the appropriateness of an individualized education program developed by the group of knowledgeable persons. The complainant may exercise his right to due

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<sup>3</sup> OCR did not visit School 1.

process by contacting the PRODE in writing. Accordingly, OCR will take no further action with respect to Allegation 3(a).

With respect to allegation 3(b), the complainant alleged that the PRODE discriminated against the Student, on the basis of his disability, by failing to provide, as of XXXXXXXXX, a pre-school disabled classroom at School 2 that was of comparable quality to the classrooms provided to students without disabilities at School 2. The complainant alleged that the pre-school disabled classroom had mold and feces in it, and lacked the air conditioning supplied to many of the regular education classrooms at School 2.

The PRDOE asserted that Classroom 2 was essentially in the same condition from the date that the students started class in XXXX until the date of OCR's site visit on May 27, 2014. As stated above, OCR noted that Classroom 2, located on the first floor, was spacious, well-equipped, had a bathroom containing toilets and a changing area, and a smooth, slip-resistant cement floor. OCR confirmed that neither Classroom 2 nor any other classroom in School 2 had air conditioning or a shower within the classroom. Also, OCR confirmed that students needing to shower had to use the designated accessible bathroom on the first floor, where Classroom 2 was located. The complainant provided pictures of Classroom 2 that showed droppings on the floor, which the complainant alleged were from rodents. OCR determined, however, that the complainant visited School 2 prior to the PRDOE's cleaning it and preparing it for students to attend.<sup>4</sup> OCR's inspection did not uncover disparities between the quality of Classroom 2 and the general education classrooms at School 2.

Based on the above, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the PRDOE discriminated against the Student, on the basis of his disability, by placing him in Classroom 2. OCR determined that Classroom 2 provided equal or better equipment, space and toileting facilities than the majority of the classrooms for students in the regular education program. Accordingly, OCR will take no further action with respect to Allegation 3(b).

This letter should not be interpreted to address the PRDOE'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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the PRDOE may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant 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, it 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.

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<sup>4</sup> The pictures provided to OCR show that Classroom 2 was not yet set up as a classroom, and lacked any furniture.

If you have any questions, please contact Genara C. Necos, Compliance Team Attorney, at (646) 428-3828 or [genara.necos@ed.gov](mailto:genara.necos@ed.gov); or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).

Sincerely,

/s/

Timothy C J Blanchard

Encl.

cc: XXXXX.