



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

March 14, 2017

Executive Director Tim Thiery
Estancia Valley Classical Academy
P.O. Box 2340
Moriarty, New Mexico 87035

Re: **Estancia Valley Classical Academy**
OCR Case Number: **08-16-1123**

Dear Mr. Thiery:

On January 12, 2016, the United States Department of Education's Office for Civil Rights received a complaint alleging Estancia Valley Classical Academy (Academy) discriminated against three of the Complainant's children on the basis of disability.

The issues that OCR investigated were:

1. Whether the Academy engaged in different treatment when it prohibited Student #1 from participating in a flag ceremony because of his disability;
2. Whether the Academy failed to respond to reports of disability harassment against Student #2;
3. Whether the Academy subjected Student #2 to inappropriate restraint;
4. Whether the Academy failed to provide Student #2 with a FAPE by failing to evaluate him in a timely manner;
5. Whether the Academy has identified and provided notice of a Section 504 coordinator;
6. Whether the Academy failed to provide Student #3 with a FAPE by failing to reevaluate him in a timely manner; and
7. Whether the Academy properly maintains Section 504 policies and procedures.

We are responsible for Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 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 Academy is subject to these laws and regulations.

Discrimination on the Basis of Disability

1. Academy forbade Student #1 from participating in a flag ceremony because of his disability:

Student #1 had an IEP while he was enrolled in the Academy. The Complainant alleges that the Academy forbade him from attending the flag ceremony because of his disability (multiple emotional disabilities). She states that the Academy told her that students are expected to be still during the ceremony, and Student #1 could not do this due to his disability. She alleges that Academy staff prevented him from attending the ceremony or asked her to keep him from the ceremony because of his behavior; meanwhile non-disabled students who could not stand still were allowed to attend. She told OCR that Student #1 eventually stopped trying to attend the flag ceremony of his own accord.

The Academy states that Student #1 was never prohibited from attending the flag ceremony. The Academy acknowledges that he did not attend on occasion, but that he was given the option to attend, but he chose not to participate. The Academy stated that they would present the option not to attend if Student #1 seemed agitated and preferred to use the time during the ceremony as a moment of quiet reflection. The Academy stated that Student #1 was always presented with the choice to participate in the flag ceremony and was not prohibited from participating.

The data that OCR reviewed also indicated that the Complainant's other two children with behavioral disabilities were allowed to attend the flag ceremony.

Under the Section 504 regulations, at 34 C.F.R. §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 which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. §104.4(b)(1) and 28 C.F.R. §35.130(b)(1) a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than non-disabled individuals under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school district's actions were based on the individual's disability.

The factual accounts provided by the Complainant and the Academy differed significantly, and OCR's investigation did not reveal any evidence that could corroborate either account. However, in examining an allegation of disparate treatment on the basis of disability, OCR ultimately considers whether the Student #1 was treated differently because of his disability. While it is undisputed that Student #1 did not attend some flag ceremonies, there was insufficient evidence to indicate that he was singled out in a discriminatory manner because of his disability. Notably, other disabled students – with similar disabilities – were permitted to participate in the flag ceremony. As such, OCR could not conclude that the Academy was treating Student #1

different because of his disability. Consequently, OCR is closing our investigation of this complaint allegation effective the date of this letter.

2. The Academy failed to respond to reports of harassment against Student #2 based on his disability:

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. School districts are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

School districts provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the school district is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the district is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The district must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In addition, the Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. §104.8 and 28 C.F.R. §35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. §104.7[b] and 28 C.F.R. §35.107[b]). The regulations also require that recipients/public entities designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. §104.7[a] and 28 C.F.R. §35.107[a]).

The Complainant told OCR that an aide grabbed Student #2 by the shirt collar. The Academy confirmed that there was a single incident in which an aide grabbed the Student's shirt collar to remove him from a doorway, but the Academy did not construe the Complainant's report about this incident as a complaint of harassment. OCR's investigation found no indication that this incident was connected to the Student's disability, that the aide targeted the Student because of his disability, or even that the Complainant reported the incident as disability harassment to the Academy. Without evidence to indicate that the Academy knew or should have known that this

incident had a nexus to disability discrimination, OCR could not conclude that the Academy failed to respond appropriately to a report of disability harassment. Consequently, OCR is closing our investigation of this complaint allegation effective the date of this letter.

3. The Academy subjected Student #2 to inappropriate restraint:

The Complainant told OCR that Student #2 told his therapist that his aide restrained him sometime in late 2015. The Academy stated that they were unaware of any incident or allegation that Student #2 was subjected to inappropriate restraint. In order to investigate this allegation, on October 21, 2016, OCR emailed the Complainant to request further information about this allegation, including the date of the alleged restraint incident, whether the Complainant reported it to the Academy, to whom she reported the alleged incident, and the Academy's response. As of the date of this letter, the Complainant has not provided sufficient answers to our questions that would allow OCR to investigate this allegation further.

Under Section 110(f) of the CPM, OCR will close a complaint if we determine that our ability to complete the investigation is substantially impaired by the complainant's refusal to provide information that is reasonably accessible to the complainant and is necessary for investigation of the complaint. The Complainant has not provided sufficient information for OCR to be able to fully investigate this complaint. Consequently, we are closing this complaint allegation as of the date of this letter.

4. Failure to properly identify a Section 504 Coordinator:

The Section 504 regulations, at 34 C.F.R. §104.7(a), require a recipient that employs 15 or more persons to designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under Section 504. The Title II regulations, at 28 C.F.R. §35.107(a), contain a similar requirement for public entities that employ 50 or more persons to designate a compliance coordinator. The Section 504 regulations, at 34 C.F.R. §104.8, require a recipient to provide notice of the identity of the individual responsible for coordinating compliance with Section 504.

During the course of OCR's investigation, OCR found that the Academy does not properly identify the employee(s) responsible for coordinating its efforts to comply with Section 504 as provided for in 34 C.F.R. §104.8. Correspondingly, OCR found the Academy in violation of this provision of Section 504 and OCR and the Academy negotiated terms in the Agreement to address the noncompliance.

During the investigation of this complaint, before OCR had sufficient evidence to make findings, the Academy informed OCR that it wished to resolve the remainder of the Complainant's allegations. Pursuant to Section 302 of our *Case Processing Manual*, a complaint allegation may be resolved when, before the conclusion of an investigation, a recipient agrees to resolve the allegation and OCR has determined that the allegation is appropriate for resolution during the investigation. OCR has not completed its investigation and does not yet have sufficient facts to reach a finding of compliance or non-compliance. Therefore, OCR has determined that the Complainant's allegations described below are appropriate for a Section 302 Agreement, and the Academy signed an Agreement which, when fully implemented, will resolve these allegations. OCR will monitor the implementation of the Agreement until all terms are fulfilled. A brief

summary of the remaining allegations and OCR's investigation, to date, of those allegations follows:

5. The Academy failed to provide Student #2 a free appropriate education (FAPE) by failing to evaluate him in a timely manner:

The Section 504 regulations, at 34 C.F.R. §104.33, require public 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 non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the 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 §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Student #2 enrolled at the Academy in August 2014. The Complainant stated that she asked the Academy to evaluate him for a potential disability since his enrollment. She states that the Academy has refused to evaluate him without convening a Section 504 or an IEP team to make that decision. The Academy told OCR that they had no notice that Student #2 needed an evaluation until the Complainant requested an evaluation on February 22, 2016, and it conducted an evaluation and put the student on an IEP shortly thereafter. OCR's investigation, to date, was not complete, and OCR had not determined whether the Academy had failed to evaluate Student #2 from August 2014 through February 2016. However, the Academy has agreed to conduct another IEP meeting to determine if compensatory education is appropriate, in order to resolve any potential violations of Section 504.

6. The Academy failed to provide Student #3 a FAPE by failing to reevaluate him in a timely manner:

Student #3 enrolled at the Academy in August 2014. The Complainant alleged that she asked the Academy to reevaluate him since that time but they refused. The Academy told OCR that the Complainant only requested an evaluation of Student #3 on February 22, 2016, and it conducted an evaluation and put the student on an IEP shortly thereafter. OCR's investigation, to date, was not complete, and OCR had not determined whether the Academy had failed to reevaluate Student #3 from August 2014 through February 2016. However, the Academy has agreed to conduct another IEP meeting to determine if compensatory education is appropriate, in order to resolve any potential violations of Section 504.

7. The Academy does not have Section 504 policies and procedures, instead relying on the State of New Mexico guidelines:

The Section 504 regulations, at 34 C.F.R. §104.33, require public 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 non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.36 of the regulations requires that school districts have a system of procedural safeguards with respect to any action taken by the district regarding the identification, evaluation or placement of the student. Such safeguards must include notice of the action, an opportunity to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.

During the course of the investigation, it was discovered that the Academy does not have its own written Section 504 policies and procedures that ensure procedural safeguards are provided under Section 504. The Academy relies solely on the State of New Mexico guidelines on Section 504. The Academy voluntarily agreed to adopt and implement its own policies and procedures to provide better compliance with Section 504 going forward.

Conclusion

As noted above, OCR will actively monitor the Academy's implementation of the Agreement until the Academy fulfills the terms of the Agreement and is in compliance with the statutes and regulations at issue in this case. If the Academy fails to implement the Agreement as specified, OCR may initiate administrative or judicial proceedings as described in the Agreement or resume its investigation of the initial allegation. A copy of the Agreement is enclosed.

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.

Please be advised that the Academy 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. In addition, the Complainant may have the right to file a private suit in Federal court, regardless of whether 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. If OCR receives such a request, we will protect personal information to the extent provided by law.

If you have any questions, you may contact XXXX, the equal opportunity specialist assigned to this case, at (303) 844-XXXX or by email at XXXX@ed.gov.

Sincerely,

/s/

Stephen Chen
Program Manager

Enclosure: Signed Resolution Agreement

CC (without enclosure): Honorable Hanna Skandera, Secretary of Education