

May 14, 2019

Eligio Hernández Pérez  
Interim Secretary of Education  
Puerto Rico Department of Education  
P.O. Box 190759  
San Juan, Puerto Rico 00919-0759

Re: Case No. 02-15-1027  
Puerto Rico Department of Education

Dear Interim Secretary Hernández Pérez:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Puerto Rico Department of Education (the PRDOE). The complainant alleged that the PRDOE discriminates on the basis of disability, because the PRDOE's Escuela Especializada Central de Artes Visuales (the Escuela) is inaccessible to individuals with disabilities because there is no accessible entrance to the school building (Allegation 1) and the elevator providing access to upper floors is inoperable (Allegation 2). The complainant further alleged that the PRDOE discriminated on the basis of disability, or in the alternative retaliated after he complained that the Escuela was inaccessible, by charging parents a fee in order to hold his son's (the Student's) XXXXXX school graduation ceremony offsite at a XXXXXXXXXXXX accessible facility, on or about June 1, XXXX (Allegation 3). The complainant also alleged that the PRDOE failed to address that students from the Escuela subjected the Student to retaliatory harassment, in or around June XXXX, because their parents were charged a fee for renting the XXXXXXXXXXXX accessible facility for the XXXXXX school graduation ceremony (Allegation 4).

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 (the Department). 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 educational system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In its investigation, OCR reviewed documentation that the PRDOE and the complainant submitted. OCR also interviewed the complainant and conducted an on-site inspection of the Escuela facilities. The complainant advised OCR that he is XXXXXXXXXXXXXXXXXXXX and uses a XXXXXXXXXXXX.

**Allegation 1**

The complainant alleged that the PRDOE discriminates on the basis of disability, because there is no accessible entrance to the Escuela’s main school building. Specifically, the complainant stated that the main entrance to the Escuela has stairs and no ramp. The complainant stated that because the Escuela’s main school building has no accessible entrance, XXX XXXXXXXXX with Escuela staff have been held in alternate locations such as the physical education classroom located in the basement of the Escuela in the gymnasium; the cafeteria building; the basketball court within the covered courtyard; or, the school yard. The complainant asserted that even these alternative locations are not fully accessible.

The complainant acknowledged that XX XXX enter the back entrance of the main building, which is accessed via a covered courtyard designated by the Escuela floorplan as the “Cancha Bajo Techo.” The courtyard contains an outdoor basketball court and is attached to a parking lot. The complainant asserted that the floor inside the covered courtyard is made of wood which is somewhat uneven due to cracks in the floorboards. The complainant asserted that XX XXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX the covered courtyard due to the cracks in the floorboard which must be XXXXXXXX XXX XX XXX. The complainant further stated that the door to the covered courtyard involves two parts; a wooden door which does not have a handle, and an iron security door. The complainant stated that XX XXXXXXX XXXXXX the covered courtyard XX XXXXXXXX due to the lack of a door handle, the weight of the door, and the two components of the door. The complainant stated that the door is sometimes left open and sometimes closed completely. If the door is closed, the complainant stated that XX XXXX XXXX until he finds a passing school employee, student, or visitor to open the door XXX XXX. The complainant stated that there is no buzzer or similar means of communication that XXX XXXXXXXXXXXX XXXXXX XXX to contact the Escuela personnel; however, the complainant acknowledged that if XX XX XXXXXXXXXXXX a scheduled meeting at the Escuela, the Director of the Escuela ensures that the door is opened XXX XXX. The complainant further stated that via a ramp from the courtyard, XX XXX access the physical education classroom, which is located within the basement of the Escuela. The complainant stated that there is also a ramp to the cafeteria that is in good condition; however, XX XXXXXXXXXXXX XXXXXXXXXXXX to enter the cafeteria because the route between the ramp and the door to the cafeteria building is not well paved. Additionally, the complainant

informed OCR that XX XX XXXXXX to open the cafeteria door XX XXXXXXXX because the entryway involves two doors; a wooden door and a metal security door similar to the doorway to the covered courtyard.

OCR determined that the Escuela, also known and commonly referred to as Central High, was built in 1923 and is a cultural and historic landmark that is included in the United States Park Service's National Register of Historic Places. As a result, the Escuela is placed under special rules under Puerto Rico's building construction and land use regulations.

The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies. The ADA includes a similar requirement for public entities at 28 C.F.R. § 35.149.

The regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities built prior to June 3, 1977, as "existing facilities." Under the regulation implementing the ADA, at 28 C.F.R. § 35.150, an existing facility includes facilities that were constructed, or for which construction was commenced, prior to January 26, 1992, the effective date of the regulation implementing the ADA. Accordingly, OCR determined the Escuela is an existing facility under Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.22, requires a recipient to operate each program or activity conducted in existing facilities so that the program or activity, when viewed in its entirety, is readily accessible to individuals with disabilities. The ADA includes a similar requirement for public entities at 28 C.F.R. § 35.150. Accordingly, each program or activity operated in the Escuela, when viewed in its entirety, must be readily accessible to individuals with disabilities. The regulations implementing Section 504 and the ADA do not require a recipient to make structural changes to existing facilities. A recipient may comply through means such as redesign of equipment, or reassignment of classes or other services to accessible buildings or locations. Where programs or activities cannot or will not be made accessible using alternative methods, structural changes may be required in order for recipients to comply. In such a case, the regulation implementing Section 504, at 34 C.F.R. § 104.23, would apply with regard to the accessibility standards applicable to the structural changes and alterations. Additionally, the regulation implementing the ADA, at 28 C.F.R. § 35.150, states that the regulation does not require a public entity to take any action that would threaten or destroy the historic significance of an historic property. The regulation implementing the ADA, at 28 C.F.R. § 35.151(d), states that alterations to historic properties shall comply to the maximum extent feasible with the applicable accessibility standards.

OCR determined that the Escuela is located on a hill; consequently, the front entrance sits above ground and has a set of stairs. Therefore, the front entrance is not an accessible entrance; however, Escuela staff informed OCR staff present at the on-site visit that the Escuela does not currently use the front entrance. Rather, students enter the building through a back entrance that leads to the basement. Specifically, students enter the building into the basement, through a large enclosed courtyard, which opens to a parking lot; and, the entrance from the courtyard to the building is

level with the ground. Accordingly, the back entrance does not require navigating stairs or the use of a ramp.<sup>1</sup> Escuela personnel informed OCR, during the on-site inspection, that persons with mobility impairments who are visiting the Escuela are provided with access to programs and activities in the covered courtyard; the gymnasium, which is located in the covered courtyard; or, in the cafeteria.<sup>2</sup>

OCR staff determined that the covered courtyard is level to the ground and does not require the navigation of stairs. OCR measured the entrance to the gymnasium in the covered courtyard, which is level with the ground and was more than 32 inches wide; however, OCR noted that the hardware on the door to the covered courtyard/gymnasium requires twisting and grasping.

OCR inspected the ramp that leads to the cafeteria from the outside courtyard and determined that it was compliant with the 2010 ADA Standards for Accessible Design (2010 ADA Standards); however, the hardware on the door to the entrance of the cafeteria required twisting and grasping. The Principal stated that on occasions when a XXXXXXXXXXXX XXXX had a scheduled meeting, the door would be held open. OCR determined that the door is 42 inches wide. OCR also determined that the ground surface on the route leading to the ramp in the courtyard is not well paved.

Based on the foregoing, OCR determined that the Escuela's main entrance is inaccessible; however, the Escuela has a means to ensure that each program and activity conducted in the Escuela, when viewed in its entirety, is readily accessible to individuals with disabilities. Specifically, the Escuela can make these programs and activities available in the outdoor covered courtyard; the gymnasium located in the covered courtyard; or the cafeteria, located inside the Escuela. OCR determined that the outdoor covered courtyard and the gymnasium located therein are readily accessible to individuals with disabilities, as these are level to the ground; however, the hardware on the door to the covered courtyard/gymnasium requires twisting and grasping. Entrance to the cafeteria requires the use of a ramp, but the ramp is compliant with accessibility standards. OCR noted an issue with respect to the ground surface on the route leading to the ramp from the courtyard to the cafeteria, and the hardware on the door to the cafeteria.

On May 9, 2019, the PRDOE agreed to implement the enclosed resolution agreement, which addresses the compliance issues identified above regarding the door to the covered courtyard/gymnasium; the ground surface to the ramp leading to the cafeteria; and, the door to the cafeteria. OCR will monitor the implementation of the resolution agreement.

## **Allegation 2**

With respect to Allegation 2, the complainant alleged that the Escuela is inaccessible to individuals with mobility impairments because the elevator, which would provide access from the ground level

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<sup>1</sup> A stairway to the first floor from the outdoor courtyard provides another entrance to the building; however, since it requires navigating a set of stairs, this entrance is not accessible.

<sup>2</sup> OCR determined that prior to school year 2014-2015, meetings were also held in the physical education classrooms in the basement of the Escuela. Escuela personnel informed OCR that visitors could enter the basement of the Escuela via an outdoor ramp along the side of the covered courtyard; however, because this area of the Escuela campus is susceptible to flooding, the Escuela no longer uses this ramp.

to the first floor and upper floors is inoperable. The complainant stated if the elevator was repaired, XX XXXXX XXXX XXXXXX to all of the programs and activities in the main building. He stated that there are annual art exhibits throughout the building that XX XXXXXX view because of the lack of access. Additionally, the complainant stated that XX is XXXXXX to visit the Student's classrooms on the upper floors.

OCR confirmed that the elevator was inoperable. The Principal stated that the elevator was installed around 2002, and that it functioned for a short period of time since it was first installed. The regulation implementing Section 504, at 34 C.F.R. § 104.23, requires that all buildings constructed or alterations to existing facilities made after January 18, 1991, must be in compliance with the Uniform Federal Accessibility Standards (UFAS), or it must be clearly evident that equivalent access is provided to meet the requirements of Section 504, such as through compliance with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). Pursuant to the regulation implementing the ADA, at 28 C.F.R. § 35.151, new construction or alteration of existing facilities commenced after January 26, 1992, must be in conformance with UFAS, ADAAG, or equivalent standards.<sup>3</sup> Accordingly, OCR determined that the elevator is new construction, as defined by Section 504 and the ADA, and it must comply with UFAS, ADAAG, or equivalent standards.

The Principal informed OCR staff during the on-site visit, that the Escuela could not relocate classrooms on the upper floors of the building to accessible locations because “the School’s space is completely taken up with instructional needs.” The Principal additionally asserted that because the Escuela is a visual arts school, several of the classrooms have furniture that cannot be relocated. Counsel for PRDOE confirmed that art exhibits are held throughout all of the floors of the Escuela. The Principal further stated that, in the past, when a student was XXXXXX to XXXXX XXXXXX to upper level classrooms due to a medical impairment, school staff XXXXXXXXXXXX XXXXXXXX the student XX the XXXXXXX. Eventually this student was XXXXXX on XXXX XXXXXXXXXXXXXXX. A XXXX XXXX teacher had also previously been XXXXXXXXXXXX XXXXXXXX XX the XXXXXXX to upper level classrooms before being provided with a first floor classroom.

On November 7, 2016, the PRDOE provided documentation to OCR indicating that it had repaired the elevator in October 2016; and, on October 12, 2016, the elevator passed an inspection completed by the Administración de Seguridad y Salud Ocupacional de Puerto Rico (Administration of Occupational Safety and Health). PRDOE stated that the Administration of Occupational Safety and Health determined that the elevator met the operating requirements of the Guía para Inspección de Ascensores y Escalares Mecánicas (Inspection Guide for Elevators and Escalators) and ADAAG.

On December 5, 2016, the complainant confirmed that the elevator was functional and provided access to the upper floors of the Escuela; however, on January 11, 2017, the complainant informed OCR that the elevator was no longer functional. In addition, on May 12, 2017, the complainant provided a video to OCR in which XX XXX XXXXXXXX into the Escuela in order to attend an

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<sup>3</sup> Additionally, in accordance with 28 C.F.R. § 32.133, “public entities shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities.”

event because the elevator was not functioning. PRDOE confirmed that the elevator at the Escuela was not functional as of March 2019.

On May 9, 2019, the PRDOE agreed to implement the enclosed resolution agreement, which addresses the accessibility of the interior of the main building by repairing or installing a new elevator. OCR will monitor the implementation of the resolution agreement.

### **Allegation 3**

The complainant alleged that the Escuela discriminated on the basis of his disability, or in the alternative retaliated after he complained that the Escuela was inaccessible, by charging parents a fee in order to hold the Student's XXXXXX school graduation ceremony offsite at a XXXXXXXXXXXX accessible facility, on or about June 1, XXXX. The complainant alleged that the Escuela changed the location of the XXXXXX school's graduation ceremony after the complainant threatened to take legal action if the ceremony was not held in an accessible location. According to the complainant, because the Escuela changed the location of the XXXXXX school's graduation ceremony to an accessible location near the Escuela, an \$800.00 fee was charged to the complainant and other parents.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

OCR determined that the complainant engaged in protected activity by writing a letter to the Puerto Rico Secretary of Education on February 13, XXXX, complaining that the site for graduation ceremony was inaccessible. The PRDOE asserted that the costs associated with the graduation ceremony were determined between September and December XXXX, prior to the complainant's complaint about the location for the graduation ceremony. Therefore, the PRDOE asserted that any increase in cost from prior years was not influenced by the decision to hold the ceremony in an accessible location.

PRDOE provided documentation to OCR regarding the fees assessed to parents of XXXX grade students participating in the graduation ceremony. OCR determined that letters dated September 15, XXXX, October 10, XXXX, and December 9, XXXX, were sent from the Escuela's Parent Committee to parents/guardians of students graduating from the XXXXX grade in June XXXX. The letters state that the total fee of \$275 covered the cost of the junior prom, graduation fee, graduation robe, and awards. Accordingly, OCR determined that the alleged adverse action occurred before the complainant's protected activity. Absent evidence of a causal connection between the adverse action and protected activity, a prima facie case of retaliation cannot be established; and, OCR does not proceed further with retaliation analysis.

Further, OCR determined that the same fee was charged to parents of both disabled and non-disabled students. During its investigation, OCR contacted the complainant for additional information regarding his allegation that the charging of the fee resulted in disability discrimination; however, the complainant was unable to provide documentation supporting this allegation.

Based on the above, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the Escuela discriminated on the basis of disability, by charging the complainant and other parents a fee in order to hold the Student's XXXXXX school graduation ceremony offsite at a XXXXXXXXXXXX accessible facility, on or about June 1, XXXX. Accordingly, OCR will take no further action with regard to Allegation 3.

#### **Allegation 4**

The complainant alleged that the PRDOE failed to address that students from the Escuela subjected the Student to retaliatory harassment in or around June XXXX, because their parents were charged a fee for renting the XXXXXXXXXXXX accessible facility for the XXXXXX school graduation ceremony. The complainant stated that because the graduation location was moved to an accessible facility to accommodate XXX XXXXXXXXXXXX, the additional fee was imposed; and as a result, students harassed the Student.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. 35.130(a), contains a similar provision. Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or, conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the recipient's program. If OCR determines that harassing conduct occurred, and that the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to determine whether a hostile environment existed and whether the recipient took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and, as appropriate, remedy its effects.

Counsel informed OCR that the Escuela did not have actual or constructive notice that the Student was subjected to harassment. During the course of the investigation, the complainant acknowledged that he did not inform Escuela personnel that the Student was harassed because the Student did not want him to report it.

Based on the above, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the PRDOE failed to address that students from the Escuela subjected the Student to retaliatory harassment in or around June XXXX, because their parents were charged a fee for renting the XXXXXXXXXXXX accessible facility for the XXXXXX school graduation ceremony. Accordingly, OCR will take no further action with respect to Allegation 4.

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 individual may file a 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 that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

The complainant has a right to appeal OCR's determination with regarding Allegations 3 and 4 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied; and, how correction of any error(s) would change the outcome of the case. Failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit, to OCR, a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

If you have any questions regarding OCR's determination, please contact Joy M. Purcell, Senior Compliance Team Attorney, at (646) 428-3766 or [joy.purcell@ed.gov](mailto:joy.purcell@ed.gov); Tracey Beers, Senior Compliance Team Attorney, at (646) 428-3804 or [tracey.beers@ed.gov](mailto:tracey.beers@ed.gov); or Félice Bowen, Compliance Team Leader, at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Sincerely,

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXX XXXXXXXXX, Esq.