



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

32 OLD SLIP, 26th FLOOR
NEW YORK, NY 10005-2500

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NEW YORK
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October 15, 2015

Rafael Román Meléndez
Secretary of Education
Puerto Rico Department of Education
P.O. Box 190759
San Juan, Puerto Rico 00919

Re: Case No. 02-15-1228
Puerto Rico Department of Education

Dear Secretary Román Meléndez:

This letter is to notify you of the determination made by the U. S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against the Puerto Rico Department of Education (the PRDOE). The complainant alleged that the PRDOE discriminated against her son (the Student), on the basis of his disability, by failing to provide the Student with an individual, full-time dedicated aide (or services assistant), as prescribed by his individualized education program (IEP) for school year 2014-2015 (Allegation 1). The complainant also alleged that the XXXXXX District Facilitator for Special Education (Facilitator 1)¹ retaliated for the complainant's previous disability-related advocacy on behalf of the Student, by instructing the Student's substitute dedicated aide not to assist the Student during a trip to the bathroom on or about February 25, 2015 (Allegation 2); and filing a civil complaint in a local court in or around February 2015, in which she allegedly falsely accused the complainant of stalking (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

¹ The complainant referred to this individual as the "Special Education Supervisor" in her complaint.

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 (the 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. § 104.61, 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 information and documentation that the complainant and the PRDOE provided. OCR also interviewed the complainant. OCR made the following determinations.

During school year 2014-2015, the Student was enrolled in first grade at the XXXXXXXX XXXXX School (the School) in PRDOE's XXXXXXXX District; and was eligible for special education and related aids and services based on the classification of XXXXX. The Student's IEP for school year 2014-2015 provided for special education and related aids and services such as specialized instruction in general education and resource room settings; speech-language therapy; occupational therapy; psychological therapy; and several testing accommodations, including the use of a dedicated aide during testing.

With respect to Allegation 1, the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, by failing to provide the Student with an individual, full-time dedicated services assistant, as prescribed by his IEP for school year 2014-2015. Specifically, the complainant asserted that during school year 2014-2015, the PRDOE required the Student to share his services assistant (Services Assistant 1) with another student during lunch time; and, for approximately three weeks in February 2015, the Student did not have a services assistant.

The Student's IEP for school year 2014-2015 does not state that the Student would be provided with a services assistant; however, OCR determined that during a meeting convened on May 14, 2014, the Committee on Special Education (COMPU) concluded that for school year 2014-2015,

the Student would be assigned a services assistant to assist him in the general education classroom, cafeteria, bathroom, school patio, and with assignments in the resource room.²

The complainant asserted that Services Assistant 1 was supposed to work with the Student exclusively; citing an employment contract for Services Assistant 1 that included only the Student's name. The complainant asserted that in a previous school year, when the Student shared an assistant with another student, the contract included the Student's name along with the name of the other student.

Services Assistant 1 acknowledged simultaneously providing assistance to another student during the Student's lunch period throughout school year 2014-2015. The documentation the PRDOE submitted to OCR does not indicate whether the services assistant who was assigned to the Student was permitted to assist other students while assisting the Student.

Further, the PRDOE acknowledged that the Student was not provided with a full-time services assistant for approximately three weeks during school year 2014-2015. PRDOE stated that Services Assistant 1 abruptly resigned to accept a teaching position on or about February 6, 2015. On March 2, 2015, a new services assistant was assigned to the Student who served in that role through the end of school year 2014-2015, and provided the Student with the requisite services. However, between February 6, 2015, and March 2, 2015, the School's Director assigned a series of temporary services assistants for the limited purpose of assisting the Student with going to the bathroom. The information the PRDOE provided did not substantiate that the temporary services assistants provided the Student with the other services that the COMPU had determined necessary; namely, assisting the Student in the general education classroom, cafeteria, school patio, and with assignments in the resource room.

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

Based on the above, OCR determined that between February 6, 2015, and March 2, 2015, the PRDOE failed to provide the Student with a services assistant who could provide all of the services deemed necessary by the COMPU to meet the student's individual educational needs as adequately as the needs for non-disabled students are met. Accordingly, OCR determined that the PRDOE failed to provide the Student with a free appropriate public education; and therefore, is not in compliance with the regulations implementing Section 504, at 34 C.F.R. § 104.33(a).

With respect to Allegation 2, the complainant alleged that Facilitator 1 retaliated for the complainant's previous disability-related advocacy on behalf of the Student, by instructing the Student's temporary services assistant (Services Assistant 2) not to assist the Student during a trip to the bathroom on or about February 25, 2015. In analyzing whether retaliation occurred,

² According to the meeting notes from that date, the COMPU agreed to request the assignment of a services assistant, and developed a services assistant plan. In addition, PRDOE provided documentation of the request and the plan for the Student's services assistant.

OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant/alleged injured party suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in protected activity between March 2012 and February 2015 when she advocated on behalf of the Student at IEP meetings. The complainant also engaged in a protected activity when she filed an administrative complaint with the legal division of PRDOE in August 2013, alleging that Facilitator 1 had discriminated against the Student by denying him special education services. OCR determined that Facilitator 1 was aware of the complainant's protected activities.

Documentation the PRDOE provided indicated that the Director of the School designated Services Assistant 2 as the first in a series of temporary services assistants assigned to assist the Student in using the bathroom during the school day. Services Assistant 2 was simultaneously assigned as a full-time services assistant for another student at the School. OCR determined that on February 25, 2015, Facilitator 1 instructed Services Assistant 2 to stop assisting the Student with using the bathroom.

With respect to Allegation 3, the complainant alleged that in retaliation for her previous disability-related advocacy on behalf of the Student, Facilitator 1 filed a civil complaint in a local court in or around February 2015, in which she falsely accused the complainant of allegedly stalking her. Based on documentation the PRDOE provided, OCR determined that Facilitator 1 filed a civil complaint in a local court on or about February 27, 2015, accusing the complainant of allegedly stalking her and seeking a temporary protective order against the complainant. OCR determined that on the same day, the complainant filed a similar complaint against Facilitator 1, accusing Facilitator 1 of "institutional abuse." Documentation that the PRDOE provided to OCR indicates that after Facilitator 1 informed her superiors at PRDOE of the civil action on or about March 4, 2015, and the Student was removed from Facilitator 1's caseload and assigned to the caseload of Facilitator 2.

On October 14, 2015, the PRDOE agreed to resolve the compliance concern identified with respect to Allegation 1. Also on October 14, 2015, the PRDOE voluntarily agreed to resolve Allegations 2 and 3 without further investigation. OCR will monitor implementation of the resolution agreement. If the PRDOE fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This letter should not be interpreted to address 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 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.

If you have any questions regarding OCR's determination, please contact Joy M. Purcell, Compliance Team Attorney, at (646) 428-3766 or joy.purcell@ed.gov; or Felice Bowen, Compliance Team Leader at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

/s/

Timothy C.J. Blanchard

Encl.

Cc: XXXXXXXX XXXXXXXX, Esq.