

February 7, 2017

Julia Keleher
Secretary of Education
Puerto Rico Department of Education
P. O. Box 190759
San Juan, Puerto Rico 00919-0759

Re: Case No. 02-16-1516
Puerto Rico Department of Education

Dear Secretary Keleher:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR) in the above-referenced complaint filed against the Puerto Rico Department of Education (PRDOE). The complainant alleged that the PRDOE has discriminated against her son (the Student), on the basis of his disability (XXXXXXXX XXXXX), since August 2016, by failing to provide the Student with the following special education and related aids and services, as required by his individualized education program (IEP), or Programa Educativo Individualizado (PEI) for school year 2016-2017: a special education placement (Allegation 1); and, weekly individual oro-motor therapy (Allegation 2).

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 educational programs or 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 education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

On August 22, 2016, OCR contacted the PRDOE to provide notice of the complaint and initiate OCR's Rapid Resolution Process (RRP). OCR reviewed documentation the complainant and the PRDOE submitted. OCR also interviewed the complainant. OCR made the following determinations.

During school year 2016-2017, the Student was classified by the PRDOE as a student with a disability, based on his diagnosis of XXXXXXXX XXXXX and various developmental delays. The Student's PEI for school year 2016-2017 provides for various special education services, including specialized instruction, a special education placement, physical therapy, speech and language therapy, occupational therapy, and weekly individual oro-motor therapy.

With respect to Allegation 1, the complainant alleged that the PRDOE has discriminated against the Student, on the basis of his disability, since August 2016, by failing to provide the Student with a special education placement, as required for school year 2016-2017 by his PEI. In support of Allegation 1, the complainant asserted that during a meeting of the Student's Committee on Special Education, or Comité de Programación y Ubicación (COMPU) on June 29, 2016, the COMPU determined that the Student required a special education placement with small group instruction for school year 2016-2017. The complainant further asserted that during the meeting, the PRDOE offered the Student two special education placements located within local public schools, the XXXXXXXX XXXXXXXXXXXX School (school A), and the XXXXXXXX X. XXXXXXXXXXXX School (school B); however, the complainant did not agree to either placement because she had not been able to visit either school prior to the meeting on June 29, 2016. On August 19, 2016, the complainant informed the PRDOE that she had visited the offered placement at school A but could not agree to it because she did not believe that the placement complied with the Student's PEI. Specifically, she asserted that the class had 30 students and there was no assigned special education teacher. The complainant also asserted that another classroom at school A was also inappropriate because it was a XXXXXXXXXXXX classroom and the Student was enrolled as a XXXXXXXXXXXXXXXX student for school year 2016-2017.¹

On September 2, 2016, after OCR had initiated RRP, the PRDOE denied that it had failed to provide the Student with a special education placement; rather, the PRDOE asserted that the complainant did not agree with the special education placement offered by the Student's COMPU. However, the PRDOE informed OCR that it had again offered the Student a special education placement at school A that could provide the special education and related aids and services required by the Student's PEI. The PRDOE provided documentation to OCR from a Special Education Facilitator (facilitator) stating that the classroom within school A to which the Student would be assigned had a current enrollment of only XXX student; was air conditioned; had a dedicated services assistant; and offered the related services that the Student required, including speech and language therapy, physical therapy, occupational therapy, and psychological therapy.

OCR contacted the complainant on three occasions in October 2016, and again on December 7, 2016, to confirm that the Student had been provided a special education placement; however, the complainant did not respond to OCR's inquiries. On January 4, 2017, the PRDOE informed OCR that the complainant unilaterally enrolled the Student at XXXXXXXX XXXXXXXX (the XXXXXXXX) at the start of school year 2016-2017, and the PRDOE subsequently authorized payment for the Student's placement. The PRDOE informed OCR that the XXXXXXXX is able to provide the Student with the special education and related aids and services required by the Student's PEI. The PRDOE also informed OCR that it offered the Student extended school year services to compensate for any services that may not have been provided due to the lag in formal

¹ The PRDOE informed OCR that the complainant did not visit the offered placement at school B.

approval of the Student's placement. Therefore, OCR has determined that Allegation 1 is resolved.² Accordingly, OCR will take no further action regarding Allegation 1, and has dismissed it as of the date of this letter.

With respect to Allegation 2, the complainant alleged that the PRDOE discriminated against the Student, on the basis of his disability, since August 2016, by failing to provide the Student with weekly individual oro-motor therapy, as required by his PEI for school year 2016-2017. OCR determined that on September 13, 2016, a COMPU meeting was held wherein the PRDOE confirmed that the Student's oro-motor therapy had not yet been initiated. On January 4, 2017, the PRDOE informed OCR that it had secured a provider to begin providing the Student with the weekly individual oro-motor therapy required by his PEI.

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. Implementation of an IEP or PEI is one means of meeting this requirement.

Based on the above, OCR determined that the PRDOE failed to provide the Student with special education and related aids and services, specifically weekly individual oro-motor therapy between August 2016 and January 2017, in accordance with his PEI, as deemed necessary by the PRDOE's 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 is not in compliance with the regulations implementing Section 504, at 34 C.F.R. § 104.33.

On February 3, 2017, the PRDOE agreed to implement the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement. If the PRDOE fails to comply with the terms of the resolution agreement, OCR will resume its investigation of this complaint.

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.

² To the extent that Allegation 1 concerns the complainant's objection to the determination of how special education and related aids and services are to be provided to the Student, and therefore, constitutes a disagreement with the PRDOE regarding the Student's placement, it is OCR's policy to refrain from assessing the appropriateness of decisions made by a group of knowledgeable persons, such as a COMPU, convened for the purpose of developing a student's PEI, including determining what special education placement is appropriate. Any disagreement between the complainant and the COMPU should be addressed through a due process hearing. A due process hearing officer is empowered to review the appropriateness of a placement decision made by the group of knowledgeable people. The complainant may exercise her right to due process by contacting the PRDOE in writing.

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 another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this letter 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.

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; Jessica Daye, Compliance Team Investigator, at (646) 428-3812 or jessica.daye@ed.gov; or me, at (646) 428-3806 or felice.bowen@ed.gov.

Sincerely,

/s/

Félice Bowen
Compliance Team Leader

Encl.

cc: XXXXXXXXX XXXXXXXXX, Esq.