

May 8, 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. 02-19-1069
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 from August 2018 to December 2018, the PRDOE discriminated against students who were enrolled in the pre-kindergarten autism classroom at XXXXXXXX XXXX Elementary School (the School), including her son (the Student), on the basis of their disabilities, by providing them with only three hours per day of academic instruction, but providing students enrolled in general education classes at the School with six hours per day of academic instruction.¹

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.

¹ As discussed further below, OCR originally also accepted for investigation the complainant's allegation that since August 2018, the PRDOE has discriminated against the Student, on the basis of his disability, by failing to implement a provision in the Student's individualized education program (IEP), or programa educativo individualizado (PEI), for school year 2018-2019, which requires that the Student not be exposed to heat at school. By letter dated February 9, 2019, OCR notified the parties that it had dismissed this allegation.

Pursuant to the regulation implementing Section 504, at 34 C.F.R. § 104.4(b)(1)(ii), (iv) and (vii), a recipient may not, on the basis of disability, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; provide different or separate aid, benefits, or services to qualified individuals with a disability, unless such action is necessary to provide the qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others; or, otherwise limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The regulation implementing the ADA, at 28 C.F.R. §35.130(b)(1)(ii), (iv) and (vii), contains similar provisions. Further, the regulation implementing Section 504, at 34 C.F.R. § 104.38, states that a recipient that operates a preschool education program or activity must take into account the needs of qualified individuals with disabilities in determining the aid, benefits, or services to be provided under the program or activity.

In its investigation, OCR reviewed information that the complainant and PRDOE submitted to OCR.

The complainant alleged that from August 2018 to the present, the PRDOE discriminated against the students enrolled in the pre-kindergarten autism classroom at the School, including the Student, on the basis of their disabilities, by providing them with only three hours per day of academic instruction, but providing students enrolled in general education classes at the School with six hours per day of academic instruction. The complainant also asserted that during the fall of 2018, the special education classroom teacher, the principal of the School, the Regional Director of Education (regional director), and the Coordinator of Special Education Services (coordinator) all informed her that the students' academic instruction was limited to three hours per day because the classroom lacked air conditioning. The complainant asserted that although she attempted to resolve the issue with the PRDOE on various occasions, the shortened school day continued.

On January 18, 2019, the PRDOE informed OCR that on November 13, 2018, the complainant had filed a due process complaint with the Unidad Secretarial de Querellas y Remedio Provisional which contained allegations regarding the implementation of the Student's individualized education program (IEP), or programa educativo individualizado (PEI), and the shortened school day for the Student, which was then currently pending. The PRDOE also informed OCR that on January 9, 2019, pursuant to an interim order of the impartial hearing officer, the PRDOE convened a meeting of the Student's Committee on Special Education (CSE), or Comité de Programación y Ubicación (COMPU) to discuss the complainant's proposal for a private special education placement, and the PRDOE's proposed special education placement for the Student.² Thereafter, on March 22, 2019, the complainant informed OCR that the Student was no longer attending the School, as he had been placed in a private school, where he was receiving a full day of instruction, and his special education and related aids and services.

² Pursuant to OCR's case processing manual, OCR will dismiss an allegation when the same or a similar allegation filed with OCR based on the same operative facts is currently pending through a recipient's internal grievance procedures, including due process proceedings; and, OCR anticipates that the allegation will be investigated and that there will be a comparable resolution process pursuant to legal standards that are acceptable to OCR. Based on the information the PRDOE provided to OCR on January 18, 2019, by letter dated February 9, 2019, OCR notified the parties that OCR had dismissed the complainant's allegation that the PRDOE had discriminated against the Student, on the basis of his disability, by failing to implement the Student's PEI.

Pursuant to OCR's case processing procedures, OCR will dismiss an allegation where OCR obtains credible information indicating that an allegation raised by the complainant is currently resolved and is therefore no longer appropriate for investigation. Based on the information OCR obtained during the course of its investigation from the PRDOE and the complainant, OCR determined that the complainant's allegation that from August 2018 to December 2018, the PRDOE discriminated against the Student by providing him with only three hours per day of academic instruction in the pre-kindergarten autism classroom at the School, but providing students enrolled in general education classes at the School with six hours per day of academic instruction, is resolved. Accordingly, OCR has determined that the allegation as it pertains to the Student is no longer appropriate for investigation, and has dismissed it as of the date of this letter.

With respect to the other students who were enrolled in the pre-kindergarten autism classroom at the School during school year 2018-2019, on May 3, 2019, PRDOE provided to OCR a written statement signed by a Special Education Facilitator, which stated that on January 10, 2019, the PRDOE reassigned those students to a new classroom at XXXXXXXX XXXXXXXX XXXX XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX (School 2). The written statement further stated that on February 7, 2019, the PRDOE began providing these students with a full day of academic instruction at School 2, from 8:00 a.m. to 2:00 p.m.

Prior to the completion of OCR's investigation, on May 8, 2019, the PRDOE voluntarily agreed to sign a resolution agreement to resolve this complaint without further investigation. OCR will monitor the implementation of the Agreement.

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.

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

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXX XXXXXXXXX, Esq.