



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
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August 25, 2014

XXXXXXXXXX

President
Alabama School of Math and Science
1255 Dauphin Street
Mobile, AL 36604

Re: OCR Complaint # 04-14-1440

Dear XXXXXXXX:

On February 26, 2014, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint, alleging discrimination on the basis of disability by the Alabama School of Mathematics and Science (ASMS). Specifically, the Complainant alleged that ASMS discriminated against a former student (Student) as follows:

1. On November 1, 2013, ASMS administratively dismissed the Student based on her disability.
2. During the 2013-14 school year, ASMS failed to respond appropriately to reports of other students bullying and harassing the Student based on her disability.

OCR investigated the complaint pursuant to Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a public entity, the School is subject to Title II. Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether ASMS discriminated against the Student on the basis of disability when it administratively dismissed the Student, in noncompliance with the Title II implementing regulation at 28 C.F.R. § 35.130(a), (b)(1)(i), (ii), (vii) and (b)(7).
2. Whether ASMS discriminated against the Student by failing to respond appropriately to incidents of disability harassment, in noncompliance with the Title II implementing regulation at 28 C.F.R. §§ 35.130(a), (b)(1)(i), (ii), (vii) and 35.107.

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OCR's investigation of the complaint included an analysis of the data provided by both parties and interviews with the Complainant, Parent, Student, and ASMS administrators, faculty and staff. OCR reviewed the evidence under the preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine whether the greater weight of the evidence is sufficient to support a conclusion that ASMS failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion.

After a thorough review of all of the evidence, OCR found insufficient evidence to support a finding of noncompliance with Title II, as alleged. However, OCR did find a compliance concern in regards to ASMS's Title II policies and grievance procedures. The factual and legal bases for our determinations are set forth below.

Legal Standards

The Title II implementing regulation at 28 C.F.R. § 35.130 (a) provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. The Title II implementing regulation at 28C.F.R. § 35.130 (b)(1) states that a public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) 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; or (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. Section 35.130 (b)(7) provides that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

According to 28 C.F.R. § 35.104, disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. The phrase physical or mental impairment means: (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. The phrase is regarded as having an impairment means the following: (1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined above but is treated by a public entity as having such an impairment.

The Title II implementing regulation at 28 C.F.R. § 35.106 states that a public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of Title II and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Americans with Disabilities Act.

The Title II implementing regulation at 28 C.F.R. § 35.107(a) requires a public entity that employs 50 or more persons to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title II, including any investigation of any complaint communicated to it alleging its noncompliance with Title II or alleging any actions that would be prohibited by Title II. The public entity shall make available to all interested individuals the name, office address, and telephone number of the designated employee(s). Section 35.107(b) requires a public entity that employs 50 or more persons to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would be prohibited by Title II.

Disability harassment under Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the school's educational program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Title II regulation.

To determine whether a public entity is responsible under Title II for disability harassment, OCR examines: (1) whether a hostile environment exists because harassing conduct is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a public entity; (2) if a hostile environment exists, whether a public entity has actual or constructive notice of the hostile environment; and (3) if a public entity has notice, whether the recipient took appropriate responsive action to end the harassment and prevent its recurrence.

Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances, including a consideration of whether the disability harassment is severe, pervasive, or persistent. In making this determination, OCR examines the context, nature, scope, frequency, duration, and location of harassing incidents, as well as the identity, number, and relationships of the persons involved. In addition, as with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim. For example, the age and maturity of the students involved must be considered. Under OCR policy, the harassment must, in most cases, consist of more than casual or isolated incidents to constitute a hostile environment on the basis of disability.

Schools have a legal responsibility to prevent and respond to disability harassment. Once a school learns that disability harassment may have occurred, the district must investigate the incident promptly and respond appropriately. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed. If a school employee engages in harassment that denies or limits a student's ability to participate in or benefit from a school program based on disability, the school is responsible for the discriminatory conduct. The school is therefore also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. This is true whether or not the school has received "notice" of the harassment. A school is deemed to have notice of harassment if a responsible school employee actually knew or, in the exercise of reasonable care, should have known about the harassment.

Background

The ASMS is the State of Alabama's only public residential high school for sophomores, juniors and seniors. All courses are taught at the college level and are Advanced, Honors, Advanced Placement (AP), or dual enrollment courses. ASMS receives state funding, but it does not receive federal funding from any source. ASMS does not fall under the jurisdiction of the Alabama State Department of Education or any local school district. ASMS is akin to a single school, school district. The President functions as both a Superintendent and Principal. The geographical school zone is the entire State of Alabama. Tuition, room and board are free. Students have to qualify for admission, and all students are required to live on campus. ASMS accepts an average of 100 students per year out of 400 applicants. The total enrollment at the beginning of the 2013-2014 school year was 250 students, which is maximum enrollment; and, the enrollment at the end of the school year was 230 students.

The Student applied and was accepted to attend ASMS for the 2013-2014 school year as a tenth grader. The Student was 16 years old at the time of the filing of the complaint. The Complainant alleged that the Student's disability is an anxiety disorder; however, the Complainant did not submit to ASMS any documentation that supports that the Student had a mental or physical disability that substantially limits a major life activity. The Student was one of two students administratively withdrawn from ASMS during the 2013-2014 school year. The Student did not have a Section 504 Plan or Individual Educational Plan (IEP) in place at the school she attended prior to ASMS or at her current school. In fact, the Complainant, although referring to the Student's medical condition as a disability, insisted that she did not request any accommodations

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for the Student and repeated several times to OCR that the Student did not need any accommodations. The evidence shows that ASMS accepted that the Student had an anxiety disorder and took medication for the anxiety.

Factual Findings

ASMS's Disability Policies and Procedures

OCR reviewed ASMS's policies and procedures regarding discrimination and harassment based on disability.

Notice of Non-Discrimination/Anti-Harassment Policy

The regulation implementing Title II requires public entities to issue a notice of non-discrimination, which notifies applicants, participants and other interested persons that they do not discriminate on the basis of disability.¹ This notice requirement applies to all entities of state or local government, whether or not they receive federal financial assistance. The Title II regulation does not specify the methods to be used by public entities in publishing notices of non-discrimination.

ASMS's Notice of Non-Discrimination and Anti-Harassment Policy is a combined policy, which states that ASMS believes in providing a safe and harassment-free educational environment and discrimination or bullying will not be tolerated. It also provides that any act of harassment or discrimination—physical, verbal or in writing—by students, faculty or staff based on a person's sex, age, race, color, national origin, native language, religion, physical disability or sexual orientation will result in disciplinary action.

ASMS's Notice of Non-discrimination states that ASMS does not tolerate discrimination on the basis of disability and other prohibited bases; however, it fails to state that ASMS, itself, does not discriminate on the basis of disability in its programs and activities.

Designation of Title II Coordinator

The Title II regulation requires a public entity to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title II and to make this employee's name, office address and telephone number available to all interested parties.

ASMS informed OCR that it has not designated a person to coordinate its compliance efforts regarding Title II.

Grievance Procedures

The Title II regulations require a public entity with 50 or more employees to adopt and publish grievance procedures providing for the prompt and equitable resolution of disability complaints.

¹ OCR Notice of Non-Discrimination Guidance (August 2010).

ASMS has over 50 employees. OCR requested a copy of ASMS's grievance procedures for filing complaints of discrimination on the basis of disability, including disability harassment. ASMS provided OCR with a copy of its disciplinary policy, which shows that harassment is an intermediate infraction and the consequences for intermediate infractions.

In evaluating whether a public entity's grievance procedures satisfy the Title II requirements, OCR reviews all aspects of a public entity's policies and practices, including the following elements that are necessary to achieve compliance with Title II:

1. Notice to students and employees of the grievance procedures, including where complaints may be filed;
2. Application of the grievance procedures to complaints filed by students or on their behalf alleging discrimination or harassment carried out by employees, other student, or third parties;
3. Provision for adequate, reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
4. Designated and reasonably prompt time frames for the major stages of the complaint process;
5. Written notice to the complainant and alleged perpetrator of the outcome of the complaint; and
6. Assurance that the school will take steps to prevent recurrence of any disability-based harassment or discrimination and remedy discriminatory effects on the complainant and others, if appropriate.

ASMS's disciplinary policy contains none of the elements listed above.

Analysis and Conclusion

OCR reviewed the evidence to determine whether ASMS's disability policies and procedures complied with Title II. While ASMS's Statement of Non-Discrimination states that it does not tolerate discrimination on any impermissible basis, it fails to specifically state that ASMS, itself, does not discriminate on the basis of disability. The evidence showed that ASMS has not designated any employee to coordinate its compliance effort and responsibilities under Title II. The evidence also showed that ASMS has not adopted and published grievance procedures to handle disability complaints.

Based on a preponderance of the evidence, OCR finds that ASMS is in noncompliance with Title II with respect to its Notice of Non-Discrimination, the designation of a Title II Coordinator², and the adopting and publishing of grievance procedures for disability complaints. To resolve this compliance issue, the ASMS voluntarily entered into the enclosed Resolution Agreement (Agreement). OCR will monitor the implementation of the Agreement to ensure that it is fully implemented.³

Issue #1: Alleged Harassment of Student

Factual Findings

The Complainant alleged that during the Fall Semester 2013, other students bullied and harassed the Student based on her alleged disability. The Complainant further alleged that the Student reported the bullying and harassment to ASMS staff, but they took no action.

Reports to ASMS of Harassment

OCR interviewed ASMS administrators and staff regarding the Complainant's allegation that the Student was harassed on the basis of her alleged disability, and that ASMS failed to respond. The President informed OCR that there was only one alleged incident of bullying and harassment at ASMS, and the incident had absolutely nothing to do with the Student's alleged disability. According to the President, a XXXXX staff member informed her of the alleged incident. The President personally met with the Student to investigate her allegation. The Student told the President that a female student was "being mean to her." The Student showed the President a two-way exchange of text messages ("texts") between the female student and her. The President reviewed all of the texts, and she noted that the texts did not contain any name calling, mean-spirited statements, or anything about a disability or medical condition. Also, according to the President, there was nothing at all in the texts that could be construed as bullying, harassment, threatening, or hostile. In the texts, the female student told the Student that she needed to stop hanging around anyone who was not a good or positive influence. The President also interviewed the female student and staff with knowledge of the allegations. The President informed OCR that she discovered the Student was upset because she saw another female student hugging her boyfriend. The President stated that she found no information to support or suggest that the Student was bullied or harassed based on her disability.

The XXXXX corroborated the President's statement that the Student's allegations had nothing to do with her anxiety, medication, alleged disability, a perceived disability, or any manifestations of her alleged disability. The XXXXX also confirmed there was only one incident of alleged bullying and harassment, they reviewed the text messages, and nothing in the texts could be construed as bullying and harassment. The XXXXXX added that the Student stated that a

² Because OCR recognizes that the inclusion of a person's name in a non-discrimination notice may result in an overly burdensome requirement to republish the notice if a person leaves the coordinator position, it is acceptable for a public entity to identify its coordinator only through a position title.

³ ASMS's President informed OCR that based on the scheduled meeting dates for ASMS's Board of Directors, ASMS will need to revise some of the implementation dates in the Resolution Agreement.

female student called her a “bitch” in a text; however, after a review of the text it was determined that it was not true.

The XXXXX informed OCR that the Student mentioned that she had an argument with another student, but provided no details. The Student told the XXXXX that she did not need her take any action because the matter had been addressed. The XXXXX stated that she received no information to support or suggest that the Student was being bullied or harassed based on her alleged disability.

OCR also interviewed two of the XXXXXX, and they informed OCR that the Student never reported to them that she was being bullied or harassed. One XXXXX stated that she did not have any information to support or suggest that the Student was being bullied or harassed.

ASMS’s Response to the Reports of Harassment

The President informed OCR that after she received the report alleging bullying and harassment, she immediately conducted an investigation that consisted of separately interviewing the Student and alleged harassers, reviewing the alleged harassing communication, and meeting with ASMS staff who had knowledge of the incident. The President concluded that the allegation of harassment and bullying was unsubstantiated.

The XXXXX and XXXXXX informed OCR that each one of them conducted separate investigations into the Student’s allegation. They each interviewed the students involved, and they reviewed the text messages. Both investigations did not reveal anything that amounted to bullying and/or harassment; the allegations were never substantiated. However, the XXXXX and XXXXX still reported the incident to the President, who conducted her own investigation as outlined above.

Analysis and Conclusion

OCR reviewed the evidence to determine whether ASMS failed to respond appropriately to reports of disability harassment. The evidence showed one alleged incident of bullying and harassment. The evidence also showed that ASMS conducted multiple investigations into the Student’s allegations. None of these investigations yielded any evidence that supported or substantiated the Student’s allegations that she had been bullied or harassed based on her alleged disability or for any other reason.

On rebuttal, the Student confirmed that there was only one alleged incident of bullying and harassment, and it involved only one other student. The Student also confirmed that the President met with her and reviewed the alleged harassing text messages. She also stated that the XXXXX staff met with her regarding her allegations, and she believes they also met with the student who sent the texts to her.

In light of the evidence noted above, OCR finds, by a preponderance of the evidence, insufficient evidence to support a finding that the Student was harassed on the basis of her alleged disability or that ASMS failed to adequately and promptly respond to the reported harassment.

Issue #2: Alleged Dismissal Based on Disability

The Complainant alleged that the Student was first diagnosed with an anxiety disorder during the summer of 2013. The Parent stated that she informed ASMS of the Student's diagnosis in medical documentation she submitted to ASMS before school commenced.⁴ OCR reviewed the documentation and found that it simply states that the Student has generalized anxiety. There is no further information of a diagnosis that would support a determination that the Student has a mental impairment that substantially limits a major life activity within the meaning of Title II; and there were no records that the Student had such an impairment. The evidence, however, was not clear as to whether ASMS regarded her as having such an impairment. OCR, therefore, investigated the Complainant's allegation that on November 1, 2013, ASMS dismissed the Student due to her disability. The Parent informed OCR that ASMS gave the following reasons for the dismissal: the Student needed more attention than ASMS could provide to her, she needed to be home with her parents so they could provide her with the attention she needed, and she needed more parental supervision.

ASMS's Admission Criteria

Admission is open to all high school students in the State of Alabama. ASMS's Admission Selection Committee (Committee) evaluates three areas: (1) academic achievement, (2) maturity, and (3) achievement through extracurricular activities. All students are required to live on campus; there are no exceptions. As a result, the Committee also evaluates whether students are emotionally stable and mature enough to function independently without their parents. ASMS's rigorous academic program combined with the residential environment is designed to simulate a college environment.

Students with Disabilities

The President informed OCR that ASMS has had students with anxiety, ADHD, Asperger's Syndrome, and other medical conditions that required medication. There were also students who may require accommodation because of their physical disability. The XXXXX informed OCR that after a student is accepted, the parent completes several medical forms. One of the forms is a "special accommodations form", which inquires as to whether the student requires any special accommodations from ASMS staff due to a health (mental or medical) condition. If accommodations are listed or a student requests accommodations, such as extended time, tutoring, counseling or any other accommodation in the classroom, ASMS provides the accommodations. ASMS also assist students in applying for accommodations on standardized testing. The XXXXX also uses the medical documentation to create an emergency action plan for students that may require emergency or immediate medical attention or for students with chronic illnesses, such as asthma, diabetes and severe allergies.

⁴ The Student's Health Assessment Record form completed on August 9, 2013, listed "anxiety (generalized)" under the category of "emotional/behavioral/psychological."

The XXXXX stated that the Student's August 2013 documentation listed generalized anxiety as a medical condition, which was being managed or addressed with the medication. The medical documentation did not reveal a history of treatment by a therapist or self-harm. The XXXXX also stated that the Student's Parent and her physician both completed the special accommodations form for the Student, dated June 17, 2013. However, neither the Student's Parent nor her physician indicated that any accommodations were requested or needed for her anxiety. The XXXXX further stated the Parent did not inform her that the Student had a disability that required special attention.

The XXXXX also informed OCR that the Student ran out of her medications on several occasions, despite the fact she had previously notified the Parent that the medications were low on quantities. The XXXXX stated that the Parent would take a lengthy amount of time to provide ASMS with the Student's medication. The XXXXX also stated that it was difficult to communicate with or contact the Parent; and, ASMS staff had a difficult time getting the Parent to return their telephone calls. The XXXXX confirmed the problems with obtaining the Student's medication from the Parent.

Student's Dismissal

In a letter dated November 1, 2013, ASMS notified the Parent of the Student's dismissal, stating that she had some troublesome events in the past few months. The letter also stated that the Student required more parental supervision than ASMS was able to provide "in this environment." OCR interviewed the President and other staff members regarding the factors that led to the Student's dismissal.

The President informed OCR that the Student disclosed her history of cutting to XXXXX staff during the first week of the 2013-2014 school year, which commenced on August 12, 2013. The President stated it is not uncommon for students in this age group to engage in cutting and unlike other schools, ASMS chose to help the Student instead of dismissing her by putting measures in place to help the Student. The XXXXX, President, XXXXX, and XXXXX developed a plan to accommodate and assist the Student. The Counselor developed a plan entitled a "behavior contract" to accommodate and assist the Student.⁵ The plan required, among other things, that the Student meet with a private therapist.

The Parent did not take any action on obtaining the therapist until October 2013. However, once the therapist was obtained, ASMS staff transported the Student to and from her therapist appointments. In addition, the XXXXX and other staff administered the Student's medication to her. Further, at least four staff members were available to assist the Student whenever she requested their assistance. The President stated that ASMS administrators and staff worked literally around the clock with the Student. The President stated that the Parent's claim that ASMS dismissed the Student because she disclosed her cutting history is not true. The President also stated that if the ASMS's motivation was to dismiss the Student because of her history of cutting, it would have done so the first week of school when it first learned of her history.⁶

⁵ According to the President, all students who engage in self-injurious behavior are placed on a behavior contract.

⁶ The Student never engaged in cutting while at ASMS.

The President stated that one of the factors in the Student's dismissal was that she consumed an extraordinary amount of ASMS staff's time, especially the XXXXX staff. For instance, the Student called XXXXX staff on their cell phones when they were off duty. As a result of the calls, the staff would then come to campus, on their days off, to check on the Student only to find there was nothing wrong. Most of the issues the Student contacted ASMS staff about pertained to boys. For instance, the Student called them for things such as she thought her boyfriend was interested in other girls. XXXXX staff also reported to the President that the Student frequently awakened them at night. The Student would enter the staff's bedrooms around 10:00 p.m. or 11:00 p.m. and not leave until as late as 2:00 a.m. or 3:00 a.m. Staff also reported that the Student took time away from the other students that needed them because they were tied up with the Student. The Student demanded most of the XXXXX staff's attention, her need for attention was excessive by any standard, and it was on a consistent basis. XXXXX staff reported to the President that the Student's issues were beyond what they were capable of handling. No matter how much time the staff gave the Student she still needed or demanded more of their attention. These issues with the Student started at the beginning of the ASMS school year and did not end during her time at ASMS. OCR interviewed the XXXXX staff, and they corroborated the information provided by the President.

The School Counselor and School XXXXX reported similar problems to the President regarding the amount of time that the Student demanded and that her constant need for attention was interfering with their ability to assist other students. The Counselor and XXXXX informed the President that the Student would spend hours in their office, and they had to encourage her to return to class. OCR interviewed the XXXXX who corroborated the information provided by the President.

The President informed OCR that the residential component, which is a critical part of the ASMS's mission, requires that students be self-starters, independent, mature, and able to care for themselves. The President stated that the Student was not mature or independent enough for the residential environment. ASMS determined that the Student needed parental attention and supervision that did not meet the standards of being independent enough for the residential environment.

The President also cited the lack of parental involvement and failure to communicate with ASMS administrators and staff as another factor that led to the dismissal. The President stated that the Parent did not address issues regarding the Student, such as her medication and history of cutting. The President reiterated the Parent's failure to provide ASMS staff with the Student's prescribed medication in a timely manner. The President also stated that the Parent did not communicate with ASMS administrators or staff, or work with them to help the Student. The President further stated that the Parent seemed to ignore the Student's issues, that she was not attentive to Student's needs, and that she was not that engaged in addressing any issues concerning the Student.

The President informed OCR that ASMS administrators did not see the Student making any progress despite all the support ASMS administrators and staff were providing to her. Despite all of the measures put in place to accommodate the Student to help her remain on campus, her

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situation never improved. The President stated that ASMS administrators and staff had exhausted all avenues of support. As a result, ASMS administrators consulted with staff regarding whether the Student could be successful at ASMS. All staff consulted supported the decision to dismiss the Student based on the issues outlined above. As a result, the Student was dismissed in a November 2013 letter.

The Parent appealed the Student's dismissal, and ASMS convened a hearing on November 7, 2013. On November 21, 2013, ASMS notified the Parent that the Hearing Committee had upheld the Student's administrative dismissal. OCR interviewed several members of the Hearing Committee, regarding their unanimous decision. Some of the key factors for the Committee members were that the Student was consuming a huge amount of the staff's time; and, ASMS staff was spending an enormous amount of time with the Student, because they felt someone needed to be with the Student at all times. Also, the Student reached out for attention from the ASMS staff at inappropriate times, but she never reached out to her family. In addition, since ASMS is a residential campus, students need to be independent because their schedules are very demanding and rigorous. The Hearing Committee determined that the Student could not function in ASMS's residential environment because she was not independent; she was very dependent; she needed parental guidance.

Analysis and Conclusion

The evidence shows that a form completed by the Parent disclosed that the Student had been diagnosed with generalized anxiety. Although there was no documentation that supported a determination that the Student had a mental impairment that substantially limited a major life activity, the evidence was not clear as to whether the Student was regarded as having such an impairment. Accordingly, OCR concludes for purposes of analysis that the Student was regarded as having a disability.

Different treatment requires a finding of intentional discrimination on the basis of an individual's disability. Evidence of discriminatory intent may be direct or circumstantial, and "intent cases" usually involve a highly fact-intensive inquiry. Absent direct proof of discriminatory motive, a different treatment inquiry frequently focuses on: (1) whether the recipient—in excluding or denying the aggrieved person a program, service, or benefit—treated the person differently; and (2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. Also, a recipient's rebuttal or nondiscriminatory justification can be overcome with a showing of pretext.

OCR reviewed the evidence under the preponderance standard to determine if ASMS subjected the Student to different treatment on the basis of her perceived disability by dismissing her. The evidence showed that out of the twenty-two (22) students withdrawn from ASMS for the 2013-2014 school year, 10 students, besides the Student, were involuntarily withdrawn. Of these 10 students, only one was on medication for mental or emotional issues. For the 2013-2014 school year, there were eight other students, besides the Student, on medication for mental and emotion conditions. Five of these students are returning for the 2014-2015 school year, one graduated, one voluntarily withdrew and one was involuntarily withdrawn. Thus, the evidence does not support a conclusion that the Student was treated differently based on her use of medication for

her anxiety. OCR, nevertheless, proceeded to examine whether ASMS presented a legitimate, non-discriminatory reason for the Student's involuntary dismissal.

ASMS administrators stated that the Student's alleged disability never factored into their decision to dismiss her, because the Parent never identified the Student as having a disability. Instead, ASMS based its decision on the lack of parental involvement, and the Student's need for parental support and guidance. Other factors were the Student's need for constant attention overwhelming ASMS staff, and the inappropriate times at which the Student repeatedly sought out staff. The ASMS administrators determined that the Student lacked the maturity and independence needed to exist in ASMS's residential environment. Further, the Student appeared to be becoming more dependent instead of making any progress, despite all of the measures ASMS put in place to help the Student remain on campus. OCR finds that ASMS has stated legitimate, nondiscriminatory reasons for its actions. OCR next analyzes whether the proffered reasons are a pretext for discrimination.

OCR finds that the reasons provided by ASMS were not a pretext for discrimination. Pretext can be shown by deviation from policies and practices or evidence which tends to weaken the inference that the asserted reason is the true reason for the action. The evidence showed that the Parent failed to provide ASMS staff with the Student's required medication in a timely manner, which staff felt negatively impacted the Student. The evidence also showed that communication with the Parent and the Parent's responsiveness to ASMS staff was an area of concern. Further, the evidence showed that the frequency and duration that the Student sought the staff's assistance were problematic and never ceased. The evidence revealed that ASMS put measures in place to assist the Student in remaining on campus, such as transporting her to her private therapist appointments, administering her medications, and ensuring the staff was available for the Student whenever she sought them out. However, ASMS administrators and staff determined that despite all of the support provided to the Student, her issues never improved. ASMS administrators and staff determined that the Student lacked the necessary maturity and independence to function in ASMS's residential environment, which is a core component of ASMS's program, and she needed parental guidance and support. Even with the measures that ASMS put in place, the Student was not independent enough to live in the residence hall. All students are required to live on campus, and the Student was not able meet the residential requirement of the program.

On rebuttal, the Parent admitted that ASMS staff contacted her regarding the Student's low quantities of medications and that the Student was sometimes out of her medications; however, the Student denied any physical or mental impact from missing her medications. The Student confirmed that ASMS staff administered her medications to her, and three ASMS staff members transported her to her private therapist appointments. She also stated that none of ASMS staff members ever failed to stop and speak with her when she visited their rooms or offices. The Student stated that she might have stayed in the XXXXX staff's rooms as late as 1:00 a.m. She also stated that she might have gone to their rooms after midnight. The Parent denied being non-responsive to ASMS staff's attempts to contact her, but admitted that she would wait until she spoke to the Student before returning staff members' telephone calls. The Parent informed OCR that the Student's physician stated that no special accommodations were required for the Student while she attended ASMS. The Parent also stated that she was not requesting that ASMS do

anything special for the Student. The Parent further stated that she is not requesting that ASMS modify its programs or services.

Based on the foregoing, OCR finds insufficient evidence that ASMS discriminated against the Student on the basis of her alleged disability by dismissing her from ASMS. Based on the preponderance of the evidence, OCR finds that ASMS proffered a legitimate, nondiscriminatory reason that is not a pretext for discrimination and concludes that there is insufficient evidence to support a finding that ASMS discriminated against the Student based on her alleged disability, in noncompliance with Title II.

Pursuant to OCR procedures, ASMS is reminded that no public entity may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in connection with a complaint.

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, we 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.

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.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact XXXXXXXX, Compliance Team Leader, at (404) 974-XXXX.

Sincerely,

Cynthia G. Pierre, Ph.D.
Regional Director