



UNITED STATES DEPARTMENT OF EDUCATION
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February 26, 2014

Dr. Penne Wilson, Ph.D.
Head Administrator - Sage Montessori Charter School
5120 Masthead St. NE
Albuquerque, NM 87109

Re: Sage Montessori Charter School
OCR Case Number: 08-13-1273

Dear Dr. Wilson:

In a letter dated September 20, 2013, we notified the Sage Montessori Charter School (the School) that we were opening for investigation the above-referenced complaint filed against the School. In our notification letter, we stated that we were opening the following allegations for investigation: 1) the Complainant's allegation that the School discriminates by discouraging the enrollment of students with behavioral disabilities; and 2) whether the School has an adequate notice of nondiscrimination and disability grievance procedures.¹ We have completed our investigation and are notifying you of our decisions.

We investigated these allegations under Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The School is a public entity that receives Federal financial assistance from the Department and is subject to the requirements of these laws and regulations.

In the investigation, we considered information provided by the Complainant, documents submitted by the School and the Complainant, and the School's response to the complaint. We also interviewed the Complainant, multiple School witnesses with information relevant to the allegations, and other parents who attended School meetings for parents prior to registration. Our investigation found insufficient evidence that the School violated Section 504 or Title II with respect to the first allegation identified above. This letter explains our findings.

¹ Our notification letter originally identified this allegation as "whether the School has an adequate notice of nondiscrimination, disability grievance procedures, and policies and procedures used for identifying and providing services to students with disabilities." We have removed our consideration of the School's "policies and procedures used for identifying and providing services to students with disabilities," however, because there were no allegations that the School was failing to identify students with disabilities or provide them with a free appropriate public education, and the Section 504 and Title II regulations do not require specific procedures for identifying and providing services to students with disabilities. As a result, our investigation of this allegation focused on whether the School has an adequate notice of nondiscrimination and disability grievance procedures.

Our investigation did, however, reveal a potential compliance concern with respect to the second allegation identified above. After this potential compliance concern became apparent, the School indicated its desire to voluntarily enter into an agreement to resolve it pursuant to Section 302 of our *Case Processing Manual* (CPM). We reviewed this request and determined that it justified entering into an agreement. We received the School's signed Resolution Agreement (enclosed). When the Agreement is fully implemented, the potential compliance concern we identified will have been resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. We will monitor implementation of the Agreement through periodic reports demonstrating the terms of the Agreement have been fulfilled. We will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the agreement and will promptly require actions to address such deficiencies. If the School fails to implement the Agreement, we will take appropriate action, which may include enforcement actions, as described in the Agreement.

Background

The School, which was created in the summer of 2012, is a public charter school that follows the Montessori educational model. Students can attend the School by submitting a lottery application for an enrollment slot at the School. The Complainant submitted a lottery application to enroll a child at the School for the 2013-14 school year, and that child was admitted. Prior to the start of the 2013-2014 school year, the Complainant attended a mandatory meeting for School parents. At this meeting, the Complainant felt that the School's XXX, who was running the meeting for the School, focused on the School's strict disciplinary policy and made statements that were intended to discourage parents of students with ADHD and behavioral disabilities from enrolling in the School, and in response, she filed this complaint with OCR. As a result, the Complainant enrolled her child at a different school.

Discussion

I. Alleged Discrimination in Enrollment

Legal Standard

The regulations implementing Section 504 at 34 C.F.R. § 104.4(a) and Title II at 28 C.F.R. § 35.130, provide that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity. In evaluating an allegation of different treatment on a class-wide basis, we determine what action the recipient took against the alleged injured class, whether it followed its policies and procedures for taking such action and whether similarly situated non-disabled individuals were treated differently. If the alleged injured class members were treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

Relevant Facts

OCR investigated the School's application, admission, and enrollment process. We summarize the process generally as follows:

- Parents can submit applications during various lottery enrollment periods to enroll students in the School.² The application form does not request any information related to whether the student applying has a disability, an Individualized Education Plan (IEP), or a Section 504 Plan. Each application the School receives is assigned a number based on the order the application is received. If there is greater capacity in a particular grade at the School than there are applications for students in that grade, all students applying for that grade are admitted to the School.
- If there are more applications than slots available in a particular grade, the School conducts a lottery by drawing numbers at random out of a hat or dark container until capacity is reached for a particular grade to determine who has been admitted. After the capacity is reached for a particular grade, the School continues drawing numbers to determine the order of the waiting list for that grade. The School holds additional lottery application periods as necessary to fill its available student slots.
- At no point in this process does the School know the identity of the students whose numbers they are drawing or whether the students associated with those numbers have a disability, an IEP, or a Section 504 Plan.
- After determining who has been admitted, the School notifies the families of admitted students and asks them to let the School know within a specified period of time whether they will enroll their student in the School. If they are enrolling a student, the families are then asked to fill out a registration packet, which requests more information about the students than is included in the lottery applications. The registration packet asks whether the enrolling student has a disability or an IEP and represents the first instance in which the School would learn this information. That information, however, has no bearing on whether the student will be admitted to the School because the student has already been admitted and enrolls in the School by submitting the registration form containing this information.
- No student has ever been denied admission by the School, and with respect to the waiting list, the School explained that it has very rarely had a waiting list and even when it has had a waiting list, the students on the waiting list have almost always been admitted because there is a lot of student movement at charter schools during the first 40 days of the school year.³ In short, nearly every student, including those with disabilities, who has applied for admission to the School has been offered enrollment.

In addition to the School's application and enrollment process, we investigated the statements made by School administrators at parent meetings and tours to determine whether the School made statements that discriminated against students with behavioral disabilities by discouraging them from enrolling. The Complainant alleged, among other things, that at a mandatory parent meeting prior to the 2013-14 school year:

² The lottery process described here only applies to new students. Current students can maintain their enrollment at the School for the following school year by reregistering in January.

³ The School has stated that there is currently one student on the waiting list and other than that, every student who was placed on a waiting list was eventually offered enrollment.

- The XXX repeatedly instructed the group of parents on students who would not be tolerated at the School. She repeatedly referred to undesirable students as “nasty, awful children” and described these unwelcome students as those who “fidget,” “cannot focus,” “lack impulse control,” and “without self-control.”
- The XXX stated the school’s discipline policy was “behave or get out.”
- The XXX stated that children who need to “fidget” should not attend the School because they might break the expensive Montessori materials. She stated if a child could not have self-control to not touch a Montessori material without permission, the student should not attend the School.

The Complainant believed that the numerous statements made by the XXX at this parent meeting were an attempt to dissuade parents of children with behavioral disabilities or ADHD from attending the School and that the XXX’s tactics attempted to shame parents of children with disabilities and convince them to take their children elsewhere so that the School would not have to provide a free appropriate public education to these students.

In response, when asked about the statements, the XXX denied making any of them. In addition, the XXX denied making any statements similar to those alleged by the Complainant with one exception. More specifically, the XXX acknowledged stating “be good or be gone” at this meeting and at other parent meetings and tours. The XXX explained, however, that the context in which this statement was made was far different from the way it was portrayed by the Complainant. The XXX explained that many of the parents at the meetings had serious concerns about their children being bullied in Albuquerque Public Schools, and that was why they were seeking an alternative school. The XXX said the parents told stories of their children being physically attacked at other schools and that they wanted a safe environment. In response to these concerns, the XXX stated that she told the parents that the School does not tolerate violence and that its policy was “be good or be gone.” In other words, the XXX states that the “be good or be gone” comment she made was not intended to discourage students with behavioral disabilities from attending but rather, was meant to assuage parents who were concerned about their children being bullied.⁴ In addition, the XXX states that she did not say anything specific regarding students with behavioral disabilities at the parent meetings.⁵ The interview of the School’s XXXXX corroborated the XXX’s statement that the XXX made the “be good or be gone” statement that she had made at the mandatory parent meeting, but that it was made within the context reported by the XXX. And neither the XXXXX nor the XXX believed they made any other potentially discriminatory statements at other parent meetings or at tours of prospective parents.

When provided with a rebuttal opportunity, the Complainant acknowledged that the information provided by the School regarding its lottery application and enrollment process was consistent

⁴ In addition, the School has an appropriate policy for determining when it can impose discipline on students with disabilities when that discipline would constitute a significant change in placement.

⁵ The School explained that the purpose of these parent meetings was to educate the parents about the Montessori educational model employed at the School. The School found that many parents were submitting applications to the School without any understanding of the Montessori model, and the School decided to hold these meetings to help parents understand the School’s methods and expectations prior to the school year.

with her experience but disagreed with the XXX's statements regarding the parent meeting, and the Complainant reiterated that the XXX made the statements alleged in her complaint. Further, the Complainant stated there was little discussion between parents and the XXX, she did not recall any parents asking about bullying or fighting, and she continued to reiterate that the XXX's focus was to tell parents that their children should not attend the School if they would behave in certain ways.

To resolve the factual disagreement between the Complainant and the XXX, and because there was no audio recording of the meeting to confirm what the XXX said, we contacted other parents who were in attendance at the parent meetings last summer. Both of the parents who responded to us had children who either had ADHD or a lot of trouble sitting still, so they were likely sensitive to the same kinds of issues as the Complainant. Generally, these parents informed OCR:

- The School did spend a meaningful amount of time taking questions from parents, but they did not recall parents expressing concern about how the School would respond to bullying or fighting.
- The parents did not recall the XXX making the specific statements alleged by the Complainant and confirmed that the XXX did not say that students who lack impulse control or fidget were not welcome at the School, which they believe they would have remembered based on their children. Nonetheless, one of the parents felt the XXX did spend time stating that disruptive behaviors would not be tolerated at the School; the XXX never said these kinds of students were not welcome at the School, just that that behavior was not acceptable at the School. The other parent recalled the XXX spending a lot of time discussing the behavioral trouble at the School from the prior year and that they were not going to tolerate it again; she felt like the XXX was stating that children who fight or cause problems like they had last year would not be tolerated at the School, but the parent added that not every child who fights has a disability and the comments were not directed at children with disabilities. In other words, she did not feel like the XXX's comments were directed at kids who have trouble sitting in their seats like her child does.
- Regarding the Montessori materials, the parents confirmed the XXX stated that if students are unable to respect the materials, they would not be allowed to use them and that the School might not be a good fit for such children. But again, they were not told that those types of students were not welcome at the School, just that they needed to respect the materials and that maybe they should not enroll in the School if they were not going to be able to respect the materials.
- Notably, when asked whether they thought the XXX made statements that would discourage students with behavioral disabilities or ADHD from attending the School, one of the parents stated no, and the other parent stated yes. The parent who answered yes, however, was not entirely consistent because she also stated that she felt like the XXX was just trying to communicate that the behavior at the School the prior year was unacceptable and would not be tolerated again, and that parent explicitly stated that as a

parent of a child with ADHD on an IEP, she did not think the XXX's comments were directed at her.

- One parent also added that the XXX stated at the meeting that the School would make provisions for students who have IEPs.
- Finally, despite attending this meeting and having children described as either having ADHD or trouble sitting still, both of these parents enrolled their children at the School and did not feel that their children were unwelcome. They feel that the School has been welcoming and accommodating to all kinds of students, including those with ADHD or behavioral disabilities.

Finally, we investigated whether the School's practices towards students with ADHD or behavioral disabilities attending the School resulted in them withdrawing from or being forced out of the School. We found that although the School has four students with ADHD or OHI in attendance at the School, none have withdrawn. Further, we found that only three students with disabilities have withdrawn from the School since its founding and that none of these students had any behavioral problems at the School or behavior-related disabilities. The School provided a credible explanation for each student's withdrawal, and none of those explanations had anything to do with their disabilities or behavior. We also looked into the disciplinary history of the students with ADHD or OHI at the School and found nothing objectionable.

Analysis

Based on the facts in our investigation, we find insufficient evidence that the School treats students or applicants with behavioral disabilities or ADHD differently than non-disabled students or applicants. Notably, when the School selects students for enrollment through its lottery process and determines the order of its waiting list, the School does not know which students have disabilities; the School's application process is blind to disability. As a result, students with disabilities are treated in the same manner as their non-disabled peers with respect to the lottery and admissions process and their treatment on waiting lists.⁶

Even though the School's application process treats all students equally, if the Complainant's allegations about what the XXX said at the mandatory parent meeting were true, OCR would be concerned that the School was attempting to discourage students with ADHD or behavioral disabilities from enrolling at the School – even though they had been admitted. Although the XXX acknowledged stating “be good or be gone” at the parent meetings and tours, she stated that when she said “be good or be gone,” she was responding to concerns about bullying expressed by other parents and was trying to address their concerns about their children's safety and communicate to them that the School would not tolerate bullying or physical violence; the statement did not concern and was not directed at students with behavioral disabilities. The Complainant viewed this statement, which she recalled as “behave or get out,” as a threat to students with ADHD or behavioral disabilities that they cannot attend the School if they cannot control their behavior. Further, although the Complainant stated that the XXX made numerous

⁶ Further, the fact that no student has been denied admission by the School and only one student remains on the waiting list provides additional evidence that it does not discriminate against students with disabilities through its application and admission procedures.

other statements that were intended to discourage students with disabilities from enrolling, the XXX denied making those statements.

In light of the disagreement between the Complainant and the XXX about the XXX's statements at the parent meetings last summer, we relied heavily on the statements from other parents who attended those meetings. These parents' statements raised questions about what was stated by the School at those meetings. For example, the other parents did not corroborate the XXX's contention that other parents expressed concerns about bullying and fighting and how the School would respond. In addition, regarding the Montessori materials, both parents confirmed that the XXX did state that if the students are unable to respect the materials, they would not be allowed to use them, and one of the parents viewed this statement as an indication that such students would not be a good fit at the School.

At the same time, the other parents did not recall the XXX making most of the statements alleged by the Complainant. Further, the other parents confirmed that none of the XXX's statements were directed at students with ADHD or behavioral disabilities. In general, these parents stated that the XXX was trying to communicate that certain types of behaviors were not acceptable at the School, but they did not believe these statements were directed at students with ADHD or that those students were not welcome at the School.

Significantly, when asked whether they thought the XXX made statements that would discourage students with behavioral disabilities or ADHD from attending the School, one parent stated no, and the parent who answered yes added that she felt like the XXX was just trying to communicate that the behavior at the School the prior year was unacceptable and would not be tolerated again, and even as the parent of a child with ADHD on an IEP, she did not think the XXX's comments were directed at her. Finally, we were persuaded by the fact that despite attending this meeting and having children described as either having ADHD or trouble sitting still, both of these parents enrolled their children at the School and felt that their children were welcome there.

OCR's evidentiary standard requires a finding by a preponderance of the evidence in order to support finding a violation. Viewing the totality of the evidence here, we find insufficient evidence to support finding that the School discouraged students with ADHD or behavioral disabilities from enrolling at the School. We certainly understand that a parent of a student with ADHD or a behavioral disability could view the XXX's statements at the parent meeting as discriminatory towards students with ADHD or behavioral disabilities, and the Complainant's perspective was not unreasonable. Nonetheless, in light of the statements from the other parents at the meeting, we find the greater weight of the evidence supports finding that the XXX's comments at the parent meetings were not directed towards students with ADHD or behavioral disabilities or intended to discourage the enrollment of those students.

Finally, despite its facially neutral admissions procedures, our investigation sought to determine whether the School engaged in practices that were intended to encourage students with behavioral disabilities or ADHD to withdraw from the School, and we found insufficient evidence that the School engaged in any such practices. As described above, none of the students with ADHD or behavioral disabilities who attended the School have withdrawn, and the three students with disabilities who did withdraw did not have ADHD or behavioral disabilities

and their withdrawals were reported by the School as being due to family decisions unrelated to behavioral issues or their disabilities.

In conclusion, we find that the School's application and admission procedures do not discriminate against students with behavioral disabilities. Further, we find insufficient evidence that the statements made by the XXX at the parent meetings were discriminatory or made in an attempt to discourage students with behavioral disabilities from enrolling at the School. For these reasons, we find insufficient evidence that the School's enrollment practices or procedures towards students with behavioral disabilities were discriminatory as alleged.

II. Analysis of the School's notice of nondiscrimination and disability grievance procedures

With respect to the issue of whether the School has an adequate notice of nondiscrimination and disability grievance procedures, the School has agreed to resolve that allegation as part of the attached Resolution Agreement. Thus, no further discussion of that allegation is necessary.

Conclusion

As explained previously, we find that there is insufficient evidence that the School violated Section 504 or Title II with respect to the first allegation identified in our notification letter. With respect to the second allegation identified in our notification letter, we are pleased that the School voluntarily entered into the enclosed Resolution Agreement to address this compliance issue. This concludes our investigation of this complaint.

This letter addresses only the issues raised in this complaint and should not be interpreted as a determination of the School's compliance or noncompliance with Section 504, Title II, or other Federal civil rights laws in any other regard. Please note that the Complainant may have the right to file a private suit in federal court regardless of whether OCR finds a violation.

OCR routinely advises recipients of Federal funds and public educational entities that Federal regulations prohibit intimidation, harassment, or retaliation against those filing complaints with OCR and those participating in a complaint investigation. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will protect personal information to the extent provided by law.

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.

Thank you for the courtesy and cooperation your staff extended to OCR during the investigation of this case. If you have any questions regarding your complaint, please contact X – contact information redacted – X. You may also contact me at (303) 844-6083.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Resolution Agreement

cc (w/o enclosures): Shana Baker, Counsel
Hanna Skandera, Secretary of Education