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September 20, 2016

Mr. Thomas Drumm
Executive Director
Flagstaff Junior Academy
755 N. Bonito Street
Flagstaff, Arizona 86001

Re: Flagstaff Junior Academy
OCR complaint number 08-16-1251

Dear Director Drumm:

We have completed our investigation of case number 08-16-1251 and are notifying you of our decision. On March 25, 2016, we received a complaint alleging that Flagstaff Junior Academy (the Academy) discriminated against the Complainant's son (the Student) on the basis of disability and engaged in retaliatory behavior. Specifically, the Complainant alleged that the Academy failed to provide the Student with a free appropriate public education (FAPE) when it did not properly implement his Section 504 Plan during the 2015-2016 school year. Additionally, the Complainant alleged that after she advocated on behalf of the Student, the Student's teacher retaliated against the Student by threatening to isolate him in the corner of the classroom, made inappropriate comments about the Complainant in front of the Student, and continued to refuse to implement his Section 504 Plan.

We conducted this investigation pursuant to Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulation Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive 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. As a recipient of Federal financial assistance from the Department and a public entity, the Academy is subject to these laws and regulations.

In investigating this matter, we interviewed relevant Academy personnel and considered documents and information that you submitted, as well as documents and information submitted by the Complainant. We found that there was insufficient evidence to establish that the Academy failed to provide the Student with FAPE or that the Student or the Complainant were retaliated against.

Background

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

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The Academy consists of a single K-8 school. The Student, XXXX, transferred to the Academy in January 2016. The Complainant initially provided the Academy with a copy of the Student's Section 504 Plan from his prior school, which had been developed in August of 2015. The Academy then convened a multidisciplinary team and developed a new Section 504 plan on February 11, 2016. The Plan stated that the Student's areas of need relating to his disability (XXXX) were staying on task and completing tasks. The Student's February 11, 2016 Section 504 Plan stated that the Student would be provided XXXX. The District provided to OCR a Conference Summary of the February 11, 2016 meeting, which reflects that the Complainant requested additional communication from the teachers, and "teachers agreed to keep parents informed." The Conference Summary indicates that the Student's XXXX teacher ("Teacher") participated in the meeting.

Documents provided by the parties reflect that over the following weeks, the Complainant became concerned that the Teacher was not properly implementing the Student's Section 504 Plan. On February 19, 2016, the Complainant emailed the Academy's Executive Director ("Director") expressing concern about the Teacher not promptly responding to her emails and asking if there was a policy requiring teachers to respond within 24 hours. The Director stated that in general it is his expectation that teachers will respond within 24 hours. The Director pointed out, though, that teachers spend most of their day with students and do not have a lot of "computer time." Then, on February 22, 2016, the Complainant reported to the Director that the Student indicated that the Teacher had made an inappropriate comment to another teacher and to the Student about the Complainant demanding that the Student get preferential seating.

Consistent with the Academy's policy, the Complainant filed a complaint with the Director on February 23, 2016. The internal complaint alleged that the Teacher: (1) was not implementing the Student's Section 504 Plan; (2) was not communicating to the Complainant "what he [was] doing," and (3) was discriminating against her son out of anger and frustration (presumably by making an inappropriate comment to another teacher in front of the Student about the Student's preferential seating accommodation.) The Director investigated the Complainant's allegations. The Academy provided OCR with documents indicating that the Director considered the Student's statement, interviewed the Teacher, and interviewed the other teacher who was in the classroom when the alleged inappropriate statement was made. The Director convened a meeting on March 10, 2016, to inform the Complainant and her husband of his findings and develop a Corrective Action Plan. The Complainant's husband attended the meeting, but the Complainant refused to attend. Subsequently, the Academy developed the Corrective Action Plan, which articulates the Director's findings and remedies. The Corrective Action Plan indicates that the Director concluded that there was insufficient evidence to establish that the Teacher had made the comment as alleged. With respect to the allegation that the Teacher had failed to implement the Student's Section 504 Plan, the Director found that although the Teacher had provided most of the Plan's accommodations, he had not XXXX. The Director also found that prior to February 11, 2016, the Teacher had failed to respond to the Complainant in a timely fashion. The findings noted that prior to February 11, 2016, the parents had not signed up for the Academy's parent/teacher communication tool. The Director found that since the parents signed up for the communication tool on February 11, 2016, the Teacher had communicated weekly and "agreed to continue to do so."

The Corrective Action plan indicates that for the Teacher's failure to use the behavior code word and failure to communicate with the parents, the Teacher was to attend a Section 504 training course, the Academy would establish a system to check on the Teacher's future implementation of the Student's Section 504 Plan, the Teacher would communicate with the Student's parents on a weekly basis, and a paraprofessional would be added to the Teacher's classroom. The Corrective Action Plan also stated that the Academy would review and revise the Student's Section 504 Plan, if needed, to more specifically meet the Student's needs. The District provided OCR with a copy of the Corrective Action Plan signed by the Complainant¹ and her husband, which stated they agreed that the proposed remedies resolved her complaint to the Academy.

On Thursday, March 10, 2016, the Complainant sent the Teacher several messages through the Academy's parent communication tool. The Complainant sent another message on Sunday, March 13, 2016. The Academy's calendar indicates that it was also closed for spring break from March 12 through March 20. Following spring break, the Complainant complained to the Director that the Teacher had not responded to her recent communications. On March 24, 2016, the Director sent the Complainant the following email:

[The Teacher] received some very sarcastic and inflammatory messages from you over spring break. He was feeling attacked and at a loss for what to do. He shared with me all of those messages from you, one of which implied that he had not communicated with you in the week prior to spring break, however, he showed me 3 messages that he sent you that week (week of March 7). As a result, I have advised him to send all future messages to you through me. He will be sending you 1 email per week with an update of how [the Student] is doing in class including academically and behaviorally, and any relevant updates on assignments, etc. Our teachers are extremely busy, and quite frankly, he does not have time to respond to all of your emails (you sent him 4 emails on March 10th alone). As a result, you will receive one weekly email, nothing more, nothing less.

I am requesting that any emails you send to him I am cc'd on. I would prefer that we all use email as opposed to our Engrade system; I believe it will be easier for all of us to communicate using the email platform versus Engrade. You will receive an email update from him today, and one per week moving forward. Thank you.

On March 25, 2016, the Complainant sent a responsive email to the Director, acknowledging that her emails to the teacher were "extremely sarcastic" and calling the Teacher a liar. She wrote about the Teacher: "thank heavens he doesn't teach at a real school or he clearly couldn't handle it." The Complainant also pointed out that she had not yet received the information she had requested in a March 10, 2016 email to the Teacher, which was a description of the method he was using "to accommodate EVERY accommodation on the 504." The Complaint stated that if she did not receive the Teacher's explanation of how he was implementing every accommodation by the end of the day, she would be filing an OCR complaint.² The

¹ The Complainant disputes that she signed the Corrective Action Plan.

² The Student's Section 504 Plan did not include a provision requiring teachers to provide the Complainant with descriptions of the methods in which they implement the Plan.

Complainant also indicated that moving forward, she would prefer to communicate with a different administrator than the Director.

After filing this OCR complaint on March 25, 2016, the Complainant continued to express concerns about the Teacher and the Director throughout the remainder of the school year, and communicated regularly with different administrators. OCR's review of the parties' communications establishes that the Complainant continued to email the Teacher, with a copy to the Director, and the Teacher continued to provide the Complainant with weekly updates. The Student completed the 8th grade and matriculated from the Academy at the end of the school year.

Legal analysis

Section 110(a)(2) of OCR's *Case Processing Manual* provides, in pertinent part, that OCR will close complaint allegations where the allegations filed with OCR have been resolved through a recipient's internal grievance procedures, and all allegations were investigated, any remedy obtained is the same as the remedy that would be obtained if OCR were to find a violation of the complaint and there was a comparable resolution process under comparable legal standards. During the course of our investigation, OCR reviewed the Complainant's internal complaint to the Academy, as well as the summary of the Academy's investigation, its findings, and remedies. As a result of its investigation, the Academy found that the Student's Section 504 Plan was, at times, not fully implemented. The Academy notified the Complainant of its findings and developed a Corrective Action Plan. We conclude that through its internal grievance procedure, the Academy investigated the alleged failures to implement the Student's Section 504 Plan through a comparable resolution process and the application of comparable legal standards. After determining that there were instances in which the Section 504 Plan was not implemented, the Academy provided a remedy that was consistent with the remedy OCR would have attained if OCR were to have found a violation. Therefore, our analysis is limited to the portion of the Complainant's allegation that occurred after March 10, 2016, because those issues that occurred prior to that date have been resolved through the Academy's internal grievance procedure.

Free and Appropriate Public Education – FAPE

We first consider whether the Academy failed to implement the Student's Section 504 Plan after March 10, 2016. During this timeframe, the Complainant alleges that the Teacher failed to implement the Student's Section 504 Plan by refusing to consistently communicate with her. The Complainant also believed the Teacher was not providing other accommodations set out in the Plan, including writing assignments in the Student's planner.

The Section 504 regulations at 34 C.F.R. §104.33 require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36, pertaining to educational setting, evaluation and placement, and due process protections. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

The Complainant provided OCR with a series of email exchanges pertaining to the Academy's alleged failure to implement the communication provisions of the Student's Section 504 Plan. The Complainant also provided a copy of the Student's planner. The Complainant did not provide additional documentation or evidence regarding her belief that the Teacher was not implementing other provisions of the Plan.

In our review of the Student's Section 504 Plan, OCR found that while the Plan called for "consistent communication with parents," the word "consistent" was not defined. However, OCR reviewed several records which indicate that the Academy and the Complainant both acknowledged that the communication provision meant that the teacher would communicate with the Complainant at least weekly.³ As described previously, the Director implemented a communication practice on March 24, 2016, indicating that the Teacher would only provide one email each week to the Complainant. Email records provided by the parties demonstrate that the Complainant received weekly updates from the Teacher, and sent emails directly to Teacher, throughout the remainder of the school year. Further, while the Complainant alleged that the Teacher failed to implement the Student's Section 504 Plan by not writing his assignments in his planner, OCR noted that the Plan require the Student's *homeroom* teacher to "check" the Student's planner at the end of the day. The Plan does not require the Teacher to write in the planner. Consequently, OCR concludes that there is insufficient evidence to the support a finding that the Academy discriminated against the Student by failing to implement the Student's Section 504 Plan after March 10, 2016.

Retaliation

When investigating a retaliation claim, OCR must determine whether: (1) the individual engaged in a protected activity; (2) the recipient had notice of the individual's protected activity; (3) the individual was subjected to an adverse action contemporaneous with or subsequent to the protected activity; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all of these elements are established, then OCR considers whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for retaliation. While OCR would need to address all of the elements in order to find a violation, OCR need not address all of these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established.

The Complainant alleges that following her internal complaint, the Academy retaliated against her and the Student when the Teacher failed to implement the Student's Section 504 Plan and the Director advised the Complainant that all correspondence should go through him.

As discussed previously in this letter, OCR reviewed the Student's Section 504 Plan and documentation of the District's efforts to implement the Plan after March 10, 2016, and determined that there is insufficient evidence to establish that the District failed to implement the

³ The Corrective Action Plan states, "teachers and parents have communicated weekly and agree to continue to do so." In an email dated March 4, 2016, the Complainant wrote to the Teacher, "As per the 504 and my many requests, I would like at minimum weekly communication." The Teacher responded via email on March 5, 2016, that "communicating with you on a weekly basis will not be a problem."

Student's Section 504 Plan. Because there is insufficient evidence that the District failed to implement the Plan, we cannot conclude that the District retaliated in this manner.

We next consider the Complainant's allegation that the District retaliated by not requiring the Teacher to communicate with her other than by providing weekly updates. As indicated previously in this letter, the Director sent an email to the Complainant in which he characterized her emails to the Teacher as sarcastic, inflammatory, and attacking; the Director further stated that the frequency of the emails and her expectation for a prompt response was interfering with the Teacher's ability to do his job. The Academy provided OCR with copies of several emails that supported the Director's assertion that the Complainant's emails became sarcastic and unproductive. The Complainant also acknowledged that her emails were sarcastic.

For purposes of our analysis, OCR will assume that the Complainant did engage in a protected activity of which the Academy was aware (filing an internal discrimination complaint and advocating for the Student), and that the Academy's action in requiring the Teacher to only provide one update each week to the Complainant was adverse. Additionally, we will assume a causal connection between the Complainant's protected activity and the alleged adverse actions because of the proximity in time between the events.⁴

The pertinent portion of our analysis turns to whether the Academy had a legitimate, non-retaliatory reason for not requiring the Teacher to respond to the Complainant's emails within 24 hours. The Academy's stated reasons for its action were that the Complainant's emails to the Teacher were excessively frequent (up to four times per day) and the Complainant's expectation of prompt responses was interfering with his ability to do his job. The Academy added that the emails were also attacking, sarcastic, and inflammatory. The Complainant acknowledged that her emails were "extremely sarcastic," and OCR's objective review of the emails establishes that the emails can be read in a manner that is consistent with the Academy's characterization. Accordingly, we determined that the Academy's stated reason was facially legitimate and non-retaliatory.

Our analysis next turns to whether there is evidence that the stated reason is a pretext for illegal retaliation. We interviewed the Director, reviewed numerous internal communications between Academy administrators and the Teacher, and inquired as to the Academy's handling of other similarly situated parents.⁵ We could not find, nor did the Complainant identify, any direct or indirect evidence to suggest that the Academy's action was motivated by retaliation. Accordingly, we find that there is insufficient evidence to support a determination that the Academy retaliated as alleged.

Section 504 Policy and Procedures and Identification of a Section 504 Coordinator

⁴ OCR has not determined that the Complainant engaged in a protected activity, that the Academy took adverse action, or that there was a causal connection between the protected activity and adverse action. However, for the purpose of this analysis, OCR will accept the facts in a way most favorable to the Complainant to demonstrate that regardless of OCR's potential determination regarding those three factors, OCR would still not find sufficient evidence that the Academy retaliated against the Complainant.

⁵ There were no similarly situated parents.

During the course of our investigation of the Complainant's allegations, OCR reviewed the Academy's Section 504 policies and procedures and designation and notification of a Section 504 coordinator.

The implementing regulations of Section 504 found at 34 C.F.R. §§ 104.31-104.37 require recipients to locate and notify every qualified person with a disability residing in the recipient's jurisdiction; to provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction; to educate each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person; to conduct an evaluation of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person, to establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that include notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure; and to provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation.

In OCR's Data Request, dated April 26, 2016, OCR asked the Academy to provide a copy of their Section 504 policies and procedures. OCR received a copy of the Academy's Individuals with Disabilities Education Act (IDEA) Policy and Procedures. In an educational setting, Section 504 and its implementing regulations generally provide the same or greater protection than Title II and its implementing regulations. Where Title II does not offer greater protection than Section 504, OCR applies Section 504 standards. Here, Section 504 policies and procedures are more encompassing and differ from those of IDEA; therefore, IDEA policies and procedures are insufficient to satisfy the Academy's obligations under Section 504.

34 C.F.R. § 104.8 states that a recipient that employs fifteen or more persons shall notify participants, beneficiaries, applicants, and employees that it does not discriminate on the basis of disability; this notification shall include an identification of the responsible employee designated pursuant to § 104.7(a). In the April 26, 2016 Data Request, OCR requested information identifying the Academy's Section 504 Coordinator. During his interview, the Director told OCR that the Section 504 Coordinator and their contact information are identified on the Academy's website. When asked if this information is contained in the Academy's Parent/Student Handbook, the Director stated no but it will be.

Because the Academy has not developed or disseminated Section 504 policies and procedures, and because the Academy has not effectively disseminated the identity and contact information for its Section 504 Coordinator, OCR finds that the Academy is not in compliance with Section 504.

On September 19, 2016, we received the Academy's signed Resolution Agreement (copy enclosed). When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations. OCR will monitor the Academy's 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 Academy fails to implement the Agreement as specified, OCR may initiate administrative or judicial proceedings as described in the Agreement.

This letter concludes OCR's investigation of the complaint. It should not be interpreted to address the Academy's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have a right to file a private suit in Federal court whether or not OCR finds a violation.

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.

Please be advised that the Academy 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. If we receive such a request, we protect personal information to the extent provided by law.

If you have any questions, please contact me at 303-844-5942 or David Sumners, Equal Opportunity Specialist at 303-844-4512.

Sincerely,

"/s/

Sandra J. Roesti
Supervisory Attorney

Enclosures – Resolution Agreement