



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 30, 2017

Jackie Trujillo-Watins, Superintendent
La Paloma Academy
2050 N. Wilmot Road
Tucson, Arizona 85712

Re: La Paloma Academy
Case Number: 08-16-1255

Dear Superintendent Trujillo-Watins:

On March 28, 2016, we received a complaint alleging La Paloma Academy (Academy) discriminated on the basis of disability. Specifically, the Complainant alleged the Academy retaliated against the Complainant and her son (the Student) after she sought special education services for the Student. The Complainant alleged the Academy retaliated against the Student by decreasing his educational services by half; and the Complainant alleged the Academy retaliated against her by (a) contacting local law enforcement and making a complaint against her for not ensuring the Student is enrolled full time at school, even though the Academy expelled him and furnished him only four hours weekly of special education, and (b) contacting the Arizona Department of Child Safety (DCS) and making a false report against her. Through our investigation, we found that the Academy retaliated against the Complainant as alleged with respect to the truancy report and were unable to establish that the Academy contacted DCS as alleged. The Academy entered into the enclosed Resolution Agreement to address these compliance concerns.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulations Part 104, (Section 504) which prohibit discrimination on the basis of disability in programs and activities funded by 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, (Title II) which prohibit discrimination on the basis of disability by public entities. The District, a public entity, receives Federal financial assistance from the Department and is subject to these laws and regulations.

Background

The Student was in the XX grade at the Academy's Lakeside school during the 2015-2016 school year. He had an Individual Education Program (IEP) pursuant to which he received special education for a significant learning disability. He also had a Behavior Intervention Plan in place. He misbehaved on November 16, 2015. Also on this date, the Complainant contacted Arizona Center for Disability Law (ACDL) for assistance. ACDL has represented the Complainant from that time to present.

The Student was immediately suspended for his behavior and a Manifestation Determination Hearing (MDH) was held. In the Notice for the MDH dated November 19, 2015, it was noted that his attendance was good with some tardiness. The MDH team determined that the Student's behavior was not a manifestation of his disability. The Academy moved for expulsion and on December 4, 2015 the Student was expelled.

The Academy advised the Complainant in writing that it would start providing special education services for the expelled Student at two hours per day for four days, or eight hours per week. The ACDL lawyer wrote the Academy on December 18 and protested the limited amount of special education services the Student was receiving. Counsel sought an expedited IEP meeting to discuss the services which was denied by the Academy, but did not pursue due process. The Student was entitled to slightly less than eight hours per week per his IEP at the time.

Winter Break at the Academy was from December 21 to December 31, 2015. On January 6, 2016, the Academy sent a letter to Complainant expressing concern that the Student had not attended his special education instruction. The Academy acknowledged the confusion regarding when service hours were being offered and invited Complainant to return the Student to school "before the school takes further action in an effort to protect his best interests." On January 7 and 8, ACDL counsel and the Academy exchanged emails regarding what amount of services should be provided. On January 11, the Complainant brought her son to school, but did not give notice to the Academy that they were coming that day and, as a result, the Academy special education staff was not prepared to provide services on that day. The Student attended school the next day and thereafter as scheduled.

On January 15, 2016, another IEP meeting was held to discuss the hours of instruction the Student would receive. At the meeting the Academy IEP team reduced his special education services from eight hours to four hours per week. The Complainant and ACDL counsel disagreed with the decision and argued that four hours of special education services was insufficient. During the meeting (a recording of this meeting was provided to OCR), Academy staff reminded Complainant that her son was no longer a student at the Academy and strongly advised her that she must enroll him elsewhere. The District counsel argues that Complainant admitted at this meeting she had not yet sought other enrollment for her son. ACDL counsel advised us that the Complainant tried to find an enrollment for the Student, but with no success. Our investigator listened to the audio recording and learned that the Complainant stated she had tried to enroll the Student elsewhere. On January 19, 2016, ACDL counsel and Academy counsel exchanged emails regarding an ongoing dispute concerning the Academy producing the Student's academic records. On January 20, 2016, the Academy Attendance officer contacted Tucson law enforcement regarding Complainant's alleged failure to provide education instruction. This was done despite the Student's current attendance for special education services. He was not receiving general education services at any school.

ACDL counsel argued with Academy counsel for the remainder of the school year that the requirement of a Free Appropriate Public Education (FAPE) as mandated pursuant to the Individuals with Disabilities Education Act (IDEA) was not met when the Academy provided only four hours of special education services per week.

On February 1, 2016, the Complainant was issued a formal citation by Tucson law enforcement for truancy. The Attendance officer was present at the initial hearing. In addition to the truancy court proceeding, on April 11, 2016, the Complainant was contacted by Department of Child Safety (DCS). DCS questioned the Student at the Academy on May 10.

Complainant though ACDL counsel contends that when the Academy changed the services from eight hours to four it was retaliation against the Student because the Complainant disagreed with and complained about the amount of special education services provided to the Student (the Complainant believed eight hours was insufficient). They also contend that the Academy retaliated against the Complainant when it contacted Tucson law enforcement reporting truancy, and DCS reporting child safety issues. The Academy denies it contacted DCS.

The Academy's response to OCR described the difficulty the Academy had in communicating with the Complainant and reaching resolutions to the issues surrounding this case. We note the record reflects that the Complainant was not always cooperative in her dealings with the Academy.

Retaliation Analysis

Under the implementing regulations, recipients are prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504 and Title II. In analyzing a retaliation claim, we first determine whether: the individual experienced an adverse action caused by the recipient; the recipient knew the individual engaged in an activity protected by Section 504 and Title II or believed the individual might engage in a activity protected by Section 504 and Title II in the future; and a causal connection existed between the adverse action and the protected activity. If OCR determines that a causal link exists between any adverse action and any protected activity, we next determine whether the recipient has a legitimate, non-retaliatory, reason for its action; and whether such reason is a pretext for retaliation.

Referring Complainant to law enforcement for excessive absences: We determined the Academy took an adverse action when it referred the Complainant to law enforcement because she allegedly failed to provide for her son's educational instruction. She was required to appear in court many times to defend this charge. Ultimately, the prosecutor dismissed this charge as unlikely to be successful. Any reasonable person in Complainant's position would view this action by the Academy as adverse. The record reflects that the Academy was aware of the advocacy for the Student with disabilities by the Complainant and her counsel and took this adverse action contemporaneous with the advocacy by the Complainant and her counsel concerning the amount of special education services the Student received. Thus, we find a causal connection between the protected activity and the adverse action.

The Academy argues that it had a legitimate, non-retaliatory, reason for its action. Namely, that Arizona law requires that a child is enrolled and attending school and it was justified in notifying law enforcement because of truancy concerns since the Student was not attending school and the Complainant admitted she had not enrolled him elsewhere. Arizona Revised Statutes ("A.R.S.") § 15-805, allows for the attendance officer to enforce the law relating to school attendance of

children, specifically section 15-802, subsection E , and section 15-803.¹ Section 15-802, subsection E, of the Arizona Revised Statutes states in relevant part: “Unless otherwise exempted in this section or section 15-803, a parent of a child between six and sixteen years of age or a person who has custody of a child, who does not provide instruction in a homeschool and who fails to enroll or fails to ensure that the child attends a public, private or charter school pursuant to this section or fails to sign a contract to participate in an empowerment scholarship account pursuant to section 15-2402 is guilty of a class 3 misdemeanor.” However, Section 15-803 specifically lists the exemptions and definitions related to school attendance and includes reference to section 15-802, subsection D, which specifically states “A person is excused from the duties prescribed in subsection A or B if...the child was expelled from a public school...”²

We find that the stated reason proffered by the Academy is a pretext for retaliation against the Complainant. The Academy expelled the Student. Expulsion is a recognized exemption to the obligation to ensure that a child is enrolled and attending school as required by Arizona law. The Student attended the Academy for about three years. He did not have a record of absenteeism before the expulsion. Per the Complainant and counsel, the Student’s absences before the January 15, 2016 IEP meeting were due to attempts to overturn the Student’s expulsion, conflict over hours of instruction, and the holidays. Furthermore, the Academy did not follow its attendance policy and procedure regarding truancy, which calls for participation in the school’s Attendance Intervention Program. The policy states that after ten absences the student will be required to participate in the Attendance Intervention Program. The Academy states that since the Student is not enrolled in the Academy, having been expelled, these policies do not apply. We received comparative information on other Academy students referred to local law enforcement by the Academy Attendance officer. These other students were continually enrolled at the Academy and were never expelled and all of them received the opportunity to participate in the school’s Attendance Intervention Program prior to being referred to law enforcement for truancy. Finally, the court dismissed the truancy complaint based on the stated reason of “unlikely success at trial”. Therefore, we find the Academy retaliated against the Complainant when it notified local law enforcement of the Student’s alleged truancy.

Reducing special education services from eight to four hours: A reasonable person in the Complainant’s position would consider the reduction by half of special education services as adverse. This action occurred during the advocacy for the Student’s disability-related educational rights. The Academy’s stated legitimate, non-discriminatory reason for reducing the service hours from eight to four is that this was a temporary decrease. The decision was made by the Academy IEP team members to gather baseline data upon which to base future goals and adjust the time, if needed. The decision was also based on other aspects of the Student’s circumstances, including absences, the Student’s frequent complaints of hunger and fatigue, his inability to maintain focus, and the lack of sufficient baseline academic data. The IEP team also took the Complainant’s scheduling conflicts into consideration.

The Academy IEP team claims it was unable to administer assessments due to the Student’s excessive absences and Complainant’s refusal to allow assessments. The Academy’s staff members on the IEP team all agreed to reduce the Student’s special education and related

² See A.R.S §15-802(D)(6)(b).

services from eight hours per week to four in an effort to adjust for the Student's absenteeism for the eight hours of service each week it had been providing and to assess what services the Student would need in the future. The Complainant and her attorney disagreed with this decision and could have pursued due process based on this disagreement, but did not. Generally, OCR does not override the decisions of a group of persons knowledgeable about a student. Based on the facts related to this allegation, we are unable to find that the Academy retaliated when it held a properly constituted IEP team meeting to determine necessary and appropriate services for the Student.

Referral to DCS: The Academy denies that it made any call to this Agency. We could not obtain any evidence to the contrary. Complainant also does not have any information other than her suspicion. Therefore, we do not have any evidence that this was an adverse action taken by the Academy and we therefore cannot conclude that the Academy took this alleged retaliatory action.

We brought the violation identified during this investigation to the Academy's attention for resolution. On May 30, 2017, the Academy entered into a Resolution Agreement to resolve our compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the allegation in this case.

This concludes OCR's investigation of the complaint and 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.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by federal law.

Under the Freedom of Information Act, we may release this document and related correspondence and records upon request. If we receive 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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

If you have any questions or concerns about the closure of this complaint, you may contact me, at (303) 844-3333 or by e-mail at r.michael.sentel@ed.gov.

Sincerely,

/s/

R. Michael Sentel
Senior Attorney