



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 3, 2017

Mr. Felix Garcia, Head Administrator
Sage Montessori Charter School
3831 Midway Place NE
Albuquerque, NM 87109

Re: Sage Montessori Charter School
OCR Case Number: 08-17-1026

Dear Mr. Garcia

This is to notify you of the disposition of the above-referenced complaint filed against the Sage Montessori Charter School (School), alleging that the School retaliated against the Complainant and discriminated against students on the basis of their disabilities.

Specifically, the complaint alleges that:

- (1) the School retaliated against her when it terminated her because she informed School administration that the School did not provide a free appropriate public education (FAPE) to students with disabilities during the 2015-16 school year;
- (2) during the 2015-16 school year, the School did not provide FAPE to students with disabilities; and
- (3) during the 2015-16 school year, the School made placement decisions for students with disabilities that did not conform with the requirements of the Section 504 regulations in that the decisions did not draw on information from a variety of sources and were not made by a group of persons that included persons knowledgeable about the child, the meaning of the evaluation data, and that the placement options were not made by a team of individuals who examined the data.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. Title II prohibits discrimination on the basis of disability by public entities. These laws also prohibit retaliation. As a recipient of Federal financial assistance and a public entity, the School is subject to these laws. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the School and interviewed the Complainant and School staff.

OCR determined that there was insufficient evidence to conclude that the School retaliated against the Complainant as alleged or did not make placement decisions for Students that conformed with the Section 504 regulation as alleged. The bases for these determinations are set forth in this letter.

In addition, prior to the conclusion of OCR's investigation, the School requested to resolve the allegation that it failed to provide FAPE to students with disabilities during the 2015-16 school year.

Legal Standards

The standards adopted by Title II were designed not to restrict the rights or remedies available under Section 504. OCR has determined that the Title II regulations applicable to the issues raised in the complaint do not provide greater protection than the applicable Section 504 regulations. Therefore, the relevant Section 504 standards apply in analyzing the Title II issues raised in the allegations.

Retaliation

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. an individual experienced an adverse action caused by the recipient; and
2. the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and
3. there is some evidence of a causal connection between the adverse action and the protected activity.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR.

A protected activity is any action taken to further a right guaranteed by the statutes and regulations enforced by OCR or to express opposition to any practice made unlawful by the statutes and regulations enforced by OCR.

In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, or the recipient's deviation from established policies or practices.

If all of the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

Evaluation and Placement

The Section 504 regulation at 34 C.F.R. §104.35(a) requires a recipient to conduct an evaluation in accordance with the requirements of 34 C.F.R. §104.35(b) of any person who, because of disability, needs or is believed to need special education or related services, before taking any action with respect to initial placement of the person in regular or special education, and any subsequent significant change in placement. Therefore, in order to implement discipline that constitutes a “significant change in placement,” a recipient must first conduct a reevaluation of the student in accordance with the provisions of 34 C.F.R. §104.35.

The Section 504 regulation at 34 C.F.R. § 104.35(b) requires that a recipient establish certain standards and procedures for the evaluation and placement of students who, because of disability, need or are believed to need special education and/or related services. The Section 504 regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

The Section 504 regulation at 34 C.F.R. § 104.36 requires a recipient 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 includes 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.” Compliance with the procedural safeguards of the IDEA is one means of meeting this requirement.

FAPE

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The Section 504 regulation at 34 C.F.R. § 104.33(b)(1) defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met. The development and implementation of an individualized education plan (IEP) or Section 504 Plan is one means by which FAPE may be provided.

xxxxxxxxxxxxxxxxxxxxx which led to her interference in and observation of other teachers' classroom and performance. The HOS told OCR that at the conclusion of the 2014-15 school year, multiple teachers informed him that they would not return to the School because of the Complainant's behavior. In addition, the HOS told OCR that during the 2015-16 school year, the Complainant frequently left her classroom to monitor other teachers' classrooms.

The Complainant told OCR that she believed the HOS disciplined and ultimately terminated her because she complained to him that the School's Director of Special Education and Dean of Students (hereinafter, Director & DOS) was unilaterally altering student IEPs and failing to provide students with the related aids and services in the IEPs. The Complainant asserted she complained to the HOS in writing in May 2016, just before she was suspended and terminated.

OCR reviewed written correspondence between the Complainant and School staff and about the Complainant. OCR observed three instances in which the Complainant reported concerns to the HOS. First, on or around March 3, 2016, the Complainant informed the HOS that she believed evaluations were not being conducted "honestly" in that teachers were hand-selecting high achieving students from other teachers' classrooms in order to have a successful observation by the HOS. Second, on or around April 11, 2016, the Complainant informed the HOS that the Director & DOS was "interject[ing] herself" into the Complainant's classroom and attempting to make the School a "traditional paper school." Finally, on or around April 22, 2016, the Complainant reported that the Director and DOS and another teacher (xxxxxxxx xxxxxxx xxxxxxx xxxxxxx xxxxxxx) interfered with her teaching and destroying the "balance of Montessori" teaching methods by focusing on traditional teaching methods and practicing for standardized tests that the students would be taking.

The HOS denied that the Complainant ever reported a concern about the creation or implementation of IEPs. The HOS told OCR, instead, that the Complainant often requested to place students with IEPs who were not identified as gifted in other classrooms because she believed that implementing the IEPs would interfere with the Montessori method.

Placement Decisions

The Complainant asserted that during the 2015-16 school year, the Director and DOS made unilateral placement decisions without following the evaluation and placement procedures set forth in 34 C.F.R. § 104.35(b). OCR reviewed the IEPs of each student at the School during the 2014-15 and 2015-16 school years. Each IEP contained a prior written notice of the meeting to the parent(s)/guardian(s) (hereafter, parents), a recitation of the parents' input at the meeting, an attendance sheet documenting the parents' attendance at the meeting, and a statement that parents had been provided with procedural safeguards. OCR's investigation did not indicate that any IEP had been altered or tampered with after the meeting. In a few instances, the School created "addendums" to an existing IEP. The documentation provided indicated that the addendums were created after notice to parents and input from parents.

FAPE

The Complainant asserted that during the 2015-16 school year, the School did not implement all of the related aids and services in School students' IEPs (IEP services). The HOS told OCR that he believed the School did provide IEP services to School students. The School did not produce documentation, in the form of statements from service providers, service logs, class schedules, notes or memoranda, indicating that IEP services were provided to School students. OCR noted that on August 20, 2015, the School emailed all teachers to direct them to stop by the Director & DOS office to have student IEPs downloaded onto the teacher laptop. In addition, on December 2, 2015, the School held professional development which covered the IEP team meeting process.

In November 2016, the NMPED issued the Charter School Renewal Report for the School. The NMPED recommended that the School's charter not be renewed. Among other things, the NMPED noted the School did not log and monitor students' IEP services.

The School confirmed that it would not open for the 2017-18 school year, and that School records would be transferred to a custodian.

Recordkeeping

In its review of files, OCR observed that each of the students with an IEP was designated for "individual and group" service in the general education classroom. Some of the IEP's created by the School deviated substantially from the IEPs created by the student's previous school. In addition, in the section of the IEP documenting the School's consideration of the student's placement and other alternative placement, the IEPs contain no information supporting the team's placement decision; rather the IEPs indicate only that one placement "meets LRE" and other placements "do not meet LRE." The NMPED report noted the same deficiency.

Analysis

Retaliation

The Complainant asserted that the School retaliated against her when it terminated her because she informed School administration that the School did not provide a free appropriate public education (FAPE) to students with disabilities during the 2015-16 school year.

The evidence established that the Complainant was subjected to an adverse action when the School terminated her employment at the end of the 2015-16 school year. However, there is insufficient evidence to conclude that the Complainant engaged in protected activity. Although the Complainant asserts that she told the HOS about her concerns regarding the School's provision of FAPE, shortly before the adverse action, the emails and letters sent by the Complainant to the HOS indicate that she reported concerns about: (1) other teachers utilizing students to enhance their evaluation; (2) other teachers and the Director & DOS not utilizing Montessori methods and curricula; and (3) personality conflicts with other teachers and the Director & DOS that were unrelated to the provision of special education services. More, the HOS denies that the Complainant informed him that she had a concern the School was not providing FAPE to students with IEPs.

Even if it were the case that the Complainant had engaged in protected activity, there is insufficient evidence to conclude that there is a causal connection between any protected activity and Complainant's termination. The evidence establishes that the Complainant had a history of inappropriate conduct for which she had been warned or disciplined, including yelling at or pushing other teachers, leaving her classroom, and failing to report incidents of harassment to the HOS. This history pre-dates the HOS arrival at the School and pre-dates the Complainant's asserted protected activity.

For all of the reasons discussed in this letter, OCR has determined that there is insufficient evidence to conclude that the School retaliated against the Complainant as alleged.

Placement Decisions

The Complainant asserts that the Director & DOS unilaterally altered students' IEPs, in violation of 34 C.F.R. § 104.35. However, the evidence is insufficient that the School did not follow proper evaluation and placement decisions. OCR reviewed IEPs created by the School during the 2014-15 and 2015-16 school years. OCR found no indications that the IEPs had been altered or tampered with. Moreover, each IEP contained a prior written notice of the meeting to the parent(s)/guardian(s) (hereafter, parents), a recitation of the parents' input at the meeting, an attendance sheet documenting the parents' attendance at the meeting, and a statement that parents had been provided with procedural safeguards. In addition, when the School created an "addendum" to an existing IEP, the documentation provided indicated that the addendums were created after notice to parents and input from parents.

For all of the reasons discussed in this letter, OCR has determined that there is insufficient evidence to conclude that the School discriminated against students during the 2015-16 school year by unilaterally altering their IEPs as alleged.

FAPE & Recordkeeping Deficiencies

OCR's investigation noted deficiencies in the School's record keeping that indicate a potential failure to provide FAPE to students, consistent with 34 C.F.R. § 104.33(a) and to document the bases for its evaluation and placement decisions, consistent with the requirements of 34 C.F.R. 104.35(c). Prior to the conclusion of OCR's investigation, the School requested to resolve the allegation that it did not provide FAPE to students during the 2015-16 school year. In addition, the School requested to resolve the deficiency noted by OCR during its investigation that the School did not document the bases for its evaluation and placement decisions. The provisions of the resolution agreement are aligned with this allegation and deficiency and consistent with the applicable regulations.

The Section 504 implementing regulation at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a free and appropriate public education (FAPE) to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The development and implementation of an individualized education plan (IEP) or Section 504 Plan is one means by which FAPE may be provided.

OCR's investigation revealed that the School did not have documentation to demonstrate that the School had provided IEP services, a deficiency which another investigatory agency, NMPED, also observed.

In addition, the Section 504 regulation at 34 C.F.R. § 104.35(c) requires that, in interpreting evaluation data and making placement decisions, a recipient draw upon information from a variety of sources, establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and ensure that the placement decision is made by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

OCR's investigation revealed that the School did not have documentation to support the placement decision or to indicate that it considered all available information or placements, including but not limited to the students' previous IEPs or placements outside the general education classroom.

OCR's continued investigation of these issues is complicated by the fact that the School will, at the conclusion of the 2016-17 school year, cease its operations.

During the course of the investigation, before OCR had obtained sufficient evidence to make a finding, the School indicated its desire to voluntarily enter into an agreement to resolve these deficiencies pursuant to Section 302 of OCR's Case Processing Manual. We reviewed this request and determined that it justified entering into an agreement without completing a full investigation.

On March 31, 2017, we received the School's signed Resolution Agreement (enclosed). When the Agreement is fully implemented, this allegation 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. OCR looks forward to receiving the School's first monitoring report, which is due by April 30, 2017.

This concludes OCR's investigation of the complaint and should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the School may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint alleging such treatment. The Complainant may also file a private suit in federal court whether or not OCR finds a violation.

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, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We wish to thank you for the cooperation extended to OCR during our investigation. In particular, we thank xxxxxxxxxxxxxxxxxxxxxx, for her assistance throughout OCR's investigation. If you have any questions, please do not hesitate to contact Patrick Alexander, Civil Rights Attorney, by phone at 303-844-3473, or by e-mail at Patrick.Alexander@ed.gov.

Sincerely,

Sandra J. Roesti
Supervisory Attorney

cc: xxxxxxxxxxxxxxxxxxxxxx

Enclosure