



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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December 31, 2018

Ms. Barbara Hawkins, Superintendent
George Gervin Preparatory Academy
2801 East Southern Avenue
Phoenix, Arizona 85042

via email only to XXXX@XXXX

Re: **George Gervin Preparatory Academy**
OCR Case Number 08-18-1613

Dear Superintendent Hawkins:

We have completed our investigation stemming from the complaint alleging that George Gervin Preparatory Academy ("School") discriminated on the basis of disability. Specifically, the Complainant alleged that the School: (a) denied her son ("Student") admission on the basis of disability ("Individual Allegation"); and (b) discriminates against students with disabilities in registration, admission, and enrollment ("Systemic Allegation").

We found insufficient evidence to support the Individual Allegation. Our investigation established a preponderance of the evidence to support the Systemic Allegation. The reasons for our conclusions are set forth in this letter.

Upon being advised of the violation finding, the School entered into a resolution agreement ("Agreement") to resolve the matter. A signed copy of the Agreement is enclosed with this letter.

I. JURISDICTION

The Office for Civil Rights (OCR) of the U.S. Department of Education ("Department") is responsible for enforcing: Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and its implementing regulation at 34 Code of Federal Regulations (C.F.R.) Part 104, which prohibit discrimination based on disability in any program or activity operated by recipients of Federal funds; and Title II of the Americans with Disabilities Act of 1990 ("Title II"), and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination based on disability by public entities, regardless of whether they receive Federal financial assistance. As a recipient of Federal financial assistance from the Department and a public entity, the School is subject to these laws and regulations.

II. LEGAL STANDARD

Under the Section 504 regulations, at 34 C.F.R. Section 104.4(a) and (b), no qualified individual with a disability 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 which receives Federal financial assistance. The Title II regulations, at 28 C.F.R. Section 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. Section 104.4(b)(1), and 28

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

C.F.R. Section 35.130(b)(1), a recipient public school may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

To determine whether an individual has been discriminated against on the basis of disability under Section 504 and Title II, OCR looks at whether there is evidence that the individual was treated differently than individuals without disabilities under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the school provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the school's actions were based on the individual's disability.

III. INVESTIGATION

Our investigation focused on obtaining the evidence necessary to determine whether the School complied with these legal standards. Specifically, our investigation consisted of:

- requesting and reviewing documents and information from the Complainant and the District;
- interviewing the School's paraprofessional ("Paraprofessional"), interim principal ("Principal"), and contract psychologist ("Psychologist");¹ and
- providing the Complainant with an opportunity to rebut information provided by the School.²

IV. EVIDENTIARY STANDARD

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports or is insufficient to support the conclusion.

V. EVIDENCE

A. Individual Allegation

i. 2017-2018 School Year

During the 2017-2018 school year (SY), the Student was in kindergarten at the School. For the first few months of the 2017-2018 SY, the Student struggled behaviorally at the School.³ Consequently, on XXXX XX, 2017, the School's multidisciplinary evaluation team (MET) met and reviewed existing data for the Student. The Complainant provided consent for the School to evaluate the Student.

¹ We also attempted to interview the School's former principal, former special education director, and former administrative assistant; however, they were not responsive to OCR's requests.

² The Complainant did not provide a rebuttal to OCR.

³ According to the School, "No Formal Discipline records were created as the student was too young."

The Student was evaluated in January and February 2018. Documentation from the evaluation indicated that the Student struggled with being argumentative, aggressive, disruptive, angry, defiant, and overly active.

On XXXX XX, 2018, the MET convened a second time to review additional data. The MET found the Student to be ineligible, but recommended accommodations, modifications, and a behavioral reward system. The MET report noted:

[XXXX – redacted – XXXX].

Nevertheless, the MET concluded, “[The Student] does NOT qualify for special education services. The cognitive and academic achievement scores show [the Student] within normal limits for academic success in school. The developmental scale scores from the teacher and parent place [the Student] within normal limits of development and functioning consistent with the general population of students his age and grade level.”

The Complainant withdrew the Student from the School in March 2018. The Student’s “Official Notice of Pupil Withdrawal” form indicates that: the “primary withdrawal type” was “transferred to another school in state;” the Student’s last day of attendance at the School was XXXX XX, 2018; and the form was completed on XXXX XX, 2018. According to the Complainant, “Shortly after the evaluation, [the principal at the time] and I decided it was best to withdraw him, and let him start again next year, because he did start a year early and maybe he just wasn’t mature enough.” The Complainant wrote to OCR, “I was told when I voluntarily withdrew him, I could enroll him the following school year back in Kindergarten since he did not complete it.”

The School argued, in its narrative response, “Discrimination could not have occurred under the American [sic] with Disability [sic] Act, because the child does not have a disability.” However, students who have a record of or who are regarded as having a physical or mental impairment which substantially limits one or more major life activities are also protected until Section 504 and Title II. Here, there is evidence that the Student was regarded, at least by some, as a student entitled to protections under Section 504 and Title II. Regardless, since we found insufficient evidence of the Individual Allegation, this issue did not affect the outcome of the case.

ii. 2018-2019 School Year

Whether the Student would have been in kindergarten or first grade, if admitted to the School for the 2018-2019 SY, is unclear. The Complainant and Paraprofessional indicated that the Student would have been in kindergarten due to his age and the fact that he did not finish kindergarten. The Principal implied that the Student would be in first grade. The School’s data response indicated that the Student would have been in first grade. Therefore, we investigated and analyzed the facts to account for both scenarios.

On July 18, 2018, the School received from the Complainant a “Student Enrollment Form” for the Student. According to a “Student Totals” report provided by the School to OCR, as of that date, there were enrollment forms already submitted for 26 students in kindergarten and 35 students in first grade.

On August 3, 2018, the School had its “Meet the Teacher” night. The Complainant’s version and the School’s version of what happened that night differ dramatically.

According to the Complainant, she learned, for the first time, that the Student was not on a class roster. She reported that the School's administrative assistant told her that the Student was not enrolled because his paperwork was not complete; then, minutes later, the Principal told her that the Student was not enrolled "due to his discipline records" from the 2017-2018 SY.

According to the Paraprofessional and the School's narrative response, the Paraprofessional's only interaction with the Complainant that night was: (a) the Complainant requesting from the Paraprofessional (without explanation) a copy of the Student's evaluation, which the Paraprofessional provided; (b) the Paraprofessional telling the Complainant that the kindergarten and first grade classrooms were full and the Student would have to be placed onto a waitlist; and (c) the Complainant asking to speak with the Principal. According to the Principal, she was told that the Complainant was waiting to meet with her, but when she finished talking with students and went into the lobby to find the Complainant, the Complainant was gone.

The School's 2018-2019 SY began on August 6, 2018. According to the School, due to a reduction in enrollment, the School would have only one kindergarten classroom and one first grade classroom for the 2018-2019 SY. The Principal explained to OCR that: (a) not enough students had enrolled to justify expenses for two kindergarten and two first grade classrooms; (b) the School knew that there would be some natural attrition, which would bring the classrooms down to more manageable sizes; and (c) the classrooms would still be large, and therefore, no students would be accepted from a waitlist.

Then, according to a "Student Count Report" provided by the School to OCR, from August 6, 2018 to October 11, 2018: (a) the kindergarten classroom had an average size of 21 students, an active student count of 21, and a loss of eight students since the beginning of the SY; and (b) the first grade classroom had an average size of 26 students, an active student count of 26 students, and a loss of five students since the beginning of the SY.

B. Systemic Allegation

i. Policies and Practices

The School does not have formal admissions and enrollment policies. The School's "Registration" website reads:

We have a two-step enrollment process:

1. Fill out an enrollment packet and bring in all documents mentioned below to George Gervin Prep Academy.
 1. Copy of birth certificate
 2. Immunization records (up to date)
 3. Proof of residency (acceptable forms are listed in your packet)
2. Set up a meeting with administration staff and complete the registration packet.

If you have questions, please call us at (480) 219.2121, or send an email.

George Gervin Prep Academy does not discriminate on the basis of race, color, disability, or national and/or ethnic origin in the administration of its educational policies, admissions policies, and/or athletics and other school-administered programs.

The School's enrollment packet directs parents to indicate if their child receives "Special Education" or a "504 Plan." The form also asks: "Does your child receive special services?"; "Does your child have an IEP?"; and "Does your child have a 504 Plan?". Additionally, the enrollment packet includes a "Release of Records and Special Information" form that includes consent for the release of "psychological evaluation records" and "special education records." A handout titled, "What [the School] requires from you to enroll a student," lists, "SPED records (IEP, 504 If Applicable)."

According to the Superintendent, Principal, and Paraprofessional, the School admits students on a first-come, first-served basis, regardless of the responses to the questions about disability on its enrollment forms. In other words, they reported that School enrolls students automatically, regardless of disability, until classes are full. In short, the School's position is that it does not consider disability in admissions and enrollment.

The School explained that it asks about disability, IEPs, and Section 504 plans in its enrollment packet because, if a student with a disability is enrolled, the School needs to be prepared with the necessary records, services, and staff to serve the student.

ii. Data

We analyzed the School's student population data in case the data offer any evidence of discrimination in admissions and enrollment for students with disabilities.

According to the most recent Civil Rights Data Collection (CRDC), the School had zero students with disabilities during the 2015-2016 SY. However, according to the School, as of October 2, 2018, it had 16 students with disabilities.⁴ See Figure 1 below.

According to the School, as of October 11, 2018, its total student population was 171. Therefore, students with disabilities were approximately 9.4 percent of the School's total student population. Notably, according to the Paraprofessional and Principal, the School has no students with Section 504 plans.

Figure 1: Students with disabilities enrolled in the School as of October 2, 2018

Grade	Area(s) of Eligibility	Sped. Min./Wk.	Related Services Min./Wk.	Grade	Area(s) of Eligibility	Sped. Min./Wk.	Related Services Min./Wk.
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X

⁴ The School's narrative response, provided October 19, 2018, read, "Currently there are 17 Special Education students on campus[.]"

Grade	Area(s) of Eligibility	Sped. Min./Wk.	Related Services Min./Wk.	Grade	Area(s) of Eligibility	Sped. Min./Wk.	Related Services Min./Wk.
X	X	X	X	X	X	X	X
X	X	X	X	X	X	X	X

VI. ANALYSES**A. Individual Allegation**

We found insufficient evidence that the Student was treated differently than students without disabilities under similar circumstances. Instead, there was evidence that the Student was not enrolled because of the timing of his enrollment paperwork and the School's disability-neutral decisions regarding class sizes and numbers of classrooms. Therefore, we do not need to continue the analysis detailed in Section II of this letter and we found insufficient evidence to support the Individual Allegation.

The Complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain: (a) why the factual information was incomplete or inaccurate, the legal analysis was incorrect, and/or the appropriate legal standard was not applied; and (b) how correction of any error(s) would change the outcome of the case. Failure to provide this information may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the School. The School has the option to submit to OCR a response to the appeal. The School must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the School.

B. Systemic Allegation

OCR's "Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under Section 504 of the Rehabilitation Act of 1973" reads:

During the application and admission process and before enrollment in the charter school, it is generally not permissible under Section 504 to ask a prospective student whether the student has a disability. The exceptions to this prohibition ... apply where the charter school is using that information solely to enhance the chances for a student with a disability to be admitted or enrolled for required remedial action or permissible voluntary action, or where a school is chartered to serve the educational needs of students with a specific disability and the school asks prospective students if they have that specific disability. ...

Upon enrollment, it is permissible for the charter school to ask a student whether he or she has a disability in order to ensure that the school provides FAPE. ...

Absent an exception ..., in which case a student's disability is relevant to a charter school's admissions process, there is generally no legitimate reason to ask about or consider a student's disability in the process of initially accepting or rejecting applications or in admitting students to a charter school. For this reason, any pre-enrollment inquiry about disability during the charter school application and admissions process is generally prohibited as unnecessary different treatment on the basis of disability. ...

...

A recipient is responsible for determining if there are enrolled students with disabilities who are entitled to FAPE under Section 504. Therefore, *after* a charter school admits and enrolls a student, a charter school can inquire about a student's disability and request relevant records. (emphasis added)

The School's enrollment packet effectively asks parents of prospective students about whether their student has a disability by asking whether their student has an IEP or Section 504 plan. There is no evidence that the School uses the responses solely to enhance the chances for a student with a disability to be admitted or enrolled for required remedial action or permissible voluntary action. Additionally, the School is not chartered to serve the educational needs of students with a specific disability. Therefore, our investigation established a preponderance of the evidence to support the Systemic Allegation.

VII. CONCLUSION

We thank the School for being willing to voluntarily address the violation found. A copy of the signed Agreement is attached. When the Agreement is fully implemented, the allegation will be resolved consistent with the requirements of Section 504, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the School about the status of the Agreement terms. We will provide the School written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the School fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the School has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the School, copied to the Complainant, stating that this case is closed.

The Complainant may have the 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 it 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 investigation. If this happens, the individual 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. 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 thank you and your staff for the patience and cooperation extended to us during the resolution of the case. If you have any questions, please contact Jason Langberg, the attorney assigned to this complaint, at (XXX) XXX-XXXX or XXXX@XXXX.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

cc (via email): Diane Douglas, Arizona Superintendent of Public Instruction