

June 5, 2015

Ms. Linda Holland
Director
Joint Education Services in Special Education
P.O. Box 418
Plymouth, IN 46563

Re: OCR Docket # 05-15-1078

Dear Ms. Holland:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against Joint Education Services in Special Education (JESSE) alleging discrimination based on disability.

Specifically, the complaint alleged that JESSE subjected a class of middle school students with disabilities to discrimination based on disability when:

1. it placed them in a classroom facility that is not comparable to the classroom facilities provided to non-disabled students; and
2. it failed to provide an accessible restroom for the special education classroom.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 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 at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, JESSE is subject to these laws.

During its investigation, OCR reviewed information provided by the complainant and JESSE, interviewed JESSE personnel, and conducted an on-site visit of the Specialized, Academic, Vocational Education (SAVE) Program's classroom facility and a nearby middle school's classroom facilities. OCR's determinations are set forth below.

Allegation #1

The complaint alleged that JESSE subjected a class of middle-school students with disabilities to discrimination based on disability when it placed them in a classroom facility that is not comparable to the classroom facilities provided to non-disabled students. The Complainant specifically alleged numerous problems with the environmental conditions of the classroom facility for the SAVE Program, including poor air quality, lead paint, roaches, and mold. The complaint did not allege that the placement of students in the SAVE Program was inappropriate or that any students were denied a free appropriate education by virtue of their placement in the SAVE Program.

Legal Standards

In an educational setting, 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 allegation #1 in this complaint do not provide greater protection than the applicable Section 504 regulations. Therefore, OCR applied the Section 504 regulations in analyzing this allegation.

The Section 504 implementing regulation, at 34 C.F.R. § 104.4(a), provides that no qualified person 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 or benefits from Federal financial assistance from the Department. The Section 504 regulation, at 34 C.F.R. §§ 104.4(b)(1)(i)-(iv), provides that a recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability, deny a qualified disabled person the opportunity to participate in or benefit from the aid, benefit, or service; afford a qualified disabled person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; provide a qualified disabled person with an aid, benefit, or service that is not as effective as that provided to others; or provide different or separate aid, benefits, or services to disabled persons or to any class of disabled persons unless such action is necessary to provide qualified disabled persons with aids, benefits, or services that are as effective as those provided to others.

In addition, under the Section 504 regulation, at 34 C.F.R. §104.34(c), if a recipient operates a facility that is identifiable as being for persons with disabilities, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

Facts

JESSE is a co-operative program operated under Indiana Code § 20-16-10-4 to provide special education and related services to eligible students with disabilities located within nine school corporations in Indiana: Argos Community Schools, Culver Community

Schools, John Glenn School Corporation, Knox Community School Corporation, North Judson-San Pierre School Corporation, Oregon-Davis School Corporation, Plymouth Community School Corporation, Triton School Corporation, and Union North School Corporation (collectively, Participating School Corporations). JESSE's Board of Managers is comprised of the superintendent or designee of each Participating School Corporation.

JESSE operates the SAVE Program, which provides an alternative setting for 6th to 8th grade students with social and/or emotional issues who have not been successful in the general education setting. All of the students have been found to have a disability. The SAVE Program is operated in a self-contained classroom in a separate facility in Knox, Indiana; no other educational programs are located at this facility. JESSE informed OCR it chose the location because it is central for the Participating School Corporations.

The JESSE Assistant Director said that the separate facility is necessary to provide an environment that does not contain stimuli that exists in a traditional school setting, including school bells, students changing classes, and large numbers of students and staff. He said that the students in the SAVE Program have typically experienced negative emotional adjustments with adults and peers, low self-esteem, and academic struggles. The Assistant Director said that the alternative environment provides these students with immediate assistance with behavior and emotional needs that arise, as the program has three adults (one teacher and two aides) serving a maximum of ten students. He said that, by taking away the stimuli of the general education setting, a student can focus on his or her social and behavioral skills, experience academic progress, and increase self-esteem.

The JESSE Executive Director told OCR that all Individualized Education Program (IEP) and placement decisions are made by a student's case conference committee. The Executive Director said that parents must visit the facility and consent to placement prior to a student entering the SAVE Program. She said there is often a waiting list for the SAVE Program.

The Executive Director told OCR that, every nine weeks, the students are provided report cards and that, if a student has met his or her goals at this time, the student's case conference committee will reconvene to discuss whether to continue the placement in the SAVE Program. The Executive Director said that all the students in the SAVE Program are on a diploma track and the goal is to transition these students back to the general education setting. JESSE provided OCR data that showed there have been 25 students placed in the SAVE Program in the past three years, for as short as 26 days to as long as two school years; approximately half of the students were in the SAVE Program for less than six months.

The Executive Director said that if the case conference team determines that a SAVE Program student would benefit from any programs outside the SAVE Program, then the student is bused to his or her home school for that program. JESSE provided OCR IEPs documenting that students were bused to their home schools for specific programs.

With regard to the concerns raised by the Complainant about the facility, JESSE provided copies of four reports from government agencies with which complaints were filed in the 2014-2015 school year. The Starke County Health Department (Health Department) noted in November 2014 five problems (a refuse container was not covered, the refrigerator lacked a temperature measuring device, items in the refrigerator were not dated, there was no hand washing sink in the kitchen, and the lunches did not have time markings). JESSE provided OCR documentation that it corrected all the issues within 30 days, as required in the Health Department report.

The Indiana Department of Labor conducted an inspection of allegedly harmful contaminants and noted in its report in January 2015 that the exit doors at the rear of the facility were locked; another report from this agency in April 2015 stated that there was no asbestos or lead in the facility. JESSE is waiting for the final report regarding the doors; the Executive Director said that, if there is an issue remaining with the exit doors at the time, JESSE will work with the landlord to correct it.

Finally, the City of Knox Planning Commission (Commission) noted in March 2015 seven building code violations (smoke alarm was not working properly, fire extinguishers were mounted too high, outlets in restrooms lacked GFCI protection, a dryer vent from an upstairs apartment was not connected, back doors were not unlocked when class was in session, door handles had thumb locks, and the facility lacked two lighted exit signs). The Executive Director said that JESSE and its landlord will correct these issues between June 1 and August 1, 2015, when the students are on summer break and indicated that the Commission has agreed to this timeline.

The Complainant also provided a report from an independent lab that tested alleged mold in the facility in December 2014. The report indicated that no unusual mold conditions existed in the facility.

OCR conducted an onsite visit of the SAVE Program and a nearby middle school to compare the classroom facilities' physical environment. The classroom for the SAVE Program consisted of one spacious room with desks for each student, computers for each student, a projector, textbooks, and other school supplies. The classroom facility appeared well-maintained, well-lit, and clean. OCR did not note any visible problems, including the specific concerns raised by the Complainant.

The general and special education classrooms in the nearby middle school were also spacious with desks for each student, computers for each student, a projector, textbooks, and other school supplies. The classrooms appeared well-maintained, well-lit, and clean. OCR did not note any differences in the quality of the environment between the SAVE Program classroom and the middle school.

Analysis and Conclusion

The evidence established that a class of middle-school students is placed in a classroom facility that is separate from the classroom facilities provided to non-disabled students and that investigations have identified problems with the facility, include issues related to food, electrical outlets, and exits.

However, the evidence established that JESSE addressed several of the issues raised and is currently working with the landlord to address promptly the remaining issues, of which it recently became aware. OCR's on-site inspection revealed that the SAVE Program classroom facility appeared well-maintained and similar to the regular and special education classroom facilities in a nearby middle school.

Based on the above, the preponderance of the evidence is insufficient to establish that JESSE subjected a class of middle-school students with disabilities to discrimination based on disability when it placed them in a classroom facility that is not comparable to the classroom facilities provided to non-disabled students. Accordingly, there is insufficient evidence to establish a violation of the applicable regulations with regard to Allegation #1.

Allegation #2

The complaint alleged that JESSE subjected a class of middle-school students with disabilities to discrimination based on disability when it failed to provide an accessible restroom for the special education classroom.

Legal Standards

The implementing regulations of Section 504, at 34 C.F.R. § 104.21, and Title II, at 28 C.F.R. § 35.149, provide that no qualified person with a disability shall, because a recipient's facilities are inaccessible to or unusable by persons with a disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity.

The implementing regulations of Section 504, at 34 C.F.R. § 104.22, and Title II, at 28 C.F.R. § 35.150, are applicable to any facility or part of a facility where construction commenced prior to June 3, 1977 (Section 504) or January 26, 1992 (Title II), respectively. The regulations provide that with regard to such facilities, termed "existing facilities," the recipients will operate the programs, activities and (as to Title II) services so that, when viewed in their entirety, the programs, activities, and services are readily accessible to and usable by persons with disabilities. The recipients may comply with this requirement through the reassignment of programs, activities, and services to accessible buildings, alterations of existing facilities or any other methods that result in making each of its programs, activities, and services accessible to disabled persons. The recipients are not required to make structural changes in existing facilities where other

methods are effective in achieving compliance. In choosing among available methods for meeting the requirements of the statute, the recipients must give priority to methods that offer the programs, activities, and services to disabled persons in the most integrated setting appropriate.

The regulation implementing Title II was amended in September 2010 to adopt new accessibility guidelines, the 2010 ADA Standards for Accessible Design (2010 Standards), for new construction and alterations subject to Title II. See 28 C.F.R. § 35.151(c)(3), which provides, “If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards.” However, to assess accessibility in facilities, such as the facility at issue here, built before June 3, 1977, OCR uses the Uniform Federal Accessibility Standards (UFAS) as a guide.

Facts

JESSE was not able to provide the exact date of construction of the classroom facility, but reported that construction commenced prior to 1977. JESSE told OCR that its current lease for the classroom facility ends in September 2015, and the parties have negotiated a new lease, which is subject to approval by JESSE’s Board of Directors. The Executive Director said that the SAVE Program does not have any students, parents, or guardians in a wheelchair.

The SAVE Program has a unisex, single user restroom connected to the classroom. This is the only restroom available for use by students, parents, and visitors to the SAVE Program; there is another restroom identical to this one that is also available for employees, but it was being used for storage during OCR’s visit.

OCR found that there is no accessible route into the restroom, as there is a 2½” step that an individual must cross to reach the restroom entrance. There are no signs at the restroom that indicate that it is accessible to individuals with disabilities or that state the location of an accessible washroom. The door handle requires twisting. The bottom edge of the mirror over the sink and the coat hook in the restroom are both higher than appropriate for persons in wheelchairs. The sink does not have clear floor space so that a person using a wheelchair can get close enough to reach the faucet. There are no grab bars on the back or side of the toilet.

The remaining aspects of the restroom were accessible. The door is sufficiently wide and has sufficient maneuvering clearance on either side to allow use by persons in wheelchairs. The door threshold height and force required to open the door are within acceptable limits. There is sufficient clear floor space available inside the restroom for a person in a wheelchair to turn around. The faucet can be operated easily without tight grasping, pinching, or twisting of the wrist. The towel dispenser can be operated easily without tight grasping, pinching, or twisting and is at an appropriate height. There is sufficient clearance around the toilet for an individual in a wheelchair to maneuver and

the toilet is at an acceptable height above the floor. The flush control is on the open side of the water closet, and can be operated easily with one hand and without tight grasping, pinching, or twisting of the wrist. The toilet paper dispenser is located at a usable height and allows for continuous paper flow. There was no soap dispenser.

Analysis and Conclusion

OCR determined that the restroom in the SAVE Program's facility does not meet the accessibility guidelines used by OCR to assess physical accessibility. Although the restroom is in an existing facility constructed prior to 1977, and there are currently no disabled students, there must be an accessible restroom in the facility to serve visitors with disabilities. Further, there are no similar programs in accessible facilities that could quickly be made available to a student with a disability. Due to the step at the entrance to the restroom, the absence of required signage, the door handle that requires twisting, the mirror that is too high, the coat hook that is too high, the lack of clear floor space at the sink, and the absence of grab bars on the back or side of the toilet, the restroom is not accessible to individuals with disabilities.

Based on the above, OCR has determined that JESSE is not in compliance with Section 504, at 34 C.F.R. § 104.22, and Title II, at 28 C.F.R. § 35.150, with respect to this complaint. JESSE has signed the enclosed Resolution Agreement to make alterations to the restroom facility to resolve the compliance issues identified in this case. In making such alterations, JESSE, as a public entity, must use the 2010 Standards. OCR will monitor the implementation of the agreement until JESSE is in compliance with the regulations at issue in the case.

Overall Conclusions

This concludes OCR's investigation of the complaint and should not be interpreted to address JESSE'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. The complainant may file a private suit in federal court whether or not OCR finds a violation.

Please be advised that JESSE 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 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 privacy.

We wish to thank JESSE for the courtesy and cooperation extended by its staff during this investigation. In particular, we wish to thank Ms. Elizabeth Barnes, JESSE's counsel. If you have any questions, please contact Sunita Kini-Tandon, Civil Rights Attorney, at 312-730-1452 or by e-mail at Sunita.Kini-Tandon@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Ms. Elizabeth Barnes