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June 30, 2015

Ethan Hemming, Executive Director
Colorado Charter School Institute
1580 Logan Street, Suite 210
Denver, Colorado 80203

Re: Colorado Charter School Institute
OCR Case # 08-14-1263

Dear Mr. Hemming:

We have completed our investigation of the above-referenced complaint filed on September 9, 2014, against the Colorado Charter School Institute (the Institute) alleging discrimination on the basis of disability. Specifically, the complainant alleged that T.R. Paul Academy of Arts and Knowledge (the Academy), a school chartered by the Institute, dis-enrolled his son (the Student) from the Academy because of his disability.

We conducted an investigation under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, 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 and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. The Institute is subject to Section 504 and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

In the investigation, we carefully considered information provided by the complainant, data submitted by the Institute, interviews with Academy staff, and the Institute's response to the complaint. We find that the preponderance of the evidence establishes that the Institute violated Section 504 and Title II as alleged. This letter explains our findings. We thank the Institute for entering into a Resolution Agreement, which when fully executed, will resolve the compliance concerns.

Background Information

The Colorado Charter School Institute is a non-district charter school authorizer and is the recipient local education agency encompassing all of the charter schools it authorizes. The Institute currently authorizes 34 charter schools across the state of Colorado, including T.R. Paul Academy of Arts and Knowledge. The Academy serves students in kindergarten through fifth grade and is located in Fort Collins, Colorado, inside the boundaries of the Poudre School District.

At the time of his application to the Academy, the Student was entering XXX. The Student attended XXX in the XXX School District, which is his home district. He was identified as a XXX and benefitted from an Individualized Education Program (IEP). His IEP included goals related to XX skills, XX skills, XX skills, and XX skills. His parents chose the Academy over his neighborhood school in part because, unlike XXX School District, the Academy offers free full-day kindergarten.

Factual Findings

The Institute has written enrollment procedures for students with disabilities and provided OCR a copy of the procedures dated July 2011. In the opening paragraph, the procedures indicate that "[a] school may deny enrollment to a student with disabilities seeking admission in a charter school in the same manner and for the same reasons the school may deny admission to a student without disabilities, including that the student's admission would require alterations in the structure of the facility used by the institute charter school or alterations to the arrangement or function of rooms within the facility, beyond those required by state or federal law."

The following is a summary of the Institute's procedures:

- The student provides the most recent IEP or Section 504 plan.

- A "screening review team" consisting of the principal, special education teacher, and the Institute special education director, review the IEP or Section 504 plan to determine if a free appropriate public education (FAPE) is available to the student at the school. If the screening team has concerns about the school's ability to provide FAPE, the school will convene a complete IEP team to make the final determination.

- The IEP team will include the Institute's special education director, as well as "not less than one regular education teacher; not less than one special education teacher…; and an individual who can interpret the instruction implications of evaluation results…" The student's parents or guardians must be afforded the opportunity to participate, as well as the student if appropriate.

- The IEP team reviews all available information to determine whether the student can receive FAPE at the school.

- If the IEP team determines the student will not receive FAPE, the team will deny the student's application and refer the student to the Institute's director of special education. The director will confer with the family regarding other placement opportunities in Institute schools.

- If admitted, the student will be placed according to the existing IEP or Section 504 Plan, unless the school convenes a meeting to revise the IEP or Section 504 Plan.

An additional document provided by the Institute emphasizes that if the screening team is uncertain whether the school can provide FAPE, "*then they need to schedule an Enrollment*

Determination Meeting" [italics in original]. The document also specifies that "failure to have a specific service provider on staff does not constitute a valid reason to deny a FAPE (i.e., audiologist, occupational therapist, etc.)."

The complainant submitted an application for the Student to attend the Academy in April 2014. The Student was accepted for enrollment, and the complainant paid the required technology fee of $125. The complaint believes that he indicated on the application that the Student had an IEP. He told OCR that he contacted the Student's home school district to obtain a copy of the IEP, but they told him that the new school would request it from them. However, the Institute disputes that it was notified about the IEP at the time of the application, and provided a copy of the checklist of documents required for enrollment, which shows that the box for "Individual Education Plan (IEP) or Individual Learning Plan (ILP)" was not checked. However, after we requested and reviewed a complete copy of the Student's application, we noted that on the form titled "Admissions Profile" the complainant indicated that the Student currently receives special education.

This dispute about when the Institute had notice of the Student's IEP is ultimately inconsequential to the analysis, however. While earlier notice of the Student's IEP may have allowed this matter to be resolved sooner, there is no indication that the delay in receiving the IEP created any problems with the Institute's or the Academy's capacity to admit the Student, or that the result would have been different had the matter been handled in April rather than August.

The complainant, believing that the Student was fully enrolled at the Academy, attended a school open house on July 31, 2014, just before the beginning of the 2014-15 school year. At that time, according to the Academy's Head of School, the Student was observed to have physical difficulties, including XX – remainder of sentence omitted – XX. The Student and his family used the elevator to reach the second floor, where the XX classroom is located. The Head of School told OCR that she learned for the first time that the Student had an IEP at this open house event.

After reviewing the Student's IEP, the Head of School attempted to contact the complainant. A copy of notes from a phone call on August 2, 2014, shows the following conversation: "Spoke to dad – explained OT/physical barriers. Moderate – we are mild, cannot service." The notes also indicate that the complainant "totally understood" and would seek another school for the Student to attend. The Head of School told OCR that when she talked to the complainant, she said that the Student needed someone to be with him full-time. If the parents wanted to provide a full-time aide for the Student, they could, but the Academy was not able to do so.

On August 5, 2014, the Head of School sent a form letter to the complainant. The letter was titled "Colorado Charter School Institute: Enrollment Determination Letter of Denial." The letter stated that "following the Charter School Institute's Enrollment Determination Process, our Enrollment Determination team has concluded that our school is unable to meet the needs as outlined in your child's Individualized Education Plan (IEP). Regretfully, we will not be able to enroll your child …"

In the "additional information" section of the letter, the Head of School wrote, "According to IEP, which we received and were notified about after enrollment, [the Academy] would not be able to provide the depth of service nor be able to have an aide with [the Student], nor be able to alter the facility." The letter was signed by the Head of School, a special education teacher, and in the space for "Special Education Director Designee," signed again by the Head of School.

The Head of School told OCR that the complainant was upset about that decision, and she offered to set up a "review meeting." She told OCR that at that point, the complainant would be able to share all of his concerns to a team including her, the special education teacher, and even the Student's previous teacher. The team would decide if the Academy was a "good, safe place" for the Student.

In setting up the review meeting, the Head of School referred to the complainant's request for the Academy to "structurally change the school to accommodate the student." She told the complainant that any structural changes would be expensive and difficult for the school to do. The Head of School reports that at this time, the complainant said that the school did not seem like a good fit, but he did not cancel the meeting.

We asked the Head of School what structural changes would be necessary. She identified a four-inch curb that students must step down to get to the playground, as well as the need for the Student to use the elevator rather than the stairs because the XX classrooms are located on the second floor of the school. The Head of School was concerned that the Academy would not be able to provide adult assistance for the Student to use the elevator. She also indicated that because elevator maintenance is very expensive, if the elevator does go out, there are times they are unable to use it.

The Institute reported that the review meeting was scheduled for August 5, 2014, at 8:00 am. The complainant did not attend the meeting. The Institute's position is that at this point, the Academy assumed that the family had withdrawn the Student's application. The Academy took no further action with regard to the Student's enrollment.

According to the Head of School, the Academy continued to admit and enroll students who did not have disabilities beyond the beginning of the school year.

Analysis

We considered whether the Institute treated the Student differently than other applicants to the school on the basis of his disability. In evaluating an allegation of different treatment, we determine what action the recipient took against the alleged injured party, whether it followed its policies and procedures for taking such action and whether similarly situated non-disabled individuals were treated differently. If the alleged injured party was treated differently, we determine whether the recipient has a legitimate, non-discriminatory reason for the different treatment and, if so, whether the stated reason is a pretext for discrimination.

OCR finds that the Institute took action against the Student by denying him enrollment at the Academy. Although the Institute asserts that it did not deny the Student's enrollment because

the complainant "withdrew" the application for enrollment, it is undisputed that the Academy sent the complainant a letter with the heading "Enrollment Determination Letter of Denial."

OCR also finds that the Student was treated differently than non-disabled applicants to the Academy. Non-disabled applicants continued to be admitted to the Academy up to and even after the beginning of the school year.

OCR further finds that the Institute did not follow its procedures for enrollment of students with disabilities. While we understand that the Academy may not have learned of the Student's IEP until just before the start of the school year, we identified several inconsistencies with the way the matter was handled. The procedure calls for review by a screening team, which should consist of the principal, a special education teacher, and the Institute's special education director or designee. The screening team in this case included only the Head of School and the special education teacher. The Head of School signed again as the special education director's designee. However, the Institute told OCR it was not aware of this situation until it received notice of the OCR complaint.

Additionally, the screening team exceeded the role that it is purported to play pursuant to the Institute's procedures. The procedures direct the screening team to refer the student for an IEP team meeting if there are doubts about the school's ability to provide FAPE. However, in this case, the screening team made the determination that the Academy would not be able to provide the services needed by the Student, and sent a letter of denial. The Institute acknowledges that the Academy used the denial form incorrectly, and that the Student should instead have been referred for an IEP team meeting.

After sending the denial letter and contacting the complainant to convey the denial decision, the Head of School offered to schedule an additional meeting. The Head of School described this meeting to OCR as a review meeting, where the complainant could express his views. It is unclear whether this was intended to be the IEP team meeting the Institute's procedures call for. The procedures call for the attendance of regular and special education teachers, an individual who can interpret the evaluation results, and the Institute's special education director. However, because the Institute was not aware that the Head of School acted for the special education director until the OCR complaint was filed, it is apparent that the Institute's special education director was not notified of this meeting.

The Institute told OCR that when the complainant did not attend the meeting, the Academy assumed the family was abandoning the process and the meeting was not held. However, while the procedures state that parents must "be afforded the opportunity" to participate, they do not suggest that parental participation is mandatory. In OCR's experience, school personnel routinely conduct IEP team meetings where parents choose not to attend after receiving adequate notice of the meeting.

The Institute offered a non-discriminatory reason for the difference in the Student's treatment. Essentially, the Institute argues that the family had withdrawn the Student's enrollment application by not attending the August 5 meeting, and by indicating on the phone that the school may not be a good fit for the Student.

We find that this reason is not a legitimate reason for the denial of enrollment. There are several reasons for our conclusion.

Initially, we note that the process the Student was subjected to departed significantly from the Academy's written procedures. This heightens our concern that the Student was treated differently from other students.

OCR also has serious concerns about the reason cited for the Academy's inability to provide FAPE to the Student – the need to "alter the facilities," including the route to the playground and access to the elevator, which would be expensive and difficult for the Academy.

The possibility that the school building contains physical barriers to the Student's access is not a legitimate reason for denying his enrollment. In fact, the physical barriers cited by the Head of School may constitute violations of the physical accessibility requirements of Section 504 and Title II. Pursuant to the Title II regulation, "no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." 28 C.F.R. § 35.149.[1] The Institute must be in compliance with these accessibility requirements – independent of the presence of a specific individual who has mobility impairments. The presence of physical barriers may never be used as a legitimate basis for considering whether a student qualifies for admission or whether the Institute can provide FAPE to a student. Without determining whether the Institute's program at the Academy complies with the accessibility requirements of Section 504 and Title II, we do find illegitimate the citing of inaccessible features to justify the denial of admission to the Student by the Academy.[2]

With regard to the elevator, Title II regulation requires that "[a] public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by person with disabilities." 28 C.F.R. § 35.133. While the regulation does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs, it is not permissible for the Institute to allow the elevator to remain out of service for long periods due to the expense of maintenance or repair if the availability of an accessible and usable elevator is a necessary element in ensuring that persons with disabilities are not denied the benefit of the program. It is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them.

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[1] The regulation implementing Section 504 includes a similar requirement at 34 C.F.R § 104.21.

[2] OCR did not request and does not have information to analyze and determine the Institute's compliance with applicable accessibility requirements at the Institute. It is unnecessary for us to reach an additional finding on accessibility in order to reach a finding on the allegation opened for investigation. Nevertheless, the need for the Institute to understand the barriers to the program presented by the Academy's facilities and how to ensure that persons with disabilities are not denied the benefits of the Institute's program there are to be addressed as a Section 302 element of the Resolution Agreement.

The Academy's purported rule of not allowing students to use the elevator independently makes the program similarly unavailable to the Student. Pursuant to the Section 504 and Title II regulations, schools may need to make reasonable modifications to their policies as needed to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7). We note that the Student's most recent IEP prior to the attempt to enroll at the Academy did not call for a full-time aide, and there was no finding by an IEP team that the Student could not use the elevator independently. Further, we note that the Academy has been able to provide staff as needed to help students with temporary medical conditions use the elevator. The Head of School noted that students with conditions including a broken leg and a concussion used the elevator with staff assistance during their recovery without the need for a full-time aide to assist the students.

Finally, the Institute's assertion that the complainant "withdrew" from the enrollment application appears disingenuous given the steps the Academy took to discourage and block the Student's enrollment. The complainant was informed that the Student would need a full-time aide at the parents' expense to provide physical access to the school facilities, although there is no mention of a full-time aide in the Student's IEP. The Academy sent a denial letter to the complainant. In several phone calls, the Head of School told the complainant that the school could not serve the Student. Under the circumstances, despite the additional meeting scheduled by the Academy, OCR concludes that it was reasonable for the complainant to believe that the Academy had already decided to deny the Student's enrollment at the school, and that a meeting to "share his concerns" would not change the outcome. By claiming that the complainant withdrew the application, the Institute attempts to pretextually shift the responsibility for its decision to the complainant. After discouraging the complainant from pursuing the Student's enrollment, the Institute cannot use the complainant's absence at a final, potentially ineffectual meeting as a justification for dis-enrolling the Student.

For all of these reasons, we conclude that the reason the Institute provided for the Student's disenrollment is not legitimate, and is instead a pretext for discrimination. As a result, we find that the Institute violated Section 504 and Title II when it denied the Student enrollment at the Academy.

Conclusion

We brought the violation identified during this investigation to the Institute's attention for resolution. On June 26, 2015, the Institute entered into a Resolution Agreement to resolve the compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the allegation in this case. During the course of our investigation, we also identified possible compliance concerns with respect to the accessibility of the Institute's program resulting from the accessibility and usability of the Academy's facilities. A portion of the Resolution Agreement addresses measures the Institute has voluntarily agreed to undertake to resolve these potential concerns, without OCR making a finding.

This concludes our investigation of this complaint. This letter addresses only the issues listed above and should not be interpreted as a determination of the Institute's compliance or noncompliance with Section 504, Title II, or any other Federal law in any other respect. We are

closing the investigation of this complaint effective the date of this letter and will monitor the implementation of the Resolution Agreement.

Please note that the complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. Additionally, the Institute is prohibited from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions about this letter, please contact XXX XXXX, Attorney Advisor, at (XXX) XXX-XXXX, or me at (303) 844-4506.

Sincerely,

Thomas E. Ciapusci
Supervisory Team Leader

cc: Janet Dinnen, Colorado Charter School Institute

Robert Hammond, Colorado Commissioner of Education

Enclosure