



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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March 25, 2016

Ms. Alison Chaney  
Headmaster  
Scottsdale Preparatory Academy  
16537 North 92<sup>nd</sup> Street  
Scottsdale, Arizona 85260

Re: Scottsdale Preparatory Academy  
Case Number: 08-15-1327

Dear Ms. Chaney:

On September 2, 2015, we received a complaint alleging that Scottsdale Preparatory Academy (the Academy) discriminated against the Complainant's daughter (the Student) on the basis of disability and retaliated against the Complainant for advocating on behalf of the Student. Specifically, the Complainant alleged that the Academy failed to evaluate the Student for a suspected disability and that the Academy [XXXX –redacted – XXXX].

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from 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, which prohibit discrimination on the basis of disability by public entities. In addition, individuals filing a complaint, participating in an investigation, or asserting a right under Section 504 and Title II are protected from intimidation or retaliation by 34 C.F.R. § 104.61, which incorporates 34 C.F.R. § 100.7(e), and 28 C.F.R. § 35.134. As a recipient of Federal financial assistance from the Department and a public entity, the Academy is subject to these laws and regulations.

The Academy has signed an Agreement which, when fully implemented, will address the issues raised in the Complainant's first allegation. OCR continued to investigate the Complainant's second allegation and has determined that there is insufficient evidence to support a finding of noncompliance.

### **Failure to Evaluate**

The Complainant alleged that the Academy discriminated against the Student when it failed to evaluate her to determine whether she was eligible for special education or related services.

### Legal Standard

The Section 504 regulations, at 34 C.F.R. §104.33, require public school districts to provide a free appropriate public education (FAPE) to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of non-disabled students are met, and that are developed in accordance with the procedural requirements of §§104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of a Section 504 Plan developed is one means of meeting these requirements. OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the Section 504 regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of a disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. Under §104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used. Section 104.35(c) of the regulations requires that placement decisions (i.e., decisions about whether any special services will be provided to the student and, if so, what those services are) must be made by a group of persons knowledgeable about the student, the evaluation data, and the placement options. Placement decisions must be based on information from a variety of sources, with information from all sources being carefully considered and documented. School districts must also establish procedures for the periodic reevaluation of students who have been provided special education and/or related services

#### Factual Findings

[XXXX – sentence redacted – XXXX]. Before the Student XXXX, her treating physician requested that the Academy place the Student on an IEP. The Complainant met with Academy staff before the Student XXXX; at this meeting, the Complainant was given information regarding special education grievance procedures and believed that a Section 504 Plan or IEP had been created specifically for the Student. However, the Academy submitted documentation to OCR showing that the result of the meeting was that the Complainant was comfortable proceeding without a Section 504 Plan or IEP in place so long as general accommodations met the Student's needs.

In XXXX, the Complainant learned that the Student did not have, nor had she ever had, a Section 504 Plan or IEP, despite the Complainant's perception that she did. On XXXX, the Academy's XXXX emailed the Complainant to let her know that it had come to her attention that the Complainant believed that the Student had a Section 504 Plan. The XXXX clarified that a Section 504 Plan was not created the previous school year and stated that they "could always meet as a team with her teachers to discuss the need for a 504 plan." The Complainant responded to the XXXX's email and wrote, "We can do what we did last year if the teachers are all willing to work with [the Student] without a formal 504 in place. I misunderstood as I thought there was one. It worked out just fine for her last year, so I am on board with suggestions from both you and XXXX for this year as well. Thank you all for being the accommodations you are willing to

make on her behalf.” The XXXX responded to the Complainant to say that she would email the Student’s teachers to let them know what was happening with the Student and that she would keep a close eye on the Student so that if it looks like the Student wasn’t getting what she needs, then they could meet to look at a Section 504 Plan.

### Legal Analysis and Conclusion

During the investigation of this complaint, before OCR had sufficient evidence to make any findings, the Academy informed OCR that it wished to resolve the Complainant’s first allegation. Pursuant to Section 302 of our *Case Processing Manual*, a complaint allegation may be resolved when, before the conclusion of an investigation, a recipient agrees to resolve the allegation and OCR has determined that the allegation is appropriate for resolution during the investigation. OCR has determined that this allegation is appropriate for a Section 302 Agreement and the Academy signed an Agreement which, when fully implemented, will resolve this allegation. OCR will monitor the implementation of the Agreement until all terms are fulfilled.

### **Retaliation**

The Complainant also alleged that the Academy retaliated against her for advocating on behalf of the Student when the Academy [XXXX – sentence redacted – XXXX].

### Legal Standard

The regulation implementing Section 504, at 34 C.F.R. § 104.61 (incorporating 34 C.F.R. §100.7(e) by reference) prohibits retaliation and intimidation by those who advocate for a person with a disability or participate in an OCR investigation.

When investigating a retaliation claim, OCR must determine whether: (1) the individual engaged in a protected activity; (2) the recipient had notice of the individual’s protected activity; (3) the individual was subjected to an adverse action contemporaneous with or subsequent to the protected activity; and (4) there was a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all of these elements are established, then OCR considers whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for retaliation. While OCR would need to address all of the elements in order to find a violation, OCR need not address all of these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established.

In order for an activity to be considered to be “protected,” the individual must have either opposed conduct prohibited by one of the laws that OCR enforces or participated in an investigation conducted under the laws that OCR enforces. Notice of the protected activity to the recipient, and not necessarily to the alleged individual retaliator(s), is sufficient to establish the notice requirement. In determining whether an action taken by the recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent

effect. Merely unpleasant or transient incidents usually are not considered adverse. Generally, the more time in between the protected activity and the adverse action, the weaker the presumption of a causal connection. Additional evidence that would demonstrate a causal connection includes: a change in treatment of the individual before and after engaging in the protected activity; treatment of the individual that is different from treatment of other similarly situated individuals; and deviation from established practice or procedure.

#### Factual Findings

[XXXX – this section has been redacted to protect the privacy of the involved parties – XXXX]

#### Legal Analysis

[XXXX – this section has been redacted to protect the privacy of the involved parties – XXXX]

#### Conclusion

OCR has insufficient evidence to determine that the Academy retaliated against the Complainant in violation of 34 C.F.R. §§ 104.61, which incorporates 34 C.F.R. § 100.7(e) when XXXX.

In accordance with Section 302 of the CPM, the provisions of the Agreement signed by the Academy on March 10, 2016 are aligned with the first complaint allegation and the information obtained during OCR's investigation of that issue, and consistent with the applicable regulations. Because the Academy signed the aforementioned Agreement and OCR found insufficient evidence to determine that the Academy retaliated against the Complainant, OCR is closing this complaint investigation effective the date of this letter. OCR, however, will actively monitor the Academy's implementation of the Agreement until the Academy fulfills the terms of the Agreement and is in compliance with the statutes and regulations at issue in this case. If the Academy fails to implement the Agreement as specified, OCR may initiate administrative or judicial proceedings as described in the Agreement or resume its investigation of the initial allegation. A copy of the Agreement is enclosed.

OCR has provided written notice to the Complainant that the Academy has entered into this Agreement, and we provided the Complainant with a copy of the Agreement.

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 Academy 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. In addition, the Complainant may have the right to file a private suit in Federal court, regardless of whether 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. If OCR receives such a request, we will protect personal information to the extent provided by law.

If you have any questions, you may contact Allison Morris, the attorney assigned to this case, at (303) 844-2558 or by email at [allison.morris@ed.gov](mailto:allison.morris@ed.gov).

Sincerely,

Stephen Chen  
Supervisory Attorney

Enclosure: Signed Resolution Agreement

cc (without enclosure): Aaron Martin, General Counsel, Great Heart Academies  
Diane Douglas, Superintendent of Public Instruction