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March 14, 2017

Šárka White, Principal
EAGLE College Prep Harmony
2435 East Pecan Road
Phoenix, Arizona 85040

Re: EAGLE College Prep II, Inc. dba EAGLE College Prep Harmony
OCR Case Number: 08-15-1092

Dear Ms. White:

We have concluded our investigation of the above-referenced complaint filed on January 15, 2015, against EAGLE College Prep Harmony (the Recipient), alleging discrimination on the basis of disability. Specifically, the Complainant alleged that the Recipient failed to implement her XXXX's Behavior Intervention Plan (BIP) which resulted in an inappropriate use of physical restraint and a four-day suspension from school (Allegation 1). The Complainant also alleged that the Recipient failed to provide a free appropriate public education (FAPE) by failing to implement both of her children's Individualized Education Programs (IEPs) with regard to their math classes (Allegation 2). In addition, the Complainant alleged that the Recipient retaliated against her XXXX by restraining XXXX and failing to implement both of her children's IEPs with regard to their math classes (Allegation 3). Finally, the Complainant alleged that the Recipient treats students in special education differently in relation to their opportunity to take elective classes (Allegation 4).

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 Recipient is subject to Section 504 and Title II because it is a recipient of Federal financial assistance from the Department and a public entity.

During the investigation, we reviewed documentation provided by the Recipient and the Complainant. We also interviewed the Complainant and Recipient staff. With regard to Allegations 1, 4, and a portion of Allegation 3, OCR found insufficient evidence to conclude that the Recipient discriminated as alleged. With regard to Allegation 2 and the portion of Allegation 3 related to the student's math classes, we find that the preponderance of the evidence supports that the Recipient violated Section 504 and Title II as alleged. This letter explains our findings. We thank the Recipient for entering into a Resolution Agreement, which when fully executed, will resolve our compliance concerns.

Background Information

The Recipient is an open-enrollment charter school serving grades K-8. During the 2014-15 school year, the Complainant's children (Students A and B) attended XXXX grade at the school. Both students have been identified with disabilities and receive special education and related services through IEPs.

Allegation 1: Physical Restraint Incident

The Complainant alleged that the Recipient failed to implement Student A's behavior intervention plan which resulted in an inappropriate use of physical restraint and a four-day suspension from school.

Factual findings

During the 2014-15 school year, Student A's IEP included a behavior intervention plan (BIP). The BIP included the following interventions to be provided: Clear, concise directions; frequent reminders/prompts; teacher/staff proximity; avoid strong criticism; predictable, routine schedule; preferential seating; provide cooling off period; provide highly structured setting; and communicate regularly with parents. The BIP did not address the use of restraint.

On January 9, 2015, the student was subjected to a physical restraint. The restraint followed an incident in which the student became disruptive in class, followed by further escalated behavior.

- The classroom teacher told the student XXXX would be placed on "yellow" as a consequence for tardiness, which was a standard consequence for all students, and was also a consequence listed in the student's BIP.
- The teacher reported that the student complained about changing XXXX color and refused to take out XXXX class materials. The teacher called for assistance from the special education teacher.
- The special education teacher took the student to the special education classroom. Once there, the special education teacher told OCR that the student began to demonstrate what the teacher believed were unsafe behaviors. Specifically, the special education teacher described that the student was XXXX. The special education teacher told OCR that at this point, she attempted to contact the complainant by phone but was unable to reach her. The assistant principal emailed the complainant to inform her of the situation.

At this point, the student's behavior escalated further. The special education teacher described that all of the sudden, possibly triggered by seeing another student in the hallway, the student was out of control. The teacher described that the student was XXXX pushing staff members. She stated that the student was "throwing XXXX shoulder into us with enough force to push us back to make our back and head hit the wall." One teaching assistant was getting physically hurt, and a male Behavior Specialist took her place. The teacher described that it is policy to have two people in the room during escalated behavior.

The special education teacher described that the student went toward the Behavior Specialist and hit him. She explained that the student swung XXXX arm around with a closed fist and hit him in the chest. The teacher believed it was deliberate, that XXXX intended to hit him. At this point the Behavior Specialist, who was certified in nonviolent crisis intervention, restrained the student. The teacher described it as a “one person control hold,” which is part of the crisis intervention program used by the school. The Recipient provided a diagram showing the type of hold that was used. It is a hold where both the adult and restrained child are standing. The adult stands behind the child, with the child’s arms crossed in front of XXXX body, and the adult holds the child’s arms. The special education teacher described the hold as lasting 20-30 seconds, and stated that the student was not struggling. The complainant alleged that the student could not breathe during the restraint, but the special education teacher stated that the student did not appear to have trouble breathing.

In an interview, the Special education teacher described the ways in which the team implemented the student’s behavior plan during the incident. She described providing multiple redirections, providing choices, and providing direct instructions. She explained that they attempted to verbally deescalate the situation. The student was offered a break. They also provided teacher/staff proximity. They communicated with the parent during the incident by attempting phone contact before the restraint occurred and sending an email.

Analysis and conclusions of law

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 an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) 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. The failure to implement an IEP may result in a denial of FAPE to the student.

Failure to implement a BIP that is incorporated into an IEP may also result in denial of FAPE. Based on the special education teacher’s statement to OCR, as well as other documentation such as the office referral and incident reports, the Recipient has articulated specific ways in which the BIP was implemented. The special education teacher described providing multiple redirections, providing choices, and providing direct instructions for what the student was expected to do. She explained that they attempted to verbally de-escalate the situation. The student was offered a break. They also provided teacher/staff proximity. They communicated with the parent during the incident by attempting phone contact before the restraint occurred and sending an email. The interventions were not successful in de-escalating the situation, but the evidence indicates that they were attempted.

As a result, we find that there is insufficient evidence to determine that Student A's behavior plan was not implemented during the January 9, 2015 incident.

Allegation 2: IEP implementation

The Complainant alleged that the Recipient failed to provide FAPE to Students A and B by failing to implement their IEPs with regard to their math classes.

Factual findings

Both Students A and B had math services as part of their IEPs in 2014-15. Services were to be provided as "push in services," meaning that special education personnel provided support within the general education classroom.

Student B had this service added to his IEP on October 21, 2014, with 360 minutes per month. Student A's IEP was not formally adopted until December 19, 2014; XXXX IEP called for 320 minutes per month. However, the Recipient began providing services to Student A at the same time as Student B, despite XXXX IEP not being finalized. The students were in the same grade and math class, so they received the service at the same time.

The staff member who primarily provided this service to the students was a special education instructional assistant. The instructional assistant told OCR she completed a log every time she was in the classroom with the students. The Recipient provided OCR a copy of the logs.

We reviewed the logs provided by the Recipient to determine the number of minutes provided. The logs for October and November 2014 support that the appropriate number of minutes of service were provided for Student B (pro-rated to account for school breaks). However, for the remaining months, the logs do not reflect the minutes required by the students' IEPs: December, 175 minutes; January, 177 minutes; February, 185 minutes, and March, 110 minutes.

Analysis and conclusions of law

As stated above, a failure to implement a student's IEP can result in a denial of FAPE to the student. The documentation provided by the School shows that the students did not receive the required minutes in December (Student B only), January, February, or March. As a result, we find that the School failed to implement the students' IEPs with regard to math services, and therefore failed to provide FAPE to the students.

Allegation 3: Retaliation

The Complainant alleged that both of the previous allegations also constitute retaliation – that in retaliation for her advocacy for the students, the Recipient subjected Student A to a physical restraint, and failed to provide Students A and B with the math services required by their IEPs.

Factual findings

As described above, Student A was subjected to a physical restraint on January 8, 2015. Additionally, both Student A and Student B failed to receive the number of minutes of math services required by their IEPs from December to the end of the school year.

The complainant has engaged in activities that are protected by Section 504 and Title II, specifically including advocating for special education services for the students at IEP meetings on October 21, 2014, and December 19, 2014. The record indicates that the December 19 meeting was particularly contentious.

Analysis and conclusions of law

Under the implementing regulation, recipients are prohibited from retaliating against any individual for the purpose of interfering with any right or privilege protected by Section 504 or Title II. In analyzing a retaliation claim, we determine whether: the individual experienced an adverse action caused by the recipient; the recipient knew the individual engaged in an activity protected by Section 504 or Title II or believed the individual might engage in an activity protected by Section 504 and Title II in the future; and a causal connection existed between the adverse action and the protected activity. If OCR determines that a causal link exists between any adverse action and any protected activity, we next determine whether the recipient has a legitimate, non-retaliatory reason for its action and whether such reason is a pretext for retaliation.

In this case, we find that the Recipient took adverse action against the complainant's children. Placing a student in a physical restraint is an adverse action, as is failing to provide the services required by a student's IEP.

We also find that the complainant engaged in activity protected by Section 504 and Title II of which the Recipient had knowledge; specifically, she advocated for special education services for both students at IEP meetings held on October 21, 2014, and December 19, 2014. The complainant continued to advocate for the students' disability-related needs throughout the school year.

OCR must next determine whether a causal connection exists between the adverse action and the protected activity. To determine whether a causal connection exists between the protected activity and the adverse actions, OCR considers among other factors, the temporal proximity between the protected activity and the adverse action. In the case of the physical restraint of Student A, a protected activity (an IEP meeting) occurred on December 19, 2014; the restraint occurred on January 9, 2015, three weeks later. This temporal proximity is sufficient for OCR to infer a causal connection between the protected activity and the adverse action.

In the case of the failure to implement the students' IEPs with regard to math services, the logs indicate that the appropriate level of service was provided to Student B in October and November, with the failure to implement beginning in December and continuing at least through March. For Student A, who did not formally have math services in XXXX IEP until December

19, the logs show that the failure to implement began in January and continued at least through March. For both students, the failure to implement occurred in close temporal proximity to the complainant's protected activity. As a result, we also infer a causal connection between the protected activity and this adverse action.

We next consider whether the School has a legitimate, non-retaliatory, non-pretextual reason for its action. With regard to the physical restraint of Student A, the School stated that the student was restrained to stop XXXX from physically assaulting a staff member and to keep XXXX safe. The complainant disputes that the student was a danger to herself or to others. However, based on our interview of the Special Education Teacher, and our review of documentation provided by the District including an office referral, the incident report, and the statements of staff members involved in the restraint who were no longer employed by the School at the time OCR conducted interviews, we find that the School staff had a reasonable belief that the student presented a danger to both herself and to staff members. We next sought to determine whether the reason provided by the School was pretext for retaliation. We reviewed the School's policy for physical restraint of students and noted that the policy permits restraint only in situations where the student is at risk of seriously harming themselves or others, and not for disciplinary purposes. The evidence shows that the restraint was implemented according to the School's policy. Additionally, the individual who implemented the restraint was trained in the use of restraint with students. The type of restraint used was consistent with the training provided, and it was a standing restraint rather than a prone or face-down restraint that would be especially risky. Based on these factors, we determined that the School's reason for the restraint was not a pretext for retaliation. As a result, there is insufficient evidence to find that the School retaliated by placing Student A in a physical restraint.

With regard to the failure to implement the students' IEPs, the School has not provided a legitimate, non-retaliatory reason for providing fewer minutes of math push-in instruction than was specified in the IEP. As a result, we find that the School retaliated against the students based on the complainant's advocacy for their disability-related needs.

Allegation 4: Elective classes

The Complainant alleged that the Recipient treats students in special education differently in relation to their opportunity to take elective classes. Specifically, the Complainant alleged that special education students, including Students A and B, were required to take a writing class with the special education teacher rather than having their choice of electives.

Factual findings

During the 2014-15 school year, all students in grades 3-6 at the school could enroll in an elective each quarter. Electives varied from quarter to quarter. Each quarter, a list of electives was provided to students, who ranked them in order of preference. The assistant principal assigned students based on their preference. However, a student could be assigned to study hall rather than an elective based on a teacher or parent request.

During the third quarter, the special education teacher offered an elective in Journal Writing. She told OCR that some of her special education students expressed a preference to be with her during electives, and she selected journal writing as a topic that may interest them. She stated that some students chose to be in the class, and that it was their choice. She indicated that special education students are allowed to choose any elective.

The Recipient provided class lists for each elective during each quarter of the 2014-15 school year, indicating which students received special education. During the third quarter, ten of the eleven students in the journal writing elective, including Students A and B, were in special education. However, special education students also participated in other electives, including Technology and Typing, Dance Team, Art, Music, and Crafts.

During the other three quarters, the special education teacher did not offer an elective. Special education students participated in many other elective classes.

Analysis and conclusions of law

In evaluating an allegation of different treatment on the basis of disability, 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.

In this case, OCR did not find information to suggest that students with disabilities were limited in their choices of elective classes. While a number of special education students were clustered in the journal writing elective during the third quarter, the evidence does not indicate that the students did not have the choice of the other available electives. Other special education students enrolled in at least five other elective classes. We also note that at least one non-special education student enrolled in the journal writing elective, which indicates that the class was not exclusively designated for special education students. As a result, we find that special education students were not treated differently in their opportunity to take elective classes.

Conclusion

We brought the violations identified during this investigation to the Recipient's attention for resolution. On March 8, 2017, the Recipient entered into a Resolution Agreement to resolve our compliance concerns. We have determined that the Agreement, when fully implemented, will resolve the violations found in this case.

This concludes our investigation of the complaint and should not be interpreted to address the Recipient's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. We are closing the investigation of this complaint effective the date of this letter and will monitor the Recipient's implementation of the 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, be advised that the Recipient 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.

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.

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 you may contact the attorney assigned to this case, XXXX XXXX, at (303) 844-XXXX, or XXXX.XXXX@ed.gov.

Sincerely,

/s/
J. Aaron Romine
Director

cc: Kimberly Davis, Esq. (via email)

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