



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

May 3, 2018

Mr. James Culkeen
Superintendent of Schools
Southwest Vermont Supervisory Union
246 South Stream Road
Bennington, Vermont 05201
Via email to: james.culkeen@svsu.org

Re: Complaint No. 01-15-1093
Southwest Vermont Supervisory Union

Dear Superintendent James Culkeen:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against the Southwest Vermont Supervisory Union (District). The Complainant alleged that the District discriminated against his clients' son (Student), who was a student in the District, on the basis of his disability. Specifically, the Complainant alleged that the District repeatedly restrained and secluded the Student as a method of discipline during the 2013-2014 school year. As explained further below, before OCR completed its investigation, the District expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement).

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) 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 Department. OCR also enforces 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 against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The District is subject to the requirements of Section 504 because it is a recipient of Federal financial assistance from the U.S. Department of Education. It is also subject to the requirements of Title II as enforced by OCR because it is a public entity that operates a public school system.

Preliminary Investigation

In its investigation, OCR interviewed the Complainant and District staff, conducted an onsite on April 14, 2016, and reviewed information provided by the Complainant and the District. Prior to the conclusion of OCR's investigation and pursuant to Section 302 of OCR's *Case Processing Manual*, the District expressed an interest in resolving this complaint. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement which, when fully implemented, will address all of the allegations raised in the complaint. OCR will monitor the District's implementation of the Agreement.

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

The Complainant alleged that at the outset of the 2013-2014 school year, the Student attended first grade at Monument Elementary School (the School), in a regular education classroom. The Complainant stated that beginning in October 2013, the Student began to engage in behavior in the classroom that his classroom teacher characterized as “disruptive,” “defiant,” and “disrespect[ful],” and the Student’s parents requested the District to transfer the Student to a small first grade classroom, which the District denied. The Complainant alleged that District staff removed the Student from the classroom 33 times between October 2 and December 9, 2013, and “repeatedly and with only minor interruptions kept him in a physical restraint.” The Complainant further alleged that the Student was placed on an Individualized Education Program (IEP) in early 2014, and moved to an alternative program where he continued to experience removals, seclusion and restraint. The Complainant informed OCR that the Student left the District in fall 2014.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.4, provides that students with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, be afforded an opportunity that is not equal to that afforded others, or otherwise be subjected to discrimination in a school district’s programs and activities. The regulation further provides that a public school district may not otherwise limit an individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The regulation implementing Title II, at 28 C.F.R. § 35.130, contains similar provisions. OCR interprets these provisions to require that public school districts ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

Physical restraint or seclusion should not be used except in situations where the child’s behavior poses imminent danger of serious physical harm to self or others and restraint and seclusion should be avoided to the greatest extent possible without endangering the safety of students and staff.

The repeated use of restraint or seclusion, in the absence of individualized assessments, may deny students with disabilities a FAPE. The frequent use of these restrictive interventions may suggest that these strategies are not effective at changing or minimizing the problematic behavior and that the student’s current educational placement is not appropriate. Moreover, students who are removed from the educational setting to be restrained or secluded are effectively denied

educational instruction or access to the curriculum for the duration of the removal. If a school district has reason to believe that a student’s placement is not appropriate, including because of the frequent use of restraint or seclusion, it should convene a group of knowledgeable persons to examine whether additional evaluation and/or a change of placement (including a change in services) is needed, as required by Section 504.

District’s Policies/Procedures

OCR reviewed the policies and procedures provided by the District concerning restraint and seclusion, including District Policy 5405 “Behavioral Intervention” (the Policy). The Policy defines restraint and seclusion, and the circumstances in which physical restraint may be used, including imminent risk of harm to the student or others or of property damage, to quell a disturbance, or when reasonable and necessary force is required for the purpose of personal safety or to protect persons or property. The District’s Policy does not define the use of seclusion as including exclusionary timeouts where a student is physically prevented from leaving a space, or require documentation or notification to parents when seclusion is used.

The Policy restricts the use of restraint to trained staff “unless no such staff member is available,” and limits the use of force to a duration necessary for the student to compose him or herself. In addition, the Policy provides that the District will provide training in best practice models such as the “Crisis Prevention Institute” (CPI) to an appropriate number of staff in each school. The Policy further provides for documentation of the restraint by the staff person involved in the restraint, and provides for annual review of all incident reports, notification to all parents of the Policy’s requirements annually, and notice to parents of students who are restrained. The evidence obtained to date did not indicate whether the District follows use of restraint by an evaluation and monitoring of a student for the remainder of the day, or a routine physical/medical assessment by an individual not involved in the restraint or seclusion.

Additionally, OCR determined that the District developed “Responsibilities and Procedures” pursuant to the State of Vermont Rule 4500 “Restraint and Seclusion in Schools”¹ which sets forth the District’s own requirement that each building have one designated staff member well versed in Rule 4500 who is responsible for documenting and reporting and all notification, as well as the requirement that each building have a “crisis team” of individuals who are highly trained in CPI and are designated as first responders to escalating behavior.

OCR has not reached a compliance determination regarding the District’s policies and procedures, since it has not obtained evidence regarding the impact of the District’s policies and procedures on students enrolled in the District.

¹ The State rule contains definitions of physical restraint and seclusion, and circumstances in which each are permissible and prohibited; it also requires that any use of restraint or seclusion be followed by an evaluation and monitoring of the student, and appropriate documentation/reporting of the incident. In addition, it requires training, annual notification to all staff of policies pertaining to physical restraint, and a procedure for filing complaints.

The District informed OCR that in the STEP program, students were evaluated for behavioral disabilities and transitioned into the District’s On Point alternative educational program. The District further informed OCR that the On Point program served students classified with emotional disturbance or “other health impaired” who were unable to maintain their academic performance due to behavioral concerns or were being unsafe in the classrooms; all students enrolled in On Point program exhibited significant behavioral issues, such as tantrums, verbal and physical outbursts, and violence toward peers or staff.³ The STEP and On Point programs maintained “On Point Elementary Policies and Procedures” (the On Point Policies), which set forth behavior interventions and consequences, and circumstances in which personnel used “physical transport” to a conference room, if a student refused to take a break at a specified location. The On Point Policies provided for all staff to be CPI certified and follow CPI protocol when physically escorting students, and for physical restraint of a student to be conducted only when the student is exhibiting unsafe behavior to himself/herself or others.

Pursuant to the Student’s IEP (dated XXXXXXXXXXXXXXXX), during the period of XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, the Student was placed in the STEP program for part of the day (120 minutes daily) at the outset of the school day, and transported to his regular elementary school for the balance of the day (300 minutes daily). The Student transitioned into the On Point program in April 2014, which he attended for the full school day. OCR determined that the Student’s IEP did not contain any provisions addressing the use of restraint or seclusion, but provided for the Student to have a space/place to go when he recognized he was becoming frustrated/angry, and a “clear cut behavior plan”) with “immediate reinforcement and chances to see his success,” implemented with “significant consistency.”⁴ The District informed OCR that it did not implement a Behavior Intervention Plan (BIP) for the Student, but that he was provided with positive behavioral strategies and support through the On Point program, and also received a 1:1 paraeducator assigned to him for safety reasons.

The documentation provided by the District does not indicate any use of physical restraint for the Student from XXXXXXXXXXXXXXXXXXXXXXXX, during the period he was still in his regular education classroom; however, restraint was used a total of approximately 43 times for the remainder of the 2013-2014 school year, 38 of which occurred between XXXXXXXX XXXXXXXXXXXX while the Student was placed in the On Point program. The evidence indicated that most of the initial restraints of the Student were implemented after the Student was escorted to the conference room, for behaviors that included attempting to run away, kicking walls, and throwing beanbags. The evidence obtained to date does not indicate whether District staff attempted to de-escalate the Student prior to using restraints during the above-referenced incidents. In addition, OCR has not reached a determination as to whether the District should have convened a team to consider whether the Student needed further evaluation, including a functional behavioral analysis (FBA) and/or additional or different interventions or supports and services.

³ During school year 2013-2014, five elementary students attended the STEP program, all of whom were elementary students undergoing evaluations due to unsafe behavior, and approximately 13 students were enrolled in the District’s On Point program.

⁴ The remaining provisions in the Student’s IEP addressed: reinforcement of directions/expectations; avoiding use of punitive punishments and focusing on rewarding positive behaviors; close communication between school, outside agencies and home as needed; motor breaks; teacher proximity to student to allow for clarification of directions, frequent learning check-ins and reinforcement of on-task behaviors; and providing raise and encouragement in the classroom and in social settings to reinforce taught skills.

The District informed OCR that the use of the conference room for the Student did not meet the definition of “seclusion,” because the Student was not alone in the room and was under adult supervision.⁵ The evidence to date indicates that the Student was escorted to the conference room by District staff, who closed the door at times to avoid disrupting other students, due to the volume of the Student’s “language.” The District stated that subsequent to the 2013-2014 school year, it removed the door to the conference room. OCR has not reached a compliance determination regarding the specific circumstances concerning the use of the conference room for the Student, and whether this constituted seclusion.

Provision of FAPE to Other Students

During the course of its investigation, the District also provided OCR with reports regarding the three other students who were subject to restraint during the 2012-2013 school year. Based on these reports, OCR determined that one of these students (Student 2) was restrained approximately 50 times from XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, and nine additional times during the remainder of the 2012-2013 school year, for a total of 59 incidents of restraint.⁶ OCR determined that unlike the Student, Student 2’s precipitating behavior in most instances was aggression directed at other students or staff, and took place in a number of different locations.

While District staff informed OCR that they had ongoing discussions about different intervention strategies that could be used for Student 2, OCR has not reached a compliance determination as to whether the District appropriately reviewed and/or modified the strategies in place to address Student 2’s behavior; specifically, by convening a Team to determine whether further evaluation or a different placement was necessary, or modifying Student 2’s placement.

Conclusion

Prior to the conclusion of OCR’s investigation and pursuant to Section 302 of OCR’s *Case Processing Manual*, the District expressed an interest in resolving this complaint. Subsequent discussions between OCR and the District resulted in the District signing the enclosed Agreement, on April 25, 2018, which, when fully implemented, will address all of the allegations raised in the complaint. OCR will monitor the District’s implementation of the Agreement.

This concludes OCR’s investigation of the complaint. This letter 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. 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

⁵ The definition of seclusion under Rule 4500 includes the placement of a student in a room from which the student is prevented or reasonably believes he or she will be prevented from leaving.

⁶ With respect to the two remaining students, the evidence indicated that one student was restrained three times on one date in response to aggression, but had no further incidents, and the other student was restrained on two occasions.

authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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 seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, you may contact Civil Rights Attorney James Moser at (617) 289-0146 or by e-mail at james.moser@ed.gov.

Sincerely,

/s/

Ramzi Ajami
Acting Regional Director

Enclosure

cc: [XXXXXXXXXXXXXXXXXXXX](#)