



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 30, 2018

Mr. Manny P. Arvon
Superintendent
Berkeley County Schools
401 S. Queen Street
Martinsburg, WV 25401

IN RESPONSE, PLEASE REFER TO: 03-14-5002

Dear Mr. Arvon:

This is to advise you of the resolution of the above-referenced compliance review of Berkeley County Schools (the District) conducted by the U.S. Department of Education (Department), Office for Civil Rights (OCR). In this compliance review OCR examined whether the District discriminated against students with disabilities by unnecessarily subjecting them to restraint or seclusion more frequently and excessively than students without disabilities. The compliance review also assessed whether the District's use of restraint or seclusion denied students with disabilities an opportunity to receive a free appropriate public education.

OCR enforces:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity that receives Federal financial assistance from the Department.
- Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 et seq., and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public elementary and secondary education systems, regardless of whether they receive Federal financial assistance from the Department.

As a recipient of Federal financial assistance and a public entity, the District is subject to these laws.

On September 15, 2014, OCR opened this compliance review. To date, OCR's investigation has included reviewing information provided by the District, interviewing District staff, and conducting an on-site visit.

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

Prior to the completion of OCR's investigation, the District asked to resolve this compliance review. On April 23, 2018, the District submitted the enclosed, signed resolution agreement (the Agreement) to OCR. When fully implemented, the Agreement will resolve the issues in the compliance review.

Legal Standards

A school district discriminates on the basis of disability in its use of restraint or seclusion by (a) unnecessarily treating students with disabilities differently from students without disabilities; (b) implementing policies, practices, procedures, or criteria that have an effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (c) denying the right to a free appropriate public education (FAPE).

Under Section 504, no qualified individual 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 Federal financial assistance. 34 C.F.R. § 104.4(a). Under Title II, no qualified individual with a disability shall, on the basis of disability, 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. § 35.130(a). Both Section 504 and Title II prohibit measures that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability. 34 C.F.R. § 104.4(b)(4); 28 C.F.R. § 35.130(b)(3).

The regulations implementing Section 504 require public school districts to provide a 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 34 C.F.R. §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. The Section 504 regulation at 34 C.F.R. § 104.35(a) requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services before taking any action with respect to the student's initial placement in regular or special education and any subsequent significant change in placement.

Absent direct evidence that a district discriminates on the basis of disability, OCR generally applies a different treatment analysis. Under this analysis, a recipient violates Section 504 and Title II if it has treated a student differently on the basis of disability in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to limit or deny the ability of the student to participate in or benefit from the education program or activity. In applying the different treatment analysis, OCR addresses the following questions:

1. Did the recipient deny or limit the ability of one or more students with disabilities to participate in or benefit from the education program or activity of the recipient by treating them differently than one or more similarly situated students without disabilities?

2. Does the recipient have a legitimate, nondiscriminatory reason(s) for the different treatment?
3. If so, is the reason(s) a pretext for discrimination?

Districts also violate Federal law when they evenhandedly implement facially neutral policies or practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of disability. The resulting discriminatory effect is referred to as “disparate impact.” In determining whether a facially neutral student policy has an unlawful disparate impact on the basis of disability, OCR engages in the following three-part inquiry:

1. Has the policy resulted in an adverse impact on students with disabilities as compared to students without disabilities?
2. Is the policy necessary to meet an important educational goal?
3. Even in situations where a district can demonstrate that a policy is necessary to meet an important educational goal, are there comparably effective alternative policies available that would meet the district’s stated educational goal with less of a burden or adverse impact on the disproportionately affected group or is the district’s proffered justification a pretext for discrimination?

Investigation to Date

The District is the second largest district in West Virginia. During the 2015-16 school year, there were 18,877 students enrolled in the District. Of those students, 3,060 (16.2%) were classified as students requiring special education services. The District’s website lists 15 elementary schools, 6 intermediate schools, 6 middle schools, and 4 high schools.

In analyzing the District’s restraint data, OCR found that the percentage of students with disabilities subjected to incidents of restraint greatly exceeds the percentage of students with disabilities enrolled in the District during the 2012-2013, 2013-2014, and 2014-2015 school years. The District uses the same coding and the same definitions for “restraint” regardless of whether a student is or is not identified as a student with a disability.

As a result of OCR’s investigation, including a review of the District’s data from the 2012-2013, 2013-2014, and 2014-2015 school years, we observed the following:

- Sixteen students were restrained multiple times, and 13 of these students had an individual education program (IEP).
- In some cases, records were incomplete because they lacked information about: attempts to de-escalate incidents and engage in alternatives to restraint; specifics of the violent behavior that led to the restraint; post-incident debriefings; or parental contact.
- Several incidents of restraint were recorded as lasting more than 40 minutes and a teacher explained during this time the school lacked appropriately trained Behavior Disorder (BD) staff.
- Although all District staff interviewed stated that restraint is used as a last resort and only when students present a danger to him/herself or others, the records of four

students indicate that the restraint was due to the student engaging in aggressive and/or inappropriate behavior.

- While all students subject to incidents of restraint and/or seclusion were removed from class and thereby lost instructional time, there was no documentation prepared by the District to show how students were able to make-up instruction or assignments.
- One student with a disability, who was restrained 24 times, was placed on an “out of school environment” and then homeschooled in the spring of 2015. OCR was unable to determine how this placement was determined from the documents provided or when the student ultimately returned to school.
- One student with a disability was placed on a shortened day, however, it is unclear how the District made this decision. Furthermore, there was no documentation reflecting when the student returned to a full day of school, and whether and how the least restrictive environment was considered.
- One student who was not identified as having a disability was restrained ten times for aggressive and inappropriate conduct and failure to obey rules during the fall 2013. The school requested involvement of law enforcement at the student’s home and at school, due to one incident. No documentation was provided reflecting whether this student was ever referred for disability-related services.

As noted above, prior to the completion of our investigation, the District signed an agreement with OCR. In light of the commitments the District has made in the Agreement, OCR finds that the compliance review is resolved, and OCR is closing its investigation as of the date of this letter. OCR will monitor the District’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issue investigated.

If the District fails to implement the Agreement, OCR may initiate administrative or judicial proceedings to enforce specific terms and obligations of the Agreement. Before initiating administrative (34 CFR §§ 100.9, 100.10) or judicial proceedings to enforce the Agreement, OCR will give the District written notice of the alleged breach and sixty (60) calendar days to cure the breach.

This concludes OCR’s investigation of the compliance review and 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 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, OCR will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

Thank you for the assistance extended to OCR in resolving this compliance review. If you have any questions, please contact Cynthia Wesley at (215) 656-8548 or Cynthia.wesley@ed.gov.

Sincerely,

/s/

Nancy E. Potter
Team Leader

Enclosure: Resolution Agreement