



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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March 30, 2017

Tom Boasberg, Superintendent
Denver Public Schools
Emily Griffith Campus
1860 Lincoln Street, 12th Floor
Denver, Colorado 80203

Re: Denver Public Schools
OCR Case Number: 08-16-1365

Dear Superintendent Boasberg:

We write to inform you of the resolution of the above-referenced complaint, filed on June 13, 2016, against Denver Public Schools (“the District”), alleging discrimination on the basis of disability. Specifically, the allegations that OCR accepted for investigation were that the District allowed the excessive use of prone restraints on students with disabilities through arrangements with Cenpatico School Based Services (“Cenpatico”), thereby denying the students a free appropriate public education (FAPE) and subjecting them to different treatment based on disability.

The Office for Civil Rights (OCR) of the U.S. Department of Education (“the Department”) is responsible for enforcing: Section 504 of the Rehabilitation Act of 1973, and its implementing regulation at 34 Code of Federal Regulations (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; 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. As a recipient of Federal financial assistance from the Department and a public entity, the District is subject to these laws and regulations.

During the course of our investigation, the District indicated its desire to voluntarily enter into an agreement to resolve all of the Complainant’s allegations pursuant to Section 302 of our *Case Processing Manual* (CPM). We reviewed this request and determined that it was appropriate to enter into an agreement without completing a full investigation. This letter details the applicable legal standards, the status of our investigation prior to receiving the District’s request to enter into an agreement, and the reasons for our determination that an agreement pursuant to Section 302 of our CPM was appropriate in this case.

I. Legal Standards

A school district discriminates on the basis of disability in its use of restraint by unnecessarily treating students with disabilities differently from students without disabilities; or by denying students with disabilities a FAPE.

A. Different Treatment

Under the Section 504 regulations, at 34 C.F.R. Section 104.4(a) and (b), 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. The Title II regulations, at 28 C.F.R. Section 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Under 34 C.F.R. Section 104.4(b)(1) and 28 C.F.R. Section 35.130(b)(1), a recipient public school district may not, directly or through contractual, licensing, or other arrangements, on the basis of disability: (1) deny a qualified disabled individual the opportunity to participate in or benefit from an aid, benefit, or service; (2) afford a qualified disabled individual an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others; (3) provide a qualified disabled individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others; or (4) provide different or separate aids, benefits, or services, unless necessary to provide qualified disabled individuals with aids, benefits, or services that are as effective as those provided to others.

When a district restrains a student with a disability for behavior that would not result in the restraint of peers without disabilities, OCR would likely find that the district engaged in unnecessary different treatment on the basis of disability prohibited by Section 504 and Title II. Similarly, a school district that subjects a student to restraint on the basis of assumptions or stereotypes about disability also engages in conduct prohibited by Section 504 and Title II.

B. Free Appropriate Public Education (FAPE)

The Section 504 regulations, at 34 C.F.R. Section 104.33, 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 Sections 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. Sections 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.

For a student already identified as a student with a disability, a district's use of restraint could be evidence that the student's current array of regular or special education and related aids and

services is not addressing the student's needs. Because the FAPE obligation is ongoing, when a district has reason to believe that the student's educational needs are not being met, it must consider different or additional approaches or services to address the student's behavioral needs, and if necessary, reevaluate the student, which could include evaluating the need for strategies to address the student's behavior that could mitigate or eliminate the need for restraint.

If such a reevaluation is conducted that identifies additional needs, then the district has an obligation to reconvene the IEP team or Section 504 team to: (1) determine whether and to what extent additional or different interventions or supports and services are needed; (2) ensure that any needed changes are made promptly; and (3) remedy any negative effects that may have resulted from the district's prior use of restraint that, if left unaddressed, would result in a denial of FAPE.

II. OCR's Investigation

We began our investigation by requesting from the District: (1) all contracts, agreements, memorandums of understanding, or similar documents in place between the District and Cenpatico; (2) all District and Cenpatico policies, guides, manuals, and similar documents related to the use of restraint; (3) a description of how the use of restraints in Cenpatico was documented; (4) information about all Cenpatico staff trainings that included as a topic the use of restraint on students; (5) information about all students and staff in Cenpatico; (6) complaints filed on behalf of students in Cenpatico; (7) a narrative of the District's position regarding the allegations; and (8) the names and titles of relevant witnesses and individuals not already identified. The records and information produced by the District showed the following.

A. Contracts between the District and Cenpatico

For 2015-2016, the District contracted with Cenpatico to operate four classrooms: two at Trevista Elementary School and two at Skinner Middle School. Each classroom had the capacity to serve ten to 12 students. The contract required Cenpatico to: (1) "[m]aintain a placement file which documents each student's ... restraint reports"; (2) "[e]nsure that all staff are properly trained in the use of restraint"; and (3) and have four "behavior coaches" who "model effective ... safe physical intervention techniques; coordinate the documentation of Adverse Incidents, and track the frequency and intensity of student recovery time and holds[.]"

For 2016-2017, the District contracted with Cenpatico to operate three classrooms at Trevista Elementary School; the contract for the middle school classrooms was not renewed. The new contract retained the three requirements listed in Part (I)(A) above and added the following language.

If a student is removed from the Program due to (1) inappropriate use of prone restraint holds ... the District may, at its discretion, withhold eighty dollars (\$80.00), or one-half of the per-pupil daily rate of service from the monthly payment until a replacing student is assigned.

The Program acknowledges that the use of prone restraint holds is discouraged, and Program staff are encouraged to participate in training opportunities that emphasize the limitation or elimination of prone restraint holds. The Program shall take the following steps at any time a prone restraint occurs: i. The restraint report shall be sent to the Director of Special education, Associate Directors of Special education, and the Out of District Services Manager within 24 hours of the hold. ii. The Associate Partner responsible for the District's restraint training shall facilitate a review of the events leading to the prone restraint, and the Program agrees to make its staff available for participation. iii. The Program shall consider the goal of eliminating prone restraint holds while developing behavior plans and behavior management strategies. District staff shall be available to collaborate on these strategies to ensure that restraints are not interfering with a student's access to FAPE.

B. Cenpatico Policies and Practices

i. Policies

During 2014-2015 and 2015-2016, Cenpatico had a policy – titled “Professional Crisis Management Protocol & Notification of Physical Restraint” – that specified: (1) when prone restraint could be used and when it could not be used; (2) what staff must do and what staff should do during prone restraints; and (3) parent notification requirements.

ii. Documentation

During 2014-2015 and 2015-2016, Cenpatico used a “Notification of Physical Restraint Form,” which contained six main sections: (1) basic information (student name, date, time of day, and staff involved); (2) “Reason(s) For staff intervention”; (3) “Alternatives Attempted Prior to Restraint”; (4) “Immobilization Type”; (5) “Injury reporting”; and (6) “Supports and Outreach.” It also includes three open-ended fields: (1) “Antecedent Information”; (2) “Strategies and/or Interventions”; and (3) “Description of the Incident.”

iii. Staffing and Staff Training

During 2014-2015 and 2015-2016, Cenpatico had a total of 29 unique staff members. Cenpatico uses the Professional Crisis Management (PCM) system for training its staff. A total of eight certification courses took place in 2014-2015 and 2015-2016. Eight staff members had no lapses in certification; 21 staff members had lapses in certification ranging from two days to 344 days.

C. Cenpatico Student Population

During 2014-2015 and 2015-2016, the elementary school program served 27 unique students in kindergarten through fifth grade; and the middle school program served 17 unique students in sixth through eighth grade. For both programs, most of the students' area of eligibility was Serious Emotional Disability; and the length of time the students spent in the programs ranged from one or two weeks to multiple school years.

D. Use of Prone Restraints in Cenpatico

A chart in a PowerPoint provided to OCR by the District shows that, during 2014-2015, there were 228 prone restraints in Cenpatico (97% in the elementary school programs), for an average of 6.3 minutes in the elementary school programs;¹ and during 2015-2016, there were 438 prone restraints in Cenpatico (98% in elementary school programs) for an average of four minutes in the elementary school programs and six minutes in the middle school programs.

A spreadsheet provided to OCR by the District shows that, during 2015-2016, 16 students (36.4% of all students served) were subjected to 568 prone restraints; the number of prone restraints for each student prone restrained varied from one to 124; and ten students were subjected to 94% of all prone restraints.

“Records of all restraints from Cenpatico” show that, during 2014-2015 and 2015-2016, there were a combined 845 prone restraints (229 in 2014-2015; and 616 in 2015-2016) used on a combined 29 students. The records show student injuries included bloody noses, bruises, red marks, cuts, abrasions, and reported pain in various parts of the body. Information was missing for some of the records. For instance, the behaviors that led to the prone restraint is missing for approximately six prone restraints; whether the parent was contacted is missing for approximately 73 prone restraints; staff names are missing for approximately three prone restraints; and whether the student was injured is missing for approximately 250 prone restraints.

E. Other Relevant Information

The District reported to OCR that it “has received no formal complaints related to Cenpatico’s services,” but that a local disability rights non-profit had raised concerns about Cenpatico. In May 2016, the District sent a letter to Cenpatico outlining areas of concern and making suggestions for improvement, including “[d]ecreas[ing] the frequency and duration of holds for students” and “[d]ecreas[ing] the use of Prone Holds for students attending AN-I[.]”

III. Conclusion

We thank the District for being willing to voluntarily address the issues raised by the Complainant. A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, the allegations will be resolved consistent with the requirements of Section 504 and Title II and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the District about the status of the Agreement terms. We will provide the District written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the District fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This concludes OCR’s investigation of this complaint and should not be interpreted to address the District’s compliance with any other regulatory provision or to address any issues other than

¹ The average length of time was not provided for the middle school program.

those addressed in this letter. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the District has fulfilled all terms of the Agreement. When the monitoring phase of this case is complete, OCR will close this case and send a letter to the District, copied to the Complainant, stating that this case is closed.

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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Individuals filing a complaint or participating in our resolution process are protected from retaliation by Federal law.

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.

Thank you for the courtesy and cooperation you and your staff extended to us during the investigation of this case. If you have any questions regarding this letter or the monitoring of this case, please contact the assigned attorney, Jason Langberg, at (303) XXX-XXXX or XXXX@ed.gov.

Sincerely,

/s/

Stephen Chen
Program Manager

cc: Amber Elias, Deputy General Counsel for the District
(via email: XXXX@dpsk12.org)

Enclosure: Resolution Agreement