



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

November 23, 2016

Dr. James Merrill
Superintendent
Wake County Public Schools
5625 Dillard Drive
Cary, NC 27518

RE: OCR Complaint No. 11-15-1262
Resolution Letter

Dear Dr. Merrill:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on May 25, 2015 against Wake County Public Schools (the District). The Complainant alleged that the District discriminated against her son (the Student), who was enrolled in the XXXX (the School) on the basis of his disability XXXX. Specifically, the Complainant alleged that the District/School discriminated against the Student on the basis of his disability during school year 2014-2015, thereby denying the Student a free appropriate public education (FAPE), by:

- Allegation 1: Restraining the Student on multiple occasions;
- Allegation 2: Failing to properly evaluate the Student with respect to his eligibility for special education and related aids and services; and,
- Allegation 3: Failing to provide the Student with speech and occupational therapy services, as required by the Student's Individualized Education Program (IEP).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, 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), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public educational systems. The District is a recipient of federal financial assistance from the Department and a public entity and therefore is subject to the provisions of Section 504 and Title II.

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

Before OCR completed its investigation, the District expressed a willingness to resolve the complaint, as described in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation, which informed the development of the Resolution Agreement.

Legal Standards

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.

In addition, the Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a 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 IDEA 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.

Courts and OCR have determined that actions or inactions that jeopardize the safety of a student to the point where a student's educational services are impacted can rise to a denial of FAPE.¹ OCR interprets the above provisions to require that public school districts take those steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. Indeed, without the assurance of a safe environment, the Student might even be precluded from attending school, i.e., may be denied access to the educational program.

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

¹ On May 15, 2012, the Department issued a resource document entitled "Restraint and Seclusion," which outlined fifteen principles for school districts to consider regarding the use of restraint and seclusion. See <http://www2.ed.gov/policy/seclusion/index.html>.

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.

Background and Analysis

Allegation 1: Restraint

The Complainant alleged that the District/School discriminated against the Student on the basis of his disability during school year 2014-2015, by restraining the Student on multiple occasions, thereby denying the Student a FAPE.

At the time of the complaint filing, the Student was enrolled in Grade XXXX at the School, which he began attending in late XXXX. The School informed OCR that the Student exhibited “extreme physically aggressive behaviors” shortly after enrolling. Specifically, the District’s Director of Policy for Special Education Services (the Director) explained that the Student would throw things, including paper, books, and at times even his desk; and the Student would fight with other students and strike staff. In response to these behaviors, trained school personnel intervened by restraining the Student during incidents on XXXX. Shortly after the incident on XXXX, the Complainant removed the Student from the School.

The District provided OCR with information indicating that the two School staff members who restrained the Student in the incidents noted above on XXXX, were the School’s Assistant Principal and its Transition Training Facilitator (the Facilitator), who was assigned to work with the Student. The Assistant Principal stated that he first restrained the Student on XXXX, and then again on XXXX. The Assistant Principal informed OCR that he holds certifications in NC Interventions (NCI)² and Crisis Prevention Intervention (CPI). The Assistant Principal stated that he used basic NCI restraints with the Student as a last resort, and that therapeutic holds were used for the safety of the child and staff.

Specifically, the Assistant Principal stated that on XXXX, he used two restraints on the Student. He explained that the first restraint consisted of a hold involving a “C” clamp on the Student’s wrists, crossing his arms down at his pockets. The purpose of the hold was to immobilize the Student’s hands as he was throwing chairs with such violence that pieces were breaking off on the floor and steel chairs were bouncing back onto the Student. The Assistant Principal also confirmed that the Student was punching him during the incident. The Assistant Principal explained that with respect to the second restraint, he used a second hold, which consisted of placing the Student in a chair, with his hands down to his pockets; he asserted that the hold was intended to provide additional protection for himself, the person doing the restraining, as well as the Student. According to the Assistant Principal, the Student was not restrained to the chair.

The Assistant Principal stated that he responded to another incident involving the Student on XXXX, in which the Student was XXXX. The Assistant Principal noted that during this incident, the Student was less responsive to interventions and was immediately physically aggressive with him. <XXXX SENTENCE REDACTED XXXX>. The Assistant Principal

² NCI is North Carolina state-sponsored training to prevent the use of restraints and seclusion.

stated that he applied the same “C” clamp restraint used on XXXX, which was successful. The Assistant Principal stated that each hold used on XXXX lasted less than three minutes.

Regarding the third incident on XXXX, the Facilitator explained that this was his first day working with the Student; and, he used a “therapeutic” hold with the Student on two occasions on this date. Specifically, the Facilitator stated that the Student was disrespectful to a teacher, was cursing and interrupting class, and then attempted to throw a hardcover book at another student, which the Facilitator intercepted. At that point, the Facilitator attempted to convince the Student to go for a walk with him to calm down, but the Student declined. The Facilitator stated that the Student’s behavior escalated and it became necessary to put him in a therapeutic hold for the safety of everyone involved. The Facilitator stated that he placed the Student in the therapeutic hold the second time while he and the Student were in the School’s kitchen, which the School had designated as a safe space. The Facilitator stated that preceding the second hold, he placed the Student in a chair and the Student was crying; the Student then removed his shoes and spat on some tables. The Facilitator stated that after placing the Student in the hold, the Student calmed down.

Both the Assistant Principal and the Facilitator informed OCR that information related to each incident was compiled; and, that they contacted the Student’s parents on one occasion while using restraints on the Student. Therefore, it is unclear whether the District contacted the Student’s as soon as possible after using restraints on XXXX; and, it is unclear whether requirements exist at the District or School or level for the reporting of incidents of restraint or seclusion. Further, the information provided by the District indicates that at least two instances of restraint involved the use of a chair on XXXX, and it is unclear from the information provided whether the chair served as a mechanical restraint. Further, with respect to the incident on XXXX, during which the Facilitator took the Student to the School’s XXXX, it is also unclear why the Student was taken to the XXXX and then restrained, or what hazards may exist in that environment.

Based on the foregoing, and the information that OCR obtained during its investigation thus far, OCR had concerns that the District may have discriminated against the Student on the basis of his disability, by using restraints; and, consequently, that the District may not have provided the Student with a FAPE. Prior to the conclusion of OCR’s investigation, the District indicated its interest in resolving Allegation 1 through the attached Resolution Agreement, pursuant to Section 302 of the *Case Processing Manual*. The provisions of the Resolution Agreement, when fully implemented, will resolve OCR’s concerns.

Allegation 2: Failure to Evaluate

The Complainant alleged that the District/School discriminated against the Student on the basis of his disability during school year 2014-2015, by failing to properly evaluate the Student with respect to his eligibility for special education and related aids and services, thereby denying the Student a FAPE.

Prior to enrolling in the School in XXXX, as previously stated, the Student originally had enrolled in the School in XXXX, and then he transferred to XXXX. At the time the Student re-

enrolled in the School in XXXX, the Complainant informed School personnel that the Student was a student with a disability. At that time, the Director retrieved the Student's IEP from XXXX and contacted the XXXX to determine if any changes needed to be made to the IEP. The Director noted that this was standard practice in the District any time a student transfers. The Student had an IEP and Behavioral Intervention Plan (BIP) in place for the School from 2014 (when he previously attended) as well as a July 2014 IEP from the XXXX at the time he transferred back to the School.

The Director informed OCR that after the Student's behavior escalated in XXXX, the School brought in a support teacher who specialized in working with students with XXXX (the Facilitator). Thereafter, the District convened an IEP meeting on June 8, 2015, which the Student's parents attended, to discuss the need for a re-evaluation meeting with the Student's parents. The District convened a second IEP meeting on June 22, 2015, at which time the School indicated its interest in re-evaluating the Student. According to the Director, the Student's parents have not made the Student available for re-evaluation since XXXX.

OCR's review of the Student's IEP, dated June 8, 2015, indicated that the meeting was convened by a group of knowledgeable persons, including the speech therapist and several of the Student's teachers, all of whom had specific knowledge as to the manner in which the Student was affected by his XXXX. However, OCR has concerns that the School did not convene an appropriate meeting within a reasonable timeframe given the concerns that were raised almost immediately upon his re-enrollment in XXXX, or subsequent to the multiple incidents in which District staff restrained the Student in XXXX, as discussed in Allegation 1 above. Further, District/School personnel informed OCR that the Student's behavioral issues began almost immediately in XXXX, however the Facilitator did not begin working with the Student until XXXX, after the Assistant Principal had already restrained the Student on two occasions, on XXXX and XXXX. The District did not provide OCR with any information to indicate whether it implemented any other interventions for the Student, prior to the appointment of the Facilitator to assist the Student, or why the District did not convene a group of knowledgeable persons or evaluate the Student prior to June 8, 2015, to address what the District described as the Student's "extreme physically aggressive behaviors."

Based on the foregoing, and the information that OCR obtained during its investigation thus far, OCR had concerns that the District may have discriminated against the Student on the basis of his disability, by failing to properly evaluate the Student with respect to his eligibility for special education and related aids and services; and, consequently, that the District may not have provided the Student with a FAPE. Prior to the conclusion of OCR's investigation, the District indicated its interest in resolving Allegation 2 through the attached Resolution Agreement, pursuant to Section 302 of the *Case Processing Manual*. The provisions of the Resolution Agreement, when fully implemented, will resolve OCR's concerns.

Allegation 3: Failure to Provide Speech and Occupational Therapy Services

The Complainant alleged that the District/School discriminated against the Student during school year 2014-2015, by failing to provide the Student with speech and occupational therapy (OT) services, as required by the Student's IEP, thereby denying the Student a FAPE.

The Complainant informed OCR that the Student's IEP required that the District provide him with speech and OT services each week, but that the District failed to provide him with these services. OCR reviewed the Student's IEP, dated June 9, 2015, and determined that it requires that the District provide the Student with four sessions of speech therapy per reporting period; as well as one session of OT per reporting period. However, the Student's IEP also stated that the Student is to receive "00" minutes per session. The District informed OCR that the IEP states that the Student is to receive "00" minutes per session, because the Student did not receive any "direct" speech or OT services; rather, the Student's speech and OT therapists provided indirect support to the Student through the Student's teachers, including through assisting with class materials. However, the Complainant asserted that the Student was supposed to receive direct speech and OT services.

In addition, OCR's review of the Student's IEP indicated that the IEP enumerates a number of services to be provided by the speech therapist. While many of the services appear to be designed as support for the Student's classroom teacher and monitoring/observing the Student, at least one entry, entitled "other-therapist will push-in to social group," appears to indicate that the District is required to provide the Student with some direct services through his speech therapist.

Based on the foregoing, and the information that OCR obtained during its investigation thus far, OCR had concerns that the District may have discriminated against the Student on the basis of his disability, by failing to appropriately implement the Student's IEP with respect to the provision of speech and OT services; that the Complainant and the District have differing interpretations regarding the requirements of Student's IEP as it pertains to the provision of direct speech and OT services; and, consequently, that the District may not have provided the Student with a FAPE. Prior to the conclusion of OCR's investigation, the District indicated its interest in resolving Allegation 3 through the attached Resolution Agreement, pursuant to Section 302 of the *Case Processing Manual*. The provisions of the Resolution Agreement, when fully implemented, will resolve OCR's concerns.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on November 4, 2016; when fully implemented, the Resolution Agreement will resolve the allegations raised in this complaint. The provisions of the Resolution Agreement are aligned with the Complainant's allegations, the information that OCR obtained during its investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Resolution Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Resolution Agreement could result in OCR reopening the complaint.

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 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, or participates in an OCR proceeding. 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.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact Sebastian Amar, the OCR attorney assigned to this complaint, at 202-453-6023 or Sebastian.Amar@ed.gov.

Sincerely,

Letisha Morgan
Supervisory Investigator, Team II
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Maura O'Keefe, Esq.