



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 25, 2018

Mr. Dashan Turner
Superintendent
Colonial Beach Public Schools
16 N. Irving Avenue
Colonial Beach, Virginia 22443

RE: OCR Complaint No. 11-18-1266
Resolution Letter

Dear Mr. Turner:

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 March 28, 2018 against Colonial Beach Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at XXXXX (the School), alleging:

1. On or about XXXXX, the Division treated the Student differently based on race (XXXXX) by revoking his enrollment in the Division following a disciplinary incident.
2. On or about XXXXX, the Division discriminated against the Student on the basis of disability when it revoked his enrollment in the Division without appropriately determining whether the Student's underlying behavior was a manifestation of his disability or convening a group of persons knowledgeable about the Student.
3. On or about XXXXX, the Division retaliated against the Student when it revoked his enrollment in the Division following a disciplinary incident after XXXXX had filed grievances XXXXXX during XXXXX.

OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance from the Department. 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 laws enforced by

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

OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504, Title II, and Title VI.

Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. Following is a summary of the relevant legal standards and information obtained by OCR during the investigation.

Summary of Investigation

During the investigation, OCR reviewed documents provided by the Complainant and the Division, including a video recording of the XXXXX incident that led to the Student's revocation of enrollment, and interviewed the Complainant and XXXXX. Before OCR completed its investigation, the Division expressed a willingness to resolve the complaint on August 29, 2018.

Background

In XXXXX, the Student was enrolled in the XXXXX at the School and received related aids and services for XXXXX pursuant to a Section 504 Plan. In XXXXX, his immediate family (XXXXX) moved outside of the Division boundary. The Student's parents informed School personnel about the move, and the Division permitted both the Student XXXXX to remain enrolled at the School.

On XXXXX, while walking in the hallway, the Student began XXXXX. The Student received a disciplinary referral for responding disrespectfully to a teacher (the Teacher) when she attempted to stop him from XXXXX. According to the Teacher's written disciplinary referral, she XXXXX Later that day, the Principal and Superintendent interviewed the Student and several witnesses and watched video footage of the incident. In a written statement, the Student stated, XXXXX.

The next day, the Principal assigned the Student XXXXX The same day, the Principal sent a letter notifying XXXXX that the Student's nonresident enrollment would be withdrawn, effective immediately, and that they could appeal the decision to the Superintendent. Following the subsequent appeal XXXXX, the Superintendent on XXXXX upheld the rescission of enrollment. The XXXXX requested and, one week later, received a hearing before the School Board. XXXXX, the Board upheld the revocation of enrollment.

The Complainant alleges that the Student's enrollment revocation constituted racial and disability-based discrimination and retaliation.

Allegation 1: *On or about XXXXX, the Division treated the Student differently based on race (XXXXX) by revoking his enrollment in the Division following a disciplinary incident.*

Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Division's programs or activities on the basis of race, color, or national origin. When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the school division treated the student less favorably than similarly situated individuals of a different race. If so, OCR then determines whether the division had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the division is a pretext, or excuse, for unlawful discrimination.

Information Gathered During the Investigation

The Complainant alleged that the Division's revocation of the Student's enrollment constituted race-based discrimination. In an interview with OCR, the Complainant asserted that the Division's treatment of XXXXX, was disproportionately harsh compared to the Division's treatment of XXXXX. The Complainant reported that XXXXX. The Complainant therefore argued that the Division's treatment of the Student was less favorable than its treatment of XXXXX supporting an inference of race-based discrimination. OCR interviewed XXXXX.

The Division asserted that it rescinded the Student's enrollment in accordance with its internal policies concerning non-resident students, School Division Policy JEC and JEC-R (the Nonresident Policies), which together permit the Division to admit nonresident students so long as students who reside outside the Division apply for admission first. The Division also relied upon a document titled "Admission for Students Residing Outside of CBPS' Division Boundary," available on the Division website, which states that the Superintendent may consider "relevant evidence" when making admissions decisions, which includes "current class size, academic achievement, *behavior*, attendance, standardized test scores, and parental involvement" (emphasis added). Accordingly, the Division asserted that it "treats non-resident students in a neutral manner, regardless of race," and removed the Student based solely on the November 14, 2017 disciplinary incident and his nonresident status.

Prior to the conclusion of OCR's investigation, the Division agreed to resolve this allegation by agreement.

Allegation 2 - On or about XXXXX, the Division discriminated against the Student on the basis of disability when it revoked his enrollment in the Division without appropriately determining whether the Student's underlying behavior was a manifestation of his disability or convening a group of persons knowledgeable about the Student.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school divisions 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.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school division to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, and before any subsequent significant change in placement. OCR considers an expulsion, long-term suspension, or other disciplinary exclusion of more than 10 school days to be a significant change in placement. A series of short-term exclusions that add up to more than 10 days and create a pattern of exclusions may also be a significant change in placement. When a significant change in placement is for disciplinary reasons, the first step in the reevaluation is to determine whether the student's disability caused the misconduct (also referred to as a manifestation determination). That determination should be made by a group of persons who are knowledgeable about the student, the meaning of the evaluation data, and the placement options. If the group finds that the student's disability did not cause the misconduct, the division may discipline the student in the same manner as it disciplines students without disabilities. If a school division finds that the student's disability caused the misconduct, the division may not exclude the student for more than 10 days and must continue the reevaluation to determine the appropriateness of the student's current educational placement.

Information Gathered During the Investigation

As stated above, when the Division revoked the Student's enrollment XXXXX, the Student had a Section 504 Plan providing accommodations for XXXXX. There is no dispute that the Division did not hold a manifestation determination review (MDR) meeting or otherwise reevaluate the Student prior to the revocation of his enrollment. The Division argues that "the discipline imposed on the Student pursuant to the incident XXXXX did not constitute a change in placement requiring [an MDR] under Section 504." The Division further asserted that because the Student received XXXXX and not a suspension in excess of 10 days, the discipline imposed did not "trigger the due process requirements under School Division Policy JGDA [Disciplining Students With Disabilities]" and, by extension, Section 504.

The parties do not dispute, and contemporaneous documentation confirms, that the Student received XXXXX. The parties also do not dispute that XXXXX the Division revoked the Student's enrollment based "solely" on that incident, effective immediately. That is, the Division did not permit the Student to attend the School after XXXXX, nor did it provide or offer the Student with educational services and accommodations following that date.

Prior to the conclusion of OCR's investigation, the Division agreed to resolve Allegation 2 by agreement.

Allegation 3 - *On or about XXXXX, the Division retaliated against the Student when it revoked his enrollment in the Division following a disciplinary incident after XXXXX filed grievances XXXXX during XXXXX.*

Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against any individual who asserts rights or privileges under Title VI or who files a complaint, testifies, assists, or participates in a proceeding under Title VI. When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the school division took an adverse action against the Complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the school division has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the school division's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

The Complainant alleged that the Division revoked the Student's enrollment in retaliation for XXXXX. To determine whether the Complainant established an initial case of retaliation, OCR first examined whether XXXXX engaged in protected activity—that is, asserted a right or privilege or opposed an act or policy that the individual reasonably believed was discriminatory or unlawful under one of the laws that OCR enforces. As stated above, XXXXX informed OCR that XXXXX complained XXXXX. OCR finds that by reporting XXXXX, discrimination prohibited by Title VI, XXXXX engaged in protected activity.

OCR also finds sufficient evidence that the Division took an adverse action against the Student when it revoked his enrollment in the Division. An adverse action is something that could deter a reasonable person from engaging in further protected activity. Removing the Student from his educational environment and requiring him to attend his resident school is a sufficiently severe consequence that would reasonably dissuade an individual from engaging in protected activity.

OCR considered whether a causal connection exists between XXXXX and the adverse action taken against the Student, and finds that sufficient evidence of a causal connection exists. The proximity in time between the protected activity (which, based on OCR's review XXXXX occurred on or about XXXXX) and the Division's rescission of the Student's enrollment (which occurred XXXXXX) is sufficient alone to establish a causal connection for purposes of a prima facie case of retaliation.

OCR then considered whether the Division had a legitimate, non-retaliatory reason for revoking the Student's enrollment. As stated above, the Division asserts that its decision to withdraw the Student from its schools "related solely" to the XXXXX disciplinary incident, and the fact that Division practice allows for removal of a non-resident student if there are issues with discipline. Because the Division agreed to resolve this allegation by agreement prior to the conclusion of OCR's investigation, OCR did not examine whether the Division's proffered legitimate, non-retaliatory reason for revoking the Student's enrollment was pretext to retaliate.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on September 24, 2018 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division'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 Division 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.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions, please contact the OCR attorneys assigned to this complaint: Kathryn Love, at 202-453-6948 or Kathryne.Love@ed.gov, or Kendra Riley, at 202-453-5905 or Kendra.Riley@ed.gov.

Sincerely,

David Hensel
Team Leader, Team III
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Ms. Nikki Cheuk, Esq. (via email)