



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

October 12, 2018

Via Email: askthesuperintendent@vbschools.com

Dr. Aaron C. Spence
Superintendent
Virginia Beach City Public Schools
2512 George Mason Dr.
Virginia Beach, VA 23456-0038

RE: OCR Complaint No. 11-18-1408
Resolution Letter

Dear Dr. Spence:

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 April 16, 2018 against Virginia Beach City Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) at Larkspur Middle School (the School). The complaint alleges that the Division discriminated against the Student on the basis of disability (XXXXX). Specifically, on December 6, 2017, the Division subjected the Student to a hostile environment based on disability when XXXXX.

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. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

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.

Background

The Student was enrolled as an XXXXX at the Larkspur Middle School (the School) during the 2017-2018 school year. The Student had an Individualized Education Program (IEP) and had a diagnosis of XXXXX. On XXXXX, the Student reported to the School an incident that occurred

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

with XXXXX on XX XXX and the School contacted the Student's parents to inform them about the incident. On Monday, December 18, 2017, School administrators, the Student's teachers, case manager, and guidance counselor met with the Complainant and the Student's mother to discuss the incident and other matters. On February 2, 2018, the IEP team met. Currently, the Student XXXXX.

Legal Standard

A Division's failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. A Division may also violate Section 504 and Title II if an employee engages in disability-based harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the Division had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the Division's programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a Division must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a Division must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Summary of Investigation to Date

The Complainant alleged that the School failed to investigate the incident once the Student reported the incident to the School. OCR reviewed the documentation and information provided by the Complainant and the Division including internal correspondence; the Student's 2017-2018 IEP; the Student's academic record; documentation related to the Division's investigation, including student and staff statements and contemporaneous interview notes; the Division's policies regarding non-discrimination, non-harassment; procedures for Division investigations into complaints of discrimination and harassment; and other information provided by the Complainant. OCR considered the Division's documents, and lack of documents, regarding its internal investigative steps into the incidents on XXXXX.

OCR also reviewed the Division's non-discrimination and non-harassment of students policy, Policy 5-7. Policy 5-7 requires the investigator to consult with the Office of Employee Relations regarding the investigation, findings, and proposed actions. Policy 5-7 explains that the investigator will prepare an investigation report that will include the allegation, additional allegations ascertained during the investigation, a summary of the evidence, the response from the accused and any supporting evidence, a summary of statements provided by the victim or other witnesses or parties, efforts by the School to remedy or address the circumstances, whether the complainant was satisfied with the remedies, the investigator's recommendations, and any other information. Policy 5-7 states that the investigation report will be provided to the complainant, the alleged violator, and to the appropriate Division staff.

Prior to continuing the investigation, the Division requested to resolve the complaint voluntarily. Based on a review of the information provided, OCR is concerned that the conduct of XXXXX could have constituted disability-based harassment and created a hostile environment for the Student, but the Division's records were not sufficient for OCR to reliably make a determination that the Division's response was prompt or equitable. Therefore, OCR believes resolution through an agreement is appropriate. Specifically, OCR notes that the Division's documentation indicates that the School's investigator did not comply with Policy 5-7 in that there is no documentation that an investigation report was created; the investigator summarized the statements provided by student witnesses; a determination of "whether the allegation has been substantiated as a violation of [Policy 5-7];" or a determination of whether "further actions [were] needed to remedy the complaint or address unresolved issues." OCR cannot at this stage conclude that the Division's investigator focused on more than XXXXX despite being informed of XXXXX additional incidents close in time, XXXXX. The investigator may not have determined whether the other incidents were directly or indirectly related to the December XXXXX incident and may have contributed to a disability-based hostile environment. OCR notes that the contemporaneous notes indicate that School staff spoke to several other students, but that the documentation provides very little detail concerning the information the other students shared. Furthermore, the documentation indicates that although staff investigated the incident to determine the facts, staff did not ultimately determine whether disability harassment occurred and whether the harassment was sufficiently severe as to create a hostile environment. OCR notes that there is no indication that the Division considered whether the incident was harassment based on the Student's disability and serious enough to create a hostile environment. Also, there is no documentation that the School attempted to determine whether other students were negatively impacted by XXXXX conduct, such as other students XXXXX.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on October 10, 2018 which, when fully implemented, will resolve the allegation raised in this complaint. The provisions of the Agreement are aligned with the allegation and issues raised by the Complainant and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. Specifically, the Division agrees to provide training to School staff on peer to peer and employee based disability harassment; the applicable grievance procedures for complaints of disability discrimination and harassment; and the requirements for a prompt and equitable response to reports of such

discrimination or harassment. 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 Zorayda Moreira-Smith, the OCR attorney assigned to this complaint, at 202-453-6946 or Zorayda.Moreira-Smith@ed.gov.

Sincerely,

Kristi R. Harris
Team Leader, Team IV
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Matthew R. Simmons, Assistant City Attorney