



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

June 9, 2020

Via Email Cynthia.gadol@excelsiorca.org

Cynthia Gadol
Executive Director
Excelsior Classical Academy
4100 N. Roxboro Street
Durham, North Carolina 27705

RE: OCR Complaint No. 11-18-1493
Letter of Findings

Dear Ms. Gadol:

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has completed its investigation of the complaint we received on September 25, 2018 against Excelsior Classical Academy (Academy), a public charter school in North Carolina. The Complainant filed the complaint on behalf of a student (Student) alleging that the Academy discriminated against the Student on the basis of disability (XXXXXX) when:

1. In Spring 2018, the Academy denied the Student a free appropriate public education (FAPE) when staff inappropriately restrained and secluded the Student;
2. In Spring 2018, the Academy denied the Student a FAPE when the Academy failed to reevaluate the Student to provide the Student with appropriate special education and related aids and services to address the Student's behavior;
3. In Summer 2018, the Academy failed to conduct an appropriate investigation of the Complainant's grievance; and,
4. In Spring 2018, the Academy refused to allow the Student to check out a book from the Academy's library and treated similarly situated students without disabilities differently.

OCR enforces 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 education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Because the Academy receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to 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.

During the investigation, OCR reviewed documents provided by the Complainant and the Academy. These documents included the Academy’s policies and procedures regarding restraint and seclusion, in addition to the Student’s special education file, discipline file, academic and attendance records, and medical information. OCR conducted interviews of the Complainant and the Academy’s staff, including the Executive Director, the Dean of Students, the Student’s teacher, and the Student’s Exceptional Children (EC) teacher. OCR also conducted a site visit on February 12, 2019, and reviewed audio and video recordings of the Student from May 17, 2018, that were provided by the Academy.

OCR completed its investigation of Allegation 2, and after carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II, which the Academy agreed to resolve through the enclosed resolution agreement. OCR’s findings and conclusions regarding Allegation 2 are discussed below.

Before OCR completed its investigation of Allegations 1, 3, and 4, the Academy expressed a willingness to resolve those allegations. OCR determined that it is appropriate to resolve Allegations 1, 3, and 4 pursuant to Section 302 of the *Case Processing Manual* because the investigation identified issues that can be addressed through a resolution agreement. OCR’s summary of the evidence obtained by OCR to date regarding Allegations 1, 3, and 4 is below.

Allegations 1 and 2¹

Facts

During the 2017-2018 school year, the Student was in the XXXXX at the Academy. The Student was identified as a student with a disability and received special education and related aids and services through an Individualized Education Program (IEP). The Complainant XXXXX.

The Academy’s Policy and Procedures - Restraint and Seclusion

The Academy told OCR that, as its policies and procedures regarding restraint and seclusion, the Academy utilizes Disability Rights North Carolina’s² “Seclusion and Restraint in North Carolina Schools”³ (Guide), which OCR reviewed. Disability Rights North Carolina’s website further explains that the non-profit organization provides self-help tools for people with disabilities.⁴ The Guide explains the laws surrounding seclusion and restraint, what forms of seclusion or restraint are allowed, and what to do if a child has been subject to unlawful seclusion or restraint. The Guide does not provide any information specific to the Academy – of note, the Guide does

¹ OCR consolidated the discussion of Allegations 1 and 2 because the underlying facts are relevant for both allegations.

² According to its website at <https://disabilityrightsnc.org>, Disability Rights North Carolina is “a legal advocacy agency that fights for the rights of people with disabilities in North Carolina” and handles “cases involving discrimination, abuse and other rights violations.”

³ See, <https://www.disabilityrightsnc.org/wp-content/uploads/2018/05/Seclusion-and-Restraint-in-NC-Schools-Self-Advocacy-Packet.pdf>

⁴ See, <https://disabilityrightsnc.org/our-work/>

not include any information about the procedures the Academy would follow in response to a restraint and/or seclusion incident.

The Executive Director told OCR that only trained staff can restrain students, that all restraints must be documented on a restraint form, and that the parent/guardian must be notified after each incident. The Executive Director explained that seclusion should only be used when the student is a threat to others. The Dean of Students provided OCR with a copy of the Academy's Restraint Documentation Form (Restraint Form), which he asserted that the Academy uses to document restraint incidents. The Restraint Form requires staff to document specific information relevant to the restraint incident, including (but not limited to) the antecedent and precipitating events and the names of all individuals involved in the use of the restraint. During an interview with OCR, however, the EC teacher told OCR that she was not familiar with the Academy's restraint and seclusion policies and procedures and that she did not receive training about the Academy's restraint and seclusion policies and procedures during the 2017-2018 school year. She told OCR that her understanding was that restraint and seclusion incidents should be documented on discipline forms. The Student's teacher told OCR that she had never received training on restraint and seclusion at the Academy and that she did not know the Academy's restraint and seclusion policies and procedures.

Restraint and Seclusion Incidents

The Complainant alleged that staff inappropriately restrained and secluded the Student multiple times in the spring of 2018. OCR's review of the Student's discipline file and documentation identified five documented restraint incidents and two instances of seclusion that occurred during the 2017-2018 school year.

The five documented restraint incidents occurred in February, March, and April 2018. According to a text message, the first restraint occurred on XXXXX, when the Student's teacher "held" the Student, and the Student was injured during the incident. According to an office discipline referral form, the second and third restraint incidents occurred XXXXX, when the Dean of Students escorted the Student "out the class using [a] children[']s control position to the XXXXX storage room" because the Student was screaming and had "hit himself open handed to the head [eight] 8 times;" subsequently, the Dean of Students "let him go [but the Student] began hitting himself again ... [and the Dean of Students] put the Student in [a] children's control position next to [him]." According to Restraint Forms provided to OCR, the fourth and fifth restraint incidents occurred on XXXXX when the Dean of Students placed the Student in a children's control position twice, once for thirty-three seconds and a second time for one minute and ten seconds. The Academy's documentation showed that the Student engaged in the following behaviors prior to the identified restraint incidents: injuring himself, hitting staff, threatening other students, screaming, biting, cursing, and misusing the Academy's property.

OCR notes that the Complainant also told OCR that the Dean of Students "punched and slammed" the Student "on a hard cement," and the Student's "back was injured during" an incident on XXXXX. The Complainant told OCR that she took the Student to his therapist and that he told XXXXX about the XXXXX incident, and that he was afraid to return to the school. She noted that the Student "was [subsequently] put in a XXXXX." The Complainant provided

OCR medical documentation confirming the Student’s visit to his XXXXX. The Academy’s documentation indicated that the Dean of Students placed two fingers on the Student’s back in order to restrict his movement; however, there was no additional documentation or information provided by Academy staff to confirm whether the Student was, in fact, restrained on this specific date.

The two documented incidents of seclusion (i.e., placing the Student in a separate setting from other students) occurred in May 2018. According to office discipline referral forms, staff placed the Student “[i]n separate setting from 11 to 12:30 [p.m.]” XXXXX, and staff placed the Student in a “separate setting from 11 to 12:30 [p.m.] on XXXXX.” The Dean of Students’ narrative statement concerning the XXXXX incident states that he “locked the opposite door so that [the Student] couldn’t go out into the rest of the school and [the Dean of Students] sat at the opposite door.” The EC teacher explained that she took the Student to the Dean of Students due to his behavior in class when he was with her; however, the Student was not exhibiting any aggressive behaviors at the time the Student went with the Dean of Students. The Dean of Students confirmed the Student was not exhibiting any aggressive behavior towards him or others prior to him placing the Student in the room. OCR reviewed two recordings (one audio and one video) provided to OCR by the Academy that showed the Student’s behavior escalating (e.g., aggressive and threatening statements and behavior towards staff) after he was placed in the room.

The Executive Director told OCR that the Dean of Students secluded the Student on XXXXX, but did not identify any additional seclusion incidents or any restraint incidents. The Dean of Students told OCR that he was involved in one restraint incident in April 2018, but did not identify any additional restraint incidents he participated in and stated that he never secluded the Student.

Additional Interventions

The Dean of Students further explained to OCR that he checked on the Student on a daily basis and removed the Student from class, if necessary, so they could “walk around the school [and] talk about [his behavior].” He told OCR that he did not keep documentation concerning each removal. The Student’s teacher explained to OCR that the Student was removed frequently from the classroom. She told that she called the Dean of Students to her class over one hundred times to address the Student’s behavior (e.g., throwing furniture, screaming profanity towards other students and staff, threatening other students, threatening staff, etc.), and that the Dean of Students removed the Student from the classroom a quarter of the time. The Student’s teacher identified two additional incidents when the other students were removed from the classroom due to the Student’s behavior, but explained that she did not document those instances. She explained that she did not know what happened to the Student once he was removed from the classroom and that she did not document how she ensured the Student received the instruction he missed when he was removed.

The Student’s Special Education File and Academic and Discipline Record

The Complainant asserted that the Academy “failed to put a [behavior intervention plan (BIP)] in place to support [the Student] in the generalized education setting.” She explained that “[t]here was nothing in place to support [the Student] in an escalated state.” OCR notes that the

Academy's narrative response stated that "[a]t no time did the Academy refuse to complete an evaluation at the parent or teacher's request." The Academy's narrative response did not directly address whether the Academy had sufficient information that the Student required additional special education or related aids and services, such that Academy staff would initiate a re-evaluation of the Student.

According to the Academy's records, the Student's IEP team convened on XXXXX; XXXX; and XXXXX. OCR reviewed documentation regarding each of the IEP meetings listed above and found no evidence that the IEP discussed the issues relevant to the restraints or seclusions. Specifically, OCR did not find any documentation indicating that the IEP team discussed: the Student's new and escalating behavior, which were increasingly violent and aggressive; the need for repeated interventions (i.e., restraint, seclusion, and removals) to address the Student's behavior; and whether the Student's behavior was impacting his access to the curriculum.

The Student's discipline record for the 2017-2018 school year indicated that the Student received one office discipline referral in Fall 2017; in contrast, the Student received multiple office discipline referrals in Spring 2018. The Student's discipline record showed that the Student exhibited new, repeated, and aggressive behavior, starting in February 2018. The Student's behaviors included physical aggression towards staff, self, and other students; profanity towards staff; refusal to do work; refusal to reenter the classroom; and throwing objects in the classroom.

The Student's academic record showed that the Student generally met grade level expectations and was promoted to the following grade when he was in XXXXX. In XXXXX, during the 2017-2018 school year, the Student received ones and twos on a scale from one to four for most of the academic standards in the first, second, and third quarters. For the fourth quarter, the Student received zeros for the majority of his academic standards and was retained at the end of the school year.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. § 104.4(a), provides that 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 recipient, or be subjected to discrimination by a recipient of Federal financial assistance. The Title II implementing regulation, at 28 C.F.R. § 35.130(a), provides that 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.

The Section 504 implementing regulation, at 34 C.F.R. § 104.33(a), states that a recipient that operates a public elementary or secondary education program or activity shall provide a FAPE to each qualified person with a disability who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. Under the Section 504 regulation at 34 C.F.R. § 104.33(b), an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met and are based upon

adherence to procedures that satisfy the requirements for educational settings, evaluation and placement, and procedural safeguards set forth in the Section 504 regulation, at 34 C.F.R. §§ 104.34 – 104.36.

Section 504 prohibits the use of restraint or seclusion that constitutes disability discrimination. The use of restraint or seclusion could violate Section 504 if the restraint or seclusion of a student with a disability denies a student's right to a FAPE. The repeated use of restraint or seclusion may suggest that a student's current array of regular or special education and related aids and services is not sufficient to provide FAPE. If there is reason to believe that the provision of FAPE services to the student has been adversely affected by the use of restraint or seclusion, such that the student's needs are not being met, a school has an obligation under Section 504 to: (1) determine if current interventions and supports are being properly implemented; (2) determine whether and to what extent additional or different interventions or supports and services, including positive behavioral interventions and supports and other behavioral strategies, may be needed, and, if necessary, reevaluate the student; (3) ensure that any needed changes are made promptly; and (4) remedy the denial of FAPE.

The Section 504 regulation, at 34 C.F.R. § 104.35(d), requires a school district to periodically reevaluate a student who has been provided special education or related services. Also, when there is information suggesting that a student's educational program is not meeting the student's individual needs, such as a significant decline in the student's grades or behavior, a group of knowledgeable persons should consider whether further evaluation or revisions to the student's IEP or placement are necessary.

Analysis

Allegation 1 - Restraint and Seclusion

The documentation confirmed that, in Spring 2018, the Student was restrained five times between February and April 2018, and secluded twice in May 2018. As discussed above, the IEP team convened in April and May 2018, and the Academy's documentation indicated that the IEP team did not consider or discuss the Student's escalating and violent behaviors. The documentation does not show any discussion of Academy staff's repeated use of restraint and seclusion to address the Student's behaviors or a determination whether the Student's current interventions and supports were being properly implemented to address his behavior and emotional needs and whether the Student needed additional or different interventions or supports.

Additionally, the documentation indicated that the Student's teacher restrained the Student in February 2018, which resulted in the Student being injured during the restraint. Of note, the Student's teacher acknowledged to OCR that she had not received training on restraint and seclusion and was unfamiliar with the Academy's policies and procedures regarding restraint and seclusion.

Furthermore, the Complainant provided medical documentation to OCR that the Student received medical attention in May 2019 and was later XXXXX as a result of an incident that occurred at the Academy. Ultimately, she withdrew the Student from the Academy.

Based on the information above, OCR has concerns that the Academy may have denied the Student a FAPE when staff repeatedly restrained and secluded the Student during the 2017-2018 school year. OCR has concerns that the Academy failed to convene a group of knowledgeable persons to determine if the Student's current interventions and supports were being properly implemented and, if necessary, to determine the extent to which additional or different interventions or supports and services were needed during the school year. Prior to OCR completing its investigation to determine whether the restraint and seclusion incidents, by themselves, resulted in a denial of FAPE, the Academy expressed an interest in voluntarily resolving Allegation 1. Pursuant to the Agreement, the Academy will: (1) review, and, if necessary, revise its policies, practices and procedures; (2) develop and implement a tracking and monitoring system for restraint and seclusion incidents; (3) provide training on FAPE to all staff; and (4) convene a meeting with the Complainant to determine whether compensatory and/or remedial services are warranted.

Allegation 2 - Failure to Re-evaluate

Based on all the information available to the Academy in Spring 2018, OCR finds that the Academy had sufficient information that the Student may have needed additional special education and/or related aids and services due to his disability. This information includes, but is not limited to: the five documented restraint incidents and two seclusion incidents; the Student's new, aggressive, and violent behaviors that resulted in frequent disciplinary actions and removals from class; and the Student's declining academic performance. OCR's review of the Student's special education records indicated that the Academy did not take steps to reevaluate the Student despite having this information. Accordingly, OCR finds that the Academy discriminated against the Student on the basis of disability when the Academy denied the Student a FAPE by failing to conduct a reevaluation in Spring 2018. On December 12, 2019, the Academy agreed to take specific steps to address the identified area of noncompliance, which are listed above under Allegation 1.

Allegation 3

Facts

The Complainant filed a grievance with the Academy on June 8, 2019, alleging that the Dean of Students inappropriately restrained the Student during the 2017-2018 school year, among other allegations. The Complainant contends that the Academy's grievance process was inadequate, unreliable, and biased because the Grievance Review Team (GRT) did not interview her or request any additional information before issuing its report and findings.

According to the Academy's grievance documentation, the Board President assigned three members of the Board to serve as the GRT on June 10, 2018. The GRT interviewed seven staff members, including the Dean of Students, on June 12, 2018, and reviewed narratives from three

staff members, dated June 14, 2018. One of the GRT members recused herself on August 10, 2018. The GRT completed a written report with its findings on August 11, 2018, determining that the grievance was without merit and should be dismissed. The GRT's written report was emailed to the Dean of Students and the Complainant on August 20, 2018. The Complainant appealed the GRT's findings on September 9, 2018 to the Board President, alleging that the investigation was biased. On September 27, 2018, the Board President "decided to uphold the original decision."

According to the Academy's Grievance Policy, 1.06 Grievance Policy, "[t]he purpose of the Grievance Committee is to accept, review, and determine the merits of a grievance lodged against [staff].... The Grievance Committee has the duty to request additional information, recommend the matter to the Board of Directors for action, or to dismiss the grievance." The Grievance Policy states that a GRT will be formed to address the grievance and that it will be composed of a minimum of three Board members. The accused will receive a copy of the grievance and a copy of any information and/or documentation submitted with the grievance. The accused is granted 10 business days to respond in writing. The Grievance Policy does not require interviews, but states that interviews will be decided upon "on an as needed basis." It also indicates that additional information may be requested from the grievant and/or the accused. The Grievance Policy states that the Committee will dismiss the grievance "[i]f the Grievant has failed to successfully prove the allegations contained in the grievance."

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires a recipient that employs 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public recipients that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

Analysis

The GRT's written report showed that the GRT only considered the Complainant's written grievance and did not provide her an opportunity to provide additional information. The GRT report indicated that the GRT interviewed multiple individuals at the Academy concerning the Complainant's allegations, and provided the accused staff member (here, the Dean of Students) the opportunity to provide additional information to support his position. OCR has a concern that the GRT did not act in an equitable manner when it addressed the Complainant's disability-related grievance. Prior to OCR interviewing members of the GRT and completing the investigation, the Academy requested to voluntarily resolve this allegation. Pursuant to the Agreement, the Academy will review and revise its grievance procedures to ensure that parties involved in the grievance process are provided equitable opportunities to present their positions and provide training to Board members on the revised grievance procedures.

Allegation 4

Facts

The Complainant alleged that the Student was not allowed to check out a library book until the end of the 2017-2018 school year because of his disability. The Academy's narrative response confirmed that the Student was allowed to check out a book in Spring 2018, but the Student subsequently failed to return the library book and therefore could not continue checking out books until he returned the book or paid for it. According to the Student's teacher, the Complainant told her at the beginning of the school year that the Student was "destructive." The Student's teacher told OCR that she was nervous about the Student checking out books and that she and the Complainant agreed that the Student should be allowed to check out books only in the classrooms and not the library due to fears of the Student ripping book pages. She noted that the purpose of this arrangement was to see "if the [S]tudent is capable of taking care of classroom books and being responsible." She confirmed that the Student was not allowed to check out books from the library until the end of the school year.

OCR contacted the Complainant concerning the Student's teacher's statement that she and the Complainant agreed to the alternative arrangement. The Complainant denied that she agreed to an alternative arrangement. She stated that she was not aware that the Student was not allowed to check out books from the library until the Student mentioned it to her at the end of the school year.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.4, and the Title II regulation, at 28 C.F.R. § 35.130(a), provide that no qualified individual with a disability shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Academy's programs or activities on the basis of disability.

Analysis

During interviews, the Student's teacher confirmed that the Student was not permitted to check out books until the end of the school year because of a concern that he might destroy the books. Based on the evidence discussed above, the Student may have been treated less favorably than his peers without disabilities with respect to checking out books from the Academy's library prior to the end of the school year. Prior to OCR completing the investigation, the Academy requested to voluntarily resolve this allegation. To address this allegation, the Academy agreed to review its library policies to ensure students with disabilities are not discriminated against in accessing library books.

Conclusion

On December 12, 2019, the Academy agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Academy to take specific steps to address the areas of noncompliance identified in Allegation 2. In addition, when fully implemented, the Agreement will address the concerns OCR identified regarding Allegations 1, 3 and 4. Under Section 304 of OCR's *Case Processing Manual*, a complaint will be considered resolved and the Academy

deemed compliant when the Academy enters into and fulfills the terms of a resolution agreement. OCR will monitor closely the Academy's implementation of the Agreement to ensure that the commitments made are implemented in a timely and effective manner. OCR may conduct visits and may request information as necessary to determine whether the Academy has fulfilled the terms of the Agreement. If the Academy fails to implement the Agreement, OCR may initiate proceedings to enforce the specific terms and obligations of the Agreement. Before initiating such proceedings, OCR will give the Academy written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

As of the date of this letter, the Academy has submitted documentation to OCR pertinent to Action Items 1-5 of the Agreement. OCR understands that the COVID-19 virus may be impacting the Academy's operations. In view of the Academy's COVID-19-related duties and responsibilities, OCR will extend the due date for Action Item 6 until December 1, 2020. OCR invites the Academy to access the Department's COVID-19 information and resources for schools and school personnel, available at <https://www.ed.gov/coronavirus>.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Academy'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 Academy 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 Academy's cooperation in the resolution of this complaint. If you have any questions regarding this letter, 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
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Terri Hayes, Student Services Director & EC and 504 Coordinator