



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

May 12, 2020

Via Email: dean.gilbert@patrick.k12.va.us

Mr. C. Dean Gilbert
Superintendent
Patrick County Public Schools
104 Rucker Street
P.O. Box 346
Stuart, VA 24171

RE: OCR Complaint No. 11-19-1321
Resolution Letter

Dear Mr. Gilbert:

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 (Department) received on April 24, 2019 against Patrick County Public Schools (Division). The Complainant filed the complaint on behalf of a student (Student) at XXXXXX (School). The Complainant alleges that the Division discriminated against the Student on the basis of disability. Specifically, the complaint alleges that the Division denied the Student a free appropriate public education (FAPE) when the Student's teachers "verbally abused and physically restrained" the Student in XXXXX.¹

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 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.

During the investigation to date, OCR reviewed information provided by the Complainant and the Division, interviewed the Complainant, and reviewed statements from Division staff. Before OCR completed its investigation, the Division expressed a willingness to resolve the allegation pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), which states that allegations

¹ OCR notes that the original allegation alleged that the incident occurred in XXXXX; however, during the investigation, the Division informed OCR that the incident alleged occurred in XXXXX.

may be resolved prior to OCR making a determination if the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. The following is a summary of the evidence obtained by OCR during the investigation to date.

Evidence Obtained to Date

The Student was enrolled in XXXXX at the School during the 2016-2017 school year. The Student was eligible for special education and related aids with a primary disability of XXXXX and secondary disability of XXXXX. According to the Complainant, a XXXXX (XXXXX) told her, in April 2019, that the XXXXX directly observed the Student's teachers "physically restrain the Student using a Rifton Activity Chair² (Rifton Chair) during the 2016-2017 school year (discussed in further detail below). The Complainant told OCR that she believed the incident "caused trauma [to the Student] and had long-lasting negative effects," though she did not specify what those were.

The Division provided OCR written statements from the Principal, the Student's Teacher (Teacher), a Teacher Assistant (TA), and a XXXXX.³ The XXXXX's written statement corroborated the Complainant's account of the incident discussed above. Her written statement further explained that she observed the Student's Teacher and TA place the Student in the chair following a XXXXX XXXXX, secure her in the chair so that she could not stand back up, and left her in the chair. The XXXXX reported that the "chair was then turned into the corner by the bathroom and a rolling partition was placed in between [the Student] and the rest of the classroom." The XXXXX stated that, during and after the incident, the Student was screaming, crying, and resisting attempts to place her in the chair. The XXXXX also stated that she reported the incident to the Principal soon after the incident.

The Division confirmed that the School had a Rifton Chair in the Student's XXXXX classroom at the beginning of the 2016-2017 school year. The Division acknowledged receiving a report from the XXXXX about the use of the Rifton Chair with the Student, although the Principal denied receiving the details above about the incident. In the Principal's, Teacher's, and TA's written statements, they denied that the incident occurred as alleged by the XXXXX. However, in their written statements, the Teacher and TA confirmed that the Rifton Chair was used multiple times in XXXXX with the Student. They further stated that it was removed from the class in XXXXX (following the XXXXX's report) because its use was not consistent with the Student's Individualized Education Program (IEP).

OCR reviewed the Student's academic record and special education documents for the 2016-2017 and 2017-2018 school year. OCR notes that the use of the Rifton Chair by the Teacher and TA was never discussed, mentioned, or documented in the Student's records. OCR did not find any references to the Rifton Chair, nor the incident described by the XXXXX. The records

² A Rifton Activity Chair is an adaptive device, used as a "basic positioning chair." See, <https://www.rifton.com/adaptive-mobility-blog/blog-posts/2012/january/rifton-chair-proper-positioning>

³ OCR has not conducted interviews of these individuals given the Division's interest in resolving this case pursuant to CPM Section 302.

reviewed by OCR noted that the Student made progress in all areas of her IEP goals, both academic and behavioral, during the 2016-2017 and 2017-2018 school years.

OCR reviewed the Division's policies and procedures concerning restraint and seclusion. The Division's policies and procedures define restraint, mechanical restraint, and seclusion. The Division's seclusion policy requires that a staff member monitor a student in close proximity while a student is in seclusion. It requires that the staff person involved with a restraint or seclusion incident record the "date, time, duration, precipitating behavior, outcome, and other pertinent observations" and notify parents/guardians "within a reasonable period of time, not to exceed 15 school days, after any use of physical restraint; or seclusion resulting in observed physical injury to the student."

Legal Standards

The Section 504 regulation, 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 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 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. Implementation of an IEP developed in accordance with the Individuals with Disabilities Education Act is one means of meeting this standard.

In interpreting evaluation data and making placement decisions, the Section 504 regulation, at 34 C.F.R. § 104.35(c), requires that a school district draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; establish procedures to ensure that information obtained from all such sources is documented and carefully considered; and ensure that the placement decision is made by a group of persons, including persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.

The use of restraint or seclusion could violate Section 504 if the restraint or seclusion of a student with a disability denies the student the opportunity to receive 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.

Concerns

OCR first notes that the Teacher and TA stated that the Rifton Chair was used on the Student on more than one occasion in XXXXX, yet there is no information in the Student's records that this

occurred. OCR also notes that School staff did not notify the Complainant⁴ (and the rest of the Student's IEP team) of the incident reported by the XXXXX or the repeated use of the Rifton Chair on the Student. OCR has a concern that absent information about use of the Rifton Chair, members of an evaluation team, including the Complainant, cannot appropriately determine if current interventions and supports are being properly implemented and whether or to what extent additional or different interventions or supports and services are needed.

Conclusion

On December 10, 2019, the Division signed the enclosed Resolution Agreement, which required the Division to provide training to School administrators and staff responsible for implementing the Student's IEP on the Division's restraint and seclusion policy, FAPE requirements as it relates to restraint and seclusion, and restraint and seclusion techniques that are approved by the Division. The provision of the Resolution Agreement was aligned with the allegation and the information obtained during OCR's investigation, and was consistent with applicable law and regulation. On XXXXX, the Division provided training to staff, as required by the Resolution Agreement, and submitted documentation of the training to OCR. OCR reviewed the Division's documentation and has determined that the Division has implemented the terms of the Resolution Agreement. Accordingly, OCR finds that the Division has filled the requirements of the Resolution Agreement and that no further monitoring of the Division's compliance with the Resolution Agreement is required. Therefore, OCR is closing this complaint effective the date of this letter.

This concludes OCR's investigation and monitoring 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.

⁴ As noted above, the Complainant filed this OCR complaint concerning the XXXXX incident when she first became aware of it in April 2019, when the XXXXX told her about it.

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: Pakapon Phinyowattanachip
pakaponp@haneyphinyo.com