



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, 2020

Via Email: schools@lcps.org

Eric Williams
Superintendent
Loudoun County Public Schools
Administration Building 21000 Education Court
Ashburn, Virginia 20148

Re: OCR Complaint No. 11-20-1245
Resolution Letter

Dear Superintendent Williams:

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 31, 2020 against Loudoun County Public Schools (the Division). The Complainant filed the complaint on behalf of a student (the Student) who was enrolled at XXXX (the School) in the Division at the start of the 2019-2020 school year and is currently enrolled in a private day school (the Private School), paid for by the Division, that closed its day school program on March 12, 2020. The complaint alleged that the Division discriminated against the Student on the basis of disability and also retaliated against the Complainant for her advocacy on the Student's behalf. Specifically, the complaint raised the following allegations:

1. The Division denied the Student a free appropriate public education (FAPE) at different times beginning on October 24, 2019, and continuing past March 31, 2020; and
2. The Division retaliated against the Complainant for advocating for the Student's disability rights when it filed a CHINS (Child in Need of Services) petition with the court on or about September 19, 2019.

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. The laws enforced by OCR prohibit retaliation against any

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

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 and Title II.

OCR determined that this case was appropriate for the Rapid Resolution Process, as outlined in OCR's *Case Processing Manual (CPM)* at Section 110. Accordingly, OCR reached out to the Division about promptly resolving this complaint, and the Division agreed to work with OCR to resolve the allegations expeditiously.

The Division promptly took steps to resolve the portion of allegation 1 that pertains to the period when the Division and the Private School first closed and then initiated distance learning in response to the Covid-19 pandemic. Thus, consistent with *CPM* Section 110(a), OCR is dismissing that portion of allegation 1 pursuant to *CPM* Section 108(k) as of the date of this letter and will take no further action on it. OCR is closing the remainder of allegation 1 pursuant to *CPM* Section 302, which states that allegations 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. Lastly, OCR found insufficient evidence to support allegation 2 based on a review of documentation from the Division and the Complainant, as well as interviews with the Complainant and Division administrators.

OCR's resolution of the complaint is explained further below.

Facts

The Student was enrolled in the XXXX grade at the School at the start of the 2019-2020 school year. The Student has been diagnosed with XXXX and is served under an Individualized Education Program (IEP). According to the Student's IEP in place at the start of the school year, the Student received his educational instruction in a self-contained special education setting. He also received related services, specifically speech and language (SPL) and occupational therapy (OT) services.

The Complainant told OCR that the Student has "violent aggressive meltdowns." She also acknowledged that the Student elopes. She explained to OCR that the Division had recommended a private day school setting for years, but she had resisted until the fall of 2019 because the options for private day schools were far from home, and the Student gets carsick. School and Division staff reported to OCR that the Student experienced serious behavioral episodes beginning several years before the 2019-2020 school and into the fall of 2019. According to School staff, the Student's behavioral episodes increased in severity and presented risk of harm to the Student, as well as to staff and other students.

The Division's disciplinary records for the Student reflect three serious behavioral incidents during the fall of 2019. The first two took place on August 26 and September 10, 2019 and both involved elopement and aggressive behavior that posed a threat of injury to the Student and to other students and resulted in staff injuries. During the September 10 incident, the Student left

the school building near the recess area outside of the gym, injured staff, and demonstrated self-injurious behaviors. The Student's disciplinary records also reflect incidents of a similar nature during the 2019-2020 school year.

On September 19, 2019, the Division filed a CHINS petition in court on the Student's behalf. The Supervisor for Student Services (SS Supervisor) explained to OCR that a CHINS petition is generally filed when a student is high risk and the Division has exhausted efforts to meet the student's needs. The Assistant Principal (AP) for the School, who attended all meetings regarding the Student and was a support person during challenging behavioral incidents during the fall of 2019, explained to OCR that the School had brought in additional support and expertise to help the School meet the Student's needs and felt that they had exhausted all available resources. In particular, the AP told OCR that two Special Education Supervisors and a Behavioral Specialist were heavily involved in supporting the School and the Student. She further explained that the School felt that the Student needed additional support services outside of school, but that the Complainant resisted.¹

According to the Division, while Division level Special Education staff had been involved in supporting the School and the Student, the Student's significant difficulties initially came to the attention of the Assistant Superintendent through her role on the Disability and Retirement team.² On September 16, 2019, the Assistant Superintendent asked the SS Supervisor to follow up on the situation. The SS Supervisor explained to OCR that she had no prior knowledge of or experience working with the Student or the Complainant and believes the Assistant Superintendent asked her to get involved because of her substantial background in the mental health field.

The SS Supervisor familiarized herself with the situation by reaching out to the Behavioral Specialist and the Social Worker who worked closely with the Student. On or about September 17, 2019, she met in person with the Behavioral Specialist. The Behavioral Specialist read

¹ The Complainant contests the Division's representation that the Division reached out to her to see if she needed additional support services outside of school, but also told OCR that the Student works with a team of medical providers and, therefore, does not need any additional support outside of school. The Complainant believed that she had signed a medical release for the School to communicate with this team of providers, but also acknowledged that she withdrew the release in the summer of 2019 and could not recall whether she had signed a new one. She also shared that she filed a Child Protective Services (CPS) report against School staff after a September 5 incident, which she said resulted in injury to the Student's thumb, but the report did not result in charges against the Division.

² The Division explained that the Divisions of Employee Health, Wellness and Benefits and Retirement and Disability Programs provide comprehensive benefit services and education to retain and recruit over 12,055 full-time and 4,300 part-time employees. Services include the maintenance of all benefits for active employees and over 2,100 retirees and their dependents, as well as the creation, maintenance, and growth of the Wellness Works! Program and a community discount program. The staff review student/staff injury incident reports and Worker's Compensation claims for the division and provide information to the Assistant Superintendent.

through records in the Student’s file while the SS Supervisor took notes, which she provided to OCR. The SS Supervisor then confirmed the information through a telephone call on September 18 with the Social Worker.³ The SS Supervisor told OCR that she had no knowledge of the CPS complaint, and the SS Supervisor’s notes do not reflect it.

The SS Supervisor explained to OCR that the Division’s typical practice is to reach out to the Juvenile Court Services Unit (JCSU) for guidance as to whether a CHINS petition is warranted and appropriate because JCSU ultimately decides whether a case will go forward. On September 16, 2019, the Assistant Superintendent made initial contact with JCSU by email, requesting advice and or assistance on “securing assistance for a student whose parent is not accepting intervention community support.” The SS Supervisor then spoke with JCSU by telephone on September 18, 2019 and shared the Student’s circumstances hypothetically without revealing identifying information. The Division provide documentation to show that JCSU recommended to the Division that it file a CHINS petition on the Student’s behalf, and in accordance with that guidance, the SS Supervisor instructed the AP to file the CHINS petition.⁴

On October 23, 2019, following a serious behavioral incident in which the Student injured a staff member, the Student was removed from the School. On November 25, 2019, the Student’s IEP team convened and determined that he required a change of placement to a private day school setting. In the interim, the Student was to receive homebased instruction, specifically two hours per week in reading and math. The home instruction logs provided to OCR by the Division show that the Student received a total of three hours of home instruction in December and another three hours of home instruction in January. The Student began receiving services at the Private School on XXXX, 2020.

On March 12, 2020, in accordance with a state order, the Division and the Private School closed in response to the Covid-19 pandemic. During the initial weeks of closure, the Division did not provide any educational services to students; the closure was treated as an emergency closure much like a weather-related closure. The Division reported that it initiated distance learning for all students beginning on April 15. At approximately the same time, the Private School began contacting students and families to develop individual service plans for remote learning. The Complainant informed OCR that on April 30, 2020, the Student began receiving online instruction from his teachers at the Private School.

On May 6, 2020, the Student’s IEP team, including representatives from the Division and the Private School, as well as the Complainant, convened for the purpose of continuing a discussion that began in March related to the Student’s triennial reevaluation. During the meeting, the parties agreed that the Student would receive compensatory services in SPL and OT to address the services missed since the school closure on March 12, 2020. On June 11, 2020, the

³ According to the notes, the Behavioral Specialist and Social Worker provided information about the Student dating back to November 2016. In addition to the major behavioral episodes described in the Student’s disciplinary record, the notes reflect an incident on September 5, 2019, when staff responding to the Student’s extreme behavior accidentally stepped on the Student’s thumb.

⁴ The court ultimately dismissed the petition and no further action was taken.

Complainant informed OCR that the agreed upon compensatory services had been completed as of that week.

Allegation 1: The Division denied the Student a FAPE at different times beginning on October 24, 2019 and continuing past March 31, 2020.

Legal Standard

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 Individuals with Disabilities Education Act is one means of meeting this standard.

Analysis

As stated above, consistent with *CPM* Section 110(a), OCR is dismissing the portion of allegation 1 that pertains to the period of time following the school closure in response to the Covid-19 pandemic pursuant to *CPM* Section 108(k), based on credible information that the issue has been resolved. The parties agreed during the May 6, 2020 IEP meeting for the Student that the Division would provide the Student compensatory services to address the gap in services as a result of the closure, and on June 11, the Complainant confirmed that the Student had received the agreed upon compensatory services.

Regarding the remainder of allegation 1, specifically the alleged denial of FAPE between October 24, 2019 and January 13, 2020, OCR identified a concern based on the information provided by the Division that the Student did not receive the complete hours of homebased instruction provided for in the Student's November 25, 2019 IEP. On August 14, 2020, the Division signed the enclosed Resolution Agreement (the Agreement), which, when fully implemented, will address the allegation investigated. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the Division to hold an IEP meeting for the Student by September 8, 2020, the start of the 2020-2021 academic year, to discuss whether the Student is entitled to receive additional compensatory services to address the gap in the Student's services during the fall 2019. On September 14, 2020, the Division provided documentation demonstrating compliance with this requirement, including the Division's offer of compensatory services. The remaining obligation under the Agreement is for the Division to provide documentation of compensatory service hours completed. Please review the enclosed Agreement for further details. OCR will continue to monitor the Division's implementation of the Agreement until the Division has fulfilled the remaining terms of the Agreement.

Allegation 2: The Division retaliated against the Complainant for advocating for the Student's disability rights when it filed a CHINS petition with the court on or about September 19, 2019.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

A claim for retaliation cannot succeed if the recipient provides a legitimate, non-retaliatory reason for the allegedly adverse action and there is no evidence the reason is a pretext, or excuse, for retaliation.

Analysis

OCR finds that the Division presented a legitimate, non-retaliatory reason for filing the CHINS petition, specifically, the Student's increasingly serious behavioral incidents. The Division further explained that it felt that it had exhausted all possible resources and believed the Student needed home-based services, which the Complainant had resisted. Based on this explanation, OCR finds that the Division presented a legitimate, non-retaliatory reason for filing the CHINS petition.

OCR has determined that there is insufficient evidence that the Division's explanation for its decision to file the CHINS petition is pretext for retaliation. First, the Student's disciplinary record and the notes provided by the SS Supervisor support the Division's concern about his increasingly severe behavior. Second, it was the SS Supervisor and the Assistant Superintendent, neither of whom had any direct contact with the Complainant or the Student, who decided to seek guidance from JCSU as to whether a CHINS petition was appropriate. Moreover, ultimately it was JCSU, an entity in no way affiliated with the Division, that advised the Division to file the CHINS petition.

Accordingly, OCR concludes that there is insufficient evidence to support a finding that the Division retaliated as alleged in allegation 2.

Conclusion

This concludes OCR's investigation of the complaint. As stated above, OCR will continue to monitor the Division's implementation of the Agreement. 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.

The Complainant has a right to appeal OCR's determination regarding allegation 2 within 60 calendar days of the date of this letter. The Complainant must submit an online appeal form (<https://ocrcas.ed.gov/content/ocr-electronic-appeals-form>) or a written statement of no more than ten (10) pages (double-spaced, if typed) by mail to the Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue SW, Washington, D.C. 20202; by email to OCR@ed.gov; or by fax to 202-453-6012. The filing date of an appeal is the date that the appeal is submitted online, postmarked, submitted by email, or submitted by fax. In the appeal, the Complainant must explain why he or she believes the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome; failure to do so may result in dismissal of the appeal. OCR will forward a copy of the appeal to the Division. The Division has the option to submit a response to the appeal to OCR within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Division.

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 regarding this letter, please contact Sara Clash-Drexler, the OCR attorney assigned to this complaint, at 202-453-5906 or sara.clash-drexler@ed.gov.

Sincerely,

O/B/O Michael Hing
Team Leader, Team 1
Office for Civil Rights
District of Columbia Office

Enclosure

cc (via email): Anne Mickey, counsel for the Division