



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 19, 2015

Ms. Tammy Finch
Director of Education and Professional Development
The Expedition School
437 Dimmocks Mill Road
Hillsborough, North Carolina 27278

Re: OCR Complaint No. 11-15-1033
Letter of Finding

Dear Ms. Finch:

On November 12, 2014, the U.S. Department of Education (Department), Office for Civil Rights, District of Columbia Office (OCR) received a complaint of discrimination against the Expedition School (the School), on behalf of a student (the Student). Specifically, OCR investigated the following allegations:

1. The School failed to provide the Student with a free appropriate public education (FAPE) when the School failed to implement the Student's Individualized Education Program (IEP) and Behavior Intervention Plan (BIP) from August 2014 through October 23, 2014, and
2. The School denied the Student a FAPE when School personnel restrained her on September 16, 2014.¹

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

¹ OCR notes that although the Complainant initially alleged that the incident occurred on September 14, 2014, which was in fact a Sunday, she later confirmed that based on School records that the incident occurred on September 16, 2014.

The investigative team conducted a thorough investigation, which included reviewing documentation from both the Complainant and the School and interviewing School staff. With regard to Allegation 1, OCR found that the School violated Section 504 and Title II when the School did not implement the Student's daily behavior tracking sheets and did not provide the Student with a one-to-one aide. OCR identified preliminary concerns with regard to Allegation 2. Prior to the conclusion of OCR's investigation, the School expressed an interest in resolving Allegation 2 through a voluntary resolution prior to the completion of OCR's investigation. The School entered into a resolution agreement, which, when fully implemented, will resolve the issues raised in this complaint. OCR will monitor the School's compliance with this agreement. A discussion of OCR's findings and analysis is below.

General Background:

The Student was in fourth grade when she enrolled at the School in August 2014, when the School first opened. The Student receives disability-related services under an IEP and BIP. The Student's disabilities include XXXX, and XXXX. The Student's last day attending the School was October 23, 2014, and she returned to her previous school in Orange County Public Schools on November 10, 2014.

Legal Standards:

The regulation implementing Section 504 requires school systems to provide qualified students with disabilities a FAPE, defined as the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. 34 C.F.R. § 104.33(a). OCR interprets the Title II regulations, at 28 C.F.R. §§35.103(a) and 35.130(b)(1)(ii) and (iii), to require charter schools to provide a FAPE to the same extent required under the Section 504 regulations. The development and implementation of an IEP in accordance with the Individuals with Disabilities Education Act (IDEA) is one means by which charter schools may provide a FAPE. Section 504 requires a charter school to provide a FAPE to each qualified individual with a disability.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a charter school to conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the student in regular or special education. Additionally, the regulation requires recipients to reevaluate students periodically, including prior to any subsequent significant change in placement. A "significant change in placement" includes a disciplinary exclusion of more than ten school days. Removal of more than ten consecutive school days constitutes a significant change in placement triggering a reevaluation, as does a series of suspensions that are each of ten days or fewer but more than ten days in the aggregate.

In addition, 34 C.F.R. § 104.35(c) states that in interpreting evaluation data and in making placement decisions, a charter school shall (1) draw upon information from a variety of sources, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons,

including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, (4) ensure that the placement decision is made in conformity with 34 C.F.R. § 104.34, and ensure that parents/guardians are provided with notice of their due process rights pursuant to 34 C.F.R. § 104.36. Courts and OCR have determined that actions or inactions that jeopardize the safety of a student to the point where a student's educational services are impacted can rise to a denial of FAPE.

In May 2012, the Department issued a Resource Document related to the use of restraint and seclusion.² The Resource Document has identified fifteen principles that school districts and charter schools should consider as the framework for any use of restraint and seclusion. A few significant and relevant principles in the Resource Document include that schools should never use mechanical restraints³ to restrict a child's freedom of movement; that physical restraint should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others; and that school staff should be trained regularly on the safe use of physical restraint. Furthermore, the Resource Document urges schools to regularly review and update policies regarding the use of restraint or seclusion.

Allegation 1: *The School failed to implement the Student's IEP and BIP.*

Facts:

The Student had an IEP created in February 2014 from the Student's prior school, which included a BIP that was in effect from when the Student started attending the School in August 2014. The IEP was thereafter revised on October 1, 2014 by the School's IEP team. The BIP in effect from August 2014-October 1, 2014 required the Student's teachers to complete daily behavioral tracking sheets. The BIP also required the school to use a "vacation" spot for the Student to cool off. Specifically, under a "continuum of consequences addressing recurrence of student's target behaviors," the BIP required "negative report on her daily tracking sheet . . . vacation (time out) and writing in her journal." The BIP also stated that the Student will receive "positive report on her daily tracking sheet," to "encourage/motivate student to demonstrate replacement behavior(s)." In addition, the BIP stated that "documentation will be collected on a daily behavior tracking sheet with categories for retelling directions, stating expectations for herself, interactions with unknown staff member, and completing work." The teachers understood the daily behavior tracking sheet was to be filled out every day and given to one teacher in particular, who stored them in a central location. Additionally, on October 1, 2014, the BIP was revised to include that the Student would have "one on one supervision or aid" at all times. From October 6, 2014-October 17, 2014, the School was not in session.

The Complainant alleged that the School did not provide the Student with daily behavior tracking sheets⁴ and the vacation spot, as required in her BIP, nor did the School provide the

² Available at <http://www2.ed.gov/policy/seclusion/index.html>

³ "Mechanical restraint" as defined in the Resource Document does not include devices implemented by trained school personnel or utilized by a student that have been prescribed by an appropriate medical or related services professional and are used for the specific and approved purposes for which such devices were designed.

⁴ The Complainant also informed OCR that she never received a copy of the tracking sheets. While the BIP states that the Student was to receive positive and negative reports on her daily tracking sheet, neither the BIP nor the IEP

Student with a one-to-one aide as required by her revised BIP after October 1, 2014. According to discipline logs and an interview with the Director, the Student's behavior escalated over the course of the first few weeks of school.

Analysis:

OCR examined to what extent the interventions in the Student's BIP were implemented in the 2014-2015 school year, starting with the vacation spot. The School Director informed OCR that the vacation spot was used for the Student from the beginning of the school year until the Student left the School in XXXX. She stated that every one of the Student's teachers had a designated vacation spot for the Student in the classroom. According to the Director, the teachers, in fact, used a vacation spot model for all students, but were specifically made aware that the vacation spot was mandatory for the Student. One of the Student's teachers confirmed that this vacation spot was made available to the Student either when the Student indicated she needed it or when the teacher believed she needed it. In addition, the Director reported to OCR that the Student used her office as a vacation spot.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that the alleged discrimination occurred. Here, there are records reflecting that the Student went to the Director's office when she needed a break. The Director and the Student's teachers also indicated that the vacation spots were used. Therefore, OCR finds insufficient information to substantiate this allegation. However, OCR will offer technical assistance to the School recommending that it maintain documentation reflecting its implementation of students' individual plans.

OCR next examined to what extent the daily behavior tracking sheets were implemented. The Director told OCR that she was not certain if the daily behavior tracking sheets were used at the beginning of the school year. The Student's homeroom teacher told OCR that the daily behavior tracking sheets started being used by all of the teachers in September 2014, approximately three or four weeks after the Student began classes. The Student's behavior escalated throughout the first few weeks of school. The record indicates that the Student had behavioral incidents on the following dates: XXXX. Examples of her behavior during this time include: randomly targeting peers, having episodes of behavior that were disconnected from the reality of the classroom, and running around the room knocking things down or tearing things off the wall. One of these incidents caused School personnel to restrain the Student on September 16, 2014.

The Student's BIP indicated that the daily behavior sheets were intended as an intervention to identify triggers and include positive incentives for improved behavior. There is some evidence that the delay in establishing the behavior tracking sheets contributed to the Student's behavior because no system was in place to track and identify the behavior and the Student's behavior escalated after the first few weeks of school, to the point where the Student was eventually restrained by School personnel. Furthermore, neither the Director nor any of the teachers

states that the Complainant was to be given a copy of these sheets. OCR therefore concludes that there was insufficient evidence to that the BIP required that the Complainant receive the tracking sheets.

informed OCR that the Student was re-evaluated to determine how she was harmed by the delay in initiating the daily behavior tracking sheets. OCR concludes that the School failed to implement the Student's BIP when it failed to complete daily tracking sheets for the first few weeks of school.

With regard to the one-on-one aide provision, the School acknowledged to OCR that it was still in the process of interviewing and hiring an aide for the Student when the Complainant removed the Student from the School on XXXX. The record shows that the Student had several disruptive incidents after October 1, 2014. For example, on XXXX, the Student was reported as not wanting to go to reading class and she walked out of class to go to another classroom. On XXXX, the Student was participating in music class and then suddenly, without any obvious trigger, began throwing the musical instrument she was working with and then began throwing chairs that were around her. Additionally, later that same day, the Student threw chairs in her science class.

Both related services that are required by the Student's BIP – i.e., the daily behavior tracking sheets and the one on one aide – were intended to address the Student's behavior, including her challenges controlling aggression and maintaining focus in her courses. The School's delay in putting in place the behavior tracking sheets and the one-on-one aide allowed the Student to continue to exhibit behavior, such as aggression toward other students, lacking focus, and throwing objects, that eventually resulted in the Complainant removing the Student from the School. Even though the School was not in session from October 6, 2014-October 17, 2014 and the Student was removed from the school by the Complainant on XXXX, OCR found that the Student lost meaningful educational benefit as a result of the School's failure to implement these provisions of her BIP, and therefore that the School failed to provide a Student with a FAPE, as alleged.

To address this violation, the School entered into the attached agreement. OCR will monitor the School's implementation of the agreement which, when fully implemented, will resolve this allegation.

Allegation 2: *School personnel restrained the Student on XXXX.*

Facts:

The School does not have a written policy on restraint. However, the School requires all School personnel to receive training on restraint. OCR viewed the training presentation that the School provides to its personnel and found that it did not include information on the techniques to properly and safely restrain a student, and that it identified situations in which mechanical restraint may be used. Specifically, the presentation states that “mechanical restraint can be used only when: reasonably needed for self-defense; reasonably needed to ensure the safety of any student, employee, volunteer, or other person.” School staff informed OCR that they did not receive any other training on any specific methods of restraint.

The Complainant stated that three staff members were involved in restraining the Student on XXXX, and they left red marks on the Student's arms. Staff explained to OCR that they

restrained the Student after she attempted to run outside the building and attempted to rip objects off the walls. They attempted to escort her to the main office. During the journey to the office, they explained, when the Student dropped to the floor, the staff released her arms. According to staff, after they released her arms, there were several occasions in which the Student stood up, ripped items from the wall, and ran away.

The Director stated that she told the Complainant that staff only “held [the Student’s] arms when [she] was either going to run, try to harm herself, try to rip things off the wall or harm others, and that [their] priority was to keep her and other students safe.” The Director acknowledged seeing red marks on the Student’s arms. Staff involved in the incident acknowledged that they were not trained in any technique to restrain a student, and said that the method they used on the Student was “instinctual.” When OCR inquired how they would restrain a student that might be larger than themselves, staff stated that “it would depend” and they “did not know.”

On October 1, 2014, the IEP team met and reviewed the Student’s IEP and behavioral incidents, including the incident on XXXX. The Student’s IEP team conducted an annual review and updated the Student’s IEP and BIP placement. The Complainant confirmed that she received a copy of her procedural safeguards at the meeting.

Analysis:

Here, OCR found that School had no formal written policy on restraint and staff were not trained on any method to properly and safely place a student in restraint. Indeed, staff reported to OCR that they responded “instinctually” and did not know how they would respond in a future situation if a student was larger. The Student was also physically injured when staff left red marks on her arms during the incident on XXXX. In addition, the School’s single presentation to train staff on restraint allowed for the use of mechanical restraint in a manner that is inconsistent with the Department’s Resource Document, which states that “[s]chools should never use mechanical restraints to restrict a child’s freedom of movement . . .”⁵ As a result, OCR identified preliminary compliance concerns with the School’s use of restraint.

Pursuant to Section 302 of OCR’s *Case Processing Manual*, the School has expressed an interest in voluntarily resolving this complaint allegation prior to the conclusion of OCR’s investigation through a resolution agreement. The School signed the enclosed agreement which, when fully implemented, will resolve this allegation. The provisions of the agreement are aligned with this allegation and information obtained during the course of OCR’s investigation, and are consistent with the applicable regulations. OCR will monitor the School’s implementation of the agreement.

Additional Issues that the Complainant Raised During the Investigation

During the course of the investigation, OCR learned of two other concerns initially raised by the Complainant. Specifically, she alleged that the Student was removed from the School for more than ten school days without a reevaluation, and the School failed to promptly and appropriately

⁵ See <http://www2.ed.gov/policy/seclusion/index.html> at page 12.

respond to peer harassment based on disability. OCR investigated these allegations, and for the reasons discussed below, found insufficient evidence to substantiate them.

The Student was removed from the School for more than ten school days.

Facts:

The Complainant contends that the Student missed more than ten school days without being reevaluated. In a phone conversation with OCR on April 7, 2015, the Complainant stated that there were eleven behavioral incidents, and that the Student was sent home for “most of them.” She stated that in addition to these incidents, there were about two or three times in which the Student was removed from class and placed in the office. The Complainant also stated that she could not confirm that the Student missed more than ten days of school. According to the School’s records, there were eleven documented behavioral incidents involving the Student during the fall of 2014. OCR interviewed the School staff and asked whether the Student was sent home after each incident. Specifically, OCR discussed the following documented behavioral incidents:

- August 19, 2014: School staff stated the Student was not sent home;
- September 8, 2014: School staff stated the Student was not sent home;
- September 10, 2014: School staff stated the Student was not sent home;
- September 11, 2014: School staff stated the Student was not sent home;
- September 16, 2014: School staff stated that the Student was sent home at 1:20 pm;
- September 19, 2014: School staff stated that the Student was sent home at 12:00 pm;
- September 23, 2014: School staff stated that the Student was not sent home;
- September 24, 2014: School staff stated that the Student spent a half hour in the office only, and was not sent home;
- October 1, 2014: School staff stated that the Student was not sent home;
- October 2, 2014: School staff stated that the Student was not sent home; and
- October 21, 2014: School staff stated that the Student was not sent home.

Additionally, on October 22, 2014, School staff stated that the Student went home due to a doctor’s appointment. After that, the Student did not return to school. School staff stated that in some of these incidents, the Student was sent to the office to “take a break” as per her IEP. In other instances, she was sent to the office as a disciplinary referral. The School’s records show that the Student was only sent home two times. There were other times that the Student went home for therapy, or the Complainant picked her up early if the Student’s brother was going home, but the School did not send her home any other time aside from these two instances according to School staff.

Analysis:

As mentioned above, the regulations implementing Section 504 require charter schools to reevaluate students with disabilities prior to any significant change in placement, which includes a disciplinary exclusion of more than ten school days. In this case, OCR finds insufficient

evidence that there was a significant change in placement. Even though the Complainant estimated that the Student may have been sent home more than ten days, the disciplinary logs do not reflect that the Student was sent home more than ten school days, and School staff confirmed that the Student was removed from school for only two days. There were times that the Student was sent to the office, but at least some of these were pursuant to a rest break required in the Student's IEP, which would not be a change in placement because implementing a provision of the Student's IEP is not a change in placement. Accordingly, OCR finds insufficient evidence that there was a significant change in placement, and therefore insufficient evidence that the School was required to conduct a reevaluation.

The School failed to promptly and appropriately respond to peer harassment based on disability.

Facts:

The Complainant contends that the Student was harassed by her classmates on the basis of her disability. Specifically, she stated that the Student's classmates tried to trigger the Student into having a reaction, and when the Student went to get help from the teacher, the teacher would ignore her. According to a September 19, 2014 email from the Complainant to School staff, one particular female student "triggers" the Student and other students trigger her. School staff also recalled the Complainant complaining about a particular male student, but do not recall the Complainant stating that the student was bothering the Student based on disability.

The School reported to OCR that the Student told School personnel that she was bothered by another student, whom she claims had thrown her squishy ball away, and that another student kicked her, possibly by accident. OCR interviewed School staff, and reviewed correspondence pertaining to incidents among the Student and other students. School staff informed OCR that they were not aware that the Student was being harassed based on her disability.

Analysis:

Harassment of a student on the basis of disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities. In determining whether a hostile environment based on disability has been created, OCR evaluates whether the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the school's program. OCR examines all the circumstances, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the age, disability status and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the school; and other relevant factors.

Once a school has notice of possible disability harassment of a student by another student it is responsible for determining what occurred and responding appropriately. The school is not responsible for the actions of the alleged harasser, but rather for its own discrimination should it fail to respond immediately and appropriately. A school violates Title II and Section 504 if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program; (2) the school knew or reasonably should have known

about the harassment; and (3) the school fails to take appropriate responsive action. These steps are the school's responsibility regardless of whether the student who was harassed makes a complaint.

OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt and effective. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the school must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If harassment is found, the school should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment, and address the effects of the harassment. If, upon notice, the school has failed to take prompt and effective corrective action, it must remedy the effects on the victim that could reasonably have been prevented had the school responded promptly and effectively. The school must also take steps reasonably calculated to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In this case, OCR finds insufficient evidence that the School had notice that the Student was harassed based on disability. School staff informed OCR that they had no knowledge that the Student was being harassed on the basis of disability, and there is no correspondence between the Complainant and the School informing the School that harassment was occurring on the basis of disability. Furthermore, all documentation that references altercations among the Student and other students do not suggest that the Student was being harassed based on disability. Specifically, the incident reports do not show that the conduct of other students would have denied the Student the ability to benefit from the academic program, nor that their conduct targeted her based on her disability. Accordingly, OCR finds insufficient evidence that the School violated Section 504 and Title II due to a failure to appropriately respond to peer harassment based on disability.

Conclusion:

The School has signed the attached resolution agreement. The provisions of the agreement are aligned with the allegations and information obtained during the course of OCR's investigation, and are consistent with the applicable regulations. OCR will monitor the School's implementation of the agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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 School may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. 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.

Please feel free to contact Todd Rubin at (202) 453-5923 or Todd.Rubin@ed.gov, if you have any questions about this letter or the processing of the complaint. Thank you for your cooperation.

Sincerely,

/S/

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