



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 22, 2016

Dr. Ray Spain  
Superintendent  
Warren County Schools  
P.O. Box 110  
Warrenton, North Carolina 27589

RE: OCR Complaint No. 11-15-1091  
Resolution Letter

Dear Dr. Spain:

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 January 22, 2015 against Warren County Schools (the District). The Complainant filed the complaint on behalf of a student (the Student) at XXXX School (the School), alleging discrimination based on disability XXXX as well as retaliation. Specifically, the Complainant alleges that the District:

1. Denied the Student a free appropriate public education when, on XXXX, they utilized a restraint hold on the Student; and
2. Retaliated against the Student when the classroom aide physically restrained the Student as a result of the Complainant's advocacy.

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. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. Because the District receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Before OCR completed its investigation, the District expressed a willingness to resolve allegation 1 of the complaint by taking the steps set out in the enclosed Resolution Agreement. However, OCR found insufficient evidence to support allegation 2. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement to resolve allegation 1 and OCR's findings and conclusions regarding allegation 2.

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

### **Factual Background**

At the time of the complaint, the Student was in the XXXX and was enrolled in the School until XXXX, when the Complainant withdrew the Student. The Student is identified as a student with a disability XXXX and received specialized instruction under the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). The Student is non-verbal and her Individualized Education Program (IEP) requires, among other things, that she has the support of a one-to-one aide. She received specialized instruction in a self-contained classroom.

On XXXX, while working with her one-to-one aide (the Aide), the Student attempted to grab the scissors the Aide had in her possession. The Aide attempted to redirect the Student. According to witness reports, the Student became upset and began “pushing” the Aide, eventually trapping the Aide in a corner. The Student continued moving toward the Aide and began flipping over desks and throwing chairs. The teacher escorted the other students out of the room and a classroom assistant, who was near the Student, placed her arms under the Student’s arms and walked the Student back to her seat, approximately five feet away.

The Student sat down briefly and, again, lunged for the Aide. The classroom assistant blocked the Student’s path, and the Student hit the classroom assistant when she brought her arms down in a swinging motion. According to the teacher’s statement, the teacher then “wrapped [her] arms underneath [the Student’s] armpits while [the classroom assistant] held her hands” while the one-to-one Aide was removed from the classroom. During this time, a substitute teacher, who was alerted by the other students, entered the classroom to assist school staff. At that point, the Student became calm, hugged each of the staff members, and resumed her assignment.

School staff informed the Complainant about the incident. According to School staff, they did not consider the actions of either the classroom assistant or the teacher to be restraint; however, the Complainant disagreed and requested that staff provide documentation of the incident on the District’s restraint form.

At the Complainant’s request, on XXXX, the Student’s IEP team convened to discuss the Student’s behavior and the need for a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) to address the Student’s recent behaviors, including four incidents of physical violence against a staff member between XXXX. The team agreed to conduct an FBA and develop a BIP. By email dated XXXX, the Director informed the Complainant that the FBA had been conducted; however, the Complainant challenged this assertion based on a conversation she had with the Student’s teacher. Additionally, during interviews with OCR, District staff offered differing information about whether the FBA had been completed, with two individuals saying it had not been completed, and two saying that it had. The District did not provide OCR with any evidence of a completed FBA, and District staff confirmed that the BIP had not been developed at the time of the Student’s withdrawal from the District in XXXX

### **Allegation 1**

The Section 504 regulation, at 34 C.F.R. § 104.4, provides that students with disabilities shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, be afforded an opportunity that is not equal to that afforded others, or otherwise be subjected to discrimination in a school district's programs and activities. The regulation further provides that a public school district may not otherwise limit an individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. The regulation implementing Title II, at 28 C.F.R. § 35.130, contains similar provisions. OCR interprets these provisions to require that public school districts ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities.

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (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 IDEIA is one means of meeting this standard. OCR interprets the Title II regulation, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require school districts to provide FAPE to the same extent required under the Section 504 regulation.

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.<sup>1</sup> OCR interprets the above provisions to require that public school districts take those steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. Indeed, without the assurance of a safe environment, the Student might even be precluded from attending school, i.e., may be denied access to the educational program.

The repeated use of restraint or seclusion, in the absence of individualized assessments, may deny students with disabilities a FAPE. The frequent use of these restrictive interventions may suggest that these strategies are not effective at changing or minimizing the problematic behavior and that the student's current educational placement is not appropriate. Moreover, students who are removed from the educational setting to be restrained or secluded are effectively denied educational instruction or access to the curriculum for the duration of the removal. If a school district has reason to believe that a student's placement is not appropriate, including because of the frequent use of restraint or seclusion, it should convene a group of knowledgeable persons to examine whether additional evaluation and/or a change of placement (including a change in services) is needed, as required by Section 504.

OCR has concerns that the District may have denied FAPE to the Student. This belief is based on interviews with School staff that illustrated the School may not have taken necessary steps to

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<sup>1</sup> On May 15, 2012, the Department issued a resource document entitled "Restraint and Seclusion," which outlines principles for school districts to consider regarding the use of restraint and seclusion. Available at <http://www2.ed.gov/policy/seclusion/index.html>

ensure a safe school environment for the Student.<sup>2</sup> School staff corroborated the events of XXXX and, while staff stated to OCR their understanding that restraint is used only when there is a safety concern, staff denied using a physical restraint on the Student. Staff consistently stated to OCR that the Student was not restrained because they did not “cross their arms” in a “basket hold” technique. In addition to the assertions of School staff, the District said that the staff had not been trained in the use of restraint and, therefore, could not have restrained the Student. OCR disagrees with the District’s characterization of the January 13th intervention and notes that the staff’s understanding of the use of restraint is not consistent with the District’s policy or the accepted definition of restraint as physical intervention that limits movement of all or part of a student’s body.<sup>3</sup> This definition does not limit restraint to special techniques such as a “basket hold.”

According to the District’s former Director of Exceptional Children (the Director), the District offers annual training to all School personnel on restraint; however, training was not provided prior to the XXXX restraint of the Student or prior to the end of the 2014-2015 school year. The District attempted to arrange training for staff after the incident occurred, but the District explained that it was canceled due to scheduling conflicts with the North Carolina Department of Public Instruction, from which the District had requested training, and ultimately not rescheduled.

School staff had no training on the types of holds that may be appropriate in a given situation, how long to implement them, and in what circumstances to apply them. Indeed, staff confirmed to OCR that they had not received training during the 2014-2015 school year on restraint and stated that, in physically holding the Student to restrict her movement, they did not use restraint, and could not have, because they did not have training to do so. As described above, training is necessary to ensure the appropriate and safe implementation of physical restraint and to ensure the provision of FAPE when restraint is necessary. Fundamentally, OCR is concerned that the lack of understanding on the part of school staff about what constituted restraint, when to use restraint, and how to use restraint may have resulted in a denial of FAPE.

Furthermore, information obtained during staff interviews suggests that the Student may have had other aggressive behaviors, some requiring restraint, before and after the XXXX incident. During interviews, several witnesses described an incident in November 2014 when the Student became very distraught during a fire drill, attempted to leave the school, and required physical restraint to be calmed. There is no evidence that the Student’s service providers met to evaluate the Student to determine whether additional supports were required, and the incident was not documented in writing. Another witness told OCR that the Student had aggressive behaviors,

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<sup>2</sup> OCR reviewed the District’s restraint and seclusion policy and determined that the policy allows restraint in circumstances that are considerably broad. *Board Policy 4302-R Rules for Use of Seclusion and Restraint in Schools*. The policy does not provide any information about how to implement restraint or techniques to safely restrain and monitor a student. OCR also noted that the District’s policy documents are silent on the District’s process for reviewing use of restraint and developing alternative behavioral strategies. Further, the District’s policy makes no mention of providing regular training to staff on the safe use of physical restraint, which, as discussed below, OCR determined is an area of concern.

<sup>3</sup> The District’s policy, Policy 4302-R, defines physical restraint to mean the “use of physical force to restrict the free movement of all or a part of a student’s body.” *Board Policy 4302-R Rules for Use of Seclusion and Restraint in Schools*. See also Resource Document.

which resulted in staff “holding” the Student before XXXX. Further, the record indicates that the Student had multiple incidents of aggressive behavior following the January 13, restraint. Included among these were incidents on XXXX when the Student began hitting herself in the face with her fist and screaming and then hit the Aide in the face; on XXXX when the Student hit the teacher in the chest twice while screaming and then later in the day hit herself in the head with her fist; and on XXXX when she grabbed a teacher’s arms and then hit a teacher in the back. For the first of those incidents, OCR received conflicting information about whether another restraint occurred.

Moreover, while the XXXX incident was documented in writing by School staff, this step was completed at the request of the Complainant. As discussed above, School staff indicated to OCR that they believed their actions did not constitute “restraint.” Although the IEP team agreed to conduct an FBA just over two weeks after the XXXX incident, again at the request of the Complainant, the District provided no documentation to show an FBA had been completed by XXXX when the Student withdrew. To resolve this allegation, the District has indicated its willingness to enter into a voluntary resolution agreement.<sup>4</sup>

## **Allegation 2**

The Complainant alleged that the classroom assistant retaliated against the Student by restraining her because she was upset that she had been moved out of her position as the Aide. According to the Complainant, the classroom assistant had been removed from that role after two days of school when the Complainant voiced concerns that she was not appropriately meeting the Student’s needs. The Complainant had concerns that the classroom assistant did not assist the Student with toileting in the manner specified by the Student’s IEP.

When analyzing a claim of retaliation, OCR will look at the following three elements to determine if the Complainant has stated an initial case: 1) whether the individual engaged in protected activity (e.g., filed a complaint or asserted a right under a law enforced by OCR); 2) whether the District took a materially adverse action against the individual; and 3) whether there is some evidence that the District took the adverse action as a result of the protected activity. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the District has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the District’s reason for its action is a pretext or excuse for unlawful retaliation.

First, the Complainant engaged in protected activities that the District knew about during the late summer and early fall of 2014. An individual engages in a protected activity if he or she opposes an act or policy that he or she reasonably believes is discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing conducted under any of the laws that OCR enforces. Here, the Complainant advocated for the Student by requesting that the District place the Student in a different class, which she believed had a more appropriate setting, and by requesting a

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<sup>4</sup> During resolution of this complaint, the District provided OCR with documentation to support that it provided training to staff on the restraint policy and to selected staff on implementation of appropriate restraint techniques between November 2015 and May 2016. OCR acknowledges that the District conducted this training and, therefore, modified the attached resolution agreement accordingly.

different aide for the Student as a result of concern over implementation of toileting needs addressed in the Student’s IEP. The District was aware of the Complainant’s advocacy given that the Complainant communicated her concerns directly to the Student’s IEP team and then to the Principal. The Principal responded to the concerns by making the requested changes.

After the Complainant’s advocacy, the Student experienced an adverse action when staff at the District physically restrained the Student on XXXX. An adverse action is something that could deter a reasonable person from engaging in further protected activity. Here, OCR finds that restraining a student could reasonably deter a parent from engaging in further protected activity. Thus, OCR finds the restraint on XXXX to be adverse.

Next, OCR examines whether there is some evidence of a causal connection between the Complainant’s protected activity and the adverse action against the Student. Here, the Complainant’s protected activity occurred in August 2014 and the adverse action occurred five months later in XXXX. The length of time between these events is great enough that the connection is tenuous at best. Had the classroom assistant wanted to retaliate against the Student she had ample opportunity to do so on a daily basis before XXXX. However, OCR assumes for the purposes of our analysis that the evidence supports a *prima facie*, or initial, case of retaliation.

OCR next considers whether the District has a legitimate, non-retaliatory reason for its restraint of the Student. The District, although denying it used restraint, offered that the classroom assistant, teacher, and substitute teacher acted in a manner necessary to stop the Student from harming herself and others, namely the Aide the Student was attempting to hit. During interviews with OCR, staff noted that the XXXX situation escalated quickly, and the urgency of the situation left no alternatives. Each staff member described to OCR that she physically held back, or restrained, the Student to keep her safe because she was moving toward the Aide with scissors, turning over desks and chairs, and hitting and swinging her arms. During the 10-minute period the Student did not deescalate or calm on her own.

OCR finds no evidence that this offered reason is pretext for retaliation. The evidence shows, corroborated by several witnesses during interviews, and witness statements contemporaneous in time to the incident support, that the Student was imminently likely to harm herself or the Aide she was moving toward. Evidence supports that the Student “cornered” the Aide, scissors in hand, and had knocked over a couple of desks, removing the barrier between the Student and the Aide. District policy permits physical restraint in such situations. OCR has no reason to doubt that the aggressive behavior happened as described.

While OCR has concerns, as discussed above, about the School’s understanding of what constitutes restraint and the manner in which the School staff implemented it, OCR finds that the District’s legitimate, non-retaliatory reason for restraining the Student was not pretext for retaliating against the Student because of the Complainant’s advocacy. There is no evidence to suggest that the School staff was motivated because the Complainant had voiced concerns about the Student’s needs. Rather, the preponderance of the evidence shows that the classroom assistant, teacher, and substitute restrained the Student because she was engaging in unsafe

behavior. Therefore, OCR concludes that there is insufficient evidence to support a finding that the District retaliated against the Student.

### **Conclusion**

Pursuant to Section 302 of OCR's *Case Processing Manual*, the District signed the enclosed Resolution Agreement on June 10, 2016, which, when fully implemented, will resolve allegation 1 of this complaint. The provisions of the Agreement are aligned with the allegation and issue raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the District's implementation of the Agreement until the District is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR found insufficient evidence to support the finding of a violation of Section 504 or Title II with respect to allegation 2.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District'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 District 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, 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.

We appreciate the District's cooperation in the resolution of this complaint. If you have any questions, please contact Amy S. Williams or Kendra Riley, the OCR attorneys assigned to this complaint, at 202-453-5933 or [amy.williams2@ed.gov](mailto:amy.williams2@ed.gov), or at 202-453-5905 or [kendra.riley@ed.gov](mailto:kendra.riley@ed.gov), respectively.

Sincerely,

/S/  
Alessandro Terenzoni  
Supervisory Attorney, Team II  
District of Columbia Office  
Office for Civil Rights

Enclosure  
cc: XXXX