



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS  
32 OLD SLIP, 26<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10005

**TIMOTHY C. J. BLANCHARD**  
DIRECTOR  
NEW YORK OFFICE

July 28, 2016

Anne Spadone  
Superintendent  
Lackawanna City School District  
McKinley Administrative Building  
245 South Shore Boulevard  
Lackawanna, New York 14218

Re: Case No. 02-16-1124  
Lackawanna City School District

Dear Superintendent Spadone:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the Lackawanna City School District (the District). The complainant alleged that the District failed to respond appropriately to his Dignity for All Students Act (DASA) complaint filed with the District on June 2, 2015, alleging that on May 8, 2015, staff at the Martin Road Elementary School (the School) subjected his son (the Student) to harassment on the basis of his disability.

OCR is responsible for enforcing Section 504, as amended, 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 receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District is a recipient of financial assistance from the Department and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504 and the ADA.

In its investigation, OCR reviewed documentation that the complainant and the District submitted. OCR made the following determinations.

The complainant alleged that the District failed to respond appropriately to his DASA complaint filed with the District on June 2, 2015, alleging that on May 8, 2015, staff at the School subjected the Student to harassment on the basis of his disability.

Disability harassment is a form of discrimination prohibited by Section 504 and its implementing regulation, at 34 C.F.R. § 104.4, as well as the ADA and its implementing regulation, at 28 C.F.R. § 35.130. Harassing conduct by an employee, another student, or a third party may take many forms; including verbal acts and name-calling, graphic and written statements, or other conduct that may be physically threatening, harmful, or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a beneficiary's participation in or receipt of benefits, services, activities, or opportunities offered by a recipient.

The regulation implementing Section 504, at 34 C.F.R. § 104.7, states that a recipient must create grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504, including disability harassment. Additionally, a recipient must designate a responsible employee to coordinate its response to such complaints. OCR has identified a number of elements in determining if grievance procedures are prompt and equitable, including whether the procedures provide for: (a) notice to students and employees of the procedures, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (b) application of the procedures to complaints alleging discrimination or harassment carried out by employees, students, and third parties; (c) adequate, reliable, and impartial investigation, including an opportunity to present witnesses and evidence; (d) designated and reasonably prompt timeframes for major stages of the grievance process; (e) written notice to parties of the outcome and any appeal; and, (f) an assurance that the institution will take steps to prevent further harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

OCR determined that the District uses its Policy 7550, "Dignity for All Students Act" (DASA policy) and the related "Dignity for All Students Act Regulation" (DASA regulation) to respond to complaints of disability discrimination, including disability-based harassment. OCR further determined that the District's DASA policy and regulation incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504, including disability harassment. The Principal of the School is the individual designated to respond to DASA complaints arising at the School.

At the time of the events that gave rise to the instant complaint, during school year 2014-2015, the Student was in the fifth grade at the School. The Student was diagnosed with XXXXXXXXXXXXXXXX and was eligible for a Section 504 plan that provided supplemental aids and services designed to address the Student's XXXXXXXXXXXXX, XXXXXXXXX, and ability to XXXXXXXXXXXXXXXX.

OCR determined that the complainant filed a DASA complaint with the District on June 2, 2015, alleging that the Student's classroom teacher (Teacher 1), a substitute music teacher (Teacher 2), and his computer teacher (Teacher 3) subjected the Student to disability-based harassment. OCR further determined that prior to filing his DASA complaint, the complainant made several oral complaints regarding the alleged harassment, between May 8 and May 11, 2015.

The complainant advised OCR that the incidents that gave rise to the DASA complaint occurred on May 7 and May 8, 2015. Specifically, the complainant stated that on May 7, 2015, the Student wrote a note in which he described his classroom teacher (Teacher 1) as "ignorant."

The complainant asserted that this referred to Teacher 1's lack of understanding of the Student's disability. The note also described the Student's feeling that he was "just a number" to teachers at the School. The complainant stated that the note was confiscated from the Student and then shared with other members of the School faculty. The complainant alleged that on May 8, 2015, Teacher 1 pulled the Student aside and told him, "I do not want you in my classroom." The complainant further alleged that Teacher 1 required the Student to sit in the hallway while she spoke to his class, making several references to the confiscated note. The complainant alleged that Teacher 1 unjustly singled the Student out and humiliated him in front of his classmates for availing himself of a therapeutic tool to cope with his disability.

The complainant further advised OCR that the Student was scheduled to play the drums in two School concerts on May 8, 2015. The complainant asserted that on May 8, 2015, after an unrelated incident during lunch period for which the Student received lunch detention, Teacher 2 told the Student that he had "three strikes", namely the note he wrote on May 7, the incident at lunch on May 8, and another earlier lunch incident, and would thus not be allowed to perform in the second concert of the day. The complainant stated that after the Student was told that he could not participate in the concert, he began crying and was escorted to the School's main office. Teacher 3 approached the Student and told him that she was not happy with his note, and that the art teacher (Teacher 4) would not be happy about the note either. The complainant asserted that Teacher 3's statement was a veiled threat about the Student's participation in an upcoming field trip to Boston, which Teachers 3 and 4 were chaperoning. The complainant stated that the remark made the Student feel unwelcome on the trip, and he did not attend.

The Principal of the School advised OCR that on May 8, 2015, she discussed with the complainant Teacher 2's decision to remove the Student from the concert. The Principal stated that she advised the complainant that she was unhappy with Teacher 2 taking this action without first discussing it with the Principal. The Principal offered the complainant the opportunity to let the Student perform in the concert, but the complainant declined the Principal's offer.

OCR determined that on May 11, 2015, the Principal met with the complainant to discuss the complainant's concerns regarding the School staff's treatment of the Student. The Principal stated that at this meeting, the complainant explained the Student's use of journaling his feelings as a therapeutic tool. The complainant also stated that Teacher 1 had referred to the content of the note to the Student's class. The Principal stated that she advised the complainant she would make sure that Teacher 1 was aware of the Student's therapeutic tool, and would also speak with Teacher 1 about disciplining the Student in front of his classmates. OCR determined that based on the subject matter of this meeting, the Principal suggested that the complainant file a DASA complaint about his concerns, and provided a copy of the School's DASA complaint form.

OCR determined that following her meeting with the complainant on May 11, 2015, the Principal interviewed Teachers 1, 2, and 3. The Principal had previously interviewed another teacher (Teacher 5), who discovered the Student's note on May 7, 2015, and shared it with the Principal that day.<sup>1</sup> Teacher 5 advised the Principal that she heard yelling coming from the Student's classroom, and when she entered the classroom to see what was going on, she observed

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<sup>1</sup> A substitute teacher was responsible for Teacher 1's class on May 7, 2015.

the Student showing his note to other students. Teacher 5 also provided a written statement to the Principal regarding the incident.

On May 11, 2015, the Principal met with Teacher 1. Teacher 1 denied telling the Student that she did not want him in her classroom on May 8, 2015. The Principal asked Teacher 1 to explain why she required the Student to wait outside before entering her classroom on that date. Teacher 1 stated that because the Student's note had referenced students as being "just a number" to teachers, and she understood that other students had seen the note, she wanted to emphasize to the class that she considers all students important. The Principal advised her that the Student was journaling his feelings as a therapeutic tool. Teacher 1 stated that the complainant had never informed her of this prior to the incident; and she had only been told by School staff that the Student was "passing notes" and "showing other kids his notes." Teacher 1 advised the Principal that she would allow the Student to journal his feelings going forward, and offered to provide the Student a notebook.

The Principal stated that she met with Teacher 2 regarding her decision to inform the Student that he had "three strikes" and she would not let him participate in the School's afternoon concert on May 8, 2015. Teacher 2 advised the Principal that this was something she and Teacher 1 had worked out together. The Principal stated that she separately informed Teacher 1 and Teacher 2 that she is the only person with the authority to keep a student out of a School event. The Principal stated that she also told both teachers that they should not discipline a student in front of his or her peers.

The Principal also met with Teacher 5 regarding the complainant's allegation that Teacher 5 shared the note with other teaching staff members. Teacher 5 admitted that she shared the note with another teacher (Teacher 6) to ask her for help reading the Student's handwriting. She stated that at the time she shared the note with Teacher 6, she was unaware of the Student's use of journaling as a therapeutic tool. The Principal stated that she explained to Teacher 5 that it was important to respect the Student's privacy.

In addition, the Principal met with Teacher 3, regarding the complainant's allegation that she made a remark to the Student intended to serve as a threat that he may not be able to attend an upcoming field trip to Boston. Teacher 3 stated that Teacher 2 had advised her that the Student wrote an "inappropriate note," and so upon hearing of the note, she wanted to "speak to him about the Boston trip to remind him about the rules."

OCR determined that the Principal also spoke with two additional School staff members to obtain additional information about the two lunch incidents involving the Student, which had led Teacher 2 to claim that the Student had three strikes.

The District advised OCR that after the Principal's investigation, and an exchange of electronic mail messages (emails) between the Principal and the complainant on or about May 18, 2015, during which the complainant thanked the Principal for meeting with him and his wife about the incidents, the District believed the matter to be resolved. However, following the complainant's filing of a formal DASA complaint on June 2, 2015, the complainant sent an email to the District-wide DASA coordinator on June 8, 2015, stating, "We have not heard anything since the

attached complaint form was sent to you last Tuesday. Please confirm that you have received it and what follow up I should expect.” OCR reviewed an email from the DASA coordinator to the District Superintendent, dated June 12, 2015, that stated, “How would you like this situation handled? The parent continues to call for a response. [The Principal] stated that she reached out to you when it happened. Please advise.” The available evidence does not indicate that the District ever responded to the complainant’s email inquiry, or to the DASA complaint itself.

OCR determined that the Principal promptly interviewed the School staff members the complainant identified as being involved with the alleged harassment of the Student. However, the evidence did not indicate that the Principal sufficiently probed whether the incidents that gave rise to the complainant’s complaint constituted harassment of the Student on the basis of his disability. Specifically, the Principal’s notes from the interviews described how she informally addressed concerns that Teachers 1 and 2 disciplined the Student in front of his peers, and Teacher 2 sought to prohibit the Student from participating in a School event without first notifying the Principal. Notwithstanding the Principal’s recommendation to the complainant that he file a DASA complaint, there is no indication that the Principal investigated whether the incidents in question constituted disability harassment, or took any further action in response to the complaint’s filing of a DASA complaint on June 2, 2015. Moreover, the available evidence does not reflect that the Principal documented an investigatory determination with respect to whether the complainant’s allegations of harassment were substantiated, or that she notified the complainant of her findings.

Based on the foregoing, OCR determined that there is sufficient evidence to substantiate the complainant’s allegation that the District failed to respond appropriately to his DASA complaint filed with the District on June 2, 2015, alleging that on May 8, 2015, staff at the School subjected the Student to harassment on the basis of his disability.

On July 26, 2016, the District agreed to implement the enclosed resolution agreement in order to resolve the allegation. OCR will monitor the implementation of the resolution agreement, which addresses the compliance concerns identified above.

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 may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if

released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR's determination or wish to discuss it further, please contact Eric Bueide, Compliance Team Attorney, at 646-428-3851, or [eric.bueide@ed.gov](mailto:eric.bueide@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXXXXXXXX