



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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October 31, 2016

Dr. David Pruis
Superintendent
Duneland School Corporation
601 West Morgan Ave.
Chesterton, IN 46304

Re: OCR Docket # 05-16-1286

Dear Dr. Pruis:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against the Duneland School Corporation (Corporation), alleging discrimination on the basis of disability and also alleging retaliation.

Specifically, the complaint alleged that during the 2015-2016 school year:

- 1) the Corporation discriminated against a 6th grade student with ADHD and anxiety disorder (Student A) based on disability when personnel at the Liberty Intermediate School (School) subjected Student A to harassment based on disability and the Corporation failed to take appropriate action in response; and
- 2) the Corporation subjected Student A's parent to retaliation for requesting an Individualized Education Program (IEP) for Student A, in that School personnel gave Student A several detentions and harassed her.

OCR is responsible for enforcing 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, and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation at 28 C.F.R. Part 35. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance, and Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the Corporation is subject to these laws.

As part of its investigation, OCR conducted interviews with the parent and Corporation personnel. OCR has determined that there is insufficient evidence to establish that the Corporation subjected Student A to discrimination or retaliation as alleged. Prior to the conclusion of OCR's investigation, the Corporation signed an agreement to resolve its potential

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failure to investigate Student A's parent's internal complaint alleging disability discrimination and retaliation. The reasons for these determinations are set forth below.

Legal Standards

Disability Harassment

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance from the Department. The regulation implementing Title II, at 28 C.F.R. § 35.130(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

Harassment based on disability is a form of discrimination prohibited by Section 504 and Title II. Disability harassment is intimidation or abusive behavior toward an individual based on disability that creates a hostile environment by interfering with or denying a person's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. The label used to describe an incident does not determine how a recipient is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.

To determine whether a hostile environment exists on the basis of disability, OCR considers whether there was harassing conduct (e.g., physical, verbal, graphic, or written) that was sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. In analyzing claims of harassment based on disability, OCR considers the totality of the circumstances from both an objective and subjective perspective to determine whether a hostile environment has been created. These circumstances include the context, nature, scope, frequency, duration, and location of the harassment incidents, as well as the identity, number, and relationships of the persons involved.

To establish a violation of Section 504 and Title II under the hostile environment approach, OCR must find that a hostile environment existed based on disability status, the recipient had notice of the hostile environment, and the recipient failed to respond adequately to redress the hostile environment. Section 504 and Title II require that, once a recipient learns of harassment based on disability, the recipient must investigate the incident(s) promptly and then take prompt and effective action reasonably calculated to end the harassment, eliminate any hostile environment that has been created, prevent it from recurring, and where appropriate, remedy the effects of the harassment on the student who was harassed. At a minimum, the recipient's responsibilities

include making sure that the harassed individuals know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents, and responding promptly and appropriately to address continuing or new problems.

Retaliation

The regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), provides, in relevant part, that no recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the regulation or because that person has made a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under the regulation. This provision is incorporated by reference in the regulation implementing Section 504, at 34 C.F.R. § 104.61. The regulation implementing Title II, at 28 C.F.R. § 35.134(a), contains a similar prohibition against retaliation.

To establish a *prima facie* case of retaliation, OCR determines whether (1) an individual engaged in a protected activity, (2) the recipient was aware of the protected activity, (3) the recipient took an adverse action contemporaneous with or subsequent to the individual's protected activity, and (4) there was a causal connection between the protected activity and the adverse treatment. If all of the elements of a *prima facie* case of retaliation are established, OCR then considers whether the recipient presented a legitimate, non-retaliatory justification for taking the adverse action, and whether the reason is a pretext for retaliation. Pretext may be shown by evidence demonstrating that the explanation for the adverse action is not credible or believable or that treatment of the person was inconsistent with the treatment of similarly-situated individuals or established policy or practice.

Corporation Policies and Procedures

The Corporation has a policy entitled "Nondiscrimination and Access to Equal Educational Opportunity" (Nondiscrimination Policy) in the School's Student Handbook (Handbook), which is available on the Corporation's website. The Nondiscrimination Policy provides that the Corporation shall not discriminate on the basis of disability and other protected classes. The Corporation also has a policy entitled "Anti-Harassment" (Anti-Harassment Policy) in the Handbook. The Anti-Harassment Policy prohibits harassment based on disability and other protected classes and also prohibits retaliation. The Anti-Harassment Policy provides the Anti-Harassment Compliance Officer's name, address and telephone number and provides an informal and formal process for filing complaints of discrimination and retaliation.

Background

In the 2015-2016 school year, Student A was a 6th grade student at the School. The School has approximately 375 students in the 5th and 6th grades.

In January, Student A's parent contacted the Principal regarding concerns with Student A's performance in school, particularly difficulty turning in all her assignments. The Principal

suggested implementing an Intervention Plan; the parent agreed. The Intervention Plan, dated January 20, 2016, required Student A to write down the homework assignments from the board into her planner, the teacher to sign the planner, and the parent to sign the planner each day. The Principal met with each teacher to explain the Intervention Plan.

On February 18, 2016, the parent provided notice to the Corporation that Student A had been diagnosed with ADHD and an anxiety disorder and requested that the Corporation evaluate Student A to determine if she was eligible for an IEP. On March 3, 2016, the parent provided written consent for an evaluation. On May 13, 2016, a Case Conference Committee (CCC) was held and an IEP was created for Student A. On June 1, 2016, Student A's parents signed the IEP.

Facts

The complaint alleged that, during the 2015-2016 school year, the Corporation discriminated against Student A based on disability when personnel at the School subjected Student A to harassment based on disability and the Corporation failed to take appropriate action in response. The complaint also alleges that the Corporation subjected Student A's parent to retaliation for requesting an IEP for Student A, in that School personnel gave Student A several detentions and harassed her.

In particular, the parent alleged the following acts of harassment by the Principal, Language Arts Teacher, or Science Teacher: 1) the Language Arts Teacher and Science Teacher did not allow Student A to doodle in class in spring 2016; 2) the Language Arts Teacher gave Student A a recess detention for not remembering her book on April 13, 2016; 3) the Principal threatened the parent that he would change Student A's missing grades to zeros on April 15, 2016; 4) the Science Teacher took Student A's drawing book, failed to return it, and instead placed it in the lost and found on April 20, 2016; 5) the Language Arts Teacher gave Student A a detention for reading ahead in her book on April 22, 2016; 6) the Principal asked the Language Arts Teacher for Student A's detention slip in front of Student A on April 25, 2016; 7) the Principal paced the aisle in the lunch room near Student A and her parent when they were having lunch on April 26, 2016; 8) the Science Teacher gave Student A a detention for not turning in a signed report card on May 4, 2016; and 9) the Language Arts Teacher grabbed Student A's arm when she was doodling on one occasion in late April or early May 2016. The parent alleges that these above acts of harassment also constitute retaliation for requesting an IEP in February 2016. She did not identify as retaliatory any other detentions beyond those cited in #2, #5, and #8.

The Principal, Language Arts Teacher, and Science Teacher deny that they harassed Student A based on disability and deny that they retaliated against the parent for requesting an IEP. They all said they were aware that the parent requested an evaluation for an IEP for Student A.

As noted below, Corporation personnel indicated that the treatment of Student A was consistent with practices and their treatment of other students. Student A's parent did not identify any similarly-situated students without disabilities or whose parents had engaged in protected activities who were treated more favorably than Student A.

The parent emailed the Assistant Superintendent, who is the Corporation's designated Anti-Harassment Compliance Officer, on April 28, 2016, alleging harassment and retaliation for the above conduct. The parent said the Assistant Superintendent did not investigate her complaint. The Corporation did not provide any testimony or documentation of an investigation of the parent's April 2016 complaint of harassment and retaliation.

#1-Doodling in Class

The parent asserted that the Language Arts Teacher and Science Teacher did not allow Student A to doodle in class. The parent explained that Student A doodles because of her ADHD as it helps occupy her brain so she can listen.

The Language Arts Teacher told OCR that she allowed Student A to doodle in class when it did not interfere with what the class was doing. She said, as an example, that she permitted Student A to doodle when she lectured and Student A was able to answer questions when called upon. She said she did not permit Student A to doodle when the students were reading or when it interfered with Student A's ability to follow instructions. She said that she did not have any problems with Student A doodling until after March when Student A began to ignore her instructions. The Language Arts Teacher said she continued to allow Student A to doodle unless it interfered with what the class was doing.

The Science Teacher told OCR that he allowed Student A to doodle in class as a coping mechanism to help pay attention as long as she completed all assignments and it did not interfere with anything he asked Student A to do. He said he did not allow her to doodle if the doodling interfered with an assignment, quizzes or tests; he did not indicate how often this occurred.

#2- Recess Detention

The parent asserted that the Language Arts Teacher gave Student A a recess detention for not remembering her book on April 13, 2016. The parent asserted that forgetting to bring a book to class is directly related to Student A's disability so she should not be punished for it.

The Language Arts Teacher told OCR that she has a written policy posted on her door that if a student is tardy three times, the student will receive a detention. She said that if a student does not bring the required supplies, such as books, the student is considered tardy. She said Student A forgot her books more than three times in three weeks, so she gave her a recess detention; however, she said that Student A was not required to serve the recess detention because she had orchestra during the recess period. The Language Arts Teacher said she gave approximately six similar detentions in the 2015-2016 school year. She said she does not recall whether any of these students had a disability and did not indicate whether any of the students' parents had engaged in a protected activity. She said she did not retain the paperwork for the detentions for the 2015-2016 school year.

The Special Education Director told OCR that she did not believe Student A's disability prevented her from remembering to bring a book to class. The parent said that Student A's IEP, which had not been developed by the time of the recess detention, includes strategies to help Student A

remember to complete assignments but does not prevent Student A from being punished for forgetting a book.

#3- Threat to Change Grades

The parent asserted that, in a telephone conversation on April 15, 2016, with the Principal when she was objecting to the April 13 recess detention, the Principal threatened to change Student A's missing grades to a zero. The parent said her 8-year old son was a witness to this conversation that she placed on speaker.

The Principal denied that he threatened to change Student A's missing grades to a zero. He said that he has no authority to do. The Corporation reported, and the parent confirmed, that Student A's grades were not changed.

#4-Taking of Drawing Book and Placing it in Lost and Found

The parent asserted that the Science Teacher took Student A's drawing book on April 20, 2016, failed to return it, and instead placed it in the lost and found. Student A used the drawing book to doodle in during class.

The Science Teacher told OCR that he took Student A's drawing book because the class had started a health test. He said he placed it on an empty desk for Student A to retrieve at the end of the day. He explained that the desk is used as the lost and found for the classroom.

The Corporation provided documentation of an email exchange between Student A's father and the Science Teacher regarding this incident. The father emailed the Science Teacher seeking an explanation of why he took Student A's drawing book, why it was not returned to her that day, and how it appeared in the lost and found. The Science Teacher explained why he took it and said he put it in the empty desk that serves as the lost and found in his classroom for her to retrieve. Student A's father responded that "some of the misunderstandings have been cleared up, especially the lost and found part of it."

#5-Detention for Reading Ahead

The parent asserted that the Language Arts Teacher gave Student A a detention for reading ahead in her book on April 22, 2016.

The Language Arts Teacher told OCR that, on April 21, 2016, when she called on Student A to read aloud as part of a class reading activity, Student A did not know where in the book the class was because she was reading ahead. She said that, by reading ahead, Student A would already know the answers to prediction questions she uses a technique to instruct the class. The Language Arts Teacher said she told Student A at the end of the class on April 21 to stop reading ahead and explained that her conduct was disrespectful. She said that Student A continued to read ahead the next day. She said she gave Student A two more warnings but Student A continued to read ahead so she took Student A's book and placed it on her desk until the rest of the class caught up. She said

Student A then started to read ahead again after she returned the book to her, so she gave Student A a detention for disrespectful behavior and insubordination.

The Language Arts Teacher said that she did not give any other detentions in the 2015-2016 school year for disrespectful behavior or insubordination, but she did give detentions for other inappropriate conduct. She does not recall specifically whether these students had disabilities and did not indicate whether any of the students' parents had engaged in a protected activity. The Language Arts Teacher said she did not retain documentation of the detentions for the 2015-2016 school year.

#6-Request of Detention Slip

The parent asserted that the Principal asked the Language Arts Teacher for Student A's detention slip in front of Student A on April 25, 2016. The parent did not identify any witnesses.

The Principal admitted that he asked for the Language Arts Teacher's detention slip on April 25, 2016. He said he does not remember if Student A was present but said it is possible. He said it is his job to collect the detention slips from the teachers and students after a detention is served. He said that he has asked teachers for detention slips in the presence of students before and has directly asked students for detention slips if he was the one who issued the detention.

#7- Pacing in Lunch Room

The parent asserted that the Principal paced the aisle in the lunch room near Student A and her when they were having lunch on April 26, 2016. The parent did not identify any witnesses.

The Principal said that it is his job to walk around the lunch room during lunch and talk to the students. He said he often sits with the students during lunch as well. He denied that he paced near Student A to harass Student A and her parent.

#8- Detention for not Returning Report Card

The parent asserted that the Science Teacher gave Student A a detention for not turning in a signed report card by May 4, 2016. The parent said that on two prior occasions when Student A did not return report cards (October 2015 and February 2016), the Science Teacher did not give her a detention. The parent provided OCR a copy of the unsigned October 2015 and February 2016 report cards.

The Science Teacher told OCR that every student was required to have a parent sign his or her report cards within the designated timeframe. He said that, for each report card, a student is given two copies. He said one copy is returned with a parent signature and the other copy remains at home. He said parents can also print out copies electronically. He said his practice is to document whether each student returned a signed report card. He said if a student does not return a signed copy, he will give the student a detention. He said that he did not retain the documentation of the detentions for the 2015-2016 school year and does not recall specifically whether Student A

returned the October 2015 and February 2016 reports cards, but that one copy is signed and returned and the other copy remains at home, so the fact that the parent produced OCR unsigned report cards does not indicate that the other copy was not returned.

He said he handed report cards out on April 28, 2016 and explained that the students had four school days to return a copy with a parent's signature. He said that Student A did not return a signed copy and, therefore, he gave her a detention on May 4, 2016. He said he gave 3-4 detentions to other students for the same conduct. He said he is not aware if any of these other students had disabilities and did not indicate whether any of the students' parents had engaged in a protected activity.

#9- Grabbing Student A's Arm

The parent asserted that the Language Arts Teacher grabbed Student A's arm when she was doodling in class on an unspecified date in late April or early May 2016. The parent said that the Language Arts Teacher asked Student A to place her doodle book under her chair and, when she did not do it fast enough, she grabbed her arm. The parent did not identify any witnesses.

The Language Arts Teacher denied that she grabbed Student A's arm. She said she never touched Student A.

The Principal told OCR he and the Guidance Counselor investigated this incident after the parent complained by interviewing the Language Arts Teacher and another student who sits near Student A (Student B). He said the Language Arts Teacher denied that she grabbed Student A's arm. He said Student B said the Language Arts Teacher did not grab Student A's arm and that Student A does whatever she wants and does not listen to her teacher. The Principal said he spoke to the parent to explain his findings. The Principal said he does not have any notes of the investigation or written statements from the witnesses. The parent confirmed that the Principal spoke to her after he investigated and said that Student A was lying. The parent said that, after this incident, the School placed an aide in the classroom.

Analysis and Conclusion

Allegation #1

In making a determination regarding compliance, OCR must often weigh conflicting evidence and determine whether the preponderance of the evidence substantiates the allegation. After reviewing the information obtained during the investigation, OCR has determined that the evidence is insufficient to establish a violation of the applicable regulations with regard to allegation #1.

In particular, for incidents #3, 7 and 9, OCR found the School personnel's testimony credible and determined there was insufficient evidence to establish that the incidents occurred as the parent alleged. For incident #3, the evidence established the Principal does not have the authority over grades and Student A's grades were not changed. For incident #7, the evidence established that

the Principal did walk around the lunch room when Student A and her parent were having lunch, but there was no evidence to suggest that it was in a harassing manner. For incident #9, the evidence established that the Language Arts Teacher did not grab Student A's arm.

For incidents #1, 2, 4, 5, 6, and 8, the evidence established that the incidents occurred or may have occurred, but the preponderance of the evidence did not indicate that any conduct was based on Student A's disability. Specifically, for incident #1, both the Language Arts Teacher and Science Teacher said that they did not allow Student A to doodle in class when it interfered with an assignment, test or quiz; the evidence did not establish that the instances when these teachers did not allow Student A to doodle were related to Student A's disability or that Student A was treated differently than other students. For incident #2, the evidence established that the Language Arts Teacher gave Student a detention on April 13 for forgetting her books pursuant to the Language Arts Teacher's written policy that she applied to all students. For incident #4, the evidence established that the Science Teacher took Student A's drawing book because the class had started a health test, not because of Student A's disability, and then placed it on the empty desk that served as the lost and found for Student A to retrieve later. For incident #5, the evidence established that the Language Arts Teacher gave Student A a detention on April 22 for disrespectful behavior as she failed to follow instructions in class after repeated warnings. For incident #6, even assuming the Principal asked for the detention slip in front of Student A, the evidence established that it is the Principal's duty to collect detention slips from teachers and students and that the Principal's conduct was similar as when other students' detention slips must be obtained. For incident #8, the evidence established that the Science Teacher gave Student A a detention on May 4 for failing to turn in a signed report card and that he gave similar detentions to other students for the same conduct. There is no evidence to suggest that any of these alleged incidents of alleged harassment occurred because of Student A's disability or that Student A was treated differently because of her disability.

Based on the above, OCR determined that there is insufficient evidence to establish that the Corporation subjected Student A to discrimination based on disability as alleged.

Allegation #2

The evidence established that the parent engaged in protected activities of which the Corporation was aware by requesting an evaluation for an IEP in February 2016.

OCR has determined that incidents #3, 7 and 9 did not occur as the parent alleged, as noted above, and do not constitute adverse actions. In addition, incident #2 was not an adverse action because Student A was not actually required to serve the recess detention she was given. OCR has also determined that incidents #1 and #6, even if true, do not constitute adverse actions because preventing her from doodling on occasion and collecting a detention slip in her presence did not significantly disadvantage Student A and could not reasonably be said to deter an individual from engaging in additional protected activities. However, the evidence established that the District took adverse actions when Student A received detentions on April 22 and May 4 and when the Science Teacher took Student A's drawing book on April 20. The evidence further established that there is a causal connection between the parent's request for an IEP in February

2016 and these actions that occurred during the IEP evaluation process. Therefore, OCR has determined a *prima facie* case of retaliation is established with regard to these incidents.

OCR has determined, however, that the Corporation provided a legitimate, non-retaliatory justification for the adverse actions that was not pretext for retaliation. OCR found the School personnel's testimony credible regarding the alleged incidents of retaliation. The evidence established that Student A received a detention on April 22 for disrespectful behavior as she failed to follow instructions in class and after repeated warnings and received a detention on May 4 for failing to turn in a signed report card, conduct that also resulted in detentions for other students. The evidence further established that the Science Teacher took Student A's drawing book because the class had started a health test and placed it on the empty desk for Student A to retrieve at the end of the day.

Based on the above, OCR has determined that there is insufficient evidence to establish that the District retaliated against Student A's parent in violation of Section 504 and Title II with regard to this allegation.

As noted previously, however, the Corporation did not provide documentation that it investigated the parent's April 2016 grievance. Prior to the conclusion of OCR's investigation, the Corporation expressed interest in resolving its potential failure to investigate the parent's Section 504 grievance. In accordance with Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint.

On October 20, 2016, the Corporation signed the enclosed Resolution Agreement (Agreement) which, when fully implemented, will resolve the issues raised in the complaint. OCR has ensured that the Agreement is aligned with the potential compliance issue identified, the complaint allegations and the information during the investigation so far, and is consistent with the applicable regulations.

The Agreement requires the Corporation to train its Anti-Harassment Compliance Officer and administrators and employees directly involved in processing, investigating and/or resolving complaints or other reports of disability discrimination/harassment and retaliation. The Agreement also requires the Corporation to maintain records of all complaints of disability discrimination and retaliation and provide documentation to OCR for the 2016-2017 school year.

This concludes OCR's investigation of the complaint and should not be interpreted to address the Corporation'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 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 file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Corporation 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. If this happens, the complainant may file another complaint alleging such treatment.

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, we 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.

We wish to thank you and your staff for the cooperation and courtesy extended to OCR during our investigation. In particular, we wish to thank Ms. Monica Conrad, Counsel for the Corporation. If you have any questions, please contact Sunita Kini-Tandon, Civil Rights Attorney, at (312) 730-1452 or by email at Sunita.Kini-Tandon@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Ms. Monica Conrad