



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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November 2, 2016

Dr. Cheryl Pruitt
Superintendent
Gary Community School Corporation
210 North Grand Blvd.
Gary, IN 46403

Re: OCR #05-16-1287

Dear Dr. Pruitt:

This is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its processing of the above-referenced complaint filed against the Gary Community School Corporation (Corporation) alleging discrimination on the basis of disability and also alleging retaliation.

Specifically, the complaint alleged the following:

1. The Corporation subjected a high school student with multiple disabilities (Student A) to discrimination based on disability when, throughout the 2015-2016 school year, other students, teachers, and administrators engaged in harassment of Student A based on his disability, and the Corporation was aware of the harassment but failed to respond appropriately;
2. The Corporation subjected Student A to discrimination based on disability in spring 2016 when it:
 - a. delayed the implementation of homebound services for Student A;
 - b. discontinued Student A's homebound services;
 - c. prohibited Student A from attending a school event; and
 - d. failed to offer Student A and his parents due process prior to removing him from school;
3. The Corporation subjected Student A's parent to retaliation for filing a complaint of disability discrimination with the Indiana Department of Education when it:
 - a. made numerous phone calls to Student A's home;
 - b. sent local police to Student A's home;
 - c. discontinued Student A's homebound services;
 - d. prohibited Student A from attending prom;

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

- e. attempted to prevent Student A from participating in the graduation ceremony;
and
- f. removed Student A from school.

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. These laws also prohibit retaliation. 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 Corporation personnel and Student A's parent and reviewed information from the Corporation. The former Principal was not available for an interview during OCR's on-site visit. Prior to the conclusion of OCR's investigation, the Corporation signed an agreement to resolve the issues in this case. The reasons for these determinations are set forth below.

Legal Standards

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j) defines an individual with a disability as “any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”

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.

The extent of a recipient's responsibilities when an employee harasses a student is determined by whether or not the harassment occurred in the context of the employee's provision of aids, benefits, or services to students. OCR will consider a variety of factors in determining whether or not the harassment has taken place in this context including the type and degree of responsibility given to the employee to provide aids, benefits, or services to students, to direct and control student conduct, or to discipline students generally; the degree of influence the employee has over the particular student involved, including in the circumstances in which the harassment took place; where and when the harassment occurred; the age and educational level of the student involved; and as applicable, whether, in light of the student's age and educational level and the way the institution is run, it would be reasonable for the student to believe that the employee was in a position of responsibility over the student, even if the employee was not.

In cases involving allegations of harassment of elementary and secondary school students by an employee during any school activity, as in this case, consideration of these factors will generally lead to a conclusion that the harassment occurred in the context of the employee's provision of aid, benefits, or services. If an employee who is acting (or who reasonably appears to be acting) in the context of carrying out these responsibilities over students engages in disability harassment, the recipient is responsible for the discriminatory conduct. The recipient is, therefore, also responsible for remedying any effects of the harassment on the victim, as well as for ending the harassment and preventing its recurrence. These steps are the recipient's

responsibility whether or not the student who was harassed makes a complaint or otherwise asks the school to take action and whether or not the recipient has “notice” of the harassment. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment.

Different Treatment

In determining whether a recipient subjected an individual to different treatment on the basis of disability, OCR looks to whether there were any apparent differences in the treatment of similarly-situated individuals on the basis of disability. If so, OCR assesses the recipient’s explanation for any differences in the treatment of similarly-situated individuals to determine if the reasons are legitimate and non-discriminatory or whether they are merely a pretext for unlawful discrimination. Additionally, OCR examines whether the recipient treated the individual in a manner that was consistent with its established policies and procedures and whether there is any other evidence of disability discrimination.

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’s Nondiscrimination Statement, which is available in the Student Code of Conduct,¹ provides that the Corporation does not discriminate on the basis of disability and other protected classes, in its educational programs or activities. The Nondiscrimination Statement does not prohibit retaliation.

¹ <http://www.garycsc.k12.in.us/student-code-of-conduct/>

The Corporation has an Anti-Bullying Policy in its Student Code of Conduct and provides a complaint form for bullying and retaliation and the disciplinary consequences.

The Corporation's policy entitled "Section 504 of the Rehabilitation Act of 1973 Procedures," which is available in the Student Code of Conduct, provides that complaints of discrimination may be filed with the Section 504 Coordinator and provides the address; it does not provide a specific name or telephone number.

The Corporation's policy 314 entitled "Due Process," provides, "Any student who is been suspended or recommended for expulsion from school is entitled to a conference or hearing" and provides specific procedures.

The Corporation's policy 342 entitled "Homebound or Hospitalized Instruction" (Homebound Policy), provides, "The Board will consider homebound or hospitalized programs for students unable to attend school because of special health problems, temporary illnesses or injuries that preclude their attendance at school. The Board will require a medical doctor's statement indicating that because of the disability, the student will be confined to home or hospital for an extended period of time."

The Corporation's policy 362, entitled "Student Sexual Harassment Policy," provides that the Corporation shall provide an educational environment free from sexual harassment and discrimination on the basis of sex. It provides that the principal or designee is responsible for conducting an investigation of a complaint and, if a person is not satisfied with the outcome, he or she may request a Corporation-level investigation.²

Facts

In the 2015-2016 school year, Student A was a senior at William A. Wirt/Emerson Visual and Performing Arts High Ability Academy (School). The School has approximately 400 students from 6th grade to 12th grade.

Student A's parent informed OCR that Student A has an emotional disability, including anxiety, as a result of a traumatic family event in October 2014. The parent said that Student A is under the care of a psychologist. Student A did not have a Section 504 plan or an Individualized Education Program in place when he attended the School. The Executive Director of Special Education told OCR that the School never received a request for an evaluation for Student A.

OCR interviewed School personnel regarding whether Student A was a student with a disability or regarded as a student with a disability. OCR interviewed two administrators (Assistant Principal A

² OCR will provide technical assistance to the Corporation about its responsibility to provide a prompt and equitable response to complaints of sexual harassment under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation, 34 C.F.R. Part 106. Corporation counsel told OCR that the Corporation is already in the process of revising its policies regarding harassment and discrimination.

and School Interventionist) and two teachers (Orchestra Teacher A, and Orchestra Teacher B) who taught Student A. These individuals told OCR that they were not aware that Student A had any disability and did not have any reason to believe Student A had any disability.

Assistant Principal A and the School Interventionist said they were aware Student A was in counseling, but did not know the reason. The School Interventionist noted that Student A's grades did not change after October 2014.

Allegation #1

The complaint alleged that Student A was subjected to discrimination based on disability when, throughout the 2015-2016 school year, other students, teachers, and administrators engaged in harassment of Student A based on his disability, and the Corporation was aware of the harassment, but failed to respond appropriately.

a. Harassment by students

Student A's parent told OCR that students at the School called Student A weird and different. The parent said that Student A complained to Orchestra Teacher A, Orchestra Teacher B, and the School Interventionist. The parent identified one student, the School Interventionist's daughter, who she alleged harassed Student A.

Orchestra Teacher A, Orchestra Teacher B, and the School Interventionist told OCR that Student A did not complain that other students harassed him. OCR found no evidence indicating that Student A or the parent filed a bullying or disability harassment complaint under the above described procedures.

The School Interventionist told OCR that his daughter was in the 7th grade in the 2015-2016 school year. He said Student A and his daughter did not "hang out" considering the large differences in their ages.

b. Harassment by administrators and teachers

The parent identified the following acts of harassment by School personnel: Assistant Principal A and the School Interventionist stopped Student A in the hallway to say he was weird, something was wrong with him, he was disturbed, and something was not right in his head; the School Interventionist asked Student A to bring his drawings from home and then called him a terrorist and part of ISIS; Assistant Principal A pulled Student A aside to tell him war stories including how he killed children in the war; and the former Principal and the School Interventionist wrongly accused Student A in February 2016 of sexually harassing female students.

i. Stopping Student A in the hallway

The parent said Assistant Principal A and the School Interventionist stopped Student A in the hallway to say he was weird, something was wrong with him, he was disturbed, and something was not right in his head.

Assistant Principal A and the School Interventionist denied this allegation. Assistant Principal A said he did not stop Student A in the hallways and that his only interactions with Student A were in the School Interventionist's office. He said Student A would come to the School Interventionist's office almost daily on his own and the School Interventionist would instruct Student A to return to class. The School Interventionist said that he has stopped students in the hallways for various reasons and probably has stopped Student A, but denies that he stopped Student A to make any of the alleged comments. He also said that Student A would stop by his office almost daily. The School Interventionist provided to OCR a document from an individual who has an office next to him and stated that Student A visited the School Interventionist's office almost daily.

ii. Student A's drawings

The parent said the School Interventionist asked Student A to bring his drawings from home and then called him a terrorist and part of ISIS.

The School Interventionist denied this allegation. He said that, in the 2014-2015 school year, Student A showed him drawings that Student A claimed he found and he did not draw. The School Interventionist said that the drawings were disturbing. The School Interventionist said that Student A volunteered to bring drawings from home to prove he did not draw the pictures he found. The School Interventionist said that he contacted the parent to express his concerns about the drawings and the parent said she would consult with Student A's psychologist. The Corporation provided OCR a copy of the drawings.

iii. Assistant Principal A's war stories

The parent said Assistant Principal A pulled Student A aside to tell him war stories including how he killed children in the war. The parent said she would provide OCR a copy of a newspaper article about this, but OCR did not receive any such documentation from the parent.

Assistant Principal A denied this allegation. He said that he recalls a conversation with Student A in the School Interventionist's office when he mentioned to Student A that he has experience with war and has seen bad things, but that these things do not need to control your life or define you. Assistant Principal A said that the parent's allegation was reported in the local newspaper and the School Board investigated the allegation. He said that that the School Board determined he did not make the statement.

iv. Accusing Student A of sexually harassing female students

The parent said the former Principal and the School Interventionist wrongly accused Student A in February 2016 of sexually harassing female students. The parent said Student A actually wrote notes to students offering to pay them \$1 for them to stop bullying him.

The School Interventionist said that he received a written statement from a female student (Student B) on February 2, 2016, stating that Student A followed her when she left her classroom to go to the restroom and asked if he could “grind on her” and “dry hump her.” She also said that Student A pulled out a condom. The School Interventionist said that there were nine female students who said Student A offered each of them \$1 to “dry hump” them.

The School Interventionist said that he received another written statement from another female student (Student C) on February 19, 2016 that Student A “exposed himself” and pulled out a condom.

The Corporation provided OCR a copy of Student B’s and Student C’s written statements. The Corporation did not make a determination as to whether Student A created a hostile environment for Student B, Student C, or the other female students.

Allegation #2

The complaint alleged that the Corporation subjected Student A to discrimination based on disability in spring 2016 when it delayed the implementation of homebound services and discontinued Student A’s homebound services, prohibited Student A from attending school events, and failed to offer Student A and his parents due process prior to removing him from school.

a. Homebound services

The Executive Director of Special Education told OCR that Student A did not receive homebound services because he was not eligible for such services. The Executive Director of Special Education said that the parent requested homebound services sometime in February 2016 but the parent did not provide proper documentation. She said the Corporation’s Homebound Policy requires a medical doctor’s statement that the student cannot attend school because of special health problems, temporary illnesses or injuries that preclude his or her attendance at school. She said the parent provided documentation from a psychologist, not a medical doctor.

b. Attending School events

The parent identified two school events Student A was not permitted to attend, an orchestra event on February 27, 2016, and the School prom in May 2016.

Orchestra Teacher A told OCR that the former Principal made the decision to prohibit Student A from attending the orchestra event on February 27, 2016. He said that he told the former Principal

that he was concerned about Student A attending the orchestra event because one of the female students who alleged he sexually harassed her would be at the event.

Assistant Principal A told OCR that the former Principal made the decision to prohibit Student A from attending the School prom in May 2016. He said Student A was prohibited from attending prom to prevent contact between Student A and the female students he allegedly sexually harassed (who would be at the prom) and for his safety. Assistant Principal A said that the parents of the female students expressed concerns about his attendance at the prom. He also said that because of the demeanor of some of the female students' boyfriends, the School worried about Student A's safety.

c. Offering due process prior to removing Student A from School

The Corporation notified OCR that the former Principal is the only individual at the School with information regarding this allegation. OCR has not yet interviewed the former Principal.

Allegation #3

The complaint alleged that the Corporation subjected Student A's parent to retaliation for filing a complaint of disability discrimination with the Indiana Department of Education when it: made numerous phone calls to Student A's home; sent local police to Student A's home; discontinued Student A's homebound services; prohibited Student A from attending prom; attempted to prevent Student A from participating in the graduation ceremony; and removed Student A from school.

The School personnel who OCR interviewed said that they were aware that Student A's parent filed a complaint of disability discrimination with the Indiana Department of Education (IDOE) in May 2016, but denied that they engaged in retaliation.³ The School personnel argued that either the retaliatory acts did not occur as alleged or the alleged acts occurred, but the acts were justified.

a. Numerous phone calls to Student A's home

The parent said Corporation personnel made numerous phone calls to Student A's home. The parent did not provide details on the number of calls or who made the calls.

Assistant Principal A told OCR that he recalls calling Student A's home once or twice regarding a meeting that the parent requested through the State of Indiana. He said that, because the School could not get in contact with the parent, the former Principal sent the School Resource Officer (SRO) to Student A's home to deliver a letter regarding the meeting. The Corporation provided OCR a copy of the letter dated May 19, 2016 stating that the former Principal, Assistant Principal A, and the School Interventionist had left several messages to set up a meeting.

³ The Corporation provided the IDOE's letter dated May 23, 2016 that dismissed the parent's complaint stating that the complaint did not allege a violation of federal or state laws that apply to special education programs. The IDOE stated that Student A was not a student who has been determined eligible for special education and related services and that homebound services were not required to meet promotion or graduation requirements.

b. Corporation sent local police to Student A's home

The parent said the Corporation sent local police to Student A's home in retaliation for her discrimination complaint with the IDOE.

Assistant Principal A said that the former Principal instructed the SRO to deliver a letter to Student A's home regarding the requested meeting because the parent would not answer the calls from Corporation personnel.

c. Discontinued Student A's homebound services

The parent said the Corporation discontinued Student A's homebound services in retaliation for her discrimination complaint with the IDOE.

The Executive Director of Special Education told OCR that Student A was not eligible for homebound services.

d. Prohibited Student A from attending prom

The parent said the Corporation prohibited Student A from attending prom in retaliation for the parent's discrimination complaint with the IDOE.

Assistant Principal A told OCR that Student A was prohibited from attending prom in May 2016 to avoid contact between Student A and the female students he allegedly sexually harassed and for his safety, as noted above.

e. Attempted to prevent Student A from participating in the graduation ceremony

The parent said the Corporation attempted to prevent Student A from participating in the graduation ceremony in retaliation for the parent's discrimination complaint with the IDOE.

Assistant Principal A and the School Interventionist told OCR that Student A attended graduation. Assistant Principal A said that Student A's parent had to agree to certain guidelines prior to Student A's attendance at the rehearsals and graduation ceremony because of the complaints of sexual harassment. Assistant Principal A said that Student A was required to be escorted in and out of the ceremony. The School Interventionist said that one of the female students who complained of sexual harassment saw Student A at the rehearsal and then decided not to attend the graduation ceremony because of Student A's presence.

f. Removed Student A from School

The parent alleged that the Corporation removed Student A from School.

The School personnel who OCR interviewed said that after Student C accused Student A of exposing himself to her, Student A's parent pulled him out of school, requesting homebound

services. At the time Student A had enough credits to graduate from the School. The staff OCR interviewed said that the former Principal is the most knowledgeable person as to conversations with the parent about Student A remaining home from school.

Analysis and Conclusion

Prior to the conclusion of OCR's investigation, the Corporation expressed interest in resolving the issues of the complaint. 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 November 2, 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 issues identified, the complaint allegations and the information obtained during the investigation so far, and is consistent with the applicable regulations.

The Agreement requires the Corporation to develop and widely disseminate an Anti-Discrimination/Anti-Retaliation Statement. The Agreement requires the Corporation to review and revise its policies and procedures relating to disability discrimination, including harassment, and retaliation to ensure that the grievance procedures provide for the prompt and equitable resolution of reports or complaints alleging any form of disability discrimination. The Agreement requires the Corporation to review and revise, as necessary, its student code of conduct to determine whether it contains rules of behavior, offense categories and disciplinary procedures to appropriately address violations of the Corporation's revised policies and procedures. The Agreement requires the Corporation to provide effective training to relevant School personnel on the revised policies and procedures and student code of conduct. The Agreement requires the Corporation to provide an age appropriate orientation program for all School students regarding discrimination, including disability harassment. The Agreement requires the Corporation to identify "hot spots" where harassment is likely to occur in the School and take appropriate corrective actions to prevent and address harassment in the identified hot spots. The Agreement requires the Corporation to conduct an annual climate survey to assess the effectiveness of steps taken pursuant to this Agreement to achieve its goal of schools free of disability harassment and other forms of discrimination. The Agreement requires the Corporation to review and revise, as necessary, its Homebound Policy to ensure that the source of the medical documentation required is reasonable and necessary. The Agreement requires the Corporation to retain an independent qualified investigator to review the reports or complaints of discrimination and retaliation raised by Student A or his parent since the beginning of the 2015-2016 school year; make a determination as to whether Student A was subjected to disability harassment, different treatment based on disability, and/or retaliation; and prepare an investigator's report. The Agreement requires the Corporation to maintain documentation of complaints of disability discrimination and retaliation and the Corporation's response.

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. Tracy Coleman, 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. Tracy Coleman