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1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

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July 26, 2016

Dr. Loren Hudson
Superintendent
Greyhills Academy High School
P.O. Box 160
Tuba City, Arizona 86045

Re: Greyhills Academy
OCR Case Number 08-14-1210

Dear Dr. Hudson:

On August 28, 2014, we opened for investigation a complaint to determine whether Greyhills Academy High School discriminated on the basis of race/national origin and disability. Specifically, we investigated whether the Academy discriminated against the Student on the basis of race/national origin when the Student was allegedly told to relieve himself into a water bottle by a Caucasian teacher; whether the teacher later harassed the Student on the basis of his disability; and whether the Academy failed to adequately respond to the incident by closing the case without allowing the Complainant to file a discrimination complaint with the Academy under standard procedures.

We initiated an investigation under the authority of Title VI of the Civil Rights Act of 1964 and its implementing regulation at 34 Code of Federal Regulations Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities that receive Federal financial assistance from the U.S. Department of Education; and Section 504 and its implementing regulation, at 34 C.F.R. Part 104. As a recipient of Federal financial assistance, the Academy is subject to these laws and regulations.

During the investigation, we carefully reviewed documentation provided by the Academy and Complainant.

Facts

The Complainant filed this complaint on behalf of her son (the student), an 11th grade student at the Academy during the 2013-14 school year. Her son is Navajo Indian and has an IEP for Specific Learning Disability in reading, writing, and math. During the week of April 14, 2014, the student had an incident with his History Teacher (Teacher) who is white which is the subject of this complaint.

The Academy provided information which demonstrates that the Student had gone to the restroom once during the class period and that he had been acting out by talking loudly, joking with a friend, and not complying with a teacher's request, so he was required to finish his work

alone in an empty classroom, with the Teacher. While in the empty classroom, the Student asked to use the restroom again, twenty minutes after his first trip to the restroom. At this point, the Teacher denied the request and said something about the Student using a water bottle. While the Teacher was not in the room, the Student urinated into the water bottle. The Student left the water bottle in the Teacher's trash can.

Later that afternoon, when the Student attended a Junior class meeting, he was confronted by the Teacher in front of the other students and told to throw the bottle of urine "elsewhere." The Student's classmates laughed at him and the Complainant provided a written statement from the Student dated May 22, 2014, where he also confirmed that he, himself, laughed when the Teacher confronted him during the class meeting. Subsequent to this event, the Complainant contends that the story was told around school. The Student's written statement did not detail any further incidents where his peers allegedly harassed him about the matter.

The Complainant alleges that her son did not understand that he shouldn't urinate in a water bottle because of his disability. She feels her son did as the Teacher instructed when he was given no other choice. The Complainant alleged that he was afraid to attend his final year of school.¹

The Complainant was the Section 504 Reading Teacher at Greyhills Academy at the time of this incident. She did not hear of the incident from the school until a month after it occurred. After finding out about the incident, the Principal arranged for a meeting with the Complainant, her son, the Teacher, and the Principal. According to the Complainant, the Teacher initially denied the incident, but then admitted to his comments after being confronted with the Student's story. After hearing the events, the Principal asked the Complainant for recommendations in discipline of the Teacher. The Complainant later raised her concerns with the Academy's HR Director, the Principal, the Superintendent, and the Governing Board, in an effort to have the Academy investigate what had occurred. The letter the Complainant submitted to the Governing Board specifically raised her concern that the Teacher's actions amounted to disability-based discrimination.²

A third-party heard about the incident the day it occurred and filed a report with the Bureau of Indian Education (BIE)³ under the suspected child abuse and neglect (SCAN) reporting requirements. The BIE investigation concluded that no criminal activity had taken place.

The District suspended the Teacher without pay for eleven days (the remainder of the school year) based on the Teacher's involvement with the incident which resulted in the Student urinating in a water bottle. The Academy took this action based on its view that the Teacher had engaged in unprofessional behavior according to its employee code of conduct. The Teacher was not investigated for engaging in disability or racial/national origin harassment of the Student and therefore, was not suspended for having engaged in disability or racial/national origin

¹ We note that the Student did continue to attend school and graduated in May 2015.

² The Complainant did not mention race or national origin discrimination in the written complaints submitted to the Governing Board.

³ The Academy is operated by the Bureau of Indian Education, within the U.S. Department of the Interior.

harassment. The Student's IEP team determined that the Student could benefit from counseling because of the incident and reimbursed the Complainant for the Student's counseling sessions that were provided by a counselor outside the Academy.

Allegation 1

The Complainant alleged that the Academy discriminated against her son on the basis of race/national origin when the Student was told to urinate into a water bottle by a Caucasian teacher. Specifically, the Complainant alleged that the Teacher engaged in this type of behavior because the Student is American Indian. We investigated whether the incident occurred as alleged and sought to determine whether the Academy treated the Student differently in the alleged incident based on the Student's race or national origin.

Intentional discrimination on the basis of an individual's race or national origin involves a highly fact-intensive inquiry. Absent proof of intentional discrimination on the basis of an individual's race/national origin, OCR conducts a disparate treatment inquiry to determine whether there is evidence that the student was treated differently than students of other races/national origins under similar circumstances, and whether the treatment has resulted in the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether a district/school provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that a district's/school's actions were based race/national origin.

We first reviewed this allegation to determine whether the alleged action was intentional discrimination. The Teacher provided a written statement to the Academy after the incident. In a statement, the Teacher denied telling the Student to urinate in the water bottle. The Academy provided a written statement from the Principal that states that the Teacher verbally acknowledged that he teased the Student about not allowing him to go to the restroom and may have tossed a water bottle at the Student.

The Teacher and the Principal are no longer working at the Academy, and we were unable to locate them for an interview. Based on the written statements, we find that the Teacher did refuse the Student's request to use the restroom a second time and may have encouraged the Student to use the water bottle. The Complainant did not allege and we did not find any evidence that the Teacher said anything about the Student's race/national origin when the incident occurred or at any other time. Consequently, we cannot find that the Academy intentionally discriminated against the Student based on race/national origin. Therefore, we reviewed whether the Teacher treated the Student differently based on his race/national origin. There is no evidence that the Teacher encouraged any other students to use a water bottle to urinate under similar circumstances. Since the Academy is 99% American Indian and we cannot find any evidence to suggest the Teacher instructed or encouraged any other students to use a water bottle to urinate into, we are unable to conclude that the Teacher treated the Student differently based on his national origin.

We find insufficient evidence that the Teacher told or encouraged the Student to urinate in the water bottle based on his race/national origin. We found no evidence of intentional discrimination or different treatment based on the Student's race/national origin.

Allegation 2

The Complainant further alleges that the Teacher later harassed the Student for using the bottle and created a hostile environment for the Student based on his disability where other students continued to harass the Student for the incident, by joking about it afterwards.

According to the Complainant, the Student's disability manifests in slow processing speeds and cognitive processing. Because of the slow processing and lower cognitive ability, the Complainant states that the Student took the Teacher's denial of use of the restroom and encouragement to use the water bottle literally and did as he was told. The Complainant believes that the Teacher should have known the Student would take the suggestion or encouragement to use the water bottle literally as a result of the Student's disability which is why she believes the Teacher's actions amount to disability harassment. We find no information in the Student's IEP that supports that he takes instructions literally and also note that use of the restroom is not identified as an accommodation for the Student's disability. The Complainant also believes that the Teacher's ridicule of the Student in front of some of his classmates further led to them "joking" about the situation.

Harassing conduct may take many forms, including verbal acts and name-calling or may be non-verbal. We reviewed the incident to determine if the alleged harassing conduct is sufficiently serious that it creates a hostile environment based on the Student's disability. There is no evidence that the Teacher made the unprofessional suggestion or comment that led to the bottle incident based on the student's disability or that his later comment about urinating in the bottle as "sick" in front of the Student's classmates was linked to the Student's disability in any way. No witnesses indicate that any reference to the Student's disability was either implied or explicitly made. As a result, we are unable to conclude that the comments were related to the Student's disability. Even assuming the Teacher's comments were related to the Student's disability, a one-time incident usually is not sufficiently serious to create a hostile environment. While telling or encouraging a student to urinate in a water bottle and then telling him to dispose of the urine in front of his peers, who later joked about the incident, was determined by the Academy's administration to be inappropriate and unprofessional we do not find that the incident is sufficiently serious to create a hostile environment based on disability.⁴

We find that Academy did not create a hostile environment based on disability when the Teacher told or encouraged the Student to urinate in the water bottle and later said "sick" in front of the Student's peers upon finding the bottle of urine in his classroom trash can.

⁴ We note that the Student's IEP team discussed the incident at a subsequent IEP meeting and determined that the Academy would pay for an outside counselor to help the Student deal with this incident.

Allegation 3

Finally, the Complainant alleges that the Academy failed to adequately respond to the incident by closing the case without allowing her to file a discrimination complaint with the Academy under standard procedures. The Academy learned of the incident before the Complainant and a staff member contacted the BIE and initiated a sexual child abuse/neglect report (SCAN). Local police for the Navajo Nation and investigators at the Diné Department of Education were alerted when the SCAN report was filed. The police and the Diné Department of Education investigated the incident but no criminal charges were filed. We were unable to obtain a copy of the Diné Department of Education report. However, the supervisory investigator informed OCR that they did not investigate discrimination. When the Academy was notified of the SCAN report filing, the Teacher was placed on leave pending the conclusion of the investigation. The police and Diné Department of Education completed their investigation after the 2013-14 regular school year had ended. The Academy applied its own personnel policies to the facts and suspended the Teacher until the conclusion of the 2013-14 summer school year for unprofessional conduct. The Teacher returned for the 2014-15 school year, but did not return for the 2015-16 school year.

The Complainant spoke at a school board meeting and sent several letters to the Academy raising concerns regarding the incident. In these communications, the Complainant indicated that she believed that the Teacher discriminated against the Student based on his disability. The Academy did not conduct an investigation in accordance with its grievance procedures related to discrimination. The Academy's grievance procedures in its policy manual, section 5.27 states that the Superintendent will investigate and document discrimination complaints when reasonable. Upon reviewing the Academy's grievance procedures, we determined that the procedures do not meet the requirements of Section 504. The grievance procedures do not include any time frames, allows too much uncertainty about whether an investigation will be conducted, does not describe how investigations will be conducted, and does not include information on the prohibition against retaliating against those who file complaints of discrimination. The Academy has a notice of non-discrimination with information to contact a compliance officer. However, the contact information does not contain a telephone number.

We find that the Academy failed to adequately respond to the Complainant's disability discrimination complaint and its grievance procedures and notice of its compliance officer are insufficient.

Conclusion

For the reasons explained, we determined that the evidence is sufficient to conclude that the Academy discriminated against the Student on the basis of disability by not having adequate Section 504 grievance procedures in place to respond to disability discrimination complaints and by not responding to the Complainant's complaint that the incident between the Teacher and the Student was discrimination based on the Student's disability. The Academy agreed to voluntarily resolve the violations found in this investigation and entered into a Resolution Agreement, signed April 12, 2016. OCR will closely monitor the Academy's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively and that the Academy's policies and practices are administered in a nondiscriminatory manner. Once

fully implemented, the Resolution Agreement will ensure the Academy's compliance with the regulations as addressed in this complaint.

This letter addresses only the issues raised in this complaint and should not be interpreted as a determination of the Academy's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court regardless of whether OCR finds a violation.

Please be advised that the Academy 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 individual 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.

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.

If you have any questions, please contact Ms. Heidi Kutcher at 303-844-4572 or by email at heidi.kutcher@ed.gov.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney