

June 19, 2015

XX XXXXX XXXXXX, XXXXX
Superintendent
Winslow Township School District
40 Cooper Folly Road
Atco, New Jersey 08004

Re: Case No. 02-15-1131
Winslow Township School District

Dear XXX XXXXX:

This letter is to notify you of the determination made by the U. S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against the Winslow Township School District (the District).

The complainant alleged that the Winslow Township School District (District 1) failed to respond appropriately to her complaints that other students subjected her son (the Student) to harassment on the bases of his race (African American) and disability between September 2014 and December 2014, while he was attending an out-of-district placement at XXXXXXXX XXXXXXXX XXXXXXXX School District (District 2).¹

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (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 Department. Additionally, OCR is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the 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. District 1 is

¹ District 1 placed the Student in District 2's XXXXXXXX XXXXXXXX High School beginning in the school year 2013-2014.

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 Title VI, Section 504 and the ADA.

In its investigation, OCR reviewed information and documentation that the complainant and District 1 provided, as well as information OCR obtained during the course of the investigation of another complaint filed with OCR, Case Number 02-15-1103 against District 2. OCR also interviewed District 1 personnel.

District 1 is the Student's district-of-residence. District 1 determined that the Student was eligible for special education and related aids and services based on the classification of "XXXXXXXXXXXXXXXXXXXX²"; and for school years 2013-2014 and 2014-2015 (the Student's eleventh and twelfth grade years, respectively), placed the Student at XXXXXXXX XXXXXXXX High School (the School) in District 2. District 1's out-of-district placement case manager (the District 1 case manager) was responsible for monitoring the Student's academic progress and special education and related aids and services while the Student attended the School.

The complainant alleged that between September and December 2014, several students at the School harassed the Student on the bases of his race and disability. Specifically, the complainant alleged that on or about September 23, 2014, a female classmate (Student 1) grabbed the Student's eyeglasses off of his face and hit him twice in the arm (Incident 1); on or about October 9, 2014, a male classmate (Student 2) said "fuck you" to the Student in job-coaching class (Incident 2); on or about October 22, 2014, a male student (Student 3) falsely accused the Student of distributing drugs on campus (Incident 3)³; on or about November 3, 2014, a female student (Student 4) made racially derogatory comments to the Student, by comparing him to a monkey, and ridiculed the Student based on his disability by imitating the Student's body movement when he stutters (Incident 4); and on or about November 10, 2014, Student 4 punched the Student twice in the arm (Incident 5). The complainant alleged that District 1 failed to appropriately respond to her two complaints regarding District 2's handling of the aforementioned incidents.

Racial harassment is a form of discrimination prohibited by Title VI and its implementing regulation. Additionally, disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or, conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the institution's program. If OCR determines that harassing conduct occurred, and that the recipient had actual or constructive notice of the

² The Student has an intellectual disability, as well as delays in fine and gross motor skills and speech-language skills.

³ An HIB (Harassment, Intimidation, and Bullying) investigation conducted by District 2 during school year 2013-2014 substantiated that Student 3 subjected the Student to racial harassment by using racial epithets and spitting in his face in December 2013. The District 1 Case Manager was notified of the incident and received a copy of the HIB report.

harassment, OCR will examine additional factors to determine whether a hostile environment existed and whether the recipient took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

The harassment or bullying of a student with a disability who is receiving services can result in the denial of a free appropriate public education (FAPE) that must be remedied under Section 504. Pursuant to Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives services, and who is the target of harassment or bullying continues to receive FAPE. This obligation exists regardless of why the student is being harassed and/or bullied. Accordingly, under Section 504, as part of a school's appropriate response to harassment or bullying on *any* basis, the school should convene the Individualized Education Program (IEP) team or the Section 504 team to determine whether, as a result of the effects of the harassment or bullying, the student's needs have changed such that the student is no longer receiving FAPE. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the harassment or bullying.

The District 1 case manager asserted that District 2 did not disclose any of the incidents when the incidents occurred; and District 1 was otherwise unaware of any incidents in which the Student was allegedly harassed until on or about November 12, 2014, when she was copied on the complainant's electronic mail message (email) to the School's principal, complaining that the Student had been subjected to ongoing harassment on the bases of race and disability.⁴ Approximately one week after receipt of the complainant's email, the District 1 case manager contacted District 2's case manager to inquire about the incidents. The District 1 case manager advised OCR that she and the District 2 case manager agreed that the incidents did not constitute harassment, but rather were "typical behavior" between students with significant developmental delays. Documentation OCR reviewed indicated that District 2 staff attempted to resolve the issues through peer mediation on September 18, 2014 with respect to Incident 1; counseling from the job-coaching teacher in October 2014 with respect to Incident 2; and disciplinary referrals resulting in one-day in-school suspension for both the Student and Student 4 on November 10, 2014 with respect to Incident 5. The District 1 case manager advised OCR that she deemed these actions taken by District 2 as sufficient to address the conduct. Neither the District 1 case manager nor any District 1 personnel took any further action in response to the incidents.

The District 1 case manager acknowledged that she was subsequently copied on an email the complainant sent to District 2 on November 21, 2014, in which the complainant again alleged that Incidents 1-5 constituted harassment on the bases of race and disability.⁵ After receiving an email directly from the complainant on November 23, 2014, the District 1 case manager contacted District 2 staff to obtain additional information regarding District 2's response to the complainant's allegations. Specifically, by email dated November 25, 2014, to District 2 staff, the District 1 case manager requested a copy of the report which she assumed had been generated pursuant to District 2's Harassment, Intimidation, and Bullying policy in response to the

⁴ The District 1 case manager stated that District 2 provided reports of behavioral problems the Student exhibited during school year 2014-2015, but did not mention any of the incidents of alleged harassment.

⁵ District 2 staff forwarded the email to District 1 personnel on November 24, 2014.

complainant's complaint.⁶ On December 3, 2014, the District 1 case manager attended a meeting with the complainant, the District 2 case manager, the District 1 Child Study Team (CST) Director, the District 2 CST Director, the District 1 CST Supervisor, and the Student's private counselor to discuss the complainant's concerns⁷; however, neither she nor any District 1 personnel investigated or further responded to the complainant's allegations of harassment. OCR determined that District 1's CST did not convene thereafter to discuss the possible impact of the alleged harassment on the Student's access to FAPE.

Based on the foregoing, OCR determined that as of November 12, 2014, District 1 was on notice of the complainant's allegations that the Student had been subjected to race and disability-based harassment and a possible hostile environment had been created; and received additional notice of the alleged harassment on November 21 and 23, 2014. OCR determined that once on notice of the complainant's complaints, District 1 had an obligation to take prompt and effective action reasonably calculated to stop any harassment, prevent its recurrence, and remedy its effects. OCR determined that in response to the complainant's complaints, the District 1 case manager inquired with District 2 staff as to the extent of District 2's response to the incidents, but did not take any further action to investigate or otherwise respond to Incidents 1-5. Rather, the District 1 case manager stated that she specifically concurred with District 2's peremptory conclusion that the behavior was "typical" of students with cognitive impairments and therefore, could not have been harassment. Moreover, the District 1 case manager did not refer the complaints to the Anti-Bullying Coordinator or Anti-Bullying Specialists within District 1 in accordance with its policy.⁸ Accordingly, OCR will negotiate a resolution agreement (attached) to remedy OCR's compliance concerns.

OCR will monitor the implementation of the enclosed resolution agreement. If District 1 fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This letter should not be interpreted to address District 1'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 file a private suit in federal court whether or not OCR finds a violation.

⁶ District 2 denied the District 1's request for a copy of the HIB report on the basis that District 2 would need permission from the parent of the other student involved in order to release it. District 2 subsequently provided District 1 with a summary of the incidents raised by the complainant in December 2014.

⁷ The District 1 case manager's notes indicate that the "meeting [was] convened to address discord between parent, out of district placement staff, and home district case manager." Staff "questioned whether the program was the right fit based on the frequency of [the complainant's] complaints and her ongoing frustration with their procedures."

⁸ Pursuant to District 1 Policy no. 5512(F), all Board members, school employees, and volunteers and contracted service providers who have contact with pupils are required to orally report alleged violations of the policy to the Principal or the Principal's designee on the same day when the individual witnessed or received reliable information regarding any such incident.

Please be advised that District 1 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, 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 regarding OCR's determination, please contact Joy M. Purcell, Compliance Team Attorney, at (646) 428-3766 or joy.purcell@ed.gov; Gary Kiang, Senior Compliance Team Attorney, at (646) 428-3761 or gary.kiang@ed.gov; or Felice Bowen, Compliance Team Leader at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

/s/

Timothy C.J. Blanchard

Encl.

Cc: XXXXX XXXXXXXX, Esq.