

March 18, 2016

XXXXXXXXXXXXXXXXXX, XXXXX
Superintendent of Schools
Eastern Camden County Regional School District
1401 Laurel Oak Road
Voorhees, New Jersey 08043

Re: Case No. 02-15-1103
Eastern Camden County Regional School District

Dear XXXXXXXXXXXX:

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 Eastern Camden County Regional School District (District 1). The complainant alleged that 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 District 1's Eastern Regional High School (the School) as an out-of-district placement.

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 a recipient of financial assistance from the Department and is a public secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Title VI, Section 504 and the ADA.

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 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 a 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 a 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.

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 02-15-1131, against the Winslow Township School District (District 2), the Student's district-of residence.¹ OCR also interviewed District 1 personnel. OCR made the following determinations.

District 2 determined that the Student was eligible for special education and related aids and services based on the classification of "Multiple Disabilities."² For school years 2013-2014 and 2014-2015 (the Student's eleventh and twelfth grades, respectively), District 2 placed the Student at the School in District 1.³ District 2's out-of-district placement case manager (the District 2 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, 2015, 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

¹ The complainant simultaneously filed a complaint with OCR against District 2.

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

³ District 1 and District 2 shared responsibility for the development of the Student's IEP during his placement in District 1.

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)⁴; 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 complaints regarding the aforementioned incidents.

District 1’s Policy 5512(B) prohibits acts of harassment, intimidation or bullying of students, both on and off of school grounds.⁵ Pursuant to District 1’s Policy 5512(E), all Board members, school employees, and volunteers and contracted service providers who have contact with students, are required to verbally report alleged violations of this policy to the principal or the principal’s designee on the same day when the individual witnesses or receives reliable information regarding any such incident. Pursuant to District 1’s Policy 5512(G), the principal or principal’s designee is required to initiate a complete investigation for each report of violations and complaints which either identify harassment, intimidation, or bullying, or described behaviors that indicate harassment, intimidation, or bullying as defined by its policies. The investigation is to be initiated by the principal or the principal’s designee within one school day. District 1 clarified that if a staff member other than the principal, Anti-Bullying Coordinator, or Anti-Bullying Specialists receives a complaint, the staff member is expected to forward the complaint to the Anti-Bullying Coordinator or Anti-Bullying Specialists for investigation.

With respect to Incident 1, the complainant alleged that on or about September 23, 2014, Student 1 grabbed the Student’s eyeglasses off of his face and hit him twice in the arm.⁶ District 1 informed OCR that Incident 1 came to their attention when Student 1 and another female student complained to the Student’s District 1 Case Manager and the Vice Principal for the eleventh grade about the Student’s behavior in the cafeteria on or about September 18, 2014.

⁴ An HIB (Harassment, Intimidation, and Bullying) investigation that District 1 conducted 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 2 Case Manager was notified of the incident and received a copy of District 1’s HIB report.

⁵ The Policy defines harassment, intimidation, or bullying as “any gesture, any written, verbal or physical act, or any electronic communication...whether it be a single incident or a series of incidents that: (1) is reasonably perceived as being motivated by either any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability; or by any other distinguishing characteristic; and that (2) takes place on school property...; and that (3) substantially disrupts or interferes with the orderly operation of the school or the rights of other students; and that (a) a reasonable person should know, under the circumstances, that the act(s) will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his/her person or damage to his/her property; or (b) has the effect of insulting or demeaning any student or group of students; or (c) creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.”

⁶ Although the complainant asserted that Incident 1 occurred on September 23, 2014, District 1 understood the incident to have occurred on or about September 18, 2014.

The Vice Principal and District 1 Case Manager met with the Student, Student 1 and the other female student later that day and conducted a mediation session. During the students' meeting with the District 1 Case Manager and the Vice Principal, Student 1 complained that the Student had been bothering her by repeatedly asking to borrow money and/or sitting too close to her. The Student complained that Student 1 had taken his glasses, and then walked out of the cafeteria, while calling the Student "idiot" and "dumb-dumb."

District 1 informed OCR that the Student and Student 1 both also stated that they argue a lot and then are "friends" again. Based on this information, the Vice Principal concluded that the incident was merely "banter between [two] cognitively impaired students." District 1 stated that the students were instructed to sit apart during lunch, and the Student agreed not to ask Student 1 for money, which seemed to cause conflict between the two students. District 1 offered the Student counseling to address his "issues with peers."⁷ OCR determined that the complainant did not indicate that this incident constituted race and/or disability harassment at that time.

With respect to Incident 2, the complainant alleged that on or about October 9, 2014, Student 2 said "fuck you" to the Student in job-coaching class. OCR determined that District 1 first became aware of this incident when the classroom teacher notified the District 1 Case Manager and the complainant of the incident. The classroom teacher stated that he observed on a number of occasions that Student 2 interrupted the Student when he spoke, used profanity, and was argumentative with the Student. District 1 informed OCR that the classroom teacher separated Student 2 from the Student. The complainant acknowledged in an email to OCR that the Student did not experience any additional incidents with Student 2 after October 9, 2014. OCR determined that the complainant did not indicate that this incident constituted race and/or disability harassment at that time.

With respect to Incident 3, the complainant alleged that on or about October 22, 2014, Student 3 falsely accused the Student of distributing drugs on campus. OCR determined that District 1 became aware of the complainant's complaint when she sent an email to the Vice Principal on October 27, 2014, expressing concern with District 1's response to Student 3's report that the Student was distributing drugs, asserting that Student 3 intentionally made a false report. OCR determined that the complainant did not indicate that this incident constituted race and/or disability harassment at that time. District 1 asserted that by the time the Vice Principal received the complainant's email, District 1 had already conducted an investigation into Student 3's allegation regarding the Student and determined that it was unfounded. District 1 did not provide any documentation to OCR to establish that it undertook any additional inquiry or review in response to the complainant's email of October 27, 2014.

With respect to Incident 4, the complainant alleged that on or about November 3, 2014, 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. With respect to Incident 5, the complainant alleged that on or about November 10, 2014, Student 4 punched the Student twice in the arm.

⁷ The complainant refused this offer of counseling.

District 1 asserted that it first became aware of Incident 5 on November 10, 2014, when the Vice Principal received a disciplinary referral from another school staff member informing her that the Student and Student 4 were punching one another on that date. The Vice Principal and the District 1 Case Manager met with the Student and Student 4 to discuss the incident and to try to resolve the conflict between the Student and Student 4. The District 1 Case Manager advised OCR that District 1 did not perceive this incident to be bullying. According to both the Vice Principal and the District 1 Case Manager, based on their conversation with the students, they determined that the incident involved “two cognitively impaired individuals having difficulty relating to each other.” The students were reminded about maintaining personal boundaries, rules regarding personal safety, and to sit apart during lunch. The Vice Principal referred both students for disciplinary action because they had both violated the Student Code of Conduct by punching each other.⁸ District 1 notified the complainant of Incident 5 and the resulting disciplinary referral on November 10, 2014. OCR determined that the complainant did not indicate that this incident constituted race and/or disability harassment at that time.

District 1 asserted that it did not learn of Incident 4 until the complainant notified District 1 several weeks after the incident on November 11, 2014, and November 21, 2014. OCR determined that in an email to the Vice Principal on November 11, 2014, and in a written complaint to the Student’s District 1 Case Manager and the School Principal on November 21, 2014, the complainant first reported Incidents 1-5 as racial and/or disability-based harassment. In the written complaint, dated November 21, 2014, the complainant alleged that “since last year this time [the Student] has been bullied, and harassed based on his race, and disability, with name-calling, spitting, and punching.” The complainant raised Incidents 1-5 as examples of the harassment. In her complaint made on November 21, 2014, the complainant also asserted that the Student should have been provided with support after being bullied in 2013, but he was “offered counseling for the first time in May [2014]—five months after the traumatizing effects” of the previous harassment.

District 1 acknowledged that it did not conduct any further investigation or otherwise respond to the complainant’s complaints made on November 11, 2014, and November 21, 2014, because District 1 personnel had already investigated Incidents 1-3 and 5 and did not believe that any of the incidents constituted harassment within the meaning of its policies.⁹ OCR determined, however, that District 1 did not conduct any inquiry into Incident 4, since District 1 was unaware of the alleged incident until the complainant filed the complaints on November 11, 2014, and November 21, 2014. OCR determined that even after District 1 received an email from the Student’s District 2 Case Manager on November 25, 2014, in which she requested a copy of District 1’s HIB report, District 1 staff did not initiate any type of further investigation into the complainant’s allegations of harassment.¹⁰

⁸ Each student was assigned a one day in-school-suspension.

⁹ The District 1 Case Manager and Principal did not recall receiving the complaint, dated November 21, 2014; however, documentation OCR reviewed during its investigation confirmed that both parties received it.

¹⁰ OCR received a copy of the email from the District 2 Case Manager to the Anti-Bullying Coordinator in its data response in OCR Case Number 02-15-1131.

OCR determined that District 1 staff convened a meeting on December 3, 2014.¹¹ The meeting was attended by the complainant, the District 2 Case Manager, the District 1 Case Manager, the District 1 Child Study Team (CST) Director, the District 2 CST Director, the District 2 CST Supervisor, and the Student's private counselor. Subsequent to the meeting, District 1 personnel did not further investigate or respond 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 11, 2014, District 1 was on notice of the complainant's allegations that the Student had been subjected to race and/or disability-based harassment and a possible hostile environment, as described in Incidents 1-5 above. OCR determined that at this time, District 1 had already investigated Incidents 1-3 and 5. OCR determined that Incident 1 could possibly be disability-based harassment, as Student 1 allegedly called the Student an "idiot" and a "dumb-dumb" after Student 1 took the glasses off of the Student's face. District 1 did not specifically investigate Incident 1 as race or disability-based harassment, however, District 1 took action to address Incident 1 by conducting mediation with the students and offering the Student counseling. OCR determined that Incident 2 (Student 2 saying "fuck you" to the Student) could not, without more, be reasonably assumed to be race or disability-based harassment. Nevertheless, OCR determined that District 1 took action to address Incident 2 by separating the students, and the complainant acknowledged that there were no further incidents involving Student 2. OCR determined that Incident 3 (Student 3 accusing the Student of distributing drugs on campus) could not, without more, be reasonably assumed to be race or disability-based harassment. OCR determined that District 1 investigated the accusation Student 3 made and determined that it was unfounded; however, once District 1 received the complainant's complaint that the accusation might have been motivated by the Student's race or disability, District 1 took no further action to investigate whether there was such a motivation. OCR determined that District 1 did not investigate Incident 4 (Student 4 allegedly comparing the Student to a monkey and ridiculing his stuttering) even after the complainant alleged that Incident 4 was race and/or disability-based harassment. OCR determined that Incident 5 (Student 4 punching the Student) in the context of Incident 4 could reasonably be assumed to be race or disability-based harassment. OCR determined that District 1 investigated Incident 5 and confirmed that both students were punching each other; however, once District 1 received the complainant's complaint that the punching might have been motivated by the Student's race or disability, District 1 took no further action to investigate whether there was such a motivation. 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.

The regulation implementing Title VI, at 34 C.F.R. § 100.3(a), states that no person shall be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the basis of race, color, or national origin. Furthermore, 34 C.F.R. § 100.3(b)(vi) prohibits recipients from denying an individual the opportunity to participate in a program on the basis of race, color, or national origin. Once on notice of possible race based

¹¹ The District 2 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 complainants] complaints and her ongoing frustration with their procedures."

harassment, recipients have an obligation to determine whether the alleged harassment created a hostile environment in that the harassment was sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services, or opportunities in the recipient's program.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), states that no qualified person 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 receiving Federal financial assistance. The regulation implementing the ADA, at 28 C.F.R. § 35.130(a) similarly states 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. Further, 28 C.F.R. § 35.130(b)(1)(i) prohibits public entities from denying a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service. Therefore, once on notice of possible disability based harassment, recipients have an obligation to determine whether the alleged harassment created a hostile environment in that the harassment was sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services, or opportunities in the recipient's program.

Furthermore, the regulation implementing Section 504, at 34 C.F.R. § 104.33, states that a recipient shall provide a FAPE to each qualified student with a disability within the recipient's jurisdiction, regardless of the nature or severity of the student's disability. Pursuant to Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability continues to receive a FAPE. Accordingly, under Section 504, as part of a school's appropriate response to harassment or bullying of a Student with a disability, a recipient has an obligation 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 a FAPE.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), also provides that recipients shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. In addition, the regulation implementing the ADA, at 28 C.F.R. § 35.107(b), states that a recipient shall adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action prohibited by the ADA.

Based on the above, OCR determined that District 1 failed to respond appropriately to the complainant's complaints of race and/or disability based harassment, by failing to investigate the complainant's allegations and determine whether as a result of any alleged harassment the Student was no longer receiving a FAPE. Accordingly, OCR determined that District 1 was in violation of the regulation implementing Section 504, at 34 C.F.R. § 104.7(b) and 104.33. District 1's failure to appropriately investigate the complaints prevented District 1 and OCR from determining whether the alleged harassment was sufficiently serious to create a hostile environment that interfered with the Student's participation in or receipt of benefits, services, or opportunities in the recipient's program, in violation of 34 C.F.R. §§ 100.3, 104.4(a), and 28 C.F.R. § 35.130.

On June 19, 2015 OCR obtained a resolution agreement in order to resolve the complainant's simultaneous OCR complaint against District 2. Pursuant to the resolution agreement dated June 19, 2015, District 2 conducted a supplemental investigation of the complainant's allegations of race and disability based harassment in collaboration with District 1 in September 2015. District 2 also participated in a CSE meeting in September 2015, with District 1 personnel, to review whether the alleged harassment denied the Student a FAPE. OCR reviewed documentation provided by District 2, which indicated that after the supplemental investigation, District 2 determined that Incidents 1-5 did not subject the Student to a hostile environment. Nevertheless, after reviewing the findings of the supplemental investigation, the Student's CSE, which included District 1 staff, recommended that the Student receive counseling. OCR determined that District 2's investigation of the complainant's allegations of harassment, and the CSE meeting convened to determine whether the Student was denied a FAPE, complied with the requirements of the resolution agreement signed by District 2 on June 19, 2015. OCR further determined that District 1 participated in this supplemental investigation and the CSE meeting regarding the Student.

On March 9, 2016, District 1 agreed to implement the enclosed resolution agreement to remedy OCR's compliance concerns and to ensure that District 1 staff is trained in appropriately investigating complaints of racial and disability-based harassment to ensure compliance with the regulations implementing Title VI, Section 504 and the ADA in the future. In addition, OCR will monitor District 1 to ensure that it has appropriately addressed any such complaints of which it had notice during school year 2015-2016.

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.

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 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.

Sincerely,

/S/

Timothy C.J. Blanchard

Encl.