



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION II

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NEW YORK, NY 10005-2500

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NEW JERSEY  
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VIRGIN ISLANDS

October 25, 2013

David M. Miceli  
Superintendent of Schools  
New Providence School District  
356 Elkwood Avenue  
New Providence, New Jersey 07974

Re: Case No. 02-12-1239  
New Providence School District

Dear Superintendent Miceli:

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 New Providence School District (the District). The complainant alleged that a District XXXXXXXX XXXX teacher (Teacher 1) discriminated against her son (the Student), on the basis of his disability, by failing to use “nonverbal, unobtrusive signals to refocus and motivate the Student when he showed impulsive behavior” from September 2011 through February 2012, as required by his Section 504 Plan (Allegation 1). The complainant further alleged that Teacher 1 and the Student’s XXXXXX XXXXXXXX teacher (Teacher 2) subjected the Student to harassment because of his disability (Allegation 2). Additionally, the complainant alleged that from approximately April 4, 2012, through mid-May 2012, the Student’s XXXXXXXX teacher (Teacher 3) discriminated against the Student, on the basis of his disability, by failing to send him to the Principal’s office after one warning about his behavior rather than after multiple warnings, as required by his Behavioral Intervention Plan (BIP) (Allegation 3).

OCR is 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 or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (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. The District is 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 Section 504 and the ADA.

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by fostering educational excellence and ensuring equal access.*

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In its investigation, OCR interviewed the complainant, the Student, and District personnel. OCR also reviewed documentation that the complainant and the District submitted.

OCR determined that during school year 2011-2012, the Student was enrolled at the New Providence Middle School (the School). OCR determined that the Student's Section 504 Plan, dated September 14, 2011, stated that the Student had been diagnosed with XXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXX XXXXXXX and XXXXXXXXXXXXXXX XXXXXXX XXXXXXXX.

With respect to Allegation 1, the complainant alleged that Teacher 1 discriminated against the Student, on the basis of his disability, by failing to use "nonverbal, unobtrusive signals to refocus and motivate the Student when he showed impulsive behavior" from September 2011 through February 2012, as required by his Section 504 Plan. The complainant asserted that Teacher 1 instead yelled at the Student, argued with him, and otherwise treated him inappropriately. In addition, the Student stated that on a few occasions, Teacher 1 yelled at him when he disagreed with her, as she yelled at other students; however, the Student did not identify any specific incidents or explain how Teacher 1 otherwise failed to implement his Section 504 Plan. The Student identified to OCR three other students and an assistant teacher (the Assistant Teacher) in the classroom who may have witnessed Teacher 1 yelling at him.

OCR determined that the Student's Section 504 Plan required that the Student's teachers would use "nonverbal, unobtrusive signals to refocus and motivate the Student when he showed impulsive behavior." OCR attempted to interview Teacher 1; however, Teacher 1 no longer is employed by the District, and did not consent to an interview with OCR. The Principal advised OCR that he witnessed Teacher 1 implementing the relevant provision of the Student's Section 504 Plan by employing techniques such as making eye contact with the Student, using proximity, sitting in an open seat next to the Student or on nearby desktops, and touching or tapping on the Student's desk.<sup>1</sup> The Principal characterized Teacher 1 and the Student as having a "difficult relationship," and noted that the Student exhibited "sporadic" behavior problems in Teacher 1's class; however, the Principal denied that Teacher 1 yelled at or argued with the Student, or otherwise treated the Student inappropriately as the complainant alleged. The Principal stated that Teacher 1 consulted with him on a number of occasions regarding how best to address the Student's misbehavior and effectively implement his Section 504 Plan. The Principal stated that following a specific incident that occurred in January 2012, in which the Student XXXX an XXXXXXXXXXXXXXX XXXXXXX that included a XXXXXXXXXXX of Teacher 1, he transferred the Student to another class. OCR determined that the complainant agreed to the transfer.

During the course of OCR's investigation, the District informed OCR that it wished to resolve Allegation 1 without further investigation, in accordance with in Section 302 of OCR's Case Processing Manual.

Regarding Allegation 2, the complainant alleged that Teachers 1 and 2 subjected the Student to harassment because of his disability. Specifically, the complainant alleged that from September 2011 through February 2012, Teacher 1 harassed the Student because of his disability by: (a)

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<sup>1</sup> Teacher 1 did not maintain a log or records documenting the implementation of the Student's Section 504 Plan in this regard.

yelling and arguing with the Student; (b) commenting to the Student that he “never behaves”; (c) on one occasion, when the Student said that a story was “retarded,” responding, “No, you are”; and, (d) after the Student left Teacher 1’s class in February 2012, commenting to other students who were misbehaving, “Why are you taking [the Student’s] place,” and “Why are you behaving like [the Student]?” [Allegations 2(a) to 2(d)]. Additionally, the complainant alleged that in January or February 2012, Teacher 2 harassed the Student because of his disability when she handed an exam back to him, for which he receive a grade of 30 points out of 100, and stated, “We’re all tired of you not trying” [Allegation 2(e)].

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 severe, persistent, or pervasive 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 school had actual or constructive notice of the harassment, OCR will examine additional factors to determine whether a hostile environment existed and whether the school took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects.

With respect to Allegations 2(a) and 2(b), the Student stated that on at least three occasions, he disagreed with Teacher 1, and in response, she yelled at him and told him that he “never behaves.” The Student stated that Teacher 1 treated other students in the class similarly.<sup>2</sup> The Student did not provide the dates of any incidents, but identified to OCR three other students who may have witnessed Teacher 1 yelling at him in the classroom. He also stated that the Assistant Teacher in the classroom may have witnessed it. The District denied that Teacher 1 yelled at the Student or told him that he “never behaves.”

Regarding Allegation 2(c), the complainant and the Student stated that on one occasion, in or around December 2011, the Student told Teacher 1 that he thought a book was “retarded,” and in response, Teacher 1 stated, “Just like you.” The Student identified three other students to OCR who witnessed the incident. OCR determined that sometime in December 2011, the complainant complained to the Principal about the incident, but she did not identify any witnesses to the Principal. OCR determined that the Principal investigated the incident by interviewing Teacher 1. Teacher 1 denied making the comment, but recalled that the Student previously had made comments in the class about something being “retarded.” Further, the Principal stated that because the complainant asserted to him that Teacher 1 targeted the Student for behavior related to his disability XXXXXX, he interviewed another student with a similar disability XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXX in Teacher 1’s class; and, that student denied hearing the comment. Based on his investigation, the Principal concluded that Teacher 1 did not make the comment as alleged, and informed the complainant of his determination. Further, the Principal stated that he offered to interview other students in the Student’s class, but the complainant declined because she did not want to draw further attention to the matter. The complainant did not recall the Principal’s offer.

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<sup>2</sup> The Student stated that he was unaware if there were any other students in Teacher 1’s class that had a disability.

With respect to Allegation 2(d), the complainant alleged that in February 2012, after the Principal transferred the Student out of Teacher 1’s class, Teacher 1 commented to other students who engaged in misbehavior, “Why are you taking [the Student’s] place,” and “Why are you behaving like [the Student]?” OCR determined that the complainant reported the incident to the Principal. OCR determined that the Principal interviewed Teacher 1; and, she stated that another student in the class (Student 2) had made the comment. OCR determined that the Principal interviewed Student 2, who denied making the comment. Based on his investigation, the Principal concluded that Student 2 made the comment, and informed the complainant of his determination. The complainant stated that she did not recall having a conversation with Principal about his determination.

With respect to Allegation 2(e), the complainant alleged that Teacher 2 handed an exam back to the Student, for which he receive a grade of 30 points out of 100, and stated, “We’re all tired of you not trying.” Teacher 2 stated that she did not recall any exam/test on which the Student received a grade of 30; and, denied making the alleged comment or saying anything else to that effect. The Student stated that he recalled that the grade at issue possibly was 60 instead of 30, and he identified one student in his class who may have overheard the comment. The complainant stated that she did not inform the Principal or anyone else at the School about this alleged comment.

During the course of OCR’s investigation, the District informed OCR that it wished to resolve Allegation 2 without further investigation, in accordance with in Section 302 of OCR’s Case Processing Manual.

With respect to Allegation 3, the complainant alleged that from approximately April 4, 2012, through mid-May 2012, Teacher 3 gave the Student multiple warnings regarding his behavior before sending him to the main office, rather than the single warning required by his BIP. Neither the complainant nor the Student identified any specific instances in which Teacher 2 failed to implement the Student’s BIP.

OCR determined that the Student’s BIP, dated March 27, 2012, required that when the Student demonstrated an identified behavior, his teachers would provide him with one warning in a subtle and private manner. The Student’s BIP further provided that the second time the Student demonstrated an identified behavior, his teachers would send him to the main office (without consequence) where he would stay for the remainder of the class period. Teacher 3 stated that from March 27, 2012, through the end of school year 2011-2012, he implemented the Student’s BIP as required, except on one occasion in April 2012, when the XXXXXX XXXXXXXXXXXXX observed the Student in his class.<sup>3</sup>

OCR determined that the XXXXXX XXXXXXXXXXXXX observed the Student in his XXXXXX class on April 30, 2012, as part of a Functional Behavioral Assessment (FBA) she was conducting in order to create a more comprehensive BIP for the Student.<sup>4</sup> Teacher 3 and the

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<sup>3</sup> He stated that he typically warned the Student by placing his hand by his waist, in the form of a stop sign; and that this single warning was effective in addressing the Student’s identified behaviors.

<sup>4</sup> The XXXXXX XXXXXXXXXXXXX informed OCR that she observed the Student in all of his classes around this time.

XXXXXX XXXXXXXXXXXXX stated that on the date of the observation, the Student was behaving impulsively and disturbing the other students during the class. Teacher 3 and the XXXXXX XXXXXXXXXXXXX both stated that Teacher 3 gave the Student a few warnings in order to permit the XXXXXXXXXXXXX to continue to observe the Student; however, approximately 20 minutes into the class period, Teacher 3 sent the Student to the main office because he became too disruptive. OCR determined that the Student's FBA corroborated the accounts provided by Teacher 3 and the XXXXXX XXXXXXXXXXXXX.

The regulation implementing Section 504, at 34 C.F.R § 104.33(a), provides that a recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education (FAPE) to each qualified disabled person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. The regulation, at 34 C.F.R. § 104.33(b)(1)(i) and 34 C.F.R. § 104.33(b)(2), defines an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of non-disabled persons are met.

Based on the foregoing, OCR determined there was insufficient evidence to substantiate the complainant's allegation that from approximately April 4, 2012, through mid-May 2012, Teacher 3 failed to implement the Student's BIP by giving the Student multiple warnings regarding his behavior before sending him to the Principal's office, rather than the single warning required by the his BIP. OCR determined that Teacher 3 giving the Student multiple warnings before sending him to the main office on one occasion, in order to permit the XXXXXX XXXXXXXXXXXXX to observe the Student's behavior on April 30, 2012, was not sufficient to constitute a denial of a FAPE. Accordingly, OCR will take no further action regarding Allegation 3.

As stated above, the District informed OCR that it wished to resolve Allegations 1 and 2 without further investigation.<sup>5</sup> Accordingly, on September 27, 2013, the District voluntarily entered into the attached resolution agreement to resolve Allegations 1 and 2, in accordance with in Section 302 of OCR's Case Processing Manual. OCR will monitor implementation of the resolution agreement. If the District fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District'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.

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<sup>5</sup> OCR determined that the Student left the District as of March 1, 2013. OCR contacted the complainant to determine whether she would consider returning the Student to the District if OCR could obtain individual relief for the Student; however, the complainant did not respond to OCR. Although OCR determined that prospective individual relief is not available for the Student under the circumstances, OCR negotiated a resolution agreement to ensure that relevant staff receive training.

The complainant may file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District 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 Letisha Morgan, Senior Compliance Team Investigator, at (646) 428-3827 or [letisha.morgan@ed.gov](mailto:letisha.morgan@ed.gov); or Félice A. Bowen, Compliance Team Leader, at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXX XXXXX XXXXXXXX, Esq. (w/encl.)