

August 3, 2017

Michael Nitti
Superintendent of Schools
Ewing Township School District
2099 Pennington Road
Ewing, New Jersey 08618

Re: Case No. 02-17-1189
Ewing Township School District

Dear Superintendent XXXXX:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the Ewing Township School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his disability, by suspending him on ten (10) occasions between XXXXXXXXXXXX XX, XXXX, and mid-XXXXXXXXXX XXXX, without adhering to the procedural requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504).

OCR is responsible for enforcing 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 U.S. Department of Education (the Department). OCR also 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. 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 both Section 504 and the ADA.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides 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 in any program or activity that receives federal financial assistance. OCR has previously determined that a district may discipline a disabled child in the same manner as it would discipline a non-disabled child, unless the disabled child's Individualized Education Program (IEP), Section 504 Plan or Behavioral

Intervention Plan (BIP) specifies differently or unless the discipline creates a significant change in the disabled student's placement. The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), requires a recipient to conduct an evaluation of any student who needs or is believed to need special education or related services before taking any action resulting in a significant change in placement. OCR has previously determined that if the proposed exclusion of a disabled person is permanent (expulsion) or for an indefinite period, or for more than ten (10) consecutive school days, the exclusion constitutes a significant change in placement under the regulation implementing Section 504, at 34 C.F.R. § 104.35(a). If a series of suspensions that are each of ten (10) days or fewer in duration creates a pattern of exclusions that constitutes a significant change in placement, the requirements of 34 C.F.R. § 104.35(a) would also apply. In order to implement an exclusion that constitutes a significant change in placement, a recipient must first conduct a reevaluation of the student, in accordance with 34 C.F.R. § 104.35. As a first step in this reevaluation, the recipient must determine, using appropriate evaluation procedures that conform to the regulation implementing Section 504, whether the misconduct is caused by the student's disability. If it is determined that the disabled student's misconduct is caused by the student's disability, the recipient must determine whether the student's current educational placement is appropriate. If it is determined that the misconduct is not caused by the student's disability, the student may be excluded from school in the same manner as similarly situated non-disabled students are excluded.

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

The complainant alleged that the District discriminated against the Student, on the basis of his disability, by suspending him on ten (10) occasions between XXXXXXXXXX XX, XXXX, and mid-XXXXXXX XXXX, without adhering to the procedural requirements of Section 504. The complainant stated that the District frequently suspended the Student for misconduct that the District acknowledged was related to his disability, and did not instead provide him with "appropriate behavioral support."

OCR determined that the Student began attending the District's XXXXXXXX Elementary School (the school) on XXXXXXXXXX X, XXXX. Pursuant to an IEP dated XXXX XX, XXXX, the Student was placed in a XXXX-XXXXXXXXXXXXXXXXXXXXXXXX classroom for school year XXXX-XXXX.¹ The Student also had a BIP, dated XXXXXX XX, XXXX, to address behaviors including "XXXXXXXXXXXXXXXX, XXXXXXXX XXXXXXXXXXXXXXX XXX XXXXXX XXXXXXXXXXXX, XXXXXXXX XXXXXX XXX XXXXX XXXXXX XX XXXXXX, XXXXXXXX XXXX XXX XXXX XXX XXXXXXXX XXX XXXXXXXXXXXX, XXXXXXXX XXXXXX, XXX XXXXXXXX, XXXXXXXX, XXX XXXXXXXX XXXXXX XXXX XXXXXXXXXXXXXXX XX XXXXXX XXXXXXXX XXXXXXXXXXXX." Neither the Student's IEP nor his BIP exempted him from the District's disciplinary policies and procedures.

School staff informed OCR that between XXXXXXXXXX X and XX, XXXX, the Student engaged in "aggressive and destructive behaviors" on eight occasions, including hitting school

¹ The Student was diagnosed with XXXXXXXX XXXXXXXXXXXXXXX XXXXXXXX and was classified as "XXXXXX XXXXXXXX XXXXXXXX" (XXX).

staff and students; biting and spitting on school staff; throwing objects; running from the classroom and the school building; climbing on furniture; and damaging school property. On XXXXXXXXXX XX, XXXX, the Student was issued a one-day out-of-school suspension (OSS), served on XXXXXXXX X, XXXX, for “destroying classroom materials” and hitting, kicking, biting and spitting on a staff member.

The District’s Supervisor of XXXXXXXX, XXXXX XXXXXXXXXXXX XXXXXXXX (the supervisor) informed OCR that by late XXXXXXXXXX XXXX, she and other school staff members had become concerned that the Student’s placement at the school was not appropriate, based on his escalating behaviors. The supervisor discussed a change in placement with the complainant on XXXXXXXXXXXX XX, and XXXXXXXX XX, XX, and XX, XXXX. The complainant consented to allow the Child Study Team (CST) to consult with the Student’s developmental pediatrician regarding the appropriateness of the Student’s placement. The pediatrician recommended that the Student be placed in an in-district alternative education program that offered “intensive behavioral intervention with daily counseling” (school A). The complainant visited school A on XXXXXXXX XX, XXXX. On XXXXXXXX XX, XXXX, an IEP meeting was held to review and modify the Student’s BIP and to discuss the Student’s educational placement. The complainant agreed to modify the Student’s BIP to include additional behavioral interventions, but rejected the proposed placement at school A.

Despite additional behavioral interventions implemented pursuant to the revised BIP, the Student’s behaviors continued to escalate. On XXXXXXXXXX XX, XXXX, the Student was issued a one-day OSS, served on XXXXXXXXXX XX, XXXX, for “on-going violent outbursts toward staff (biting) and other students,” pulling hair, and XXXXXXXXXXXX X XXXXXXXX XXXX X XXXXX XXX. On XXXXXXXXXX XX, XXXX, the Student was issued a one-day OSS, served on XXXXXXXXXX XX, XXXX, for XXXXXXXX XXXX XXXX X XXXXXXXX XXX XXXX XXXXXXXXXXXX XXXXXXXX X XXXXXXXX XXXXX XXX XXXX; XXXXXXXXXXXX XX XXXX XXX XXXXXXXXXXXX; and, spitting at and kicking another staff member while being escorted to the main office. On XXXXXXXXXX XX, XXXX, the Student was issued a ten-day OSS, for fleeing the classroom and attempting to exit the building; biting, scratching and attempting to hit a staff member who tried to prevent the Student from exiting the building; and, “XXX[XXXX] XXX XXXX XXXX XX XXX XXXX XXXXX XXXXX XXXXXXX XXX XXXXX XXXX XXXXX” while staff members attempted to escort the Student to the office.

On XXXXXXXXXX XX, XXXX, the supervisor called the complainant to try to schedule a meeting to re-evaluate the Student and determine whether his misconduct on XXXXXXXXXX XX, XXXX, was a manifestation of the Student’s disability. The complainant informed the supervisor that she was unavailable until XXXXXXXXXX X, XXXX. The IEP team therefore convened on XXXXXXXXXX X, XXXX. During the meeting, the IEP team reviewed the Student’s BIP and data collected regarding implementation of the BIP. At that time, the complainant submitted two evaluation reports to the IEP team that had not previously been shared, which indicated that the Student had been diagnosed with a XXXXXXXXXXXX XXXXX XXXXXXX (XXX) as the result of a head injury sustained in XXXXXXXXXX XXXX. The team reviewed the new information and determined that it needed additional information regarding the Student’s XXX diagnosis to consider in revising the BIP and determining whether the Student’s

current educational program was appropriate. The IEP team therefore reconvened on XXXXXXXX X, XXXX, at which time the IEP team revised the Student's BIP to reflect that the Student had been diagnosed with a XXX and to include additional behavioral supports. The IEP team also determined at this time that the Student's prior behavior for which he had been suspended was a manifestation of his disability; however, the IEP team did not change the Student's educational placement. The Student did not return to school until XXXXXXXX X, XXXX; accordingly, the Student had already served nine days of the OSS by that time.² Coupled with the two previous days of OSS the Student had served, this totaled eleven days of OSS.

Despite additional behavioral interventions implemented pursuant to the revised BIP, the Student's behaviors continued to escalate. On XXXXXXXX X, XXXX, the Student was issued a one-day OSS, served on XXXXXXXX X, XXXX, for leaving the classroom without permission and exiting the building. On XXXXXXXX XX, XXXX, the Student was issued a three-day OSS, served on XXXXXXXX XX-XX, 2016, for being defiant towards staff; running out of the building towards the playground; and, XXXXXXXX XX XXXX XX XXX XXXX when staff tried to bring the Student back into the building. On XXXXXXXX XX, XXXX, the Student was issued a one-day OSS, served on XXXXXXXX XX, XXXX, for refusing to participate in his XXXXXXXXXXXX XXXXXXXXXXXX; chasing two students; and, XXXXXXXX XXX XXXX XX X XXXXXXXXXXXX XXXX. On XXXXXXXX X, XXXX, the Student was issued a five-day OSS, served on XXXXXXXX X-XX and XX-XX, XXXX, for refusing to follow staff members' directions; XXXXXXXX X XXXXXXX XXX XXXXXXX XX X XXXXXXXX; and, running out of his classroom and around the premises and then exiting the building.

On XXXXXXXX XX, XXXX, while the Student was serving the five-day OSS issued on XXXXXXXX X, XXXX, the Student's IEP team conducted another manifestation determination review to determine whether the Student's misconduct on XXXXXXXX X, XXXX, was a manifestation of his disability. The team determined that the Student's misconduct on XXXXXXXX X, XXXX, was a manifestation of his disability; the Student nevertheless served the remainder of his suspension, and returned to school on XXXXXXXX XX, XXXX. At this point, the Student had served a total of 21 days of OSS during school year XXXX-XXXX.

On XXXXXXXX XX, XXXX, the Student received a five-day OSS for running out of his classroom and XXXXXXXX X XXXXXXX XX XXX XXXX. After serving two days of OSS on XXXXXXXX XX and XX, XXXX, a manifestation determination review was held on XXXXXXXX XX, XXXX.³ The Student's IEP team determined that the misconduct that occurred on XXXXXXXX XX, XXXX, was a manifestation of the Student's disability. The IEP team also re-evaluated the Student on XXXXXXXX XX, XXXX, and changed his placement to home instruction, pending placement in an out-of-District program. Therefore, the Student served only two of the five days of OSS he received on XXXXXXXX XX, XXXX. At this point, the Student had served a total of 23 days of OSS during school year XXXX-XXXX.

² The District was closed for Thanksgiving break on November 24 and 25, 2016. The Student served his suspension on XXXXXXXX XX-XX, XXXXXXXX X-X and X-X.

³ Schools were closed on February 20, 2017, for President's Day; and on February 21, 2017, for Staff Development.

Based on the foregoing, OCR determined that the District imposed suspensions on the Student that amounted to significant changes in the Student's placement, even after determining that the Student's misconduct was a manifestation of his disability and that his current placement was not appropriate, in violation of the regulation implementing Section 504, at 34 C.F.R. §§ 104.4(a) and 104.35(a). On August 2, 2017, the District entered into the enclosed resolution agreement, which addresses these compliance issues. OCR will monitor the implementation of the resolution agreement.

This letter 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. The complainant may have the right to 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 individual may file a 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 that, 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 Gary Kiang, Senior Compliance Team Attorney, at (646) 428-3761 or gary.kiang@ed.gov; or Emily Frangos, Compliance Team Leader, at (646) 428-3831 or emily.frangos@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard