



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

32 OLD SLIP, 26<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD  
DIRECTOR  
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December 6, 2019

Roger León  
Superintendent  
Newark Public Schools  
Room 1003  
2 Cedar Street  
Newark, New Jersey 07102

Re: Case No. 02-17-1390  
Newark Public Schools

Dear Superintendent León:

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 Newark Public Schools (the District). The complainant alleged that a teacher at the Abington Avenue School (the School) discriminated against her son (the Student) between February and June 2017, on the bases of his (a) race (XXXXXX) and (b) disability, by seating the Student, who was the only XXXXXX student in the class, away from other students in the classroom, thereby isolating him (Allegation 1); and, choosing the Student to be “Student of the Week” XXXX, while other students in the class were chosen many times (Allegation 2). In addition, the complainant alleged that the District discriminated against the Student between February and June 2017, on the bases of his (a) race and (b) disability, by not inviting the Student to participate in activities that other students in the class could participate in such as the School’s afterschool program (Allegation 3) and the Saturday program (Allegation 4). The complainant also alleged that the District discriminated against the Student, on the basis of his race, by failing to respond to multiple complaints she filed with District administrators and staff between February and June 2017, alleging that the Student’s peers were harassing him (Allegation 5) and that the Student’s teacher made disparaging remarks about XXXXXX while teaching (Allegation 6). Further, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by (a) failing to provide him with a 1:1 aide as required by his Individualized Education Program (IEP) and (b) refusing to conduct his triennial evaluation that was due in or around May 2017 (Allegation 7). The complainant also alleged that the Student’s teacher discriminated against him, on the basis of his disability, by XXXXXXXXXXXXXXXXXXXXXXXXXXXX on 2017 (Allegation 8). In addition, the complainant alleged that in retaliation for her filing multiple complaints alleging discrimination on the basis of race, the XXXXX Specialist inappropriately evaluated the Student in or around June 2017 (Allegation 9). The complainant also alleged that the teacher retaliated because she filed multiple complaints alleging discrimination on the basis of

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race, by: (a) threatening the Student with a Saturday detention on XXXX 2017, for an incident in which another student admitted wrongdoing; (b) inappropriately disclosing information about the Student and the complainant's concerns about him to other staff and students at the School from February to June 2017; (c) making disparaging comments toward the Student from February through June 2017; and, (d) not allowing the Student to XXXXXXXXXXXXXXXX (Allegation 10).

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 or activities receiving financial assistance from the Department. Additionally, OCR 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 Title VI, Section 504, and the ADA.

The regulation implementing Title VI, at 34 C.F.R. § 100.7(e), provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint.

In its investigation, OCR reviewed information that the complainant and the District provided. OCR also interviewed the complainant, District staff, and a student witness.<sup>1</sup> OCR made the following determinations.

During school year 2016-2017, the Student was in the XXX grade in the School. Per his IEP, the Student was classified as “XXXXXXXXXXXXX” and placed in a special education classroom, assigned a 1:1 aide, and received speech therapy and testing accommodations for district and statewide testing.

With respect to Allegation 1, the complainant alleged that the teacher discriminated against the Student, on the bases of his (a) race and (b) disability, by seating the Student, who was the only XXXXXXXXXX student in the class, away from other students in the classroom, thereby isolating him. OCR determined that during the course of school year 2016-2017, the teacher used various seating arrangements throughout each school day, depending on the nature of the activity in the classroom.<sup>2</sup>

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<sup>1</sup> During the course of the investigation of this complaint, OCR staff attempted to contact parents of other students in the Student's class in order to interview student witnesses; however, only one parent consented to an interview.

<sup>2</sup> Specifically, although the students would complete their “Do Now” exercises and eat their breakfast in their regularly assigned seats, they would move about the classroom for other activities. For example, when working in small groups,

The teacher informed OCR that in December 2016, she determined that the Student was becoming overstimulated in a large group setting; therefore, when this occurred, she would have him move into an “independent work space” in the classroom where he would use a focus board and self-regulation techniques, which the teacher trained him how to use. The teacher informed OCR that she used the same technique with another student in the class (student A), and that student A was of XXXXXX origin. The aide confirmed that the teacher moved the Student, as needed, upon display of certain behaviors indicating that the Student might be overstimulated during independent work time, which was scheduled for approximately 1-3 times per week.<sup>3</sup>

The Student’s IEP, dated May 16, 2016, states that the Student’s educational program was changed for school year 2016-2017 because he needed to be in a smaller classroom setting with less distractions; the Student has difficulties focusing on tasks; and, the Student needs constant supervision and redirection. The Student’s IEP did not indicate what, if any, interventions the teacher should employ in the event that the Student became overstimulated in the classroom.<sup>4</sup>

In March 2017, the complainant expressed concerns to the teacher and the Child Study Team (CST) that the Student was being separated from his classmates. In response to the complainant’s concerns, the teacher rearranged all of the students’ desks into a contiguous horseshoe shape, such that the Student’s desk was at the XXXXXXXXXX; and when the Student became overstimulated, the teacher would turn the Student’s desk to face hers, rather than moving him to a separate work space. The teacher informed OCR that she made the same arrangement for Student A. In response to the complainant’s concerns about the seating arrangement again in April, the teacher then separated the students’ desks. The desks remained in this arrangement until the end of school year 2016-2017.

Based on the foregoing, OCR determined that the teacher had a legitimate, non-discriminatory reason for sometimes seating the Student away from other students in the classroom; specifically, when the Student exhibited behaviors indicating that the Student might be overstimulated, the teacher moved him to focus him and address the behaviors. OCR determined that the proffered reason was not a pretext for discrimination, because OCR confirmed that the Student sometimes exhibited behaviors that needed re-direction; and, the teacher treated another student of a different race similarly. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that the teacher discriminated against the Student, on the bases of his (a) disability and/or (b) race, by seating the Student away from other students in the classroom, thereby isolating him. Accordingly, OCR will take no further action regarding Allegation 1.

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students moved to one of three “collaboration centers” in the classroom. A student witness corroborated the teacher’s description of the manner in which the students moved about the room.

<sup>3</sup> The aide stated such behaviors included, touching other students’ desks and belongings after being told to stop; and, XXXXXXX behaviors such as XXXXXX and XXXXXX in his seat, XXXXXX and frequent XXXXXXX, XXXXXXX XXXXXXXXXX, and XXXXXXXXXXXX in the face.

<sup>4</sup> The Student’s subsequent IEP, dated June 13, 2017, includes a Behavior Intervention Plan that permits employing modifications that are available for use by all students in the classroom, such as setting up carrels on the desk to block out distractions; setting up a quiet work area in the classroom for students who have trouble concentrating; and specifically for the Student, having headphones accessible for times that he seems overstimulated. The IEP also indicates that the Student should have preferential seating during classes.

With respect to Allegation 2, the complainant alleged that the teacher discriminated against the Student, on the bases of his (a) disability and (b) race, by choosing the Student to be “Student of the Week” XXXX, while other students in the class were chosen many times. OCR determined that the teacher did not select students for “Student of the Week;” rather, the students in the classroom selected the award recipient each week. Specifically, the teacher informed OCR that every Monday, each student would identify a challenge that they encountered during the prior week, and that overcoming that challenge became their goal for the week. At the end of each week, the students would vote for a student who they believed was working hard to overcome a challenge, and provide three reasons why they voted for that person.<sup>5</sup> The Student was voted to be the “Student of the Week” XXX XXX XXXXXXXX during the school year.<sup>6</sup>

Based on the foregoing, OCR determined that the teacher did not deny the Student the opportunity to be selected as “Student of the Week,” as alleged. Rather, OCR determined that the Student was selected at least XXX by the other students pursuant to a democratic selection process that the teacher established. Therefore, OCR found that there was insufficient evidence to substantiate the complainant’s allegation that the teacher discriminated against the Student, on the bases of his (a) race and (b) disability, by choosing the Student to be “Student of the Week” XXX, while other students in the class were chosen many times. Therefore, OCR will take no further action with respect to Allegation 2.

With respect to Allegation 3, the complainant alleged that the District discriminated against the Student, on the bases of his (a) disability and (b) race, by not inviting the Student to participate in the School’s afterschool program. The District explained that the afterschool program was a school-wide program that was open to all students. The District submitted to OCR the notification letter distributed to all students during the second week of school regarding the afterschool program. Moreover, the Student’s case manager stated that in response to a request from the complainant in February 2017 for the application for the afterschool program, she also sent an application home with the Student, but the complainant did not thereafter submit a completed application.<sup>7</sup>

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR determined that although the District invited the Student to participate in the afterschool program, the complainant did not complete the application for the Student to participate so the Student was not further considered to participate in the afterschool program. Therefore, based on the foregoing, OCR found insufficient evidence to substantiate the complainant’s allegation that the District

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<sup>5</sup> A student witness corroborated the teacher’s statement about how the students voted to select the “Student of the Week.”

<sup>6</sup> The District did not have records documenting which students were selected to be “Student of the Week” throughout the year; however, both the District and the complainant informed OCR that the Student was selected XX XX XXXXXXXX.

<sup>7</sup> The complainant stated that “one of the principals,” who was likely the School’s Chief Information Officer, and the case manager both advised her that the program was full. The District stated that had the complainant submitted an application after the program was full, the Student would have been placed on a waitlist and could have possibly gained entry if another student stopped attending the program; but that the complainant never submitted an application. The District stated that the program lead in charge of the afterschool program informed the complainant about the waitlist. The District also noted that the Student participated in the afterschool program in the prior school year.

discriminated against the Student, on the bases of his disability and race, by not inviting the Student to participate in the School’s afterschool program. Accordingly, OCR will take no further action with respect to Allegation 3.

With respect to Allegation 4, the complainant alleged that the District discriminated against the Student, on the bases of his (a) disability and (b) race, by not inviting the Student to participate in the School’s Saturday program. The District explained that, with regard to the Saturday program, the School targeted particular students who struggled in reading. Specifically, for fourth and fifth graders, the School sought students who scored either a Level 1 or Level 2 on the Partnership for Assessment of Readiness for College and Careers (PARCC) English Language Arts/Literacy test.<sup>8</sup>

The District informed OCR that although the Student, who was in XXXX grade, scored within the Level 1 range on the PARCC test, he also showed significant growth in his reading test scores on the Scholastic Reading Inventory (SRI), thereby demonstrating that he did not need the Saturday program. The District asserted that, on this basis, the Student was not invited to participate in the Saturday program. OCR determined that SRI scores of 699 or below are considered “below grade level” for the XXX grade. The District informed OCR that the Student’s SRI scores progressed from XXX in June 2017 to XXX in November 2017; accordingly, the Student’s SRI scores were below grade level for the XXX grade.

OCR determined that a total of 48 students in the fourth and fifth grades participated in the Saturday program during school year 2016-2017. Of these 48 students, 38 students were of Hispanic origin; the District did not identify the race or national origin of the remaining 10 students. Of the 48 students, 7 students had disabilities. Of the 48 students, only 15 students who scored Level 1 or 2 on their PARCC assessments participated in the Saturday program<sup>9</sup>; while 30 of the 48 students had no recorded PARCC scores and 3 of the 48 students, who were Hispanic, scored higher than a Level 2. The District accepted those 30 students with no recorded PARCC scores based on parental request and statement of need. In addition, the District’s data demonstrated that, unlike for the Student, the District did not consider additional criteria such as SRI scores for any other fourth or fifth grade students.

Based on the foregoing, OCR determined that, although legitimate on its face, the District’s proffered reason for denying the Student the opportunity to participate in the Saturday program was pretextual. Specifically, the Student met the stated criteria for the program by scoring in the Level 1 range on the PARCC test; and, other fourth or fifth grade students who scored similarly were admitted to the program without having to meet any additional criteria. Moreover, the majority of fourth or fifth grade students who were admitted to the Saturday program had missing PARCC scores. In addition, although the District asserted that it determined that the Student did not need the Saturday Program based upon the Student’s SRI scores, the Student’s SRI scores remained below grade level for the XXX grade. As such, OCR determined that the District’s proffered explanation for its decision, that the Student was not invited to participate in the Saturday program based on his PARCC and SRI scores, was not credible based on the evidence presented.

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<sup>8</sup> The PARCC test is scored on a scale of 650 to 850, with five “levels” indicating a range for each student. For example, Level 1 ranges from 650 to 700, and Level 2 ranges from 700 to 725.

<sup>9</sup> Thirteen of the 15 students were Hispanic and 2 of the 15 students had an unidentified race. Three of the fifteen students had disabilities.

On November 26, 2019, the District signed the enclosed Agreement to remedy the compliance issue identified regarding Allegation 4.

With respect to Allegation 5, the complainant alleged that the District discriminated against the Student, on the basis of his race, by failing to respond to multiple complaints she filed with District administrators and staff between February and June 2017, alleging that the Student’s peers were harassing him. The complainant asserted that in multiple instances, the Student was pushed down on the playground, XXXXXXXXXXXXX, kicked in the leg, and choked by other students. She alleged that she mailed letters to multiple School administrators and staff, but that the School failed to stop the harassment.

Harassment on the basis of a person’s race that creates a hostile environment is a form of discrimination prohibited by Title VI and its implementing regulation. Harassment based on race can include verbal, written, graphic, physical, or other conduct by an employee, a student, or a third party. Harassment can create a hostile environment if it is sufficiently serious to limit an individual’s ability to participate in, or receive benefits, services, or opportunities in the recipient’s program. If OCR determines that harassing conduct occurred and the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to make a determination as to whether a hostile environment existed and whether the recipient took prompt and effective action to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

OCR determined that the complainant filed multiple complaints between April and May 2017 regarding incidents involving the Student, by either calling or sending letters to School and District administrators and staff. On April 5, 2017, the complainant called the Student’s case manager to report that another student had called the Student a “XXXX”; the complainant did not identify the other student involved (complaint 1). The case manager notified the School’s anti-bullying specialist, who handles complaints filed against students.<sup>10</sup> On April 5 and 6, 2017, the anti-bullying specialist met with the Student and questioned him about the incident that allegedly occurred in the cafeteria during lunchtime. The Student could not recall what was said or identify the other student involved; and, he did not know any other relevant information such as what grade the student was in or identify any other student witnesses. On April 7, 2017, the following day, the anti-bullying specialist accompanied the Student to the cafeteria to see if he could identify the student who called him the racial slur; however, the Student was unable to identify the other student. The anti-bullying specialist accompanied the Student to the cafeteria again on Monday, April 10, 2017, and walked through the halls with him; however, the Student was still unable to identify who had called him the racial slur. At that point, the Student also reported that he felt safe.

The anti-bullying specialist and the case manager provided the complainant with periodic updates about this investigation. Ultimately, the anti-bullying specialist determined that complaint 1 was “unfounded,” because the Student could not identify the student who used the racial slur; and as a result, the investigation of complaint 1 was concluded on April 10, 2017, and the case manager contacted the complainant regarding the outcome.

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<sup>10</sup> The anti-bullying specialist informed OCR that she does not address complaints that students may file against staff.

As noted in the incident tracking form, the School took follow-up actions regarding complaint 1. Specifically, the anti-bullying specialist informed OCR that she saw the Student either during lunchtime or in the classroom, and that she would ask him and/or his teacher for any updates or concerns; the CST was responsible for providing individual counseling to the Student; and, the CST, School Support Team (SST), and administrators collaborated so as to take turns monitoring the cafeteria during the Student’s lunchtime.

On XXXXX, 2017, the complainant sent a letter to the School, with copies to the Director of Special Education and the case manager,<sup>11</sup> asserting that the Student was choked by a student in his class XXXXXXXXXXXX by an unidentified student (complaint 2). She further asserted that the School is mostly Hispanic, and that the Student was treated as an outsider because he is XXXXXXXXXXXX. She asserted that the Student was afraid to attend school because of the various incidents involving students and other incidents involving the teacher.<sup>12</sup> On April 24, 2017, the complainant sent another letter to the School, stating that on XXXX, 2017, a student who had previously choked the Student had pushed him down on the playground, and that XXXXXXXXXXXXXXXXXXXX during the incident multiple students surrounded the Student and would not XXXXXXXXXXXX (complaint 3). She asserted that the Vice Principal saw the Student XXXXXXXXXXXX but only told him that he needed to “be more careful.”

In response to complaints 2 and 3, the School held a meeting on May 1, 2017, attended by the complainant, the case manager, the teacher, a CST social worker, the principal, and the Director of Education. At this meeting, the complainant reiterated the concerns stated in her letters. The meeting participants agreed to have a follow-up meeting on May 9, 2017. On May 3, 2017, the case manager sent a formal meeting notice to the complainant, and verbally confirmed the date of the follow-up meeting by telephone.

In the interim, on May 2, 2017, the complainant sent a letter to the principal, requesting that the principal conduct a Harassment, Intimidation, and Bullying (HIB) complaint investigation into incidents of harassment on the bases of the Student’s race and disability (complaint 4). In this letter, the complainant reiterated her earlier concerns that the Student was XXXXXXXXX by another student, and that the Student was “routinely” bullied by other students who XXXXXXXXX; she also raised concerns about the teacher.<sup>13</sup> She asserted that she had previously written letters, but that she had not been informed whether an HIB investigation was conducted regarding any of the conduct alleged. In complaint 4, the complainant also reiterated the incident described in complaint 1, in which the Student was allegedly called a racial slur; and, referred to the same incidents detailed in complaints 2 and 3. The complainant also sent a copy of this letter to the Superintendent.

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<sup>11</sup> The complainant’s letters are addressed “to whom it may concern.” The complainant informed OCR that she sent each of her letters to multiple people. The District informed OCR that the case manager received the complainant’s letter dated April 20, 2017.

<sup>12</sup> In the letter dated April 20, 2017, the complainant also alleged that the teacher isolated the Student from other students and excluded the Student from activities, as discussed above with respect to Allegations 1 and 2; and, that the teacher referred to her class as “XXXXXXXXXXXX” and ignored the Student when he reminded her that he is XXXXXXXXXXXX, as discussed in Allegation 5.

<sup>13</sup> The complainant alleged that the Student had been separated from other students, as referred to in Allegation 1 of the instant complaint. The complainant also alleged that the teacher had ridiculed the Student and referred to her class as “XXXXXXX” as referred to in Allegation 5.

In response to complaint 4, the principal notified the anti-bullying specialist and provided her with a copy of the letter.<sup>14</sup> The anti-bullying specialist thereafter began an investigation of complaint 4 (which also referred to the same incidents detailed in complaints 2 and 3) by meeting with the Student, along with a CST social worker. When questioned, the Student identified a student (student B) who had XXXXXXXXXXXXXXXX on one occasion, but did not report any other incidents involving any other students, as referred to in complaints 2, 3, or 4. With respect to the incident involving student B, the Student referred to student B as his friend, but stated that “XXXXXXX” He also stated that when he asked student B to XXXXXXXXXXX, student B complied.

The anti-bullying specialist interviewed student B who informed him that he accidentally XXXXXXXXXXXX while they were playing “XXXXXXX” and XXX during lunchtime/recess. Both the Student and student B reported that student B helped the Student to XXXXXXXXXXXXXXXXXXXXXXXX. The anti-bullying specialist interviewed the School staff on duty during lunchtime, who informed her that they saw the Student XXXXXXXXXXX, and that student B helped XXXXXXXX.

The anti-bullying specialist held a conflict resolution between the Student and student B, in which she discussed appropriate ways to play. At the end of the meeting, both students agreed not to play in this manner again.<sup>15</sup> The anti-bullying specialist also identified, for the Student, adults whom he could notify if anything happened to him. The anti-bullying specialist continued to check in with the Student daily. The anti-bullying specialist informed OCR that she determined race was not at issue in complaint 4 based on the results of her investigation; aside from the racial slur previously reported in complaint 1 that was unsubstantiated following investigation. Complaint 4 (which included allegations raised in complaints 2 and 3) was closed on May 8, 2017.

On May 9, 2017, the School held the previously scheduled follow-up meeting with the complainant, which was attended by the case manager, the teacher, a CST social worker, a CST psychologist, the anti-bullying specialist, the vice principal, and the principal. At this meeting, the anti-bullying specialist explained the outcome of her investigations of complaints 1 and 4 (which included complaints 2 and 3), as described above, and scheduled a follow-up meeting with the complainant. In addition, the case manager stated that she would continue her observations of the Student in his classroom and during recess. The complainant was also invited to come to the School to observe the Student.<sup>16</sup> The case manager met with the Student and explained to him that he should notify his aide, teacher, and/or the CST if he experienced anything that made him upset.<sup>17</sup>

On May 17, 2017, the complainant met with the anti-bullying specialist and completed a written complaint form, stating that student B had XXXXXXX the Student XXXXXXXXXXXXXXXX and that

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<sup>14</sup> According to the incident tracking form corresponding to complaint 4, the complainant also made an oral report regarding the incidents in complaint 4 on May 5, 2017

<sup>15</sup> OCR reviewed the anti-bullying specialist’s handwritten notes from her meetings with the Student and student B.

<sup>16</sup> The District informed OCR that the complainant did not come to the School for any observations.

<sup>17</sup> The District informed OCR that the case manager confirmed the Student’s understanding of this information by having the Student repeat the information to the case manager.



the Student's XXXXXXXX as a result (complaint 5). In the complaint form, the complainant did not raise race (or any other discriminatory basis) as a concern.

In response to complaint 5, the anti-bullying specialist met with the Student, along with a CST staff member. The Student reported that he and student B were playing "XXXXXX" and XXX, but that student B began to XXXXXXXX as they played. The anti-bullying specialist determined that this complaint was unfounded, because she determined that student B was trying to "XXX" the Student with XXX, and that the students often pushed each other when playing XXX.

The anti-bullying specialist, along with a CST staff member, held another conflict resolution meeting between the Student and student B on May 18, 2017. In this meeting, the anti-bullying specialist again explained appropriate ways to play to both students. The anti-bullying specialist left a message for the complainant on May 18, 2017; missed the complainant's call on May 19, 2017; and, called the complainant again on May 22, 2017, but her voicemail was full. She and other School staff continued to monitor the Student during lunchtime and recess; and, modelled appropriate ways to play such as by briefly playing XX with the students to demonstrate how to XXXXXXXX. Complaint 5 was closed on May 22, 2017. The anti-bullying specialist continued her check-ins with the Student until the end of the school year.

On May 24, 2017, the complainant sent a letter to the Superintendent, in which she listed eight individuals in the District with whom she had attempted to address her concerns that the Student was being bullied by other students (complaint 6).<sup>18</sup> Specifically, she reported that the Student had been XXXXXXXXXXXX, 2017 (which included conduct similar to that previously investigated in complaint 5); that one student tried to XXXXXXXX every day, and another repeatedly XXXXX him (which included conduct similar to that previously investigated in complaint 2); and, that on XXXX, 2017, she had to take the Student to the doctor because his XXX XXXXXXXX(which included conduct similar to that previously investigated in complaint 5). In complaint 6, the complainant characterized the students' behavior as bullying, but she did not allege that the Student was harassed by other students because of his race. During the investigation of complaint 6, the Student reported to the anti-bullying specialist that the XXXXXXXXXXXX happened only on one occasion, and that it was with student B (as discussed above regarding complaint 5).

On May 30, 2017, the complainant met with the School anti-bullying specialist and the District-level anti-bullying specialist. During this meeting, School staff granted the complainant's request that the Student and student B not be allowed to play together anymore. Further, School staff monitored both students to ensure that they played separately during recess. OCR determined that no further incidents involving student B were reported for the remainder of the school year.

Based on the foregoing, OCR determined that the School responded promptly and thoroughly to each of the complainant's allegations raised in complaints 1 through 6; and, did not substantiate that the Student was subjected to bullying or harassment on the basis of his race. Many of the complainant's complaints to the District and/or School contained the same or similar allegations

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<sup>18</sup> In complaint 6, the complainant also stated that she was writing to the Superintendent because the teacher had separated the Student, who is the only XXXXXXXX student, from his classmates in the classroom since February 2017 because of his laughing and "XXXXXX" behavior, which is the subject of Allegation 1.

and were filed while investigations of prior complaints were ongoing; nevertheless, the School attempted to investigate and respond to the conduct that the complainant alleged. The School's response to the complaints included interviewing witnesses, including the Student; conducting conflict resolution sessions between the Student and student B to address the behavior at issue; and, holding meetings with the complainant and relevant administrators. Moreover, the District took several steps to address the complainant's concerns and prevent the occurrence of potential bullying, such as by visiting the Student and/or teacher every day and monitoring the Student's lunch and recess period when the conduct was alleged to have occurred. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District discriminated against the Student, on the basis of his race, by failing to respond to multiple complaints she filed with District administrators and staff between February and June 2017, alleging that his peers were harassing him.<sup>19</sup> Accordingly, OCR will take no further action regarding Allegation 5.

With respect to Allegation 6, the complainant alleged that the teacher discriminated against the Student, on the basis of his race, by making disparaging remarks about XXXXXXX while teaching the class between February and June 2017. The complainant asserted that on a daily basis, the teacher referred to students as "XXXXXXX" in reference to the class and ignored the Student. The complainant also stated that the teacher would tell students in the class how her husband, who is XXXXXXX, treated her badly. The complainant further asserted that, XXXXXXXXXXXXXXX, all students in the class were Hispanic.<sup>20</sup>

The teacher denied the complainant's allegation and informed OCR that for the past five years, she has received the highest rating in the category of "Culture and Community" on her performance evaluation, as judged by five separate administrators. A student witness whom OCR interviewed also denied hearing the teacher make any comments based on race.

OCR determined that following receipt of complaint 6, referenced in Allegation 5 above, the District referred the complainant's complaint to its Office of Labor and Employee Relations, which received the complaint on June 5, 2017, and investigated the complainant's concerns regarding the teacher. The employee investigation report summarized interviews of the complainant, six students from the teacher's class, the Student, and two teacher's aides. According to the employee investigation report, the complainant specifically alleged that the teacher referred to her class as "XXXXXXX" and said that "XXXXXXXXXXXX," "XXXXXXXXXXXXXXXXXXXX," and "XXXXXXX." When the students were interviewed, the only race-related comment that several students recalled the teacher making was during a conversation about sunburn, in which the teacher stated that she wished that she was like the students who had brown skin because they did not become sunburned; and, that the teacher noted that she did not get "that beautiful skin color." The employee investigation report noted that the Student otherwise stated that the teacher said "indirect" things that made him feel bad about being XXXXXXXXXXXXXXX such as that "Spanish people have beautiful skin"; and that on one occasion, the teacher stated that an XXXXXXX lady was arrested for speeding. The employee investigation report also noted that one of the aides

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<sup>19</sup> Neither the Student's academic performance nor behavior indicated that he did not receive a free appropriate public education (FAPE) as a result of the conduct alleged.

<sup>20</sup> OCR determined that the complainant made several complaints to the District/School (complaints 2, 4 and 6 mentioned above) about the teacher's conduct, alleging, in part, discrimination on the basis of race.

interviewed shared that the teacher had not made any negative statements about cultural differences; noting that as an XXXXXXXXXX, she would have spoken up had the teacher said anything discriminatory against XXXXXXXX. The Office of Labor and Employee Relations concluded that there was insufficient evidence to support that the teacher made comments that were derogatory or discriminatory as the complainant alleged. Similarly, OCR did not find that the complainant's assertions were supported by a preponderance of the evidence. Accordingly, OCR will take no further action with respect to Allegation 6.

With respect to Allegation 7(a), the complainant alleged that the District discriminated against the Student, on the basis of his disability, by failing to provide him with a 1:1 aide as required by his IEP. OCR determined that the Student's IEP for school year 2016-2017 required a 1:1 aide for 360 minutes per day (which is the entire school day, minus 20 minutes).

The District informed OCR that until February 2017, the Student had one aide assigned to him in the morning (the morning aide), and another aide assigned to him in the afternoon (the afternoon aide). In February 2017, the afternoon aide announced that she was leaving the School. In response, the School immediately arranged for another aide in the School to replace her until a permanent replacement could be found. Subsequently, in May 2017, the School arranged for the morning aide to be assigned to the Student for the full school day. The District provided OCR with records corroborating this account, as well as time reports confirming the aides' attendance.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District discriminated against the Student, on the basis of his disability, by failing to provide him with a 1:1 aide as required by his IEP. Accordingly, OCR will take no further action with respect to Allegation 7(a).

With respect to Allegation 7(b), the complainant alleged that the District discriminated against the Student, on the basis of his disability, by refusing to conduct his triennial evaluation that was due in or around May 2017. The regulation implementing Section 504, at 34 C.F.R. § 104.35(d), states that recipients are required to establish procedures for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Individuals with Disabilities in Education Improvement Act of 2004 is one means of meeting this requirement.

OCR determined that a reevaluation planning meeting took place on XXXXXXXXX, 2017, and that the complainant attended this meeting. During the meeting, the IEP team considered the Student's PARCC testing results and report cards, along with input from the complainant, the Student's speech therapist, and the Student's social worker. As a result of this meeting, the IEP team determined that no additional information or testing was required to continue the Student's eligibility for special education and related services under the classification of Communication Impaired. The District issued a determination letter to the complainant on XXXXXXX, 2017. OCR determined that this meeting was sufficient to satisfy the requirements of the regulation implementing Section 504 regarding reevaluations.<sup>21</sup>

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<sup>21</sup> The District subsequently conducted the Student's annual review during a meeting held on XXXXXXX, 2017.



OCR determined that the complainant engaged in protected activity by filing multiple complaints alleging discrimination on the basis of race between February and June 2017. OCR further determined that the District was aware of the complainant's protected activity.

OCR determined that on May 9, 2017, the School requested a behavioral consultation for the Student, based on the Student's behavior in the classroom, including XXXXXXXXXX his hands in the classroom and his short attention span and poor focus. The District informed OCR that it scheduled the consultation, including a classroom observation, for May 23, 2017.

The District informed OCR that the complainant's meeting with the XXXXX Specialist on May 23, 2017, was so long that the XXXX Specialist was unable to complete her classroom observation of the Student on the same day; therefore, she rescheduled the classroom observation for May 31, 2017.<sup>22</sup> On May 31, 2017, the date of the rescheduled classroom observation, the teacher unexpectedly left early, so a substitute teacher was present for the rest of the day, during which time the XXXXX Specialist conducted her observation for approximately one hour. As part of her assessment, the XXXXX Specialist also reviewed a log that the teacher had prepared from May 24-26, 2017, detailing the Student's behavior during particular activities, as well as the consequences of that behavior and other relevant notes about each incident. On June 13, 2017, the District held an IEP meeting for the Student, at which the XXXXX Specialist's evaluation was discussed. The District informed OCR that although the XXXXX Specialist could not attend the IEP meeting, as she was not part of the IEP team, she spoke with the complainant by telephone immediately after the IEP meeting at the complainant's request.

Based on the foregoing, OCR determined that, contrary to her assertion, the complainant spoke with the XXXXX Specialist both before and after the classroom observation. Further, OCR determined that in conducting the evaluation, the XXXXX Specialist considered not only her own observations on the date that the substitute teacher was present, but also the written observations of the Student's regular teacher. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the XXXX Specialist's evaluation of the Student was inappropriate because she conducted the classroom observation on a day when a substitute teacher was present. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 9.

With respect to Allegation 10(a), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by threatening the Student with a Saturday detention on XXXX, 2017, for an incident for which another student admitted wrongdoing. The complainant asserted that another student admitted to making a noise, but the teacher blamed the Student for making the noise and threatened the Student with a Saturday detention.

The teacher denied ever threatening any student with a Saturday detention. She also stated that she has never given a Saturday detention, and that she would not start with this action as an initial disciplinary consequence. OCR was unable to find any evidence supporting the complainant's assertion that the teacher threatened to give the Student a Saturday detention.

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<sup>22</sup> Documentation that the District submitted to OCR corroborates this account.

As noted above, OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant's assertion that the teacher threatened the Student with a Saturday detention on XXXXXX, 2017, was supported by a preponderance of the evidence. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 10(a).

With respect to Allegation 10(b), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by inappropriately disclosing information about the Student and the complainant's concerns about him to other staff and students at the School from February to June 2017. In support of her allegation, the complainant asserted that: (i) the teacher spoke with other teachers in the School about seating the Student separately to get him to do his work; (ii) during recess, aides would discuss information from the meetings that the complainant had with various School administrators, though the aides were not part of those meetings; and, (iii) another student (student C) knew that the Student was not supposed to play with a particular other student and student C could only have learned this information if the teacher had divulged it.

With respect to Allegation 10(b)(i), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by speaking with other teachers in the School about seating the Student separately to get him to do his work. The teacher acknowledged that she had spoken with other teachers in the School about the Student; explaining that she had consulted with his prior teachers only about his progress and about the strategies that they had found successful in educating him, including seating him separately to do his work.

Based on the foregoing, OCR determined that the teacher had a legitimate, non-retaliatory reason for speaking with other teachers in the School about seating the Student separately to get him to do his work; namely, she consulted with his prior teachers about strategies that they found successful in educating him. OCR did not find that the proffered reason was a pretext for retaliation, because the teacher's account of her discussions with the other teachers was consistent with the complainant's assertions about what was discussed; and, the teacher implemented the other teachers' suggestions, such as the seating arrangements as discussed above in Allegation 1. Accordingly, OCR will take no further action with respect to Allegation 10(b)(i).

With respect to Allegation 10(b)(ii), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by disclosing information about the Student to aides. Specifically, the complainant alleged that, during recess, aides would discuss information from the meetings that the complainant had with various School administrators, though the aides were not part of those meetings. The complainant did not identify particular aides with whom she alleged that the teacher had spoken; but stated that while she could not pinpoint how information was spreading, she believed the teacher was the source. The teacher denied speaking to any staff other than the Student's former teachers, as described above in Allegation 10(b)(i). Other District witnesses also denied any knowledge of other aides or staff becoming aware of what was discussed in the complainant's meetings with the District.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant's assertion that the teacher inappropriately disclosed information about the Student to aides at the School was supported by a preponderance of the evidence. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 10(b)(ii).

With respect to Allegation 10(b)(iii), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by disclosing information about the Student to other students. Specifically, the complainant stated that student C knew that the Student was not supposed to play with a particular other student and student C could only have learned this information if the teacher had divulged it. The complainant stated that she did not know who student C was, but that he approached the Student on the playground and asked him, "didn't your mom say you can't play with him [another student]?" The teacher denied knowledge of any other students learning of such information about the Student from her or any other school staff. District witnesses acknowledged that some students were interviewed as part of the School's investigation of the complainant's various complaints, but stated that they were not aware of students gaining particular knowledge about the Student or complainant.

As stated above, OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the complainant's assertion that the teacher inappropriately disclosed information about the Student to other students was supported by a preponderance of the evidence. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action with respect to Allegation 10(b)(iii).

With respect to Allegation 10(c), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by making disparaging comments toward the Student from February through June 2017. In support of her allegation, the complainant asserted that the teacher: (i) made the Student cry on numerous occasions; (ii) humiliated him in front of other students by making comments such as "XXXXXX" when the Student had helped another student to XXXXXXXXXXXXXXXXXXXX, and publicly chastising him for "telling [his] mother everything"; and, (iii) told him that she was so angry with him that she "wanted to explode."

With respect to Allegation 10(c)(i), the complainant alleged that the teacher retaliated because the complainant filed multiple complaints with the District alleging race discrimination, by making the Student cry on numerous occasions. The teacher stated that the Student had never cried in her classroom.<sup>23</sup> OCR found no evidence that the Student cried in the teacher's classroom. Moreover, the complainant did not provide any specific factual information regarding the circumstances under which the teacher allegedly made the Student cry.

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<sup>23</sup> The teacher stated that she recalled only one time that the Student cried in School, and that it was because of an incident that happened with another student during lunchtime.





implementation of the Agreement. Upon the District’s satisfaction of the commitments made under the Agreement, OCR will close the case.

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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because the individual 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.

The complainant has a right to appeal OCR’s determination as to Allegations 1 and 3-9 within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect, or the appropriate legal standard was not applied; and, how correction of any error(s) would change the outcome of the case. Failure to do so may result in dismissal of the appeal. If the complainant appeals OCR’s determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit, to OCR, a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

If you have any questions, please contact Felice Bowen, Compliance Team Leader at (646) 428-3806 or [felice.bowen@ed.gov](mailto:felice.bowen@ed.gov).

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
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Timothy C.J. Blanchard

Encl.

cc: XXXXXXXX  
XXXXXXXXXX, Esq.