

August 28, 2018

James L. Albro
Superintendent
Wallington Public School District
32 Pine Street
Wallington, New Jersey 07057

Re: Case No. 02-18-1210
Wallington Public School District

Dear Superintendent Albro:

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 Wallington Public School District (the District). The complainant alleged that the District discriminated against her son (the Student), on the bases of his race (Allegation 1) and disability (Allegation 2), by disciplining him on numerous occasions during school year 2017-2018.

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 also 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 and activities receiving financial assistance from the Department. In addition, 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. 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.

In its investigation, OCR interviewed the complainant and District staff members. OCR also reviewed information that the complainant and the District submitted.

OCR determined that the Student was enrolled in the XX grade at the District's Jr/Sr High School (the School) during school year 2017-2018. OCR further determined that the Student had

a Section 504 Plan in effect for school year 2017-2018, dated XXXXX, which had been developed XXXXX. OCR determined that the Student's Section 504 plan did not exempt him from discipline.¹ OCR also determined that during school year 2017-2018, the Student was disciplined XX times for violations of the District's Code of Conduct (the Code), including for XXXXX.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his race (XXXXX), by disciplining him on numerous occasions during school year 2017-2018 for (a) dress code violations and (b) fighting. In support of her allegation, the complainant asserted that the Student was treated differently from white students with respect to disciplinary sanctions imposed for these types of infractions.² The complainant further stated that after an incident in which two white students were fighting in XXXXX class, but not suspended, the Student's XXXXX teacher told the Student that he would have been suspended if he had been fighting.

OCR determined that the Code does not include any general provisions regarding progressive discipline. The School's principal stated that when determining an appropriate disciplinary response to an infraction, the School considers previous infractions if they are similar in nature to the current incident. The principal further stated that for certain violations, such as dress code violations, tardiness, cutting class or detention, and smoking, the Code explains how previous infractions will affect the disciplinary response. The Code does not state how prior disciplinary referrals or consequences would affect disciplinary outcomes for subsequent incidents of fighting.

With respect to Allegation 1(a), the complainant alleged that the District discriminated against the Student, on the basis of his race, by disciplining him on numerous occasions during school year 2017-2018 for dress code violations. OCR determined that the School's dress code requires all District students to wear royal blue, white, or grey polo shirts; and khaki, black, or non-denim navy blue slacks, skirts, shorts, or capri pants. All other attire is prohibited. The Code prescribes specific and escalating consequences for dress code violations. For all dress code violations, the Code states that the student's parent or guardian would be contacted and asked to bring appropriate clothing to school; the student would have the opportunity to change; and, the student would receive a warning. For a first incident, there is no further punishment. For subsequent dress code violations, in addition to the student having his or her parent contacted, the student would receive the following disciplinary consequences: for a second incident, an after-school detention; for a third incident, another after-school detention; for a fourth incident, a Saturday detention; for a fifth incident, an after-school detention with a five-point citizenship deduction;³ for a sixth incident, another Saturday detention with another five-point citizenship deduction; and, for a seventh violation, a one-day out-of-school suspension with a five-point citizenship deduction and a mandatory parent meeting.

¹ The Student's Section 504 plan contained items supporting the Student's learning, including XXXXX. It also contained provisions to assist with behavior, including XXXXX.

² The complainant did not provide the names of these white students.

³ The principal stated that the School employs a system of citizenship points; failure to maintain a certain number of points affects students' eligibility to participate in activities such as school dances.

OCR determined that on XXXXX, 2018, the Student was referred for wearing “sweatpants” to school, in violation of the dress code (incident 1), his first violation of the dress code. The Student received a warning for incident 1. On XXXXX, 2018, the Student was again referred for wearing “gray sweatpants” to school in violation of the dress code (incident 2), and received an after-school detention. On XXXXX, 2018, the Student was referred for wearing “sweatpants” in violation of the dress code (incident 3); he received an after-school detention for incident 3. On XXXXX, 2018, the Student was referred for a fourth violation of the dress code because he wore the “wrong color pants” to school (incident 4); he received a Saturday detention. The complainant did not dispute that the Student violated the dress code on these occasions. OCR determined that the Student’s disciplinary sanctions for incidents 1-4 were consistent with the Code. OCR reviewed the School’s log of all dress code violations for school year 2017-2018, and determined that all students, regardless of race, received disciplinary sanctions for such violations, consistent with the Code. As stated above, the complainant was unable to identify, and OCR did not identify, any similarly-situated white students who were treated more favorably.

Based on the foregoing, OCR determined that the District proffered a legitimate, non-discriminatory reason for the disciplinary consequences imposed on the Student for violating the dress code on four occasions during school year 2017-2018; namely, the Student was not in compliance with the dress code on the occasions in question. OCR did not find evidence to substantiate that the proffered reason was a pretext for discrimination, as it is undisputed that the Student was out of compliance with the dress code on those dates; and, the sanctions imposed were consistent with the Code and with the disciplinary responses imposed for similarly-situated white students for dress code violations. 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 disciplining him more harshly than white students for dress code violations during school year 2017-2018. Accordingly, OCR will take no further action with respect to Allegation 1(a).

With respect to Allegation 1(b), the complainant alleged that the District discriminated against the Student, on the basis of his race, by disciplining him on numerous occasions during school year 2017-2018 for fighting. OCR determined that the Student was referred for discipline for fighting four times: XXXXX, 2017 (fight 1); XXXXX, 2017 (fight 2); XXXXX, 2018 (fight 3); and, XXXXX, 2018 (fight 4). The complainant did not dispute that the Student engaged in the fights on these dates. The Code states that students determined to be aggressors when fighting will be subject to out-of-school suspension, and students determined to be non-aggressors will be subject to Saturday detention.

With respect to fight 1, on XXXXX, 2017, the Student was disciplined for “hitting and kicking another student,” whom OCR determined to be a white classmate (student A). Student A was also disciplined for “hitting and kicking another student;” namely, the Student. Both the Student and student A received a one-day, out-of-school suspension for their participation in fight 1. Neither the Student nor student A had any previous suspensions; however, both had multiple referrals for lesser infractions that had resulted in detention.⁴ The Principal stated that since both

⁴ The Student had XXXXX previous referrals; XXXXX. Student A had XXXXX prior referrals; XXXXX.

students' previous referrals were for violations unrelated to fighting, they did not affect the School's decision regarding the appropriate disciplinary sanction.

With respect to fight 2, on XXXXX, 2017, the Student and student A were disciplined for fighting XXXXX; each received a three-day, out-of-school suspension. OCR determined that this was the second incident of fighting for both the Student and student A.

With respect to fight 3, on XXXXX, 2018, the Student and student A were disciplined for fighting a third student (student B) during XXXXX. The Student and student A each received a three-day, out-of-school suspension for their participation in fight 3. OCR determined that this was the third incident of fighting for both the Student and student A.

With respect to fight 4, on XXXXX, 2018, the Student and student A were disciplined for fighting; the discipline referral states that both boys claimed XXXXX. OCR determined that the Student and student A each received a one-day, in-school suspension for fight 4. This was the fourth incident of fighting for both the Student and student A.

OCR reviewed the disciplinary responses the School imposed for all 30 referrals for fighting during school year 2017-2018. OCR did not find evidence of a disparity between white and non-white students with respect to the imposition of disciplinary consequences for fighting.⁵

Based on the foregoing, OCR determined that the District proffered legitimate, non-discriminatory reasons for the disciplinary consequences imposed on the Student for fighting during school year 2017-2018; namely, the incidents for which the Student was referred for discipline constituted violations of the Code, and the disciplinary responses imposed were consistent with the Code. OCR did not find evidence to substantiate that the proffered reasons were a pretext for discrimination, as it is undisputed that the Student engaged in the conduct alleged; and, the sanctions imposed were consistent with the Code and consistent with the disciplinary responses imposed for a similarly situated white student who was also involved in fights 1 through 4. 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 disciplining him more harshly than white students for fighting, during school year 2017-2018. Accordingly, OCR will take no further action with respect to Allegation 1(b).

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student, on the basis of his disability, by repeatedly disciplining the Student during school year 2017-2018, for behaviors the School knew were related to the Student's disability. Specifically, the complainant stated that the Student has XXXXX, and the School repeatedly disciplined him

⁵ OCR determined that 18 of the 30 referrals resulted in out-of-school suspension; 10 resulted in Saturday detention; and, 2 resulted in in-school-suspension. These outcomes were proportional by race; for example, 7 out of 14 referrals of white students resulted in out-of-school suspension, as compared with 7 out of 11 referrals of Hispanic students, and 4 out of 5 referrals of multi-racial students. Using a one-sample Z-test of proportions, OCR determined that XXXXX students were not overrepresented to a statistically significant degree in fighting violations that led to out-of-school suspension. Additionally, OCR determined that there were 9 incidents of fighting that involved 2 students of different races, including the 4 incidents involving the Student and student A; and in all 9 instances, both students received the same disciplinary response.

for behaviors that were related to his disability XXXXX, such as disruptive behavior and insubordination, but did not evaluate him or otherwise consider the impact of his disability on his behaviors.

OCR determined that the Student's Section 504 Plan, dated XXXXX, required, among other things, that the Student be provided with XXXXX.⁶ The Student's Section 504 plan did not identify the Student's disability, exempt him from discipline, or describe how the Student's disability affected his behavior.

As stated above, OCR determined that during school year 2017-2018, the Student received XX disciplinary referrals for disruptive, inappropriate, defiant, or insubordinate behavior. The complainant asserted that these behaviors were related to the Student's disability.⁷ District administrators informed OCR that the complainant asserted during school year 2017-2018 that the Student had XXXXX that affected his behavior. The District stated that, in response, School officials requested that the complainant provide a medical diagnosis and updated medical information for the Student, in order to update the Student's Section 504 plan. School staff members acknowledged that the Student was among the XXXXX at the School and that the School intended to create an updated Section 504 plan. The District stated that, to date, the complainant has not provided updated medical information to the District; and as a result, the District has not updated the Student's Section 504 plan.

The principal and XXXXX stated to OCR that the Student's Section 504 plan needed to be updated because it was "cursory" and lacked sufficient information about the Student's disability. The XXXXX stated that the School generally conducts Section 504 review meetings at the beginning of the school year, but the School did not conduct a Section 504 meeting for the Student at the beginning of school year 2017-2018 because the complainant did not provide the updated medical information they requested.

OCR determined that on September XX, 2017, the XXXXX spoke with both the Student and the complainant about the Student's behavioral and academic issues, and again requested medical information in order to update the Student's Section 504 plan. Information the District provided indicated that XXXXX met with the Student and/or contacted the complainant to express concern about the Student's performance on XXXXX. OCR further determined that the School's XXXXX requested that the complainant provide information regarding the Student's disability on September XX and XX, October XX and XX, and November XX, 2017. The

⁶ The complainant did not allege that the District failed to implement the Student's Section 504 plan.

⁷ The regulations implementing Section 504 and the ADA do not prohibit a school district from disciplining a disabled student in the same manner as a non-disabled student, unless otherwise specified in the student's Individualized Education Program or Section 504 plan; however, if the discipline results in excluding the student from his/her placement for more than ten consecutive school days (or in some cases for more than ten non-consecutive school days), then the exclusion constitutes a significant change in placement under Section 504. The determination of whether the series of suspensions creates a pattern of exclusion that constitutes a significant change in placement is made on a case-by-case basis, taking into consideration the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from school. OCR determined that the Student received XXXXX. OCR, therefore, determined that the Student's disciplinary exclusions from his educational placement and services did not exceed ten days during school year 2017-2018.

XXXXX also spoke with the complainant on March XX and XX, 2018, to discuss the possible evaluation of the Student by the Child Study Team (CST).

OCR determined that on XXXXX, 2018, the complainant submitted a formal request for the CST to evaluate the Student. OCR determined that in preparation for the CST meeting, the Student's teachers provided progress reports indicating that the Student was disruptive in class and required constant supervision. On XXXXX, 2018, the CST met. The meeting attendees included XXXXX, the Student's XXXXX, the Student's teachers, and the complainant. The CST determined XXXXX.

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), provides that it is a district's responsibility to conduct an evaluation, in accordance with the requirements of 34 C.F.R. §104.35(b), of any student who needs or is believed to need special education and/or related aids or services because of a disability. In accordance with the regulation implementing Section 504, at 34 C.F.R. § 104.33, a recipient is required to provide a free appropriate public education to qualified disabled students, which includes special education and/or related aids and services that are designed to meet the individual educational needs of the disabled student as adequately as the needs of non-disabled students are met. In determining whether a district has an obligation to evaluate a student, OCR considers the indicia of disability that were available to the district suggesting a need for special education and/or related aids and services.

Based on the foregoing, OCR determined that as early as September 4, 2017, the District determined that the Student's Section 504 was not adequate to meet his needs, thereby triggering its obligation pursuant to Section 504 to conduct a reevaluation of the Student. The District acknowledged that the plan developed XXXXX was cursory and lacked necessary information. Furthermore, the Student's XXXXX disciplinary referrals, the expressed concerns from his teachers regarding his academic performance and disruptive behavior, and the complainant's reports of the Student's diagnosis provided sufficient indicia of a disability to suggest the need for special education and/or related aids and services. The District asserted that it was unable to update the Student's Section 504 plan because the complainant failed to submit documentation of the Student's disability; however, a parent's failure to provide such documentation under the circumstances described does not absolve the District of its obligation to evaluate the Student.

On August 28, 2018, the District signed the attached resolution agreement to resolve Allegation 2. 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 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 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 Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or jonathon.lebeau@ed.gov; Alexander Artz, Compliance Team Attorney, at (646) 428-3901 or alexander.artz@ed.gov; or Anna Moretto Cramer, Compliance Team Leader, at (646) 428-3826 or anna.moretto.cramer@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: **Patrick J. Madden, Esq.**