



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
32 OLD SLIP, 26TH FLOOR
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD
DIRECTOR
NEW YORK OFFICE

October 28, 2019

Dr. Edwin M. Quezada
Superintendent
Yonkers Public Schools
One Larkin Center
Yonkers, New York 10701

Re: Case No. 02-19-1302
Yonkers Public Schools

Dear Dr. Quezada:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the Yonkers Public Schools (the District). The complainant alleged that the District discriminated against her son (the Student), on the basis of his race, by isolating him in the classroom from September 2018 through February 13, 2019 (Allegation 1); failing to provide academic intervention services during school year 2018-2019 (Allegation 2); and, requiring the Student to eat lunch with XXXXXX instead of with his XXXXXX grade peers during school year 2018-2019 (Allegation 3). The complainant further alleged that the District discriminated against the Student, on the bases of his (a) disability and/or (b) race, by failing to timely evaluate the Student to determine whether he was eligible for special education and/or related aids and services (Allegation 4).

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 documentation that the complainant and the District submitted. OCR made the following determinations.

OCR determined that during school year 2018-2019, the Student was enrolled in XXXXXX grade classes in the District's School 21 (the school). The Student's class had 26 other students, of whom 21 are white students; 2 are black students; 2 are Asian students; and, 1 is a Pacific Islander.

With respect to Allegation 1, the complainant alleged that the District discriminated against the Student, on the basis of his race (African-American), by isolating him in the classroom from September 2018 through February 13, 2019.¹ The complainant stated that during a visit to the classroom on XXXXXX, 2019, she observed that the Student was seated off to the side, by himself, while the majority of the other students were seated in groups at tables. The complainant stated that she observed three other students seated separately from the rest of the class, but they were seated closer to the classroom teacher. The complainant asserted that the Student was seated separately because of his race, as she believed that the Student was the only black student in the class.² The complainant acknowledged that this was her only visit to the classroom in school year 2018-2019.

The regulation implementing Title VI, at 34 C.F.R. §100.3(a), provides that no person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program operated by a recipient. The regulation implementing Title VI, at 34 C.F.R. §§ 100.3(b)(1)(i)-(v) and (2), states that a recipient under any program to which Title VI applies may not, on the ground of race, color or national origin, deny any individual any service or other benefit provided under the program; provide any service or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; subject an individual to segregation or separate treatment in any matter related to his/her receipt of any service or other benefit under the program; restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service or other benefit under the program; treat an individual differently from others in determining whether he/she satisfies any eligibility or other requirement or condition which individuals must meet in order to be provided any service or other benefit under the program; or, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.

The teacher and a school aide who assisted in the teacher's classroom during school year 2018-2019 stated that, at the beginning of school year 2018-2019, the teacher seated all of the students in the class in groups of four. As the year progressed, the teacher made adjustments to the seating arrangements based on student needs and relationships; for example, by rotating students to different groups, or by seating a student at a desk on their own near the teacher's desk for a period of time. The teacher and the aide stated that the Student started off in a randomly assigned group with three other students and remained in the group into November 2018. The teacher stated that the Student had difficulty keeping up with the work in the group; he also was talkative, walked around the classroom, and slept or played at the desk. The teacher implemented several strategies

¹ The Student was XXXXXX.

² As stated previously, there were three black students in the class, including the Student.

to assist him within the group, including assigning a buddy, employing a behavior modification chart, and positive behavior support (i.e., a reward for remaining in his seat during the week); however, none of these was successful in the long term. The teacher stated that in or around November 2018, she moved the Student's seat closer to her desk, so she could more readily assist him. The teacher also stated that, after November 2018, she seated the Student with "almost every group in the classroom," but he did best when seated separately near her desk. The aide corroborated the teacher's assertions; and, stated that the change resulted in fewer disruptive behaviors. The teacher stated that it was not uncommon for a student to be seated separately from the groups at times. She stated that she did not create or keep any records of seating assignments, but she recalled two white students whom she occasionally seated near her desk. OCR determined that the two other black students in the class were seated in groups.

A school social worker familiar with the Student stated that she frequently passed the Student's classroom between September 2018 and February 13, 2019, and most often observed the Student seated at a table with three classmates. She stated that, on occasion, she observed him seated by himself working at a computer, or near the teacher's desk.

Based on the above, OCR determined that the preponderance of the evidence did not indicate that the Student was seated separately from the class from September 2018 through February 13, 2019, as alleged; rather, OCR determined that from September through November 2018, the Student was seated in a group with three other students. OCR also determined that between November 2018 and February 13, 2019, there were periods when the Student was seated in a group and periods when the Student was seated by himself, near the teacher's desk. The District proffered a legitimate, non-discriminatory reason for the Student's sitting separately during those periods; namely, sitting apart from the group improved the Student's off-task behaviors and learning. OCR determined that the proffered reason was not a pretext for discrimination, because similarly situated white students were also seated separately and the other two black students in the class were seated in groups. 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 isolating him in the classroom from September 2018 through February 13, 2019. Accordingly, OCR will take no further action regarding Allegation 1.

With respect to Allegation 2, the complainant alleged that the District discriminated against the Student, on the basis of his race, during school year 2018-2019, by failing to provide academic intervention services. The complainant stated that the teacher told her that the Student was the lowest performing student she had taught; however, the Student was excluded from Title I math support for students who need extra help. The complainant asserted that the denial of academic intervention services to the Student was due to his race, because during a telephone call on or about September 20, 2018, the teacher said in reference to the Student, "kids like these, they don't know their ABC's, they end up drug dealers their entire lives."

The teacher denied stating on September 20, 2018, or at any time, "kids like these, they don't know their ABC's, they end up drug dealers their entire lives." The teacher stated that during school year 2018-2019, the school provided pull-out math and/or reading instruction services to approximately six to eight students performing below grade level, for each subject, from each XXXXXX grade class. The XXXXXX grade teachers were responsible for referring students for

Title I math and/or reading services after the first few weeks of school. The teacher stated that she recommended students for Title I services based on the students' scores on the District's Measure of Academic Progress (MAP) math test, her own assessment of the students' academic abilities and needs during the first weeks of school, and her judgment about which students would benefit most from the service; for example, the teacher stated that she recommended students who had scored a 1 or 2 on the MAP test, and whom she believed, based on their classroom performance, would be able to move to a score of 2 or reach grade level performance.

The teacher stated that when the Student entered the XXXXXX grade, he was academically below grade level in both reading and math based on his MAP test scores and his classwork; and, behind most of his peers. The teacher stated it is not uncommon for a student to begin XXXXXX at a level similar to the Student's, and that in general students make progress with academic support. The teacher stated that she believed that the Student would benefit from small group pull-out reading support; and, recommended him for Title I reading services, which began approximately three weeks into the school year. She did not, however, recommend the Student for Title I math. The teacher stated that she believed that the Student would not have benefitted from the pull-out Title I math services, because the Student had more significant academic needs in math (e.g., he did not know XXXXXX), which were better suited to one-on-one assistance. The teacher stated that she worked with the Student one-on-one, in order to provide him with individual attention, during class "workshop," which she conducted every day in the classroom. She also arranged for the Student to receive individual academic support from a retired teacher who provided tutoring in the classroom, and from fifth grade students who provided peer tutoring every morning. Additionally, she employed a computer-based academic support program called Moby Max, designed to help students to develop mastery of their letters and numbers.³ The XXXXXX agreed that the Student would not have benefitted from the pull-out Title I math services because he was too far behind.⁴

OCR determined that the teacher referred eight students for Title I math services; of these, five are white students, one is an Asian student, one is a black student, and one is a student whose race was not identified. OCR reviewed the spring 2018 MAP math test scores for the class, and found that the Student had the second-lowest score in the class. A white student who scored lower than the Student on the MAP similarly was not referred for Title I math services.

Based on the foregoing, OCR determined that, contrary to the complainant's allegation, the District provided reading academic intervention services to the Student. Further, OCR determined that the

³ The teacher stated that she frequently contacted the complainant by telephone or written note to inform her of the Student's academic and behavioral challenges, and to enlist her help with the Student's homework and academic reinforcement. Additionally, the teacher stated that she referred the Student to the school's Pupil Support Team (PST), which provides additional support for struggling students. The PST includes the child's teacher, parent, guidance staff member, administrator, school psychologist, and other staff as appropriate. The school's XXXXXX PST meetings stated that the teacher requested a meeting for the Student on the first day the team accepted referrals; October 1, 2018. The XXXXXX stated that she and the teacher attempted on multiple occasions to schedule PST meetings with the complainant; but the complainant repeatedly canceled, rescheduled, or failed to appear. The teacher stated that, although the PST meeting did not take place, she implemented additional supports in the classroom for the Student, such as modifying his classwork and homework.

⁴ The XXXXXX stated that she began working with the Student in February 2019, but she made little progress with the Student, who would rarely engage in the work.

District proffered a legitimate, non-discriminatory reason for not providing the Student with Title I math services during school year 2018-2019; namely, his academic needs were greater than the support offered in Title I math services. OCR determined that the proffered reason was not a pretext for discrimination because there was at least one similarly situated white student who was not referred for Title I math services; and, and at least one other black student who was referred for Title I math services. Additionally, OCR determined that the school provided alternative academic intervention services for the Student, including one-on-one tutoring, peer tutoring, computer-based academic support, and modified curricula. 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, during school year 2018-2019, by failing to provide academic intervention services. Accordingly, OCR will take no further action regarding Allegation 2.

With respect to Allegation 3, the complainant alleged that the District discriminated against the Student, on the basis of his race, during school year 2018-2019, by requiring the Student to eat lunch with XXXXXX students instead of with his XXXXXX grade peers. The complainant stated that, as a result, the Student missed instruction in class. The complainant asserted that the Student was excluded from the XXXXXX grade lunch because she believed that he was the only black student in the class, and because of the teacher's alleged comment on or about September 20, 2018.

OCR determined that XXXXXX grade students shared the same lunch period; however, XXXXXX students ate lunch first and then participated in recess, whereas, XXXXXX grade students had recess first, and then ate lunch. The teacher acknowledged that the Student ate lunch with XXXXXX students for approximately one month, from mid-January to February 13, 2019. She stated that the Student had a conflict with a classmate (student A),⁵ during the lunch and recess period, XXXXXX, and the principal proposed that the students be separated at lunchtime. The teacher stated that the Student did not miss any instruction during the period when he joined the XXXXXX students for lunch and recess, because the XXXXXX grade class also had lunch and recess during the same period. The teacher stated that the Student had a good relationship with the XXXXXX teacher, who had taught him XXXXXX, and who was supervising the lunch, which would help his behavior; therefore, the principal determined that the Student should eat lunch with the XXXXXX students temporarily because he had been the aggressor during the incident with student A.⁶ The two other black students in the Student's class continued to eat lunch with the XXXXXX grade.

The principal acknowledged that she assigned the Student to lunch with the XXXXXX students after the Student's conflict with student A on XXXXXX, was brought to her attention. She stated that this was a low-level concern and a common occurrence that she addresses without a formal disciplinary response. She stated that assigning students to a different lunch is a frequent solution, but there is no investigation or record because these involve low-level incidents. The principal stated that she moved the lunch periods of students of other races during school year 2018-2019,

⁵ Student A is white.

⁶ The teacher stated that she informed the complainant about the adjustment to the Student's lunch period. The teacher's log of her telephone calls with the complainant contains an entry on XXXXXX, relating to the incident between the Student and student A.

but she did not recall any particular students, and did not keep notes. The principal stated that after the Student XXXXXX, he resumed eating lunch with the XXXXXX grade students.

Based on the above, OCR determined that the District proffered a legitimate, non-discriminatory reason for the Student's assignment to eat lunch with the XXXXXX students from XXXXXX; namely, the Student was the aggressor in a conflict with student A; the principal believed that the situation between the Student and student A could be resolved by temporarily separating the students during lunch; and, the Student had a good relationship with the XXXXXX teacher supervising the lunch, so the principal believed the Student was the better of the two to eat lunch with the XXXXXX students. OCR determined that the proffered reasons were not a pretext for discrimination, because the principal acted consistent with her practice for such issues arising at lunch; and, the other black students in the class were not similarly assigned to eat with the XXXXXX students. Further, as of XXXXXX, the Student was no longer assigned to eat lunch with the XXXXXX students. 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, during school year 2018-2019, by requiring the Student to eat lunch with XXXXXX students instead of with his XXXXXX grade peers. Accordingly, OCR will take no further action regarding 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/or (b) race, by failing to timely evaluate the Student to determine whether he was eligible for special education and/or related aids and services. The complainant stated that she hand-delivered to the District's central office a request for the Student to be evaluated for special education during fall 2018; however, there was no response from the District until February XXXXXX, 2019, when the complainant returned to the central office and signed a form consenting to the Student's evaluation. The complainant stated that months later, the District had not evaluated the Student. She asserted that the District's delay was discriminatory on the basis of race, because she believes the District considers black students to be "a throwaway and a waste of time."

The regulation implementing Section 504, at 34 C.F.R. § 104.35(a), provides that a "recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education." Section 504 and its implementing regulations do not specify a time frame for evaluating students believed to need special education and related services. New York state regulations adopt a 60-day timeframe from the time a parent provides consent to evaluate to the completion of the evaluation.⁷

The District's Policies, Practices, and Procedures for Assuring Appropriate Educational Services and Due Process in Evaluation and Placement of Students with Disabilities (the policy), provide that upon receipt of a referral, the Committee on Special Education (CSE) will promptly request written parental consent to evaluate the student. After obtaining the parent's/guardian's signed consent, the CSE determines the evaluations or assessments necessary to appropriately assess the

⁷ See, N.Y. Comp. Codes R. & Regs. Tit. 8, § 200.4(b)(1).

student and schedules those evaluations. Once the evaluations are completed, the CSE convenes a meeting to determine the student's initial eligibility for special education and related services. The policy states that the District is responsible for arranging for appropriate special education programs and services within sixty (60) days of the date of receipt of the parent's/guardian's written consent for evaluation.⁸

OCR determined that on October XXXXXX, 2018, the District received the complainant's written request for the Student to be evaluated for special education due to his low academic performance in XXXXXX and XXXXXX grade. By letter dated October XXXXXX, 2018, the District informed the complainant that the Student had been referred to the CSE, which required her written consent to conduct an evaluation to determine the Student's initial eligibility for special education services. The letter also provided to the complainant information about the evaluations the District proposed to conduct and the complainant's Procedural Safeguards. The complainant did not submit to the District her signed consent to evaluate the Student until February XXXXXX, 2019, when she visited the District's central offices to express her concerns about the Student's educational progress.⁹

OCR determined that the District conducted an Occupational Therapy Evaluation on June XXXXXX, 2019, and a Psychological Evaluation and Social History on June XXXXXX, 2019, and convened the CSE on July XXXXXX, 2019, approximately 146 days after it received the complainant's signed consent to evaluate the Student. The CSE determined that the Student was eligible for special education and related services; classified the Student as XXXXXX; and, recommended that the Student be placed in XXXXXX. The CSE also recommended that the Student receive XXXXXX services. The CSE did not discuss the Student's need for any remedial and/or compensatory services resulting from the District's delay in evaluating the Student and determining his eligibility for special education and related services.

Prior to OCR's completing the investigation of Allegation 4(a), on October 28, 2019, the District signed the enclosed agreement to resolve Allegation 4(a) without further investigation. OCR will monitor the implementation of the resolution agreement. Upon the District's satisfaction of the commitments made under the agreement, OCR will close the case.

OCR determined that 23 students at the school, including the Student, were referred to the CSE for initial evaluations and for whom the District received signed parental consent to evaluate during school years 2016-2017, 2017-2018, and 2018-2019.¹⁰ Of these, 5 are black, 17 are white, and 1 is American Indian/Alaskan Native. Of the 23 students referred, the District evaluated and convened CSE meetings (as of July 24, 2019) for 14 students.¹¹ Of these 14 students, 3, including the Student, are black students, and 11 are white students. The average number of calendar days between the receipt of parental consent to evaluate and the convening of a CSE meeting for the 11

⁸ See, <https://www.yonkerspublicschools.org/Page/1728> (site last visited on October 25, 2019).

⁹ District staff informed OCR that the District does not remind parents/guardians of the need for the signed consent form in order to evaluate students referred to the CSE.

¹⁰ There also were 2 black students, 17 white students, and 1 American Indian/Alaskan Native student who were referred to the CSE for evaluation, but for whom the District had not received signed consent forms from parents/guardians.

¹¹ There were 2 black students, 6 white students, and 1 American Indian/Alaskan Native student for whom the District had received consent forms but had not convened CSE meetings.

white students was 207 calendar days. The number of days between the District's receipt of the complainant's written consent to evaluate the Student on February XXXXXX, 2019, and the convening of the CSE on July XXXXXX, 2019, was 146 calendar days; 61 fewer days than the average number of days for white students who were evaluated.

Based on the foregoing, OCR determined that the Student was treated more favorably than his similarly situated white peers regarding the amount of time it took to convene a CSE after the complainant provided consent for his evaluation. 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 timely evaluate the Student to determine whether he was eligible for special education and/or related aids and services. Accordingly, OCR will take no further action regarding Allegation 4(b).

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.

The complainant has a right to appeal OCR's determination regarding Allegations 1, 2, 3 and 4(b), 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 regarding OCR's determination, please contact Andy Artz, Compliance Team Attorney, at (646) 428-3901 or alexander.artz@ed.gov; Jonathon LeBeau, Compliance Team Investigator, at (646) 428-3790 or jonathon.lebeau@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: Michelle Klemperer, Esq.