



**Complaint against the South Orange Maplewood School District under
Title VI of the Civil Rights Act of 1964 and
Section 504 of the Rehabilitation Act of 1973**

October 9, 2014

Re: Complaint against the South Orange Maplewood School District under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973

This Complaint, filed by the ACLU of New Jersey, the ACLU Racial Justice Program, the Center for Civil Rights Remedies at the Civil Rights Project of UCLA, A.B. and B.B. on behalf of C.B., and X.Z. and Y.Z. on behalf of Z.Z., alleges that academic tracking and the frequent use of out-of-school suspension (hereinafter “suspension”) by the School District of South Orange and Maplewood (SOMSD or “the District”), New Jersey violate the Department of Education’s regulations interpreting Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.¹

Applying a “disparate impact” theory, this Complaint seeks to vindicate the rights of all SOMSD students—including Black and Hispanic students, students with disabilities, and especially Black students with disabilities—who are disproportionately harmed by out-of-school suspension policies and practices in the District. The Complaint also seeks to vindicate the rights of Black and Hispanic regular education students harmed by the racially disparate use of “tracking” and “leveling” by SOMSD, which refers to the sorting of students into different classrooms on the basis of the students’ perceived ability or previous achievements. Tracking reinforces negative stereotypes, exposes children to different curriculums, and creates a dual school system within the same building. This Complaint asks the Department of Education’s Office for Civil Rights (OCR) to investigate SOMSD and encourage the district to adopt new policies and practices that use out-of-school suspension only as a last resort, if at all, and to eliminate all vestiges of the systematic “tracking” of regular education Black and Hispanic students into remedial and lower-level courses of study.

I. Introduction and Summary

A. Discipline Claims Regarding Students of Color and Students with Disabilities.

SOMSD disproportionately suspends Black students, Hispanic students, and students with disabilities. For the 2011–2012 school year, data submitted to OCR and to the undersigned counsel via public records requests shows that SOMSD suspended 14.7 percent of Black students, 6.5 percent of Hispanic students, and 2.7 percent of White students.² When compared to the available state-wide data on school suspensions from 2009-2010,

¹ 42 U.S.C. §§ 2000d-2000d-7 (Title VI); 29 U.S.C. § 794 (Section 504).

² These percentages represent the suspension rate for the two middle schools and one high school in SOMSD for the 2011–2012 school year. See Exhibit A for a summary of the OCR statistics.

SOMSD's Black-White percentage point gap in suspensions (12) is substantially greater than the state average (8.7). Data on school suspensions throughout the state of New Jersey in 2009-2010 indicates that 12 percent of Black students, 6.6 percent of Hispanic students, and 3.3 percent of White students were suspended statewide, exposing a significantly higher Black-White percentage point gap in suspensions in SOMSD.³ Furthermore, "research suggests that the substantial racial disparities of the kind reflected in [SOMSD's data] are not explained by more frequent or more serious misbehavior by students of color."⁴

In SOMSD, the disparity in suspensions between students with disabilities and students without disabilities is even more pronounced. While the overall suspension rate for students with disabilities throughout the state of New Jersey is 10 percent and the rate for all students without disabilities is 4 percent,⁵ in SOMSD the suspension rate for students with disabilities was 21.3 percent, versus an overall suspension rate of 9.8 percent among all students, and a 7.7 percent suspension rate for students without disabilities.⁶ In SOMSD, when race and disability overlapped, suspension rates were even higher. Most alarmingly, *the SOMSD high school suspension rate for Black students with disabilities was 30.6 percent.* In contrast, for White high school students without disabilities, the suspension rate was a mere 2.4 percent.

³ Specifically, data on school suspensions throughout the state of New Jersey in 2009-2010 indicates that 12 percent of Black students, 6.6 percent of Hispanic students, and 3.3 percent of White students were suspended. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at The Civil Rights Project, 19 (2012), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf>.

⁴ U.S. DOJ & U.S. DOE, Dear Colleague Letter regarding School Discipline, 4 (2014) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (citing Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011); T. Fabelo, M.D. Thompson, M. Plotkin, D. Carmichael, M.P. Marchbanks & E.A. Booth, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (Council of State Governments Justice Center, 2011); A. Gregory & A.R. Thompson, *African American High School Students and Variability in Behavior Across Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); R.J. Skiba, R.S. Michael, A.C. Nardo & R.L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?* 116 AM. J. EDUC. 557 (2010)).

⁵ U.S. Dep't of Educ. Office of Civil Rts., *Data Snapshot: School Discipline*, Issue Brief No. 1, 17 (2014) available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

⁶ Unless otherwise indicated, the phrase "suspension rate" throughout this document refers to the 2011-2012 suspension rate in SOMSD.

SOMSD's high and disparate suspension rates are not a result of written policies that intentionally discriminate against students of color or students with disabilities. In fact, this Complaint does not allege intentional discrimination by anyone involved in the South Orange and Maplewood Public Schools. Rather, we concede that SOMSD's policies are facially neutral, and were likely written with the intention of ensuring a safe and orderly learning environment.

Nonetheless, SOMSD's suspension policies and practices are unnecessarily harsh and, in some cases, so vague that discriminatory application of the rules against students with disabilities and students of color is very likely. For instance, in SOMSD, the maximum penalty of expulsion may be imposed for almost any code of conduct violation, and only "a limited exception to the reporting and disciplinary action requirements may be provided when circumstances warrant." On the Maplewood Middle School website, students are warned that, per "the district code of conduct, an administrator may assign severe consequences⁷ for certain violations, including suspension or expulsion from school."⁸ These violations include, among other things, "roughhousing," "refusing to follow a staff directive," and "profanity."⁹

Furthermore, the failure to provide individualized, meaningful, behavior-related services for students with disabilities may be contributing to the high suspension rates. The data shows that, for both students of color and White students, being identified as a student with a disability increases the likelihood that the student will be suspended out-of-school, rather than provided with additional behavior services to ensure success in school.

In addition to adversely affecting students of color and students with disabilities, SOMSD policies and practices result in frequent out-of-school suspensions for all students. This approach to school discipline is not supported by research on best educational practices. To the contrary, contemporary education research indicates that relying on out-of-school suspensions undermines rather than enhances the goal of providing a productive learning

⁷ SOMSD's broad policy regarding suspension permits suspension or expulsion of "pupils who indulge in behavior that is disruptive or otherwise violates the applicable code of conduct." See The School District of South Orange & Maplewood, Board of Education Information, Series 5000 – Pupils, March 2014, *available at* <http://www.somds.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/3/se5000%20-%203-2014.pdf>.

⁸ SOMS Student Handbook, *available at* <http://www.somds.k12.nj.us/domain/298>.

⁹ According to the Columbia High School Manual, out-of-school suspension may be assigned for each of these offenses as a "third intervention" or "consequence". Columbia High School Student/Parent Handbook 2012-2013, *available at* http://www.somds.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/70/CHS_Handbook_2012_-_2013_pdf_copy.pdf.

environment.¹⁰ SOMSD’s suspension policies and practices therefore violate Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based on disability.

Pursuant to Department of Education regulations, Title VI and Section 504 prohibit government practices that have the *effect*—even if not the *intent*—of discriminating by race or disability.¹¹ Under this “disparate impact” view, if a public school district’s disciplinary policies or practices disparately harm students of color or students with disabilities, those policies and practices are unlawful unless they are justified by educational necessity *and* there are no less-discriminatory means of achieving the same educational goals.

South Orange Maplewood’s suspension and tracking practices and policies do not survive this disparate impact analysis. The data establishing discipline disparities by race and disability in South Orange Maplewood were in fact collected and certified by SOMSD itself in response to the undersigned organizations’ request for records pursuant to New Jersey’s Open Records Act. Further, the district’s policies that cause those disparities are not justified by educational necessary, while less-discriminatory means are available to the District to achieve its educational goals.

As noted, the data provided by the District illustrates clear disparities based on race and disability. The largest single disparity was for Black students who also have disabilities; it appears that black students with disabilities are being disciplined especially harshly under SOMSD’s policies compared to White students without disabilities. For example, there was a 28.2 percentage point difference between the suspension rate for Black students with disabilities and White students without disabilities at SOMSD’s Columbia High School (CHS).

¹⁰ Research from the Council of State Governments, the American Academy of Pediatrics, the American Psychological Association, and several other sources has demonstrated that frequently suspending students out-of-school is associated with higher levels of grade retention, academic failure, dropping out, and involvement in the juvenile justice system. *See, e.g.* Tony Fabelo et al., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, Council of State Governments Justice Center 54–72 (2011), *available at* <http://knowledgecenter.csg.org/kc/content/breaking-schools-rules-statewide-study>; American Academy of Pediatrics Committee on School Health, *Out-of-School Suspension and Expulsion*, Vol. 112 No. 5 Pediatrics, 1206 (2003), *available at* <http://pediatrics.aappublications.org/content/112/5/1206.full.pdf+html?sid=b76baf23-07bf-4cdf-8fa010587add04f3>; American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, Vol. 63 No. 9 American Psychologist 852 (2008), *available at* <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf>.

¹¹ 34 C.F.R. § 100.3(b)(2); 28 C.F.R. § 41.51(b)(3).

Thus, there is ample evidence that these disparities persist in SOMSD schools today. Although data disaggregated by race and disability is available only for the 2011–2012 academic year, the policies and practices that created these disparities have not changed. During both the 2011–2012 and 2013–2014 school years, SOMSD used disciplinary codes authorizing out-of-school suspension not only for acts of violence, but also for any offense deemed “serious” by school officials. For example, South Orange Maplewood’s high school and middle school students can be suspended or even expelled for anything punishable with detention if an administrator believes that such punishment is necessary.¹²

These practices and policies are not justified by educational necessity for purposes of either Title VI or Section 504. Research from the Council of State Governments, the American Academy of Pediatrics, the American Psychological Association, and several other sources has demonstrated that frequently suspending students out-of-school is associated with higher levels of grade retention, academic failure, dropping out, and involvement in the juvenile justice system.¹³ Despite the good intentions of teachers and administrators, frequent out-of-school suspensions simply do not create more productive learning environments.

Based on this research, some states are taking steps to limit the use of out-of-school suspensions to only the most serious offenses. For example, in Maryland, the state Board of Education has proposed regulations to reduce the use of out-of-school suspensions and eliminate racial disparities in discipline.¹⁴ The Board finalized new guidelines in July 2014.¹⁵

¹² Each handbook provides complete discretion to building-level administrators. The CHS discipline code provides that “[t]he discipline guidelines set forth in this section are not meant to be exhaustive. Students may be disciplined for other good cause. The discipline shall ordinarily be progressive and may be increased or decreased based upon particular circumstances. Conduct which is particularly egregious may result in severe punishment even if it is the first offense, and expulsion can be recommended to the Board of Education.” Columbia High School Student/Parent Handbook 2012-2013, *available at* http://www.somsd.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/70/CHS_Handbook_2012_-_2013_pdf_copy.pdf. Maplewood Middle School’s discipline code states that “within each [discipline] tier the administrator has the discretion to impose the response deemed most appropriate to address the infraction based on the severity of the infraction, the developmental age of the student and the student’s history of problem behaviors.” Maplewood Middle School Code of Conduct, October 1, 2013, *available at* <http://www.somsd.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/261/student%20handbook-code%20of%20conduct-2013-14.pdf>.

¹³ Tony Fabelo et al., *supra* note 10 at 61. *See also* American Academy of Pediatrics Committee on School Health, *Out-of-School Suspension and Expulsion*, Vol. 112 No. 5 Pediatrics, 1206, 1208 (2003), *available at* <http://pediatrics.aappublications.org/content/112/5/1206.full.pdf+html?sid=b76baf23-07bf-4cdf-8fa010587add04f3>

¹⁴ Maryland State Board of Education, *A Safe School, Successful Students, and a Fair and Equitable Disciplinary Process Go Hand in Hand: A Study of School Discipline Practices and Proposed Regulatory Changes* (2012), *available at* http://msde.state.md.us/School_Discipline_Report02272012.pdf

In Connecticut, which has also enacted legislation limiting out-of-school suspensions, former Governor M. Jodi Rell explained:

*Students should be removed from the school setting only under the most exceptional circumstances. . . . Keeping children out of school is a direct line to delinquent behavior. Students get farther [sic] behind in their course work. They lose hope of catching up. It's a recipe for failure.*¹⁶

Because SOMSD's suspension practices and vague policies have a disparate impact on and are not supported by educational necessity, they fail the disparate impact analysis under both Title VI and Section 504. Even assuming *arguendo* that it was necessary to consider the existence of less discriminatory alternatives, SOMSD's suspension practices would fail that inquiry as well, as described herein.

B. Claims Regarding Discriminatory Tracking

SOMSD has a long history of tracking or “leveling” students and, despite attempts to address the racial disparities and achievement gap that result from this practice, continues to track students with discriminatory effects.¹⁷ “Tracking” is an organizational feature of schools that “sort[s] students into different classrooms (or small groups within classrooms) on the basis of their perceived ability or previous achievement,” Roslyn A. Mickelson writes.¹⁸ “In theory, tracking is a meritocratic and technical process that allocates educational resources and opportunities commensurate with students’ prior academic achievement, ability, and interest, and with course availability;” however, “[b]ecause of the pervasive practice of curricular differentiation, students are sorted into racially correlated educational trajectories soon after

¹⁵ Maryland State Department of Education. Press Release: Maryland State Board of Education Accepts Guidelines for Student Code of Discipline (2014). Available at http://www.msde.maryland.gov/press/07_23_2014.html.

¹⁶ State of Connecticut Executive Chambers, Governor Rell Signs In-School Suspensions Bill (2007), available at <http://www.ct.gov/GovernorRell/cwp/view.asp?A=2791&Q=385306>.

¹⁷ Contemporarily, parents of students of color have criticized SOMSD's “leveling” program for years, as demonstrated by stories run by national news sources such as National Public Radio and The New York Times. Despite this regular criticism, SOMSD has made minimal efforts to curb “leveling” due to competing pressure from the parents of children in the highest academic levels. Nonetheless, the District's “leveling” program is extremely rigid and relies heavily on teacher recommendations, which, as research and the statistics discussed herein indicate, lead to racially disproportionate assignments.

¹⁸ Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513, 1529 n.76 (2003).

they enter school.”¹⁹ Consequently, “tracking assigns minority students unjustifiably and disproportionately to lower tracks and almost excludes them from the accelerated tracks; it offers them inferior opportunities to learn and is responsible, in part, for their lower achievement.”²⁰

This Complaint’s goal is not to eliminate Advanced Placement (AP) classes at Columbia High School. Rather, this Complaint seeks to ensure that all students are given access to a challenging and rigorous curriculum. In order to remedy the racial disparities that arise from the current intense leveling in SOMSD, this Complaint seeks to encourage the district to eliminate leveling at the middle school and high school over the course of the next six to ten years. In its place, each student would be placed on the most advanced track with supports and services both for those students who will struggle in a faster-paced curriculum and for those gifted students who need additional enrichment. Additionally, training would be provided to teachers to ensure they are equipped to teach students at all levels. AP courses at the high school would remain, but enrollment would be open and students could self-select placement in those classes. This approach has worked in other districts and would remedy the long history of tracking and its segregative effects, as described below.

Eliminating tracking is necessary because SOMSD’s current practice has a disparate, negative impact on students of color and therefore violates their rights under Title VI. Recent guidance from the Department of Education provides support for the claim that the exclusion of Black and Latino students from upper level classes is violative of Title VI. When considering Title VI claims, OCR has definitively stated it will consider a “school district’s decision to provide a particular resource to students, such as technology or a gifted and talented program, as evidence that the district believes the resource is important” and that OCR “expected these resources to be equitably provided without regard to students’ race, color, or national origin.”²¹ For Black SOMSD high school students, the impact of tracking is that they are under-represented in Levels 5 and 6 (the highest academic levels) and Advanced Placement classes, and over-represented in Level 2 and 3 classes (lower academic levels). This has created a school within a school at Columbia High School. While the high school is composed of slightly less than 50 percent White students, over 70 percent of the lower-level

¹⁹ *Id.* at 1530; *see also Coal. to Save Our Children v. State Bd. of Educ. of State of Del.*, 901 F. Supp. 784, 800 (D. Del. 1995), *aff’d*, 90 F.3d 752 (3d Cir. 1996) (“The question, whether posed as one of ‘tracking’ or ‘ability grouping,’ is whether such assignments are accomplished on the basis of race or for the purpose of racial segregation.”).

²⁰ *Id.* at 1531.

²¹ United States Department of Education. October 1, 2014 Dear Colleague Letter: Resource Comparability. Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

classes are filled by Black students and over 70 percent of the higher level classes are filled by White students. Students have described knowing the level of the classroom by looking through a window and noting the racial composition of the class. Tracking is widely used across the country and in New Jersey, but it is controversial for precisely this reason: the low tracks are largely populated by, and psychologically and academically damaging to, minority students. As one study noted, “curricular stratification in American schools has not realized its main goal: homogeneity in student ability at the classroom level...this [typical model of tracking] disadvantages lower-income students and students of color, who are disproportionately assigned to low-track classes.”²²

The damage inflicted by ability tracking and the disproportionate placement of students of color into low-track classes outweighs any slight benefit achieved. Nationwide studies indicate that not only are students of color disproportionately placed in remedial or low educational levels, but that such students rarely advance between levels.²³ Because of the “limited, rote-oriented, basic-skills curriculum” that students receive in the lower-level classes, students rarely move between levels and often struggle when they do.²⁴ Similarly, students in SOMSD middle schools are taught different curricula at different rates, and with different expectations.²⁵ The District provides guidelines on advancing between levels,²⁶ but even if students meet the testing and grade requirements, district data shows that “few remain” in their higher levels.²⁷ Thus, the effect of missing requisite building blocks in the lower levels persists.

²² Carol C. Burris, et al., *Universal Access to a Quality Education: Research and Recommendations for the Elimination of Curricular Stratification*. Boulder and Tempe: Education and the Public Interest Center & Education Policy Research Unit. Available at <http://nepc.colorado.edu/publication/universal-access>

²³ Angelia Dickens, *Revisiting Brown v. Board Of Education: How Tracking has Resegregated America’s Public Schools*, 29 Colum. J.L. & Soc. Probs. 469, 474–75 (1996).

²⁴ Tonya L. Nelson, *Tracking, Parental Education, and Child Literacy Development: How Ability Grouping Perpetuates Poor Education Attainment Within Minority Communities*, 8 Geo. J. on Poverty L. & Pol’y 363, 366 (2001).

²⁵ See Sch. Dist. of S. Orange & Maplewood, *Middle School Mathematics Curricula*, <http://www.somds.k12.nj.us/Page/149>.

²⁶ See Exhibit B, Description of SOMSD’s leveling system, R2314.

²⁷ Sch. Dist. of S. Orange & Maplewood, *Superintendent’s Report: Equity and Excellence Recommendations* 11 (2010), available at http://www.somds.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/1/Supts_Report_EE_Recommendations_-_FINAL_5-17-10.pdf.

This Complaint's seeks to implement discipline alternatives to the frequent use of out-of-school suspensions in SOMSD, and to eliminate the segregating effect of ability tracking. We hope to reach a Resolution Agreement with SOMSD that will call for new policies and practices that are less punitive, more effective, and more equitable. Consistent with our hope for a mutually agreeable outcome, this Complaint does not allege that SOMSD intentionally discriminated against anyone in either discipline or tracking.²⁸ Rather, it asserts that the administration of the District's discipline and tracking policies have an adverse and unlawfully disparate impact on Black students, Hispanic students, students with disabilities, and—most profoundly with respect to discipline policies—Black and Hispanic students with disabilities.

Should the parties be unable to reach a Resolution Agreement, the undersigned believe that OCR is uniquely situated to investigate this Complaint and facilitate an appropriate remedy for the complainants and SOMSD regarding both discipline and tracking disparities. OCR is the only administrative body authorized to make a finding of unlawful disparate impact, and to enforce a remedy pursuant to such a finding. Therefore, the undersigned hope that OCR's investigation will lead to the elimination of tracking, and the adoption of new discipline practices and procedures in the District that eliminate unjust and harmful outcomes.

II. Timeliness

This Complaint is timely because the disparate impact of SOMSD's suspension and tracking practices and policies is likely ongoing, and because evidence of disparate impact was not publicly available until the district responded to our open records requests on or about March 6, 2013. Analysis of these records establishes the following facts. Both individual

²⁸ One possible reason for the racial disparities in SOMSD, which persist despite race neutral policies implemented by individuals who are not overtly racist, is a phenomenon known as "implicit bias." The researchers at the Kirwan Institute on Race and Ethnicity define implicit bias as "the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection." Kirwan Inst., *Understanding Implicit Bias*, available at <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>. Research also suggests that "[t]eacher expectations related to student achievement is one area in which implicit biases can have detrimental effects" and that "students' verbal nuances and vernacular dialects" can "arouse implicit biases in teachers" causing them to judge "the speakers' intelligence, personality, social status, and ambition." Kirwan Inst., *State of the Science: Implicit Bias Review 2013*, at 30-31, available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

In addition to influencing perceptions of students' academic ability and intelligence, implicit bias influences discipline because studies found that "students who displayed a Black walking style (*i.e.*, 'deliberately swaggered or bent posture, with the head slightly tilted to the side, one foot dragging, and an exaggerated knee bend') were perceived by teachers as lower in academic achievement, highly aggressive, and more likely to be in need of special education services." *Id.* at 32 (citations omitted). And "Whites with relatively high levels of implicit racial bias perceived Blacks to be more threatening than Whites." *Id.* at 32.

complainants were subject to and harmed by the practices complained of during the 2013-14 school year, which ended in June 2014.

III. Factual Background

SOMSD is a district in New Jersey with approximately 6,600 students enrolled in nine schools. There are six elementary schools, two middle schools, and one high school (Columbia).²⁹ Students in the District are frequently suspended out-of-school and are at greater risk of suspension if they are Black, Hispanic, or have a disability. Consequently, students of color who also have disabilities are at the greatest risk for out-of-school suspension. Furthermore, SOMSD utilizes an extensive ability grouping system with various criteria that a student must meet to qualify for and advance through the stratified system.³⁰ These overriding criteria together act to create a formidable barrier to parents who want to petition to have their children placed in higher-level courses.³¹ This results in Black students being disproportionately placed in lower-level classes and excluded from higher level classes.

In addressing the District's discipline disparities, this Complaint relies on three main sources of information. First, the OCR's collection of suspension data through its Civil Rights Data Collection (CRDC) is the main source of discipline information in this Complaint. This information was obtained by the undersigned from the District for the 2011–2012 school year via the New Jersey Open Records Act. This data is sortable by race and disability for out-of-school suspensions in SOMSD during the 2011-2012 academic year. Second, SOMSD's online publication of a portion of its disciplinary codes, which show that the District has consistently authorized out-of-school suspension for even minor infractions, is referenced throughout this Complaint. Third, the undersigned rely on statistical analysis and anecdotal evidence suggesting that the District continues to impose suspensions frequently and for minor infractions.

Finally, to address the tracking disparities, data were drawn from SOMSD's board reports regarding the state of the District and its achievement gap, as well as CRDC data regarding AP courses.

²⁹ SOMSD Facts at a Glance. Available at <http://www.somds.k12.nj.us/page/298>.

³⁰ See generally Exhibit B, *supra* note 26.

³¹ *Id.* at 16–17.

A. Complainants

1. *A.B. and B.B. on behalf of C.B.*

A.B. and B.B. are the parents of C.B. Beginning in the 2011-2012 school year and ending the 2013-2014 school year, C.B. was a student in the SOMSD. As a sixth grader, C.B. was identified as a student with a disability pursuant to the Individuals with Disabilities Education Act³² following an evaluation identifying an auditory processing disorder and dyscalculia. His eligibility identification category was specific learning disability or “communication disorder.” To address C.B.’s behavior, his Individualized Education Program team (“IEP” team) developed a Behavioral Intervention Plan (BIP) in April 2012. However, contrary to sound educational practice, there is no evidence that a Functional Behavioral Assessment (FBA)³³ was completed first. In the 2012–2013 school year, C.B. was issued more than forty days of out-of-school suspension (OSS) for various behaviors, culminating in SOMSD recommending out-of-district placement. There is no evidence that adequate adjustments were made to the BIP to better address C.B.’s behavior. C.B. was suspended for twenty-two days during the 2013-2014 school year despite having a truncated year. For the first two-and-a-half months of the school year, C.B. received homebound services while a due process complaint filed by his parents was resolved. The number of disciplinary sanctions C.B. received, coupled with the district’s attempt to remove him from his middle school, suggests that rather than proactively addressing his behavior and learning challenges so he could benefit from his education as required by IDEA, the District instead relied on school removal, which only exacerbated C.B.’s needs.

At the request of his parents, C.B. was re-evaluated in July 2013 for academic and attentional difficulties. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Phonological processing disorder (weakness in decoding, encoding, and reading comprehension), and Dyscalculia (weakness in math). The July 2013 IEP changed his IDEA eligibility classification from Specific Learning Disability to Other Health Impairment (OHI) due to the ADHD diagnosis and the parents’ request for additional behavioral supports and services. While C.B.’s full scale IQ is 73, the IEP team had decided to not take into account his functional ability, noting that, “it is not recommended that the Full Scale IQ be used in making educational programming decisions. These scores should be considered an underestimate of C.B.’s intellectual functioning due to his lack of interest and resistance to the test.”³⁴

³² 20 U.S.C. 1400, *et. seq.*

³³ An FBA is completed by observing oppositional, defiant, disruptive, and aggressive behavior, searching for triggering stimuli, and developing appropriate interventions to prevent such behaviors.

³⁴ IEP of C.B., Nov. 2013.

Behavioral support services had been added,³⁵ but were insufficient to meet C.B.’s needs and did not permit him to benefit from his education because he was suspended for over six weeks during the 2012–2013 school year.

C.B.’s experience during the 2013-2014 school year was, again, dominated by negative discipline and out-of-school suspensions.³⁶ He was suspended for three weeks during the 2013–2014 school year, despite his parents’ effort to keep him in school with additional behavior supports and a due process complaint filed in June 2013 and resolved in October 2013. Furthermore, at the beginning of the 2013–2014 school year, C.B. was on homebound instruction despite IDEA’s “stay-put” regulations and the parents’ pending due process complaint against SOMSD requesting additional behavioral supports.³⁷ After the District and the parents mediated and settled their dispute, C.B. was permitted to return to classes at Maplewood Middle School in November 2013. Certain supports were discontinued because his parents did not approve of the services and a new BIP was developed. Within days of returning to school, however, C.B. was suspended out of school for ten days. The lack of evidence suggests that C.B.’s Behavior Intervention Plans from the 2013–2014 school year were still not based on a FBA or tracked and amended in accord with common procedures. He received an additional fifteen days of OSS during the remainder of the school year and will not return to the district for the 2014–2015 school year.

Due to the District’s failure to adjust C.B.’s BIP to respond to his behaviors and complete an FBA to create a tailored BIP, coupled with the District’s over-reliance on OSS which exacerbated his learning challenges, SOMSD is partially responsible for C.B.’s continuous behavior failures. An adequate BIP requires data-based tracking of behaviors and responses to interventions. C.B.’s story is illustrative of SOMSD’s failure to intervene with special needs students to adequately address behavior challenges and to instead rely on OSS as a response to poor behavior from students with disabilities.

2. *X.Z. and Y.Z. on behalf of Z.Z.*

³⁵ A Behavior Intervention Plan (BIP) was added to the IEP on April 27, 2012, a personal aide was assigned April 2012 through June 2012, and SOMSD’s paperwork indicates that a neurological evaluation was recommended in April 2012, but that the parents did not consent to district’s evaluator. IEP of A.B., Apr. 2012; Manifestation Determination, Apr. 2013.

³⁶ Records indicate that at the beginning of the 2012–2013 school year, the District contracted with Effective School Solutions (ESS) to provide counseling and support during the school day. From that point forward, C.B.’s IEPs only indicate that his BIP supports are per his ESS behavior plan. Again, there is no indication that a FBA was completed or that modifications were made to his BIP, addressing his behavior.

³⁷ Manifestation Determination, Nov. 2013.

Z.Z. is a sophomore at Columbia High School. She does not have a disability and has been an academically high-performing and civically engaged student throughout her school career in SOMSD. She scored advanced proficient on state math tests in elementary and middle school and earned an A in eighth grade Level 4 “Advanced Honors” Algebra. As a result, her parents wanted her to stay on track to take Calculus in her senior year when she entered high school. Despite her strong performance in middle school and on standardized tests, she was not recommended for Advanced Honors Level 5 Geometry in ninth grade, which would permit her to take AP Calculus her senior year. Z.Z.’s parent, X.Z., was unaware that Z.Z. was not placed in the highest level for math or that Z.Z.’s math classes had been leveled since the sixth grade. Z.Z. had consistently received excellent standardized test scores and her parents were never aware that an opportunity existed for parents to ask that their children be placed into a more advanced curriculum while in middle school.³⁸

As a result, Z.Z.’s parents were alarmed when she was not initially recommended for Advanced Honors Level 5 Geometry in ninth grade by her eighth grade Math teacher and Middle School principal. No reasonable explanation was provided for her omission and X.Z. pointed out that by the SOMSD’s published criteria, Z.Z. met the requirements for placement in Level 5 math. X.Z. communicated with the district Math department supervisor and demanded Z.Z.’s placement in Level 5 Geometry and that request was fulfilled for the 2012-2013 school year.

Z.Z. maintained a B average in Advanced Honors Level 5 Geometry for most of her freshman year and made the Honor Roll three out of the four marking periods. Her final grade was affected by her unexpected success in varsity track and field, which extended her season until the end of June when she competed in the national high school championships out-of-state. It was clear to both parents of Z.Z. that as a 14 year-old freshman, Z.Z. did not account for the fatigue she encountered at the end of the school year, and that affected her final grade. Those considerations were taken into account when planning for her tenth grade year in Level 5 Algebra 2 for 2013-2014.

During an Advanced Placement information session at Columbia High School in the fall of 2013, X.Z. approached the math department supervisor to express concern over his

³⁸ The middle school Z.Z. attended, Maplewood Middle School, has been identified a “Focus School” by the New Jersey Department of Education. This designation signifies that a school is not meeting academic standards and can be cause for the removal of the school’s administrative leadership if conditions persist for three consecutive years. Maplewood Middle School will be entering its third-year under the designation in the 2014-2015 school year and the principal, who was principal at the time of Z.Z.’s enrollment, abruptly resigned at the close of the 2013-2014 school year.

daughter's early experience in her Level 5 Algebra 2 class. X.Z. was told by the supervisor that Z.Z. was one of a group of students that the math department was aware had not received instruction in Middle School mathematics necessary to absorb content in Level 5 Algebra and therefore may not have been adequately prepared. Furthermore, Z.Z.'s performance in Level 5 Algebra 2 was complicated by the behavior of her teacher, who indicated early in the academic year her unwillingness to provide assistance to Z.Z. to help her improve her performance. Throughout the school year, Z.Z.'s Level 5 Algebra 2 teacher repeatedly dismissed Z.Z.'s academic potential and regularly implied that she did not believe Z.Z. belonged in her class. She also explicitly encouraged Z.Z. to drop down to a lower-level class and, during Parents' Night, and told Z.Z.'s parents that athletes like Z.Z. did not necessarily do well in Level 5 math. In her Level 5 Algebra 2 class of 32 students, Z.Z. was one of only a handful of Black students following the withdrawal of almost half of the Black students who initially enrolled in the course.

Further disadvantaging Z.Z. was her guidance counselor's lack of knowledge concerning the material differences in mathematics levels at Columbia High School. During a meeting requested by Z.Z.'s parents with the math department supervisor and guidance counselor to discuss concerns over the Level 5 Algebra 2 class, the counselor stated that it was her understanding that there was no substantive difference between Honors Level 4 Algebra 2 and Advanced Honors Level 5 Algebra 2, and that Z.Z. should level down. When challenged by X.Z. on this assertion, the math department supervisor quickly corrected the counselor and affirmed that there was a material difference between the curriculums in both courses. The courses are also weighted differently for grade point average computation.

The parents of Z.Z. took multiple affirmative steps to obtain the support of the teacher and math department in addressing Z.Z.'s predicament without adequate results. For instance, at the suggestion of the math department supervisor, Z.Z. often used the Math Lab before school or during lunch periods. Z.Z. also sought out the assistance of her teacher, but it was apparent that the teacher had little interest in developing a plan to help Z.Z. When the parents of Z.Z. communicated with the teacher and sought a meeting with her, the math department supervisor, and the guidance counselor, the teacher indicated that she did not see a need for a meeting, and was not required to stay after school to help Z.Z. after 3:28 pm due to the teachers' contract. Her teacher also stated that Z.Z. was solely responsible for her success in the class. It was only after X.Z. communicated his outrage to the math department supervisor that the teacher sent an email to him on a Saturday morning agreeing to meet. During that meeting, as described above, the parents of Z.Z. absorbed the full magnitude of SOMSD's systemic failure and neglect of Z.Z.'s education, and the degree to which she had been harmed

both by tracking and SOMSD's failure to provide support to students who attempt to level up.³⁹

Because of her experience in Advanced Honors Level 5 Algebra 2, Z.Z. no longer enjoys math and her self-confidence and self-worth have diminished greatly. Her experience in the math department during the 2013-2014 school year affected her overall academic performance and her performance in varsity athletics.

Because of SOMSD's failure to utilize a transparent process for placement in the highest level classes, coupled with the varied curriculum, Z.Z. has been harmed in a number of ways and is representative of the class of high-performing Black students in SOMSD. Her transition between levels has caused emotional harm, her enthusiasm for math has subsided, and her confidence has been unnecessarily eroded. While she did not go down to a different academic level, her grades suffered. Had SOMSD provided the same curriculum to all students in middle school or made the tracking process transparent for parents, Z.Z. and other similarly situated high-performing Black students would not have been tracked into lower-level classes or placed into high level classes without adequate preparation.

B. Evidence of Disparate Impact in Discipline

Overall, New Jersey schools suspend students out-of-school at a rate of approximately 5.5 percent.⁴⁰ Not only was SOMSD's suspension-rate high relative to the state average at 10.7 percent overall in the high school, but discipline was also disproportionately applied to students of color and students with disabilities.

1. Race and Discipline

In the 2011–2012 academic year, SOMSD students experienced clear racial disparities in out-of-school suspensions. Overall, Columbia High School's suspension risk was 10.7 percent.⁴¹ While White students at Columbia High School had a 3.5 percent suspension risk during that academic year, the risk for Black and Hispanic students was 15.9 and 7.1 percent,

³⁹ Sensing the difficult environment Z.Z. was encountering in Level 5 Algebra 2, her Level 5 ninth grade Geometry teacher provided emotional support and extended herself to Z.Z. Despite facing systemic barriers, Z.Z. scored exceptionally well in mathematics on the PSAT during her tenth grade year and is being recruited by many colleges that have strong mathematics programs.

⁴⁰ Daniel J. Losen & Jonathan Gillespie, *supra* note 3 at 19.

⁴¹ Suspension risk is calculated by dividing the number of suspended students in a given group by the overall number of students in said group.

respectively. This makes Black students over 4.5 times more likely to face out-of-school suspension than White students, and 1.5 times more likely to be suspended than the overall student population. Similarly, Hispanic students are over twice as likely to face out-of-school suspension as their White peers. The risk is higher for males than for females. At Columbia High School, the overall out-of-school suspension risk for males is 14.2 percent, Black males have a 21.2 percent suspension risk, Hispanic males have a 12.5 percent suspension risk, and White males have a 5.9 percent suspension risk. Black females have a 12.2 percent suspension risk versus a 1.1 percent suspension risk for White females.

These statistics are startling. While White students are suspended at a rate consistent with the state average, Black and Hispanic students are suspended by SOMSD at much higher rates. The suspension risk for all high school students is itself substantial—approximately 11 out of every 100 students were suspended out-of-school at least once, demonstrating that there is an over-reliance on out-of-school suspensions at the high school. However, even compared to this high baseline, the suspension risk for Black and Hispanic students is substantially higher, and for Black males it is *almost four times higher than the risk faced by their White peers*.

2. Disability

In addition to highlighting racial disparities, the SOMSD data also reflect large disparities based on disability. Why students with disabilities would be suspended more often than students without disabilities is not clear. Indeed, federal and state law mandate that students with disabilities be given extra support and special education services related to their behavior (if necessary to allow them to benefit from their educational program), and the law prohibits schools from suspending these students for more than 10 days if their behavior is a manifestation of the student's disability.⁴²

Yet, in SOMSD, students with disabilities are suspended far more often than their non-disabled peers. Specifically, students with disabilities are over 2.5 times more likely to face out-of-school suspension than students without disabilities. Furthermore, Black students with disabilities are 2.5 times more likely to face out-of-school suspension than Black students without disabilities. Similarly, White students with disabilities are twice as likely to face out-of-school suspension than their non-disabled White peers.

The overall suspension risk for males with disabilities is 24.1 percent; however, Black males with disabilities have a 32.8 percent suspension risk, compared to an 7.3 percent

⁴² 20 U.S.C. § 1415(k)(B) (2012).

suspension risk for White males with disabilities. These statistics demonstrate that, regardless of race, having a disability increases a student’s risk of out of school suspension. Further, they show that both having a disability and being black poses the greatest risk of suspension.

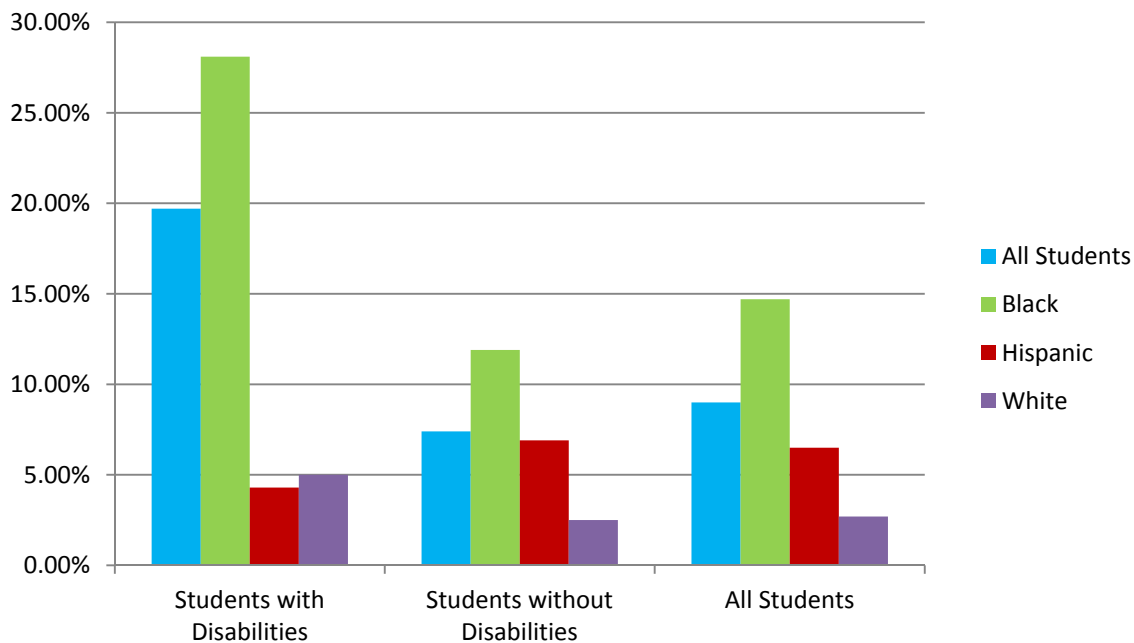
3. Race and Disability

SOMSD’s disparate suspension of students of color and students with disabilities combine to produce particularly high suspension rates among Black and Hispanic students who also have disabilities.

Table 2: 2011–2012 Out-of-School Suspension Rates in SOMSD

Race	All Students	Black	Hispanic	White
Suspension Rate Students with Disabilities	19.7%	28.1%	4.3%	5.0%
Suspension Rate Students without Disabilities	7.4%	11.9%	6.9%	2.5%
Suspension Rate Overall Student Body	9.0%	14.7%	6.5%	2.7%

Figure 1: 2011-2012 Out-of-School Suspension Rates in SOMSD



C. South Orange Maplewood’s Disciplinary Policy and Practice

Although there is no publicly available information regarding the justifications for the out-of-school suspensions that the District imposed during the 2011–2012 academic year outside of interviews with students, there are two indications that relatively minor infractions drove a substantial proportion of those suspensions.

First, students with disabilities report serving suspensions for minor behaviors that may be associated with their disabilities. For instance, C.B. was suspended for one day in January 2013 because he was in the wrong place, attempted to enter a classroom, and brushed a teacher. He was also disciplined with in-school suspension (ISS) for “attempt[ing] to fight,” and, in 2014, threatened with out of school suspension for “tr[ying]to trip.” For a student functioning well below grade level, with documented ADHD, processing, and behavioral issues, punishment for attempting to commit an act could and did lead to excessive, almost weekly, punishment.

Second, SOMSD’s suspension policies give school administrators wide discretion to impose out-of-school suspensions *or even expulsion* in response to vague public-order infractions, such as “caus[ing] disruption to the educational process and/or school climate”. The District’s high school similarly gives administrators wide discretion and permits “more serious consequences” for behaviors that are punishable by detention but not remedied by detention.⁴³

D. Ongoing Suspension Practices in South Orange Maplewood

Because SOMSD has not materially changed its suspension policies since the 2011–2012 academic year, there is no reason to believe that the District’s students have seen reductions in suspension rates or in disparities by race and disability since that time.

⁴³ The Code of Conduct for Columbia High School contains the statement “[w]illful violations of other school rules and regulations (see Code of Conduct). Note: Intervention/Consequences may include but are not limited to the following: warning, parent contact, confiscation of unauthorized materials, reimbursement assignment to detention or suspension, and recommendation for expulsion. Students, who accumulate chronic, unabated discipline referrals that cause ongoing disruptions to the educational process and/or school climate, are subject to consequences that include, but are not limited to out of school suspensions and/or BOE hearings.” Columbia High School Student/Parent Handbook 2012-2013, *available at* http://www.somsd.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/70/CHS_Handbook_2012_-_2013_pdf_copy.pdf

Furthermore, the most recent data available from the OCR website demonstrates that SOMSD is one of ten districts in New Jersey with the greatest disparity between the rate of OSS for students of color with disabilities and White students without disabilities.

The undersigned anticipate that an OCR investigation will reveal that the underlying issues that brought about these disparities persist today.

E. Students in SOMSD Report That Suspensions Persist

Students in SOMSD report that the District disproportionately suspends students of color and students with disabilities, and that it does so under policies favoring OSS for minor offenses. For instance, C.B.’s parents filed a complaint in 2013 with the New Jersey State Department of Education merely to keep C.B. in his local school after his learning disability and behavior prompted school administrators to request placement in a behavioral school. Even after missing weeks of school due to suspension during the 2012–2013 school year, C.B.’s complaint was resolved with placement in the Maplewood Middle School. Within ten days of returning to school, however, administrators suspended C.B. for ten days for “using obscenities,” making a “threatening remark,” and allegedly fighting.

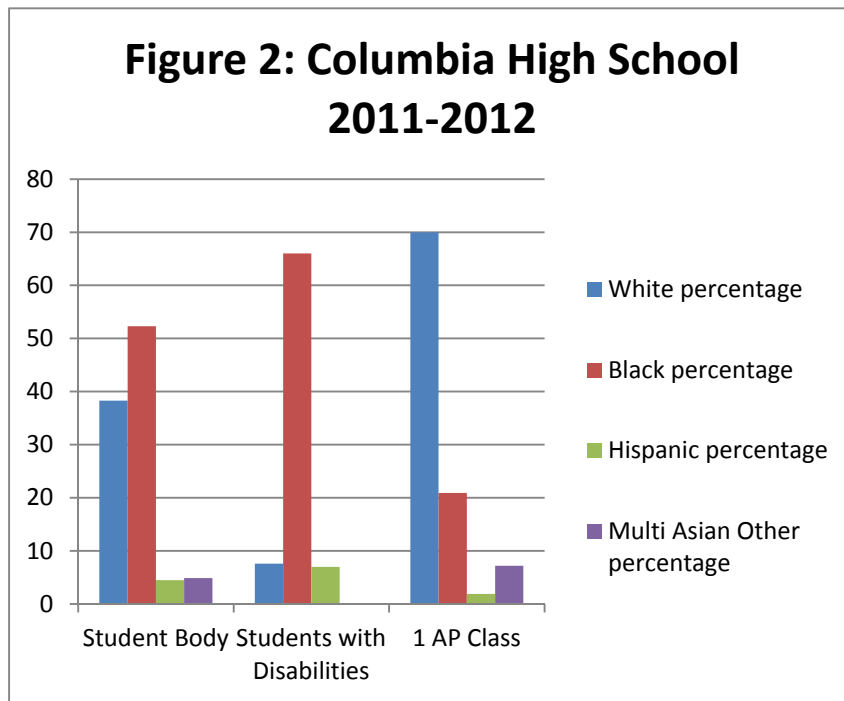
F. Evidence of Racially Disparate Tracking by South Orange Maplewood Public Schools.

In addition to its racially disparate out-of-school suspension rates, evidence suggests that SOMSD students of color are disproportionately tracked into lower-level academic classes in violation of Title VI and Section 504. CRDC data from Columbia High School illustrates the phenomenon and result of racial tracking in the school district. During the 2011–2012 school year, Columbia High School was composed of 1,863 students, of whom 52.3 percent were Black, 38.3 percent were White, 4.5 percent were Hispanic, and 4.9 percent were a mix of Asian, Native American, and multi-racial.⁴⁴ Despite these demographics, Black and Hispanic students made up 66.4 percent and 7.6 percent, respectively, of students with disabilities served under IDEA, compared to 23.9 percent who were White. This suggests that SOMSD may be over-identifying students of color as students with disabilities.

Columbia High School’s racially disparate tracking was even starker with regard to its AP courses and selection during the 2011–2012 school year. In order to enroll in AP courses, Columbia High School students are required to obtain a recommendation and/or meet

⁴⁴ All statistics regarding Columbia High School are derived from the school’s CRDC SY 2011-12 Part I School Form.

additional criteria other than having completed prerequisite subject courses. Of the 424 students, or 22.8 percent of the total student body, who took at least one AP course during the 2011–2012 school year, a staggering 70 percent of those students were White, compared to only 20.9 percent of whom were Black, and 1.9 percent of whom were Hispanic. This immense discrepancy was present in the makeup of each individual AP course that the school offers: 72.7 percent of AP Mathematics students were White, compared to 14.4 percent Black and 3 percent Hispanic; 73.3 percent of AP Science students were White, compared to 14.4 percent Black and 1.1 percent Hispanic; 65.8 percent of AP Foreign Language students were White, compared to 28.9 percent Black and 2.6 percent Hispanic; and 73 percent of students in all other AP subjects were White, compared to 17.3 percent Black, and 2 percent Hispanic. These racially disparate statistics alone merit further investigation by OCR.⁴⁵



Additionally, anecdotal evidence suggests that the racially disparate tracking at Columbia High School derives from school and district policies and practices that systematically favor and encourage the enrollment of White students in AP courses, while funneling Black and Hispanic students into lower-level remedial courses. One Black Columbia High School Student describes having been placed in a less-rigorous Level 2 English course upon entering Columbia High School in the ninth grade despite the fact that he

⁴⁵ Cf. *Anderson v. Banks*, 520 F. Supp. 472, 482 (S.D. Ga. 1981).

earned very high grades in middle school. This student was able to transfer into a higher-level course only after enduring the lower-level course for a full semester. Another Black student reports that Columbia High School refused to enroll him in Level 4 courses in the ninth grade despite the fact that he was previously enrolled in honors classes at his prior middle school. Only after his parents became involved was this student permitted to enroll in higher-level classes. Z.Z.'s experience is but one of many stories which illustrate the difficulty high-achieving students of color face with such intense tracking practices in the District. While these policies may be race neutral, as explained below, they are the historical product of the practice of educating students differently based upon their perceived career possibilities informed by the student's race, ethnicity, and/or class.

1. *History of Tracking in SOMSD and New Jersey*

Tracking has persisted since the early 20th century, and New Jersey school districts have long embraced it. As early as 1887, a superintendent in Elizabeth, New Jersey developed a grouping plan known as the "Elizabeth Plan."⁴⁶ While tracking has gradually lost the explicit stratification emblematic of the early twentieth century, many school districts and scholars have simply renamed their programs to avoid the controversy surrounding tracking. Ability grouping takes many forms and includes in-class breakout groups or short pullouts for struggling and excelling students to receive extra instruction, as well as grouping students by ability into separate classrooms with separate curricula. The former is also known as "heterogeneous grouping," and the latter as "homogeneous grouping." SOMSD commonly uses the term "leveling" to describe its system, though it is no different from homogeneous grouping in design, or tracking in its effect. For clarity, this section will refer to heterogeneous and homogeneous grouping, but these terms are interchangeable with un-leveled and leveled, or ability-grouped.

Developed on paternalistic and racist notions at the turn of the twentieth century, tracking helped separate the affluent White establishment that was destined for college from the immigrant populations and minorities who were consigned to industrial and low-skilled

⁴⁶ Heber Hinds Ryan & Philipine Grecelius, *Ability Grouping in the Junior High School*, 24 (1927), available at <http://books.google.com/books?id=ErSeAAAAMAAJ&pg=PA24&lpg=PA24&dq=tracking+new+jersey+heber+hinds&source=bl&ots=yXuwUZdDP&sig=EtPJnBVseEOD3JpFPFH7DEqUHCE&hl=en&sa=X&ei=s9iU8nxDbOqsATDkIDgDA&ved=0CCIQ6AEwAA#v=onepage&q=tracking%20new%20jersey%20heber%20hinds&f=false>. Across New Jersey, ability grouping remains a widely used practice with schools starting as early as fourth grade. See also River Vale Public Schools, *Ability Grouping Mathematics*, <http://www.rivervaleschools.com/Page/3269> (detailing when numerous neighboring school districts begin ability grouping for math in defense of its decision to begin ability grouping in seventh grade rather than fourth).

jobs.⁴⁷ In the 1930s, the practice retreated as research indicated that homogenous grouping by perceived ability failed to accelerate achievement and may in fact have harmed students.⁴⁸ However, tracking rose to prominence again after *Brown v. Board of Education* as a way to continue to segregate schools in the South and as an answer to the influx of Black immigrants in the North.⁴⁹ Ability grouping (then still called tracking) re-emerged in the 1960s and 1970s as schools shifted their mission and began to offer standard curricula for all students.⁵⁰ For instance, district officials in Montclair, New Jersey used ability grouping to assure White parents that the desegregated schools would not lower academic standards for their children when their schools were integrated with students of color, who were perceived as less academically talented.⁵¹ However, this shift away from the old tracking model of completely separate courses of study for vocational and college-bound students did not result in equitable education, as schools began to stratify individual courses by ability level.⁵² Ability grouping/tracking fell out of favor in the late 1980s and early 1990s when research concluded that ability grouping was harmful, inequitable, and unsupportable to students.⁵³ Despite the deleterious effects on minority students and students in lower academic levels, tracking has risen to prominence again in the last ten years as a response to No Child Left Behind.⁵⁴

2. *Current State of Tracking at SOMSD*

Beginning in 1993, the District has entertained multiple recommendations and studies calling for the reduction or elimination of tracking, but nevertheless still maintains a very

⁴⁷ Ellison & Hallinan, *Ability Grouping in Catholic and Public Schools*, 8(1) Cath. Educ.: A J. of Inquiry & Prac., 107, 110 (2004), available at <http://digitalcommons.lmu.edu/ce/vol8/iss1/4>.; see also Carol Corbett Burris *et al*, *supra* note 22 at 4.

⁴⁸ Dickens, *supra* note 23, at 472; Danielle Kasten, *Modern Day School Segregation: Equity, Excellence, and Equal Protection*, 87 St. John's L. Rev. 201, 208 (2013); Nelson, *supra* note 24, at 364–65.

⁴⁹ Dickens, *supra* note 23, at 472; Kasten, *supra* note 48, at 208; Nelson, *supra* note 24, at 365.

⁵⁰ Ellison & Hallinan, *supra* note 47, at 111.

⁵¹ Jane Manners, *Repackaging Segregation? A History of the Magnet School System in Montclair, New Jersey*, 8 Race Traitor 51, 89-90 (1998), available at http://www.zinelibrary.info/files/Race_Traitor_No_08_1998_Winter.pdf.

⁵² *Id.*

⁵³ Burris *et al*, *supra* note 22, at 2; Tom Loveless, *The 2013 Brown Center Report on American Education: How Well are American Students Learning?* 13, 15 (2013), available at <http://www.brookings.edu/research/reports/2013/03/18-tracking-ability-grouping-loveless>.

⁵⁴ Loveless, *supra* note 53, at 20.

stratified secondary education system.⁵⁵ SOMSD utilizes an extensive ability grouping system, which includes specific criteria that a student must meet in order to advance to a higher academic level.⁵⁶ These criteria prevent parents from petitioning to have their children placed in higher-level courses.⁵⁷ Middle school language arts, science, and social studies classes are grouped heterogeneously (not tracked), except that in seventh grade students can take a test to enroll in an accelerated eighth grade English language arts program.⁵⁸ However, the District tracks all middle school math courses.⁵⁹ In the spring of fifth grade, students take a math test to determine their math placement in sixth grade.⁶⁰ School officials also consider grades, teacher recommendations, and five end-of-unit assessments.⁶¹ Students are assigned to one of three math classes in sixth grade—Accelerated (students skip to seventh grade material), Honors, or College Prep (a grade-level course). Seventh grade students also take math at one of the same three levels, advancing or descending based on grades, test scores, and teacher recommendations.⁶² In eighth grade, students are further stratified into one of four classes—Accelerated, Advanced Honors Algebra, Honors Grade 8 Math, or College Prep Math.⁶³ The “College Prep” label is deceptive because District data shows these students are not prepared for college. The Superintendent’s Excellence and Equity Report indicates that only 13 percent of Level 3 students and 5 percent of Level 2 students earned a college degree. Furthermore, while not every middle school class is formally leveled (“grouped homogeneously” or tracked), with math being leveled, parents report that the students in the most advanced math classes invariably end up taking many of their classes together because of scheduling issues that arise in relatively small schools. As a result, middle school ends up having a group of students on an unofficial accelerated track.

⁵⁵ See Letter from Brian G. Osborne, (former) Superintendent, to Board of Education Members, Re: Proposed Changes to Academic Placement at CHS, 2–4, January 18, 2012, *available at* https://www.google.com/url?q=http://www.somds.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/60/SOMSD_CHS_academic_placement.pdf&sa=U&ei=DMO-U4-D4mlsQT3moDYCw&ved=0CAUQFjAA&client=internal-uds-cse&usg=AFQjCNE_MhwAX42h3gHbSGMCd8skUxEbSw.

⁵⁶ See generally Exhibit B, *supra* note 26.

⁵⁷ *Id.* at 16-17.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Once SOMSD students reach Columbia High School, the already stratified nature of adolescence is compounded by official, intense ability grouping. Each course requires students to meet certain criteria for registration. The Fine Arts Department offers heterogeneously grouped courses, auditioned music groups classified at Level 3, and Level 6-Advanced Placement (AP) Studio Art, Art History, and Music Theory.⁶⁴ Social Studies courses are offered in three levels—Level 3 College Prep, Level 4 Honors, and Level 6-AP.⁶⁵ The criteria for AP Social Studies courses include grades and a teacher recommendation considering mostly subjective criteria such as resourcefulness, independence, responsibility, and a “passion to ensure a lasting commitment to the subject.”⁶⁶ Additionally, English courses are grouped at three levels—Level 3 College Prep, Level 4 Honors, and Level 6-AP—and placement is mostly based on previous grades, previous level, and a graded writing sample.⁶⁷ Students report not being told when the placement tests are given for AP courses if they are not in the highest-level courses.

Language, math, and science courses are divided into additional levels. There are four levels in World Language courses Level 2, Level 3, Level 4, and Level 6-AP with placement based on grades and teacher recommendations, as well as subjective criteria such as independence, abstract thinking, and problem solving.⁶⁸ High school math courses are grouped into five levels based on grades in the previous course, state test scores, and teacher recommendations.⁶⁹ Similarly, Science courses are grouped into five levels and placement is based on grades, teacher recommendations, and subjective observations such as effort, ability to work independently, and motivation.⁷⁰

SOMSD’s leveling system results in a disproportionately low representation of Black students in AP courses, and a disproportionately high representation of Black students in

⁶⁴ *Id.* at 5.

⁶⁵ *Id.* at 10–11.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 4–5 (AP courses require an application, teacher recommendation, and, possibly, passage of a placement test).

⁶⁸ *Id.* at 11 (AP courses also require a written essay and oral exam).

⁶⁹ *Id.* at 6–7.

⁷⁰ *Id.* at 8–9.

lower-level courses. During the 2011-2012 school year, Black students consisted of 52.3 percent of the student population at Columbia High School, compared to a 38.3 percent White population.⁷¹ Nevertheless, only 21.5 percent of students in AP classes and 18.4 percent of students in Level 5 advanced classes were Black.⁷² In contrast, White students made up 69.0 percent of AP students and 71.5 percent of Level 5-Advanced students.⁷³ Conversely, Black students comprised a disproportionately high percentage of the lower-level course population. District data from 2009 indicates that 72.8 percent of Columbia’s Black student population was placed in Level 2 and 3 language arts courses, while only 17.6 percent of white students attended the same courses.⁷⁴

3. *Unlike Heterogeneous Grouping or De-Leveling, Tracking Is Not Effective*

The body of research regarding leveling and ability grouping is immense. Meta-analyses distilling leveling yield the conclusion that it is largely ineffective. Researcher John Hattie examined the large, established research base and conducted a meta-analysis of more than 300 ability grouping studies, including all grade levels and curriculum areas.⁷⁵ His research concluded that, “tracking has minimal effects on learning outcomes and profound negative effects on equity outcomes.”⁷⁶ Examining the effects on subgroups of students, he concluded “no one profits,” even high achievers, from ability grouping.⁷⁷

While the body of research on ability grouping/tracking varies in certain respects, three consistent groups of studies and conclusions have emerged.⁷⁸ The first group of studies

⁷¹Nat’l Ctr. for Educ. Statistics, *Common Core of Data*, http://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=3415330&ID=341533002422.

⁷² Lovie Lilly, *et al*, PowerPoint Presentation *Forging Pathways for Innovative Learning Opportunities for All Students: Progress on the CHS 5 Year Strategic Plan 13–14* (2012), available at http://www.somds.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/74/CHS_Strategic_Plan_Update.pdf.

⁷³ *Id.*

⁷⁴ *Superintendent’s Report*, *supra* note 27, at 27. Although this data is older, more recent higher-level enrollment numbers are not available, and there is no indication that these ratios have been ameliorated in any way since 2009.

⁷⁵ Hattie’s entire work examines over 50,000 studies and 800 meta-analyses assessing student achievement.

⁷⁶ John A. C. Hattie, *Visible Learning: A Synthesis of Over 800 Meta-Analyses Relating to Achievement* 90 (2008).

⁷⁷ *Id.*

⁷⁸ Burris, *et al.*, *supra* note 22, at 5–6.

compares ability grouped and non-ability grouped classes showing no effect on learning when grouped without differentiated curriculum.⁷⁹ The second group of studies compared high-track and low-track classes with differentiated curriculum, indicating that low-track students learned less than their high-track peers.⁸⁰ Thus, compensatory programs meant to help low-level students “catch-up” do not achieve their goal and result in discouragement and lower outcomes for students in lower levels.⁸¹ The final group of studies addressed the impact of high track curriculum.⁸² As expected, high-level students benefitted from enriched curriculum, but research also showed that low- and middle-track students (included by either design or administrative accident) benefitted from the same curriculum.⁸³ Synthesizing these studies, ability grouping, at best, benefits high-level students without any benefit to low-level students. At worst, ability grouping serves to widen the achievement gap. The minimal benefits do not outweigh the social and diversity costs.

Research and anecdotal evidence demonstrate that other systems can provide comparable rigor to high-level students, while also challenging and raising overall student achievement. One such case study from Long Island demonstrates how de-leveling can raise achievement levels for all students. In 1989, the school district in Rockville Centre, Long Island undertook to de-track its entire district and transition to heterogeneous grouping. Previously, the district’s test scores were competitive and most residents were happy with the status quo; however, there was a significant achievement gap between high- and low-performing students.⁸⁴ Due to tracking, the district’s predominantly White upper-middle-class majority enjoyed a very different educational experience from the minority population.⁸⁵

Before the district’s superintendent began de-tracking, like SOMSD, “each core academic area in the middle and high schools had at least two tracks, and as many as five.”⁸⁶ Minority students were over-represented in low-track classes and nearly non-existent in high-

⁷⁹ *Id.* at 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 8.

⁸⁵ *Id.*

⁸⁶ *Id.* at 9.

track classes. The district began by de-tracking middle school English and social studies. After eliminating the low-track courses, the total number of students failing courses decreased, while the school's high-end test scores remained the same.⁸⁷ Math and science courses were opened up for all students to self-select, but a disproportionate number of minority students were not enrolling in the high-level courses.⁸⁸ In response, the district implemented a multi-year plan in which it removed the less-challenging options and eliminated the curricular stratification in middle school math and science.⁸⁹ In 1995, heterogeneous *accelerated* math classes began for the entering sixth-grade class.⁹⁰

To ensure that all students had a chance to succeed without reducing the achievement of the most proficient students, the district implemented three measures: “(a) heterogeneous grouping, (b) high-track curriculum, and (c) pre- and post-teaching in alternate-day Math workshops for a subgroup of students, meeting for one period every other day.”⁹¹ The workshops were optional but expected for struggling students, and complemented the heterogeneous math class by providing extra support without a separate “remedial” track.⁹² The reforms resulted in nearly every student entering high school having completed Algebra in the eighth grade without affecting the achievement of the most proficient students.⁹³ Furthermore, the number of students taking advanced math classes like Pre-Calculus and AP Calculus increased for students of all achievement levels, minority and majority students alike.⁹⁴

The high school gradually eliminated all curricular stratification in ninth and tenth grade classes between 1998 and 2002.⁹⁵ After tenth grade, students opted for the college preparatory New York State Regents curriculum, the International Baccalaureate (IB) curriculum, or

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 10.

⁹⁵ *Id.*

both.⁹⁶ Forty-five percent of the class of 2006, the first untracked group of students through tenth grade, were International Baccalaureate candidates.⁹⁷ Only 35 percent of the class of 2004 was IB candidates.⁹⁸ The number of Black and Hispanic students who were IB diploma candidates nearly tripled from 13 percent to 38 percent over the same period.⁹⁹ IB exam scores remained high, with 75 percent of all exams scoring a 4 or better,¹⁰⁰ and a third of the 2007 class earning an IB diploma in addition to the New York State Regents diploma.¹⁰¹

The district also closed the racial gap in its award of New York State Regents diplomas.¹⁰² In 2000, 32 percent of Black and Hispanic students and 88 percent of White or Asian American students earned Regents diplomas.¹⁰³ Five years later, the achievement gap had nearly disappeared—92 percent of Black and Hispanic students and 98 percent of White or Asian American students in the class of 2005 earned Regents diplomas.¹⁰⁴ The heterogeneous grouping of students through early high school therefore yielded long-term gains in student learning and achievement.

The benefits of heterogeneous grouping (de-leveling) vastly outweigh the deleterious effects of the racial and achievement disparities of ability grouping/tracking. This is why the National Education Association (NEA) has come out against homogeneous grouping. “The National Education Association supports the elimination of... [ability] groupings. The NEA believes that the use of discriminatory academic tracking based on economic status, ethnicity, race, or gender must be eliminated in all public school settings (NEA Resolutions B-16, 1998, 2005).”¹⁰⁵ The National Association of School Psychologists (NASP) has also critiqued

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ This score is equivalent to a 3 on the AP exams and makes students eligible for college credit at certain colleges. *Id.* at 47 n.40.

¹⁰¹ *Id.* at 9.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Nat’l Educ. Ass’n, *Research Spotlight on Academic Ability Grouping: NEA Reviews of the Research on Best Practices in Education*, available at <http://www.nea.org/tools/16899.htm>.

tracking, announcing that NASP “supports the instruction of students within heterogeneous classrooms that recognize and accommodate individual student differences in learning style, ability, and interests.”¹⁰⁶

There is no evidence that suggests tracking benefits a school district. Rather, research suggests that de-leveling curricula and adopting high expectations with support for all students increases the achievement level of all students, and decreases the racial achievement gap.

IV. Legal Analysis

SOMSD’s suspension and tracking practices and policies raise serious questions about the District’s compliance with Title VI of the Civil Rights Act of 1964 and, with respect to discipline, Section 504 of the Rehabilitation Act of 1973. Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin.¹⁰⁷ Section 504 likewise prohibits recipients of federal financial assistance from discriminating based on disability.¹⁰⁸

Department of Education regulations implementing these statutes prohibit practices that have a *disparate impact* by race or disability, even if there is no *discriminatory intent* behind those practices. The regulations prohibit school district conduct that has “the effect of subjecting individuals to discrimination because of their race, color, or national origin,” as well as conduct that has “the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap.”¹⁰⁹

In the education context, a disparate-impact analysis proceeds in three steps. The first step is to ascertain whether a school district’s facially neutral practice has a disproportionate and adverse impact on children of a particular race or children with disabilities. If so, then there is a *prima facie* case of disparate-impact discrimination. Next, if there is a *prima facie* case of disparate impact, the practice is unlawful unless the district demonstrates that it serves an educational necessity or an important educational goal. Finally, even if the practice does

¹⁰⁶ Nat’l Ass’n of Sch. Psych., *Research on Effects of Ability Grouping and Tracking: Position Statement on Ability Grouping and Tracking*, available at dlti.us/doc/RESEARCHABILITYGROUPING.pdf.

¹⁰⁷ 42 U.S.C §§ 2000d-2000d-7 (2012).

¹⁰⁸ 29 U.S.C. § 794 (2012).

¹⁰⁹ 34 C.F.R. § 100.3(b)(2); 28 C.F.R. § 41.51(b)(3)(i).

serve an educational necessity, it is unlawful if equally effective and less discriminatory alternative practices are available.

In South Orange Maplewood, each step of this analysis demonstrates that the school district's suspension practices have the unlawful effect of discriminating by race and disability.

A. South Orange Maplewood's Suspension Practices Disparately Impact Students of Color and Students with Disabilities

As described herein, there is overwhelming evidence of the disparate impact SOMSD's disciplinary policies and practices have on students of color and students with disabilities. Certain disparities from the 2011–2012 academic year, however, warrant special emphasis:

- Independent of disability status, the data reflect large disparities by race. The suspension rate for Black students in the district is 16.1 percent, versus a rate of just 2.7 percent for White students overall.
- Students with disabilities face an intolerable risk of suspension, with higher rates for both Black and White students. At Columbia High School, 30.6 percent of the school's Black students with disabilities received an out-of-school suspension. The suspension rate for White high school students with disabilities was 23 percent lower than the rate for Black students with disabilities. Similarly, SOMSD suspended 23.3 percent of Black with disabilities enrolled in middle school. The suspension rate for White middle school students with disabilities was almost 22 percentage points lower than the rate for Black students with disabilities.
- The most pronounced disparities are revealed when the risks of suspension by race *with* disability are compared. The most pronounced difference was at South Orange Maplewood's two middle schools, where the suspension risk for Black students with disabilities is 17.2 times higher than non-disabled White students' out-of-school suspension risk.
- Independent of race, the data reflect large disparities by disability status. Across SOMSD, more than one in every five students with disabilities was suspended at least once. Moreover, 15 percent of students with disabilities repeatedly received out-of-school suspensions, while just 5.8 percent of students without disabilities repeatedly received out-of-school suspensions.

Under a disparate-impact theory, this *prima facie* evidence of discriminatory impact cannot be undermined by a showing that students of color or students with disabilities actually engage in a disproportionate share of behaviors punishable by suspension. The U.S. Department of Education’s disparate-impact regulations prohibit unjustified practices that have the “effect” of discriminating, even when they are applied neutrally. Thus, the core questions are whether widespread out-of-school suspensions are educationally necessary, and even so, whether there is an equally or more effective response that is less harmful.

B. Frequent Out-of-School Suspensions Are Not Educationally Necessary

South Orange Maplewood’s frequent out-of-school suspensions are not educationally necessary under the second step of the disparate-impact analysis, as relevant research supports imposing out-of-school suspensions only as a last resort. In fact, research suggests there is no educational benefit to suspending students—and thereby denying them access to school—for anything less than the most serious offenses. The American Psychological Association has determined that out-of-school suspension is not only ineffective, but for some students, can actually reinforce misbehavior.¹¹⁰

The Civil Rights Project at UCLA has found no research linking frequent out-of-school suspensions with improvements in school safety or student behavior. Its review of the literature merely confirms a previous review by the American Psychological Association, which found no evidence that zero-tolerance disciplinary policies, as applied to mundane and non-violent misbehavior, improve school safety or student behavior.¹¹¹ Vague and discretionary rules—such as South Orange Maplewood’s rules authorizing suspension for disruption—are likewise flawed. Research suggests that when school administrators are afforded such discretion, they tend to punish Black students more harshly than White students who engage in identical conduct.¹¹²

In fact, evidence indicates that frequent out-of-school suspensions exacerbate the problems they are supposed to cure. A study by the Council of State Governments, which tracked over one million middle school students for six years, linked suspensions to dropping out and a high risk of involvement with the juvenile justice system.¹¹³ That is why professional

¹¹⁰ American Psychological Association Zero Tolerance Task Force, *supra* note 10 at 854.

¹¹¹ *Id.* at 583-584.

¹¹² Tony Fabelo et al., *supra* note 10 at 40.

¹¹³ *Id.* at 61.

organizations like the American Pediatrics Association and the American Psychological Association have concluded that out-of-school suspensions do not work.¹¹⁴

SOMSD's disproportionate suspension of students with disabilities is particularly troubling. Those students and their parents already face substantial educational challenges. Logically, if out-of-school suspensions were helpful to them, then suspensions would lead to marked improvements in behavior and academic outcomes. But that is not what the data suggest; instead, the data show a high frequency of disabled students being suspended repeatedly in the District.

Thus, although teachers and administrators surely face substantial challenges in educating and disciplining students, there is no evidence that frequently suspending students helps to meet those challenges. For that reason, SOMSD's disparate suspension of students of color and students with disabilities violates Title VI and Section 504.

C. Less Discriminatory Discipline Practices Provide Greater Benefits

Even if SOMSD's suspension policies conferred some benefit on the District's students—which they do not—they would still violate Title VI and Section 504. This is because SOMSD could improve educational outcomes and school discipline through policies and practices that do not disproportionately harm students of color and students with disabilities.

Recent research by The Council of State Governments suggests that even high-suspending districts like SOMSD can reduce out-of-school suspensions if adults at school change their approach to managing student behavior. For instance, researchers analyzed disciplinary variations in Texas's largest school districts, controlling for both individual traits—including disability type, test scores, and prior disciplinary history—and school traits such as teacher experience and the percentage of students with socio-economic disadvantage. They found that the actions of school administrators “can make a difference in whether students are successful in avoiding disciplinary actions independent of their risk factors.”¹¹⁵

Even when disciplinary actions are unavoidable, school administrators can choose actions that work better than out-of-school suspension. For example, in 2010 Connecticut

¹¹⁴ American Academy of Pediatrics Committee on School Health, *supra* note 13; *see also* American Psychological Association Zero Tolerance Task Force, *supra* note 10 at 852.

¹¹⁵ Fabelo, *supra* note 10 at 83.

passed a law requiring that out-of-school suspensions be imposed only rarely. Under the law, out-of-school suspensions can be imposed only on students who pose a danger to themselves or others, or instead as a last resort for students who engage in persistent and egregious misbehavior. Even disobedient students that need to be removed from their classrooms are supposed to remain in school.¹¹⁶

The alternatives to out-of-school suspension are many, so we address only a few specific examples here.

1. School-Wide Positive Behavioral Interventions and Supports and Restorative Justice

One especially promising option is the practice known as School-Wide Positive Behavioral Interventions and Supports (SWPBIS). SWPBIS seek to reduce disciplinary incidents by implementing systems in schools that encourage good behavior.¹¹⁷ For example, schools in Florida that have implemented this alternative *with high fidelity* have reduced out-of-school suspensions from an average of 43 days per 100 students to 25 days per 100 students.¹¹⁸ Alternatives like SWPBIS improve circumstances for all students, including students of color and students with disabilities, because they improve behavior management while using out-of-school suspensions only as measures of last resort.

SWPBIS seeks to change underlying attitudes and policies concerning how behavior is addressed,¹¹⁹ and it comprises multiple levels of intervention. The first level is school-wide. Its goal is to ensure a safe and effective learning environment by monitoring office referrals for discipline and setting school-wide goals for reducing these referrals. The system of interventions and supports is designed to shift the focus from the individual student to the

¹¹⁶ Conn. Gen. Stat. Ann. §10-233c (West 2012).

¹¹⁷ See School-wide PBIS. Technical Assistance Center on Positive Behavioral Intervention & Supports. Available at <http://www.pbis.org/school/default.aspx>.

¹¹⁸ See Florida's Positive Behavior Support: Rtl for Behavior Project, *Annual Report 2008-2009: Outcome and Evaluation Data*, at 23 (2009), available at www.pbis.org/common/pbisresources/publications/FLPBS_RtIB_Project_Annual_Report20082009.pdf.

¹¹⁹ George Sugai & Robert Horner, *The Evolution of Discipline Practices: School-wide Behavior Supports*, Vol. 24 No. 1/2 Child and Family Behavior Therapy 23, 24 (2002).

collective behaviors, structures, and routines in the school as a whole. Numerous studies have found positive results with this approach.¹²⁰

The second and third levels of SWPBIS provide additional supports and services for smaller numbers of students who exhibit challenging behavior. These include interventions conducted in individual classrooms and focus more on specialized instruction of school expectations, skills training for students, or other strategies tailored to specific behaviors.

Another school-wide disciplinary alternative is restorative justice, a practice intended to abate the growing number of youth suspensions by engaging in disciplinary activities that build relationships and community within schools. Rather than suspending children for minor incidents, such as intentionally bumping into someone or being disruptive in class, a student in a restorative justice program may have the opportunity to write an apology or resolve the incident by discussing it with their peers and teachers. This alternative to “zero tolerance” policies helps keep streets safe, teaches children how to effectively problem solve, and keeps many children out of the “school-to-prison pipeline.”

Restorative justice “provides high levels of both control and support to encourage appropriate behavior, and places responsibility on students themselves, using a collaborative response to wrongdoing.”¹²¹ Teachers implementing this approach use “core strategies like conferencing circles to resolve conflict and engage students in managing the environment.”¹²² At a March 2012 conference sponsored by the New York State Permanent Judicial

¹²⁰ See, e.g., Robert H. Horner, et al., *A Randomized Wait-list Controlled Effectiveness Trial Assessing School-wide Positive Behavior Support in Elementary Schools*, 11 *Journal of Positive Behavior Interventions* 133 (2009); Stephen R. Lassen, et al., *The Relationship of School-wide Positive Behavior Support to Academic Achievement in an Urban Middle School*, 43 *Psychology in the Schools* 701–712 (2006), available at <http://flpbs.fmhi.usf.edu/revision07/research/research%20articles%20supporting%20pbs/middleschoolimplementation.pdf>; Carol W. Metzler, et al., *Evaluation of a Comprehensive Behavior Management Program to Improve School-wide Positive Behavior Support*, 24 *Education and Treatment of Children* 448–479 (2001); Howard S. Muscott, et al., *Positive Behavioral Interventions and Supports in New Hampshire: Effects of Large-Scale Implementation of Schoolwide Positive Behavior Support on Student Discipline and Academic Achievement*, Vol. 10 No. 3 *Journal of Positive Behavior Interventions* 190-205 (2008).

¹²¹ Abby J. Porter, *Restorative Practices in Schools: Research Reveals Power of Restorative Approach, Part II*, International Institute for Restorative Practices (2007), available at http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/schoolresearch2.pdf.

¹²² Nancy Fishman & Dory Hack, *School-based Youth Courts: Creating a Restorative Justice Alternative to Traditional School Disciplinary Responses*, Keeping Kids in School and out of Courts: A Collection of Reports to Inform the National Leadership Summit on School-Justice Partnerships, New York State Permanent Judicial Commission on Justice for Children (2012), available at http://www.school-justicesummit.org/papers/paper_11.cfm.

Commission on Justice for Children, several experts presented very promising examples of how restorative justice improved school climate and reduced out-of-school suspensions.¹²³ While the researchers who study restorative justice are only beginning to develop empirical proof of its effectiveness, increasing reports of success suggest that this may be a viable and less discriminatory alternative worth exploring in South Orange Maplewood.

2. *Student-Specific Alternatives*

Perhaps the most obvious alternative to out-of-school suspension is in-school suspension. That tactic provides students with supervision and gives them the opportunity to stay productive and avoid falling behind in class.

However, even in-school suspensions are usually more severe than other effective means of discipline. Mediation, counseling, and parent conferences are examples of more constructive interventions that provide an opportunity to better understand and address the root cause of student misbehavior.

3. *Teacher Training in Classroom and Behavior Management*

There are also systemic means of improving school discipline that do not hinge upon direct intervention with misbehaving students. One approach is to provide training and support for teachers in classroom and behavior management. Researchers from two national centers—the National Comprehensive Center for Teacher Quality and the National Evaluation and Technical Assistance Center for the Education of Children and Youth who are Neglected, Delinquent, or At-Risk—have described four ways in which teachers and school administrators can improve the classroom environment: “(1) through their relationships with children and youth, (2) through their attitudes and social emotional competence, (3) by contributing to the conditions for learning and (4) through their responses to student behavior.”¹²⁴ On this last point, the researchers noted, “educator practices often contribute to students’ indiscipline and oppositional behavior.”¹²⁵

¹²³ Summit materials are available at http://www.school-justicesummit.org/presentations/presentation_details.cfm?topicID=5.

¹²⁴ Jane G. Coggs, David Osher, & Greta Colombi, *Enhancing Educators’ Capacity to Stop the School-to-Prison Pipeline*, American Institutes for Research, 169-186 (2012), available at http://school-justicesummit.org/pdfs/journal-web_paper_12.pdf.

¹²⁵ *Id.* at 174 (internal citation omitted).

Consistent with those recommendations, SOMSD could undergo additional training on the best ways to manage classrooms and interact with students.

4. *Ecological Approaches*

Ecological approaches to classroom management “deal[] with school discipline by increasing the strength and quality of classroom activities.”¹²⁶ Some of the defining features of the ecological approach are well-planned lessons, varied methods of instruction, clear and developmentally appropriate behavioral expectations, and careful monitoring of student engagement.

5. *Social and Emotional Learning*

Social and emotional learning is best described as “the process through which we learn to recognize and manage emotions, care about others, make good decisions, behave ethically and responsibly, develop positive relationships, and avoid negative behaviors.”¹²⁷ Social and emotional strategies aim to develop student assets that foster self-discipline. The Director of the Safe and Supportive Schools Technical Assistance Center, David Osher, suggests that “if classroom activities lack holding power, it is unlikely that schoolwide discipline approaches [schoolwide positive behavioral supports and social emotional learning] will make up for this deficiency.”¹²⁸ Therefore, social and emotional learning and ecological management approaches are likely most effective if implemented in combination with SWPBIS.

D. SOMSD’s Tracking Policies and Practices Have a Disparate, Negative Impact on Black Students

As described above, SOMSD’s racially disparate tracking system has a disparate, negative impact on Black students. In the high school, the evidence of this disparity could not be clearer. Of the 424 students, or 22.8 percent of the total student body, who took at least one

¹²⁶ David Osher et al, *How Can We Improve School Discipline?*, 39 (1) Educational Researcher. 48, 49 (2010).

¹²⁷ Joseph E. Zins, et al., *The Scientific Base Linking Social and Emotional Learning to School Success*, Building Academic Success on Social and Emotional Learning: What Does the Research Say? Zins et., al Eds., Teachers College, 4 (2004), available at http://selted.weebly.com/uploads/1/8/6/4/18649540/zins_et_al._2004.pdf.

¹²⁸ Osher, *et al.*, *supra* note 126, at 49–50.

AP course during the 2011-2012 school year, a staggering 70 percent of those students were White, compared to only 30 percent of whom were Black, and 1.9 percent of whom were Hispanic. This is in a school that has a smaller percentage of White students than the overall district. Black students make up over 50 percent of the student population at Columbia High School. Black students are systematically excluded by the District's policies and practices. These racially disparate statistics alone merit further investigation by OCR, as the complainants have established a *prima facie* case of disparate-impact discrimination.¹²⁹

E. Tracking is Not Educationally Necessary and Less Discriminatory Alternatives are Available.

As described above, SOMSD's racially disparate tracking system is not educationally necessary. Tracking fails to serve most students, and tends to harm students of color and increase segregation within a school building. The result in SOMSD has been an increase in the achievement gap. Furthermore, tracking or homogeneous grouping fosters low expectations for students and negative stereotypes. Research demonstrates that the elimination of tracking increases expectations for all students and reduces the racial achievement gap. The students currently benefitting from higher-level courses can have their educations enriched in other ways, but all students deserve high expectations and a rigorous curriculum. Therefore, while a small percentage of students may marginally benefit from tracking, it is not educationally necessary and the less discriminatory alternative of de-leveling, as demonstrated by the case study in Long Island, is available and should be implemented. The complainants are aware the SOMSD has recently entered a Resolution Agreement with OCR regarding the access to Advanced Placement classes and enrichment for Black students, the details of which are unavailable, but may impact the relief requested.

V. Relief Requested

The undersigned request that OCR thoroughly investigate out-of-school suspension disciplinary practices and policies as well as academic tracking in the South Orange Maplewood School District, and explore any evidence that those practices and policies violate either Title VI or Section 504.

¹²⁹ Cf. *Anderson v. Banks*, 520 F. Supp. 472, 482 (S.D. Ga. 1981) ("OCR found that black students were over-represented in the lower achievement groups and under-represented in the higher groups. This occurred in many cases despite rather than because of the [placement test] scores achieved by the children.").

Our purpose with this Complaint is to improve rather than vilify the District. We believe that SOMSD has the capacity to make substantial changes that will dramatically reduce the use of out-of-school suspensions, while maintaining safe and orderly learning environments and improving achievement for all of its students and advancing its goal of ensuring that its students of color achieve at the same level as its White students. We request that OCR encourage SOMSD to enter into a formal and public Resolution Agreement with the ACLU of New Jersey, the ACLU Racial Justice Program, and The Center for Civil Rights Remedies at The Civil Rights Project of UCLA. In fact, preliminary discussions with SOMSD suggest that they may be amenable to such a solution. We anticipate that we would not press OCR for a formal finding of a Title VI or Section 504 violations, provided the Resolution Agreement includes the following prescriptions:

1. SOMSD will collaborate and partner with the complainants, mutually agreed upon experts, and members of local community groups serving the interests of parents and children from the subgroups represented in this Complaint, to create and monitor a Resolution Agreement designed to eliminate or significantly reduce the adverse and disparate impact of SOMSD's discipline policies and practices, with an emphasis on reducing the use of out-of-school suspension.
2. The Resolution Agreement shall contain strategies, objectives, and timelines to ensure that SOMSD discipline policies and practices allow for out-of-school suspension only as a measure of last resort, and that the usage rate out-of-school suspension and all other disciplinary interventions are monitored for their impact on the subgroups identified in this Complaint on a quarterly basis.
3. The Resolution Agreement shall place clear limits on the use of out-of-school suspensions and expulsions. Other less severe disciplinary sanctions shall be required except for serious offenses to be specified in the Resolution Agreement. These serious offenses might include violence or physical threats, weapons possession, or illegal drug offenses.
4. SOMSD will collaborate and partner with the complainants, mutually agreed upon experts, and members of local community groups serving the interests of parents and children from the subgroups represented in this Complaint, to create and monitor a Resolution Agreement designed to eliminate or significantly reduce the adverse and disparate impact of SOMSD's tracking policies and practices, which shall include the gradual but full elimination of homogeneous grouping. Accordingly, a yearly gradual elimination of homogeneous grouping in middle school math classes, beginning with the incoming sixth-grade class the first year, seventh grade the next year, and eighth grade in the third year, shall be implemented.

Homogeneous grouping should therefore be replaced with heterogeneous grouping, including necessary parallel supports and enrichments for struggling and advanced students.

5. Parallel to the sixth grade de-leveling, the Resolution Agreement shall include open enrollment in all high school courses except for necessary pre-requisites (*e.g.*, completion of English I before English II). Once the heterogeneous middle school classes reach high school, ninth and tenth grade classes will also have become heterogeneous with eleventh and twelfth grade courses offered at either the advanced honors or AP level. At all levels, the heterogeneous classes replacing the leveled system shall be taught at the advanced honors or accelerated level, thereby challenging all students. This proposal is not a “watering down” but a “leveling up.” Students who struggle to keep up are given parallel, not remedial, supports to help them succeed (similar to the current Project Ahead program). Open selection with less emphasis on teacher input will alleviate the subconscious racial biases of teachers making recommendations for placement.

6. The Resolution Agreement will create and authorize a Review Team, including parties to this Complaint or their assignees, to further analyze and revise the SOMSD student code of conduct and de-leveling/de-tracking initiatives.

7. SOMSD will contract with an independent consultant, selected by the Review Team and approved by the complainants, with expertise in classroom management in order to identify means of reducing out-of-school suspensions and improve school climate and safety without relying on frequent disciplinary exclusions.

8. The Review Team and the independent consultant shall also consider and implement at least three of the following interventions:

- SOMSD will implement School-Wide Positive Interventions and Supports (SWPBIS) in its schools. The Superintendent shall establish and train a district-wide Leadership Team in SWPBIS as well as other evidence-based alternatives to Zero Tolerance policies such as “ecological approaches to classroom management” and “social emotional learning.” Ideally, this would be combined with training on multi-cultural competency.
- SOMSD will implement a restorative justice approach, where the students who cause conflicts are instrumental in resolving them. This may include methods such as conflict management, mediation, restorative conferencing, and circles.
- SOMSD will implement specific training for teachers and administrators in classroom management and discipline as well as social and emotional learning.

This training may be provided through professional development or by working with a consultant such as that provided by Research for Better Teaching. However, the mere expansion of extant training programs in South Orange Maplewood, if they are not associated with fewer out-of-school suspensions, would not be sufficient.

- SOMSD will provide training for parents who request support around behavioral issues.

9. The Resolution Agreement will require SOMSD to implement new directives related to students with disabilities. These directives might include the development and implementation of functional behavioral assessments (FBA), behavior intervention plans derived from FBAs, and a process for conducting appropriate manifestation determination reviews for students with disabilities whose behavior impedes the child's or others' learning.

10. The Resolution Agreement will require data analysis, periodic review, and reporting: SOMSD will agree to collect all discipline data, disaggregated by race and/or ethnicity, gender, disability status, and type of offense, on a quarterly basis. We also request that the data be publicly reported to the South Orange Maplewood community and published on the District's website on an annual basis. This data shall be monitored for a period of three years to ensure that disparities are being reduced. If disparities are not reduced, SOMSD agrees to reconvene parents, experts, and relevant administrators to develop new initiatives to combat discipline disparities.

11. The Resolution Agreement will include measures to ensure that students with disabilities who are suspended have individualized behavior intervention plans and functional behavior assessments developed by trained school psychologists in response to the first suspension in a school year to ensure that the disparity between suspensions of students with disabilities and students without disabilities is reduced in the next three years.

12. The Resolution Agreement will include other measures, goals, and actions to respond to additional issues discovered in the course of OCR's investigation.

13. The Resolution Agreement will include mandatory training for SOMSD teachers on the following issues:

- Training to equip teachers to instruct a leveled-up, advanced curriculum to heterogeneous classes, while avoiding the pitfalls of diluting instruction to the "middle"

of the class. Such training will be ongoing, supported, and monitored by supervising teachers, administrators, and/ or third-party consultants.

- Training to implement complementing parallel supports for students who need such support, while avoiding remedial pitfalls. Additionally, the District will provide necessary enrichment opportunities to gifted students.
- Training and support to create a school environment that fosters a community of excellence and challenges every student achieve at a high academic level, ensuring that all teachers believe in every student's ability to excel. Training will also be provided to guidance counselors and other enrollment decision-makers to challenge every student to take challenging courses and avoid biases, which steer students into less challenging coursework. However, implementation of such programs with training and mission statements unaccompanied by observable and measureable academic gains would be insufficient.

Individual Remedies Necessary to Resolve this Complaint on Behalf of Z.Z.

An agreement shall be entered whereby SOMSD agrees to provide the following to X.Z. and Y.Z. on behalf of Z.Z. to resolve her individual claims:

1. Counseling or therapy for Z.Z. to remediate the psychological impact of leveling;
2. Compensatory education for Z.Z. in the form of:
 - a. Individual math tutoring at school, or by a private tutor or independent learning center, as chosen by Z.Z.'s parents;
 - b. Written acknowledgement from the math department of its failure with respect to Z.Z., or an apology.
3. Services sufficient to ensure that Z.Z. stays in Level 5 courses and is not punished for the district math department's failures in 2013-2014, via a high school, community college, or online course during the summer or weekends;
4. The removal of the letter grade for Z.Z.'s Level 5 Algebra 2 class and replacement with a Pass (P) grade and explanation on Z.Z.'s transcript
5. Placement of Z.Z. with SOMSD's geometry teacher – with whom Z.Z. has a good relationship – for the 2014-2015 school year.

If the South Orange Maplewood Public Schools do not enter into a mutually agreed upon Resolution Agreement along these lines, or if they fail to implement the terms of such an Agreement, the undersigned urge OCR to complete its investigation and find that SOMSD employs policies and engages in practices that disparately impact each of the aforementioned

subgroups in violation of Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.

VI. Conclusion

The ACLU of New Jersey, the ACLU Racial Justice Program, and the Civil Rights Project at UCLA respectfully ask that OCR investigate this Complaint and facilitate or require the relief requested.

Respectfully submitted,

/s Courtney Bowie

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**CONFIDENTIAL – Initials Changed to
keep minors' identities confidential

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