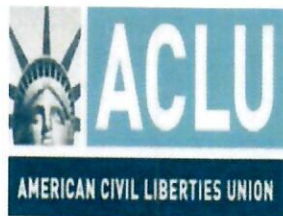


APPENDIX TABLE

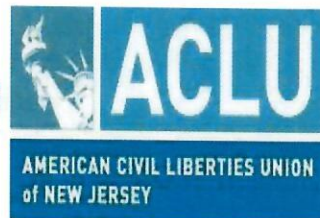
DOCUMENT	DESCRIPTION
EXHIBIT A	ACLU-NJ, ACLU, & UCLA CIVIL RIGHTS PROJECT OCR Complaint v. SOMSD
EXHIBIT B	SOMSD OCR RESOLUTION AGREEMENT (OCR DOCKET No. 02-13-5003)
EXHIBIT C	BIBLIOGRAPHY ON TRACKING AND ABILITY GROUPING
EXHIBIT D	BLACK PARENTS WORKSHOP CORRESPONDENCE TO BOE RE: STUDENT ACCESS
EXHIBIT E	SLIDES FROM SUPERINTENDENT'S PRESENTATION – FEBRUARY 20, 2018
EXHIBIT F	COLUMBIA HIGH SCHOOL ALUMNA FACEBOOK POST RE: TEACHER EXPERIENCE
EXHIBIT G	LEVEL 3 – ALGEBRA I HOMEWORK ASSIGNMENT
EXHIBIT H	ACCESS & EQUITY, & ACADEMIC PLACEMENT POLICIES – SOMSD
EXHIBIT I	BLACK PARENTS WORKSHOP CORRESPONDENCE TO BOE PRESIDENT
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TABLE I	HISTORICAL TABLE – MINORITY STUDENT ENROLLMENT, SOMSD
TABLE II	RACIAL PROFILE OF SOMSD SCHOOLS
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TABLE V	PARCC SPRING 2017 – LANGUAGE ARTS, GRADE 3
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TABLES 1-11

EXHIBIT A



The Center for Civil Rights Remedies
at The Civil Rights Project [Harvard Law School](#)



**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.somsd.k12.nj.us/cms/lib7/NJ01001050/Centricity/Domain/3/se5000%20-%203-2014.pdf>.

⁸ SOMS Student Handbook, *available at* <http://www.somsd.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.somsd.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 necessity, 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.somsd.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.

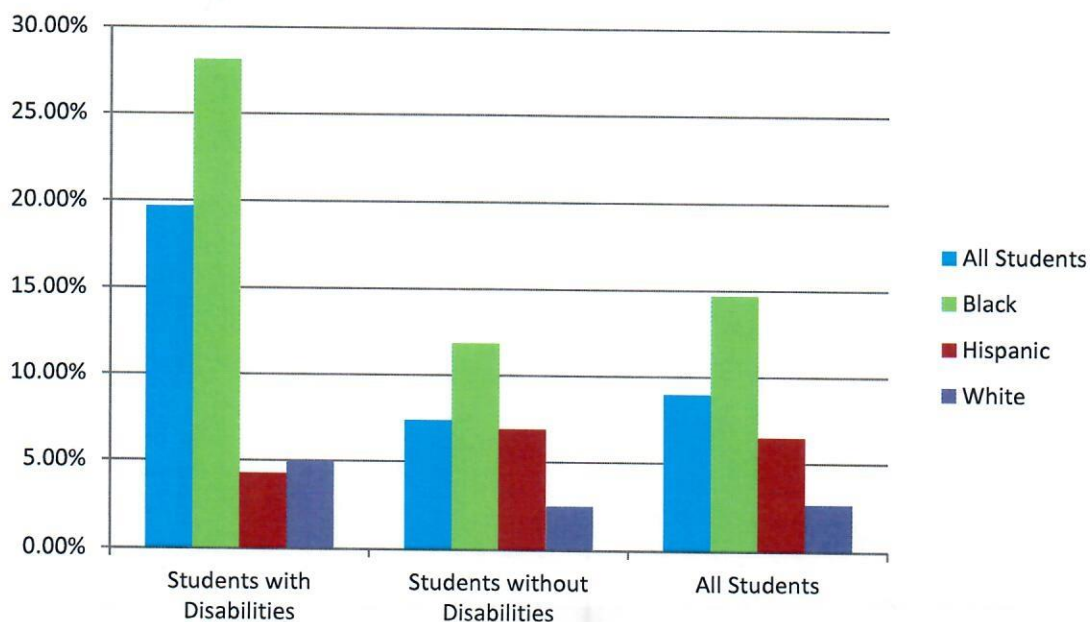
3. *Race and Disability*

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.

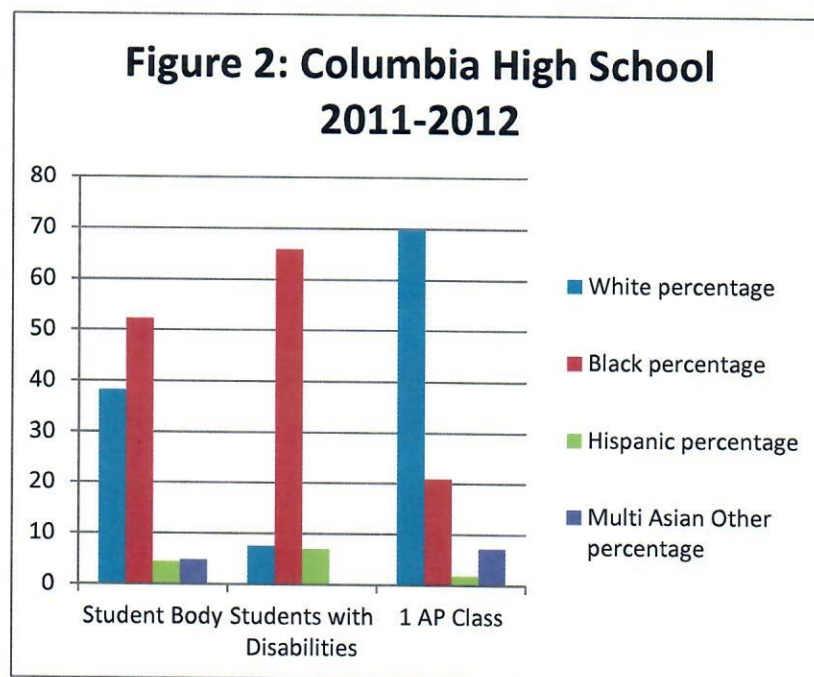
F. Evidence of Racially Disparate Tracking by South Orange Maplewood Public Schools.

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&usq=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.

⁷²Lovie 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.somsk.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.

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

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

⁷⁷*Id.*

⁷⁸Burris, *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.*