

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

The district also closed the racial gap in its award of New York State Regents diplomas.<sup>102</sup> In 2000, 32 percent of Black and Hispanic students and 88 percent of White or Asian American students earned Regents diplomas.<sup>103</sup> 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.<sup>104</sup> 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).”<sup>105</sup> The National Association of School Psychologists (NASP) has also critiqued

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 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.

<sup>101</sup> *Id.* at 9.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 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.”<sup>106</sup>

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.<sup>107</sup> Section 504 likewise prohibits recipients of federal financial assistance from discriminating based on disability.<sup>108</sup>

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.”<sup>109</sup>

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

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<sup>106</sup> 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](http://dlti.us/doc/RESEARCHABILITYGROUPING.pdf).

<sup>107</sup> 42 U.S.C §§ 2000d-2000d-7 (2012).

<sup>108</sup> 29 U.S.C. § 794 (2012).

<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> That is why professional

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

<sup>111</sup> *Id.* at 583-584.

<sup>112</sup> Tony Fabelo et al., *supra* note 10 at 40.

<sup>113</sup> *Id.* at 61.



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

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.”<sup>115</sup>

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

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<sup>114</sup> 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.

<sup>115</sup> 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.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup> 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,<sup>119</sup> 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

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<sup>116</sup> Conn. Gen. Stat. Ann. §10-233c (West 2012).

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

<sup>118</sup> See Florida's Positive Behavior Support: RtI 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](http://www.pbis.org/common/pbisresources/publications/FLPBS_RtIB_Project_Annual_Report20082009.pdf).

<sup>119</sup> 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.<sup>120</sup>

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.”<sup>121</sup> Teachers implementing this approach use “core strategies like conferencing circles to resolve conflict and engage students in managing the environment.”<sup>122</sup> At a March 2012 conference sponsored by the New York State Permanent Judicial

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<sup>120</sup> 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/middleschoolimplementat ion.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).

<sup>121</sup> 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](http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/schoolresearch2.pdf).

<sup>122</sup> 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](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.<sup>123</sup> 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.”<sup>124</sup> On this last point, the researchers noted, “educator practices often contribute to students’ indiscipline and oppositional behavior.”<sup>125</sup>

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<sup>123</sup> Summit materials are available at [http://www.school-justicesummit.org/presentations/presentation\\_details.cfm?topicID=5](http://www.school-justicesummit.org/presentations/presentation_details.cfm?topicID=5).

<sup>124</sup> Jane G. Coggshall, 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](http://school-justicesummit.org/pdfs/journal-web_paper_12.pdf).

<sup>125</sup> *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.”<sup>126</sup> 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.”<sup>127</sup> 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.”<sup>128</sup> 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

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

<sup>127</sup> 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](http://selted.weebly.com/uploads/1/8/6/4/18649540/zins_et_al._2004.pdf).

<sup>128</sup> 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.<sup>129</sup>

**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.

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<sup>129</sup> 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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X.Z. AND Y.Z. ON BEHALF OF Z.Z.\*\*

A.B. AND B.B. ON BEHALF OF

C.B.\*\*

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

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<sup>132</sup> Law student summer employee writer

# EXHIBIT B



**Resolution Agreement**  
**School District of South Orange and Maplewood**  
**OCR Docket No. 02-13-5003**

The School District of South Orange and Maplewood (the District) enters this Agreement to resolve the proactive compliance review, OCR Docket No. 02-13-5003, conducted by the U.S. Department of Education (Department), Office for Civil Rights (OCR). The review addressed whether African American students are provided equal access to and an equal opportunity to participate in rigorous college and career preparatory courses within the District. The District enters this Agreement to ensure its compliance with the requirements of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*, as amended, and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the bases of race, color and national origin by recipients of Federal financial assistance from the Department. Accordingly, the District agrees to implement the action steps set forth below:

**ACTION STEPS**

**I. CONSULTANT**

By November 30, 2014, the District will retain a consultant with expertise in addressing the underrepresentation of African American students in college and career preparatory courses to study and make recommendations as to what measures the District will take as part of its ongoing efforts to provide all students with equal access to and an equal opportunity to participate in:

1. college and career preparatory courses offered by the District, including the District's International Baccalaureate (IB) program at the District's South Orange and Maplewood Middle Schools, Advanced Placement (AP) courses, dual enrollment courses, and high school honors courses<sup>1</sup>;
2. foundation courses at the elementary, middle school and high school level, i.e., those courses that are necessary for enrollment in later CCP or specialty courses/programs.

The consultant will examine and make recommendations to address the root cause(s) of any disparity in enrollment of African American students in these programs and courses. The consultant may be an independent contractor for the District or a District employee. The District, after retaining its consultant, shall promptly provide the consultant with all appropriate information the consultant believes is necessary to engage in this process. At a minimum, the consultant will provide recommendations to and assist the District, as requested, with Action Step II below.

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<sup>1</sup> Hereafter, the courses and programs listed in 1 will be referred to as "college and career preparatory courses" or "CCP" courses and programs.



**Action Step I - Reporting Requirement**

1. By November 15, 2014, the District will submit to OCR for review and approval, the name of the consultant to be retained consistent with Action Item 1, including a copy of the consultant's curriculum vitae or resume or other summary of the consultant's qualifications and experience, the consultant's name, and a statement regarding whether the consultant is a District employee or independent contractor.
2. Within 30 days of OCR's approval, the District will submit documentation demonstrating that the consultant has been retained, including the date the consultant was retained and terms of any contract.

**II. REVIEW AND ASSESSMENT BY DISTRICT**

By February 1, 2015, the District will complete a review and assessment of the District's courses and programs identified in Action Step I.1 above for school years 2011-2012 to 2013-2014. As part of its review and assessment, the District, at a minimum, will:

1. review enrollment data, including trend data (*i.e.*, student enrollment data for each course and program identified in Action Step I.1, for each year, disaggregated by race and grade);
2. review the correlation between enrollment in the identified elementary/middle school courses and programs in Action Step I.1 and later enrollment in CCP high school courses and programs;
3. review the correlation between elementary and middle school performance and subsequent enrollment in CCP high school courses and programs, including the correlation between the courses in which students elect to enroll during high school and their elementary and middle school academic profiles (e.g., grades, previous test scores, other indicators) and any additional support provided for students (such as counseling, peer mentoring groups, or tutoring or rigorous academic preparation) at the elementary and middle school levels to prepare them for CCP courses at the high school level;
4. review and assess any potential barriers to increased student participation in the CCP courses and programs identified in Action Step I.1 relating to:
  - a. the location, number, and subject matter of such course offerings and programs;
  - b. participation (or lack of participation) in such courses and programs;
  - c. transportation to and from the location where the courses and programs are offered;
  - d. the lack of a structured program of course offerings or lack of available foundation courses at the elementary and middle schools (such as eighth



- grade algebra or foreign language courses) to prepare students for more rigorous courses later in their education;
  - e. the role of prerequisite courses, and teacher recommendations in student enrollment in higher level learning opportunities;
  - f. the impact of level placement in the freshman year of high school, on student participation in higher level learning opportunities;
  - g. any District enrollment, registration, or other policies and procedures related to enrollment in such courses or programs;
  - h. teacher qualifications to teach such courses or programs;
  - i. communication and outreach to students and parents/guardians about these courses and programs;
  - j. advertisement of such courses and programs;
  - k. peer pressure;
  - l. early awareness on the part of parents/guardians/students of the relationship between the elementary/middle school curriculum and the high school curriculum for college and career readiness;
  - m. the role of guidance counselor services;
  - n. support services for students enrolled in such courses or programs or preparing to enroll in them;
  - o. identify any other potential barriers to increased student participation in courses or programs identified in Action Step I.1; and
  - p. identify any other potential barriers to increased student participation not listed above.
5. review and assess which methods undertaken by the District, to date, have been effective (or ineffective) for early awareness and in encouraging student participation in the programs and courses identified in Action Step I.1, starting at the elementary school level;
6. consider ways to increase student readiness for higher level learning opportunities, including, for example, by strengthening the rigor of courses in earlier grades and increasing communication between elementary, middle and high schools to ensure that students are better prepared for higher level learning opportunities in high school;
7. consider whether the current criteria, method of implementation or system in general relating to the assignment of levels to incoming high school freshman might be eliminated or altered in a way that would increase access to higher level learning opportunities;
8. host meetings for interested District parents/guardians and age-appropriate meetings for interested first through twelfth grade students to share information about the programs and courses identified in Action Step I.1, identify any perceived barriers to increased enrollment and solicit recommendations for increasing enrollment. The District will ensure that it effectively and widely disseminates notice of the meeting in appropriate language(s) and will hold the



meeting at a time and place that it reasonably believes to be most convenient for parents/guardians and will work with parents/guardians and community leaders to encourage attendance;

9. develop and administer a survey to offer to parents of students in grades 3-7 and students and their parents in grades 8-11, and relevant staff, the opportunity to submit information about their perceptions and understanding with respect to the recruitment, selection, and/or participation of students in the programs and courses identified in Action Step I.1;
10. schedule a reasonable number of date(s)/time(s) for interviews to offer relevant school administrators, faculty and staff, and parents/guardians and students of the District, the opportunity to submit information about their perceptions and understanding with respect to the recruitment, selection and/or participation in the programs and courses identified in Action Step I.1; and
11. consult with other similar, public school districts concerning effective methods for increasing student enrollment in CCP courses.

#### **Action Step II - Reporting Requirement**

- By March 15, 2015, the District will submit documentation to OCR showing implementation of the actions required by Action Step II above, including but not limited to a copy of the District's assessment, including any trend data; any identified barriers to student enrollment in such courses or programs; a detailed description of the effectiveness of methods undertaken by the District to encourage participation and to consider preparation of students beginning at the elementary school level; the date(s), location(s), and time(s) of any meeting(s) held pursuant to II.A.8, including a copy of the meeting minutes, participant lists; etc.; a copy of the survey, including the results, a list of the individuals interviewed, by name, title, etc., and a summary of information gathered pursuant to II.A.9; and a list of school districts or other organizations consulted by the District, including notes of such consultations and any related data collected pursuant to II.A.11. In the event OCR has any objections to the documentation provided by the District for review, OCR will notify the District of its objections promptly, no later than 60 calendar days after receiving the draft documents.

### **III. CONSULTANT RECOMMENDATIONS**

- A. By March 31, 2015, in collaboration with the consultant, the District will review the results of the assessment of past enrollment in the courses and programs identified in Action Step I.1 conducted in accordance with Action Step II.A.1-7, as well as the surveys and interviews, and any consultations, conducted in accordance with Action Step II.A.7-11.
- B. By March 31, 2015, the District shall obtain from the consultant a written report outlining the recommendations relating to measures the District could take to further facilitate its



efforts to provide all students with equal access to and an equal opportunity to participate in the courses and programs identified in Action Step I.1.

- C. By April 15, 2015, the District will consider and identify what action it will take with respect to the recommendations made by the consultant, based on Action Step II.A.1-7 above, and to incorporate those recommendations into the action plan it develops. If the District rejects and/or modifies any recommendations made by the consultant(s), the District will provide to OCR a reasonably comprehensive explanation for the rejection or the modification of the recommendation.
- D. By August 30, 2015, and by the same date annually thereafter, the District will submit documents to OCR showing implementation of any further modifications to its programs made pursuant to Action Step II above.

### **Action Step III - Reporting Requirement**

- 1. By April 8, 2015, the District will provide to OCR a copy of the consultant's written report outlining the consultant's recommendations after the completion of the District's review and assessment of past enrollment, interviews, and surveys in conjunction with the Action Steps above; and
- 2. By April 14, 2015, the District will provide to OCR its response to the recommendations made by the consultant and its plan for implementing recommendations made by the consultant. If the District rejects and/or modifies any recommendations made by the consultant, the District will provide to OCR a comprehensive explanation for the rejection or the modification of the recommendation. In the event OCR has any objections to the documentation provided by the District for review, OCR will notify the District of its objections promptly, no later than 60 calendar days after receiving the draft documents.

## **IV. ELIGIBILITY/SELECTION CRITERIA**

- A. By May 1, 2015, after reviewing the recommendations of the consultant, the District will consider whether to revise and/or expand its eligibility and selection criteria for the CCP courses and programs identified in Action Step I.1 in order to further facilitate its efforts to provide all students with equal access and an equal opportunity to participate. The District also will ensure that:
  - 1. if it retains any criteria currently used for identification/selection, it will specifically consider whether a modest modification of such criteria (such as considering classroom performance) would result in an increase of students that would be considered for participation and an increase in participation by African American students;
  - 2. any District/school personnel responsible for conducting any assessments or evaluations as part of the identification/selection process will receive consistent



- and accurate training in the implementation of any additional, revised or modified criteria; and adequate instruction on how to access information regarding students' eligibility;
3. it provides students at the elementary and middle school levels information and assistance to ensure that such students are well prepared for receiving any assessments or evaluations that remain part of the identification/selection process;
  4. the District's appeal processes for students who apply to but are not selected for enrollment in the District's CCP courses and programs, as applicable, are clearly set forth in the District's application materials, in letters sent to such students informing them that they were not selected, and in the District's policies related to the selection process. The information will fully explain how appeals are handled, including all applicable time frames, necessary documentation to support an appeal, and definitions of all terms related to an appeal (e.g., "special circumstances" that would constitute acceptable grounds for an appeal); and
  5. any revised or expanded criteria adopted by the District will be used to determine eligibility and selection for enrollment in these programs beginning with school year 2015-2016.

**Action Step IV - Reporting Requirement**

1. By May 15, 2015, the District will provide to OCR the revised or expanded eligibility and selection criteria, incorporating recommendations of the consultant, in order to further facilitate its efforts to provide all students with equal access and an equal opportunity to participate in CCP courses and programs. In the event OCR has any objections to the documentation provided by the District for review, OCR will notify the District of its objections promptly, no later than 60 calendar days after receiving the draft documents.
2. By August 30, 2015, and by the same date annually thereafter, if any further changes are made, the District will provide OCR with documentation that the revised or expanded criteria were disseminated. After the District's adoption of the revised or expanded criteria, if any, the District will update any relevant printed publications and on-line publications with the revised or expanded criteria within a prompt and reasonable timeframe. Inserts may be used in printed publications until re-printing. Thereafter, the District will disseminate the revised or expanded criteria to all relevant students, their parents/guardians, administrators, teachers and staff of the District within a prompt and reasonable timeframe, and will use the revised or expanded criteria to determine eligibility and selection for enrollment in CCP courses and programs, beginning with school year 2015-2016.



## **V. PARENT/GUARDIAN AND STUDENT OUTREACH**

- A. By April 14, 2015, after reviewing the recommendations of the consultant, the District will determine whether changes are needed to its current outreach plan for the parents/guardians of elementary, middle, and high school students regarding its CCP courses. If not already being done as part of its outreach plan, the District will ensure that the outreach conducted at each elementary, middle, and high school sites includes at a minimum:
1. a description of the benefits and opportunities available to students in its CCP courses and programs, and any applicable changes made at the elementary and middle school level District-wide to prepare students for success in such programs;
  2. information regarding the identification/selection process for the aforementioned courses/programs, including information about the importance of taking foundation courses in the elementary and middle school years to prepare students for enrollment in later courses and programs;
  3. information regarding the identification/selection criteria (such as test scores) for the District's CCP courses and programs;
  4. providing messages from building principals to all parents and/or students, regarding the availability of, and benefits of, higher level learning opportunities at the high school level, and the value of higher level learning opportunities;
  5. notifying students who have achieved certain test scores on standardized tests, or grades in earlier courses in similar subjects, or who have been identified using tools offered by the College Board, that they should strongly consider participating in AP or other higher level learning courses; and
  6. the name(s) and contact information for the committee or coordinators for the District's CCP courses and program at the parent/guardian's respective school site and at the District's main administrative office;
  7. information regarding how to appeal decisions made regarding the identification and selection of students for such programs and courses.
- B. The District will also consider outreach to community organizations, including those that are in regular contact with the parents/guardians of African American students regarding the opportunities and benefits of these programs and courses, as well as the importance of the foundation courses in elementary and middle school.
- C. By April 15, 2015, after reviewing the recommendations of the consultant, the District will determine whether changes are needed to its current outreach plan for students. If not already being done as part of its targeted outreach plan, at a minimum, the outreach



activities should include peer presentations on a voluntary basis by available and interested African American students enrolled in such courses and programs regarding their experiences in such courses and programs. The District may consider and implement other actions not otherwise described in this Agreement in an effort to increase student participation, including race/ethnic-targeted recruitment and outreach efforts to directly encourage African American students to consider participation.

#### **Action Step V – Reporting Requirement**

- By August 30, 2015, and annually by the same date thereafter, the District will provide to OCR documentation demonstrating that the parent/guardian and student outreach plans were implemented during the previous school year consistent with Action Step V above, including copies of any written notices or other correspondence, and details and documentation of any events held with parents/guardians and students.

### **VI. ACADEMIC COUNSELING SERVICES**

- A. By May 14, 2015, after reviewing the recommendations of the consultant, the District will determine whether changes are needed to its current academic counseling services at the middle school and high school levels and make any changes necessary to ensure that all students receive counseling that:
1. informs each student of all available program and course options and encourages participation in these programs and courses, including foundation courses and course progression at the District's elementary and middle schools, as applicable. This will include individual counseling as well as inclusion of information on the District's CCP courses and programs in any information sessions provided to students about middle and high school enrollment and the college application process. These sessions may include presentations by college admissions coordinators and testimonials from a diverse group of students and from their parents/guardians, as well as from teachers and principals;
  2. allows each student to meaningfully consider enrollment in the programs and courses that are most likely to meet their educational needs and objectives;
  3. advises students of the significance given to CCP courses and programs by colleges and universities in the admissions process and of the opportunity to receive college credit for certain AP, IB, and dual enrollment courses; and
  4. directly and personally encourages each student to enroll in programs or courses that are appropriately challenging and will appropriately prepare each student for CCP courses and programs and later for higher education.

The District will thereafter continue to assess its counseling services to ensure that all students are reasonably informed of all available and relevant program and course options, including information on the District's CCP courses and programs.



**Action Step VI - Reporting Requirement**

- By August 30, 2015, and by the same date annually thereafter, the District will provide to OCR documentation demonstrating that academic counseling services were reasonably implemented during the previous school year consistent with Action Step VI above, including, but not limited to, a description of how these services were provided to students.

**VII. TRAINING FOR DISTRICT STAFF/ADMINISTRATORS**

- A. By May 14, 2015, after reviewing the recommendations of the consultant, the District will determine whether changes are needed to its current training plan for relevant District and school site administrators, counselors and teaching staff regarding its CCP courses and programs and its foundation courses at its elementary and middle schools. If not already being done, any training plan will include, at a minimum:
1. an assessment that ensures that teachers are qualified to teach in the areas they have been assigned to teach and that counselors provided accurate information about the District's CCP programs and courses;
  2. a review of the enrollment demographics for students enrolled in the District's CCP courses and programs, including enrollment at each CCP course and program, by race, at each school site, including comparisons to the overall District enrollment rate;
  3. a presentation by an expert during school year 2014-2015, which may be the consultant, in best practices for identification/selection and retention of African American students in such programs and courses;
  4. instruction on encouraging student participation in these courses and programs;
  5. an overview of the identification/selection criteria for these courses and programs;
  6. an overview of parent/guardian and student outreach efforts regarding these courses and programs; and
  7. information or instruction regarding other actions the District may be taking in an effort to increase student participation in these courses and programs, including race/ethnic-targeted recruitment and outreach efforts to directly encourage African American students to consider participation.

**Action Step VII – Reporting Requirement**

- By August 14, 2015, the District will provide to OCR documentation demonstrating that it has provided training to district personnel during school year 2014-2015 in accordance with Action Step VII above, including: (a) the name(s) and title(s) of the individuals who conducted the training; (b) a list of the individuals who attended the training and their positions; (c) the date(s) the training was conducted; and (d) copies of any training materials disseminated.



### **VIII. DATA MAINTENANCE**

- A. Beginning with the 2014-2015 school year, and annually thereafter, the District will maintain the following data:
1. the number of students, by race, enrolled in each District school in the just-completed school year; and
  2. the number of students, by race, and school, enrolled in each CCP course and program, in each of the District's elementary/middle/high schools in the just-completed school year – the information will be provided for each program/course, so that an accurate percentage of overall students is possible – *i.e.*, data should be reported in such a manner so that students who are taking more than one of the specified courses are not double-counted.

#### **Action Step VIII - Reporting Requirements**

- By August 14, 2015, August 14, 2016, and August 14, 2017, the District will provide to OCR the data referenced in Action Step VIII.A.1-2.

### **GENERAL REQUIREMENTS**

The District understands that OCR will not close the monitoring of this agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with Title VI and its implementing regulation at 34 C.F.R. § 100.3(a) and (b), which were at issue in this case. Prior to the conclusion of OCR's monitoring, the District will provide documentation establishing that any disparities relating to the underrepresentation of African American students in rigorous college preparatory courses in the District are not the result of discrimination prohibited by Title VI and its implementing regulations.

The District understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, the District understands that during the monitoring of this Agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with Title VI and its implementing regulation at 34 C.F.R. § 100.3(a) and (b).



The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. In the event that OCR decides to initiate administrative enforcement proceedings pursuant to 34 C.F.R. §§ 100.9, 100.10, or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

10/1/14

Date

/s/

South Orange Maplewood School District

# EXHIBIT C



## EXHIBIT C

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