

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 22-3157

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**CATHERINE FERNANDEZ,**  
Appellant

v.

**BOARD OF PEMBERTON TOWNSHIP;  
PEMBERTON TOWNSHIP H.S.**

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On Appeal from the United States District Court  
for the District of New Jersey  
(D.C. Civil Action No. 1-20-cv-08600)  
District Judge: Honorable Renée Marie Bumb

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Submitted Pursuant to Third Circuit LAR 34.1(a)  
June 1, 2023

Before: KRAUSE, PHIPPS, and SCIRICA, Circuit Judges

(Opinion filed June 20, 2023)

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OPINION\*

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PER CURIAM

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Catherine Fernandez appeals from an order dismissing her motion under Fed. R. Civ. P. 60(b). We will affirm.

Fernandez filed this suit raising claims relating to injuries that she claimed to have suffered from her daughter's treatment in school. The District Court, after allowing Fernandez to amend her complaint, dismissed it with prejudice both as barred by the statute of limitations and for failure to state a claim. Fernandez filed both a motion for reconsideration and a notice of appeal. The District Court denied reconsideration, and we affirmed the dismissal of the complaint. See Fernandez v. Bd. of Pemberton Twp., No. 21-1820, 2021 WL 5984974 (3d Cir. Dec. 16, 2021). We also denied Fernandez's petition for rehearing.

While Fernandez's petition for rehearing was pending in our Court, she filed with the District Court the Rule 60(b) motion at issue here. Fernandez challenged both grounds for dismissing her complaint, but she did not rely on any new law or new facts. Instead, she relied on the allegations of her complaint and on documents she previously submitted, and she merely repeated arguments that both the District Court and our Court already had rejected. After we denied Fernandez's petition for rehearing, the District Court dismissed her Rule 60(b) motion on the ground that the court lacked jurisdiction to entertain arguments that we had rejected. Fernandez appeals.

We have jurisdiction under 28 U.S.C. § 1291 and will affirm for the reasons explained by the District Court. See Seese v. Volkswagenwerk, A.G., 679 F.2d 336, 337

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UNITED STATES COURT OF APPEALS  
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BOARD OF PEMBERTON TOWNSHIP;  
PEMBERTON TOWNSHIP H.S.

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(D.C. Civil No.: 1-20-cv-08600)

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SUR PETITION FOR REHEARING

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Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE,  
RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-  
REEVES, CHUNG, and <sup>1</sup>SCIRICA, Circuit Judges

The petition for rehearing filed by Appellant Fernandez in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of

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<sup>1</sup> Judge Scirica's vote is limited to panel rehearing only.

the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause  
Circuit Judge

Dated: October 30, 2023  
Sb/cc: Catherine Fernandez

## Appendix C

US Court of Appeals For Third  
Circuit

Opinion on June 1, 2023  
Opinion on December 16, 2021

IN THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW  
JERSEY CAMDEN VICINAGE

CATHERINE FERNANDEZ,

Plaintiff,

v.

BOARD OF PEMBERTON TOWNSHIP  
and PEMBERTON HIGH SCH.,

Defendants.

Civil No. 20-8600 (RMB/MJS)

**ORDER**

**BUMB, U.S. District Judge**

This matter comes before the Court upon Catherine Fernandez's ("Plaintiff's") Motion for Relief from Final Judgment Pursuant to FED. R. CIV. P. 60(b). [Docket No. 19.] For the reasons set forth in the accompanying Opinion of today's date, and for good cause show,

IT IS on this 3rd day of November 2022, hereby

**ORDERED** that Plaintiff's motion is **DISMISSED WITH PREJUDICE**.

s/Renée Marie Bumb  
Renée Marie Bumb  
U.S. District Judge

IN THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW  
JERSEY CAMDEN VICINAGE

CATHERINE FERNANDEZ,

Plaintiff,

v.

BOARD OF PEMBERTON TOWNSHIP  
and PEMBERTON HIGH SCH.,

Defendants.

Civil No. 20-8600 (RMB/MJS)

**OPINION**

**BUMB, U.S. DISTRICT JUDGE**

This matter comes before the Court upon the Motion for Relief from Final Judgment Pursuant to FED. R. CIV. P. 60(b) by Plaintiff Catherine Fernandez ("Plaintiff"). [Docket No. 19.] This Court previously dismissed Plaintiff's case with prejudice finding that her (1) claims were time-barred, and (2) largely conclusory allegations failed to comply with FED. R. CIV. P. 8(a)(2). [Docket No. 13.] The Third Circuit affirmed this Court's dismissal of Plaintiff's case after she appealed. [Docket No. 18.] Because the arguments made in support of the present motion were the same arguments rejected by the Third Circuit on appeal, the Court shall deny the pending motion, with prejudice, for the reasons set forth herein.



## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Plaintiff's Initial Complaint and Application to Proceed *In Forma Pauperis*

On July 8, 2020, Plaintiff initiated this action by filing a *pro se* Complaint against Pemberton Township High School, where Plaintiff's daughter attended school before graduating in June 2018, and the Board of Pemberton Township (together the "Defendants"). [Docket No. 1.] In the Complaint, Plaintiff alleges the Defendants discriminated and retaliated against her on the basis of her disability, ethnicity or perceived ethnicity, socioeconomic status, and status as a single mother. [Id.] More specifically, "Plaintiff seeks redress of her own injuries she alleges she suffered in connection with a previous IDEA dispute and lawsuit involving [the] Defendants and Plaintiff's daughter."<sup>1</sup> [Docket No. 2.] With the Complaint, Plaintiff also included an application to proceed *in forma pauperis* ("IFP"). [Docket No. 1, Doc. 1-1.]

Initially, this Court rejected Plaintiff's application to proceed IFP because the application was incomplete. [Docket No. 2, at 2.] In the same Order denying her IFP application, this Court also noted apparent deficiencies regarding Plaintiff's claims as

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<sup>1</sup> Plaintiff previously brought a separate action before this Court on behalf of her daughter alleging claims of discrimination by the Defendants. *See Martino v. Pemberton Township Board of Education, et al.*, Civ. No. 16-9456 (RMB/JS). However, finding that there was no need for Plaintiff to represent her daughter as guardian *ad litem* in this other case, the Court Ordered that Plaintiff's daughter replace her as the named party in that case, terminating Plaintiff from this other action on December 15, 2017. [Id., Docket No. 41.] On July 16, 2018, the Court also appointed pro bono counsel to represent Plaintiff's daughter in her case. [Id., Docket No. 71.]

set forth in the Complaint and granted leave for Plaintiff to amend because Plaintiff's Complaint "fail[ed] to comply with FED. R. CIV. P. 8(a)(2)," among other things. [*Id.* at 3-4.] This Court also noted "Plaintiff's discrimination and retaliation claims are likely time-barred" under the applicable statutes of limitations because "[i]f Plaintiff's daughter graduated sometime in June 2018, the instant suit—which was filed on July 8, 2020—was filed more than [2] years after the last alleged incident of discrimination or retaliation." [*Id.* at 3.] This Court allowed Plaintiff the opportunity to clarify her pleadings and demonstrate that her claims were not, as it initially appeared, time-barred. [Docket No. 2.]

**B. Plaintiff's Amended Complaint**

On July 24, 2021, Plaintiff filed an updated IFP application, which this Court granted based on the updated (and now complete) financial information provided by the Plaintiff. [Docket Nos. 6 & 13.] Plaintiff also filed an Amended Complaint on August 24, 2020, including a request to equitably toll the applicable statute of limitations for her claims due to circumstances arising from personal mental health issues and the state of emergency caused by the Covid-19 pandemic. [Docket No. 9.]

The Court denied Plaintiff's request for equitable tolling because "Plaintiff has failed to identify an inequitable circumstance that prevented her from bringing these claims before the expiration of the statute of limitations." [Docket No. 12, at 2-3.] This Court noted "Plaintiff's claims allegedly arose beginning in 2005..." and although Plaintiff contends "several mental health episodes, and related treatment, have delayed her filing of this action," Plaintiff initiated other *pro se* litigation (albeit

on behalf of her daughter) during the statute of limitations period. [*Id.*] For example, this Court noted that “Plaintiff’s mental health did not prevent her from filing related disputes with this Court, the Third Circuit, and the U.S. Department of Education-Office for Civil Rights.” [Docket No. 15, at 2 (citations omitted).]

In addition, this Court found Plaintiff’s Amended Complaint still failed to state a short and plain statement showing the pleader is entitled to relief in compliance with FED. R. CIV. P. 8(a)(2): “Plaintiff provides largely conclusory allegations about Defendants’ actions and offers very few facts to contextualize this dispute” and “argues, with no factual support, that Defendants’ actions are necessarily tortious and discriminatory.” [*Id.*] On April 12, 2021, this Court, again, dismissed Plaintiff’s claims as set forth in the Amended Complaint, *sua sponte*, this time with prejudice. [Docket No. 13.]

#### **C. Plaintiff’s Motion for Reconsideration**

On April 19, 2021, after this Court’s dismissal of the Amended Complaint, Plaintiff filed a letter which this Court construed as a Motion for Reconsideration under Local Civil Rule 7.1(i). [Docket Nos. 14, 15.] On April 21, 2021, this Court denied Plaintiff’s motion because “Plaintiff has failed to identify any grounds that warrant reconsideration.” [*Id.* at 1.] This Court cited *Max’s Seafood Cafe* in which the Third Circuit limited reconsideration to three grounds: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” 176 F.3d 669, 677 (3d Cir.

1999). This Court explained that “Plaintiff’s argument that her mental health and the COVID-19 pandemic prevented her from filing this dispute earlier” does not constitute a “manifest injustice” because the record makes it clear Plaintiff filed related disputes during that same period. [Docket No. 15 at 1-2.] Furthermore, this Court found the argument that Plaintiff believed courts to be closed due to the Covid-19 pandemic “amounts to excusable neglect, and is insufficient.” [*Id.* at 2-3 (citing *United States v. Thomas*, 713 F.3d 165, 174 (3d Cir. 2013)).]

**D. Plaintiff’s Appeal to Third Circuit Court of Appeals**

The same day Plaintiff sent a letter to this Court for reconsideration, Plaintiff appealed the dismissal of her Amended Complaint to the Third Circuit. [Docket No. 16.] On appeal, Plaintiff made the exact same argument as in her Amended Complaint and Motion for Reconsideration before this Court: that her claims were not time-barred, but instead subject to equitable tolling, because “[t]he effects of the medications and the covid 19 shutdown was beyond my control.” [*Id.* at 2.] On appeal, Plaintiff also requested “more time to amend my complaint,” and that a pro-bono lawyer be appointed to represent her. [*Id.* at 2].

On December 16, 2021, the Third Circuit rejected those arguments and issued a judgment affirming this Court’s dismissal of the Amended Complaint. [Docket No. 18.]

**E. Plaintiff's Pending Motion for Relief from Final Judgment Pursuant to FED. R. CIV. P. 60(b)**

After the Third Circuit dismissed Plaintiff's appeal, Plaintiff filed the pending Motion for Relief from Final Judgment Pursuant to FED. R. CIV. P. 60(b) with this Court, seeking relief from this Court's dismissal of her Amended Complaint on the grounds that "the Court erred legally and factually in that [Plaintiff] was entitled to relief at the time [Plaintiff] filed [her] papers initially." [Docket No. 19, at 2.]

Having reviewed the pending motion, this Court finds that Plaintiff did not raise any new legal or factual arguments and instead points again to conclusory allegations, restates the same averments in her previous filings, and raises the same arguments made before this Court previously and on appeal. For example, Plaintiff again alleges this Court erred in denying her claim as time-barred because she "provided inequitable reasons for filing [her] complaint late." [*Id.* at 13.] Plaintiff also reiterates "a debilitating disability... stopp[ed] me from filing my complaint in a timely manner" and "the District Court did not address [Plaintiff's] motion for tolling for a state of emergency," referring to the Covid-19 pandemic. [*Id.* at 11-12.]

**II. LEGAL STANDARD**

As applicable here, FED. R. CIV. P. 60(b) provides "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons...mistake, inadvertence, surprise, or excusable neglect" or "any other reasons that justifies relief." FED. R. CIV. P. 60(b)(1) and (6). Rule 60 is intended to strike a balance between the "conflicting principles that litigation must be brought to an end and that justice must be done." *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978).

### III. ANALYSIS

The Third Circuit held that following an appeal, "[t]he district court is without jurisdiction to alter the mandate of this court on the basis of matters included or includable in defendants' prior appeal." *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (emphasis added). In *Seese*, the Third Circuit explained this holding was consistent with the U.S. Supreme Court's earlier decision in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976). *Id.* at 337, n.1. There, the Supreme Court held the District Court had jurisdiction to reopen a case pursuant to a Rule 60(b) when the basis for the motion was later events not in the record before the appellate court. *Id.* at 17-18. The pending motion, based on argument squarely rejected on appeal, is the flipside of this same coin.

In a more recent opinion, the Third Circuit reaffirmed that a Rule 60(b) motion is not an appropriate avenue to circumvent an appellate court ruling where the basis of the motion was includable or included in the prior appeal. *See Bernheim v. Jacobs*, 144 F. App'x 218, 221-22 (3d Cir. 2005). Here, the Third Circuit reconciled the holding from both *Standard Oil* and *Seese*, explaining that

[r]ead together, *Standard Oil* and *Seese* distinguish between a Rule 60(b) motion based on matters that were before the court on appeal, which may not be reviewed subsequently by the district court, and a Rule 60(b) motion based on matters that come to light after the appellate court has issued a decision, which properly may be reviewed by the district court. *Id.* at 222.

The basis of Plaintiff's Motion was already included in her appeal and affirmed by the Third Circuit Court of Appeals, therefore this Court has no jurisdiction to entertain the present Rule 60(b) motion. [Docket No. 16.] Specifically, both arguments made in support of the pending motion that (1) Plaintiff's claims were equitably tolled and not time-barred due to inequitable circumstances and (2) Plaintiff did in fact state a valid claim alleging discrimination and retaliation; were included and rejected on appeal. [*Id.*] Absent new evidence or for another reason permitted under Rule 60(b), this case is over.

#### IV. CONCLUSION

For the reasons stated above, the Court shall dismiss, with prejudice, Plaintiff's Motion for Relief from Final Judgment Pursuant to FED. R. CIV. P. 60(b). [Docket No. 19.] An accompanying Order of today's date shall issue.

November 3, 2022  
Date

s/Renée Marie Bumb  
Renée Marie Bumb  
U.S. District Judge



Exhibit A

## PEMBERTON TOWNSHIP SCHOOLS

**RITA JENKINS**  
Assistant Director of School Counseling/Health Services

**TONY TRONGONE**  
Superintendent  
**ADELINA GIANNETTI**  
Director of Special Services

To the Parents/Guardians of:  
Catherine Martino

Dear Parent/Guardian:

Recently you were contacted by school personnel to advise that your child was party to an investigation of an alleged incident of harassment, intimidation, and/or bullying (HIB). Per *The Anti-Bullying Bill of Rights Act* (N.J.S.A. 18A:37-13) we are required to provide you with the nature of the investigation, whether the district found evidence of HIB, or discipline imposed or services provided.

Board of Education Policy #5512 – *Harassment, Intimidation, and Bullying*, and 18A:37-13, *The Anti-Bullying Bill of Rights Act*, require that the results of each bullying investigation be reported to the Superintendent of Schools and the Board of Education for review. Once the Superintendent and Board of Education have reviewed the matter and accepted the report, formal notification of such must be provided to all parties to the investigation.

By direction of Tony Trongone, Superintendent of Schools, this letter is to confirm that the Superintendent and Board of Education met on Thursday, August 23, 2018 and reviewed, and accepted the findings of the above-stated HIB report. A parent or guardian may request a hearing before the Board of Education to appeal such results by contacting the Superintendent of Schools.

The nature of the investigation was harassment. The HIB investigation was UNFOUNDED.

Information on Board of Education Policy #5512 can be found on our district website at [www.pemberton.k12.nj.us](http://www.pemberton.k12.nj.us). Please contact me to discuss any specific concerns or questions you have regarding the above information.

We are committed to providing a safe environment for our students and thank you for your cooperation in the matter.

Sincerely,

Tony Trongone  
Superintendent

PHONE: 609-893-8141 Ext. 1034 EMAIL: [rjenkins@pemb.org](mailto:rjenkins@pemb.org)  
Office: One Egbert Street, Pemberton, New Jersey 08068 • [www.pemberton.k12.nj.us](http://www.pemberton.k12.nj.us)

*Pemberton Learning Community: Pursuing Excellence One Child at a Time*



### Session Information

Client:	Fernandez, Catherine (90033327) 10/11/1989
Staff:	Asamoah, Harriet (69927)
Service Date/Time:	7/16/2020 11:00 AM - 11:30 AM
Client Program:	Mental Health - Outpatient (MH-OP)
Activity:	MH OP Telepsych Pharm Mgmt (MHOPtelePM)
Organization:	Outpatient Services - Woodlane
Service Location:	53 - Community Mental Health Center

### Chief Complaint & History

Chief Complaint/Reason for Visit:	(Also list any new problems/concerns presented) "Im ok"
History of Present Illness (HPI):	<p>Elements: Location/Quality/Severity/Duration/Timing/Context/Modifying Factors/Associated Signs &amp; Symptoms</p> <p>This is a female with a hx of schizophrenia who presents for a telephonic apt. Reports that she is doing ok but has trouble sleeping as she did not take her meds since having a surgery on June 30th. She reportedly stopped taking her meds before June 30th due to fear of pot interaction with anesthesia. Has been more paranoid and her sleep has been erratic. Has been overwhelmed at times, Denies SI or HI. She tells me that because she has an endoscopy tom, she has opted not to take her meds until tom. I have discussed the risks associated with med non compliance. Ah of daughters voice daily non command type and VH of shadows.</p> <p>Medical hx: had L Knee surgery 6/30/2020. will be having endoscopy tom for GERD</p>

### HPI Coding Requirements

	Brief: 1-3 Elements or 1-2 Chronic Conditions Extended: 4 Elements or 3 Chronic Conditions
HPI Coding:	Indicate Level <input type="radio"/> 1-Brief <input checked="" type="radio"/> 2-Extended

### Past, Family, & Social History

Check if PFSH is NOT addressed:	<input type="checkbox"/> PFSH not addressed during this session
PFSH:	<p>Consumer's past medical/psychiatric hx, pertinent family medical/psychiatric hx, current social/marital status: employment, housing, substances, education, etc</p> <p>lives alone but helps mom and daughter</p> <p>Last hosp 2009</p> <p>Medical issues: obesity, L knee surgery June 30 2020</p> <p>LMP: 2006, had a hysterectomy</p> <p>stopped smoking in 2012, does not drink or use drugs</p> <p>Dr Rasi Giovani 609 758 3200 in ocean county</p>
Physical Activities:	<input type="checkbox"/> Moderate Activity <input type="checkbox"/> Very Active <input checked="" type="checkbox"/> Not Active

### PFSH Coding Requirements

	Pertinent: 1 Element Complete: 2 Elements for established patient; 3 Elements for new patient
PFSH Coding:	Indicate Level <input type="radio"/> 1-Pertinent <input checked="" type="radio"/> 2-Complete

### Review of Systems (ROS)

Check if consumer reports No Changes in	<input type="checkbox"/> Consumer Reports No Changes
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Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

physical health since  
last visit:

- Eyes: ☒ Negative/No Complaint ☐ Positive/Complaint  
Hearing: ☒ Negative/No Complaint ☐ Positive/Complaint  
Neck: ☒ Negative/No Complaint ☐ Positive/Complaint  
Respiratory: ☒ Negative/No Complaint ☐ Positive/Complaint  
Cardiovascular: ☒ Negative/No Complaint ☐ Positive/Complaint  
Gastrointestinal: ☐ Negative/No Complaint ☒ Positive/Complaint  
Complaint: GERD  
Lymphatic: ☒ Negative/No Complaint ☐ Positive/Complaint  
Musculoskeletal: ☐ Negative/No Complaint ☒ Positive/Complaint  
Complaint: knee surgery arthroscopic (meniscus)  
Skin: ☒ Negative/No Complaint ☐ Positive/Complaint  
Neurological: ☒ Negative/No Complaint ☐ Positive/Complaint  
Allergic/Immunologic: ☒ Negative/No Complaint ☐ Positive/Complaint

### ROS Coding Requirements

Problem Pertinent: 1 system  
Extended: 2-9 systems  
Complete: 10-14 systems

ROS Coding:

Indicate Level

☐ 1-Problem Pertinent

☐ 2-Extended

☒ 3-Complete

### HISTORY Section (HPI + PFSH + ROS)

Level 1-Problem Focused: Brief HPI + n/a PFSH + n/a ROS

Level 2-Expanded Problem Focused: Brief HPI + n/a PFSH + Problem Pertinent ROS

Level 3-Detailed: Extended HPI + Pertinent PFSH + Extended ROS

Level 4-Comprehensive: Extended HPI + Complete PFSH + Extended or Complete ROS - OR - Extended HPI + Pertinent PFSH + Complete ROS

HISTORY Section -  
Indicate Level here and  
in Additional Services:

☐ Level 1-Problem Focused

☒ Level 3-Detailed

☐ Level 4-Comprehensive

☐ Level 2-Expanded Problem Focused

### Tobacco Use and Smoking Status

Tobacco Use:

☐ User

☒ Non User

☐ Unable to Collect

Type of Non User:

☐ Non-smoker for personal reasons (finding)

☐ Ex-pipe smoker (finding)

(finding)

☐ Ex-user of moist powdered tobacco (finding)

☐ Non-smoker for religious reasons (finding)

☐ Ex-cigar smoker (finding)

☐ Does not use moist powdered tobacco (finding)

☐ Never chewed tobacco (finding)

☐ Non-smoker for medical reasons (finding)

☐ Never used moist powdered tobacco

☐ Never smoked tobacco (finding)

☒ Current non-smoker (finding)

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Ex-trivial<br>cigarette<br>smoker (<1/<br>day) (finding)           | <input type="checkbox"/> Ex-cigarette<br>smoker<br>(finding)   | <input type="checkbox"/> Current non<br>smoker but<br>past smoking<br>history<br>unknown<br>(finding) |
| <input checked="" type="checkbox"/> Ex-light<br>cigarette<br>smoker (1-9/<br>day) (finding) | <input type="checkbox"/> Intolerant ex-<br>smoker<br>(finding) | <input type="checkbox"/> Tolerant ex-<br>smoker<br>(finding)  |
| <input type="checkbox"/> Ex-moderate<br>cigarette<br>smoker (10-19/day)<br>(finding)        | <input type="checkbox"/> Aggressive<br>ex-smoker<br>(finding)  | <input type="checkbox"/> Non-smoker<br>(finding)  |
| <input type="checkbox"/> Ex-heavy<br>cigarette<br>smoker (20-39/day)<br>(finding)           | <input type="checkbox"/> Aggressive<br>non-smoker<br>(finding) | <input type="checkbox"/> Ex-smoker<br>(finding)   |
| <input type="checkbox"/> Ex-very<br>heavy<br>cigarette<br>smoker (40+/<br>day) (finding)    | <input type="checkbox"/> Intolerant<br>non-smoker<br>(finding) | <input type="checkbox"/> Tolerant non-<br>smoker<br>(finding)   |
| <input type="checkbox"/> Ex-cigarette<br>smoker<br>amount<br>unknown<br>(finding)           |  |   |

Smoking Status: Former smoker

### Psychiatric Specialty Exam

MSE Findings All  
Normal: ☐ Normal

### Presentation

The consumer has presented to me as:

- |                                |   |   |  |
|--------------------------------|---|---|--|
| <b>Consciousness:</b>          | <input checked="" type="checkbox"/> Alert           | <input type="checkbox"/> Somnolent                  | <input type="checkbox"/> Obtunded              |
|                                | <input type="checkbox"/> Other                      |   |  |
| <b>Behaviors:</b>              | <input checked="" type="checkbox"/> Cooperative     | <input type="checkbox"/> Agitated                   | <input type="checkbox"/> Guarded               |
|                                | <input type="checkbox"/> Uncooperative              | <input type="checkbox"/> Aggressive                 | <input type="checkbox"/> Other                 |
| <b>Age:</b>                    | <input checked="" type="checkbox"/> Age Appropriate | <input type="checkbox"/> Older                      | <input type="checkbox"/> Younger               |
| <b>Dress &amp; Appearance:</b> | <input type="checkbox"/> Clean                      | <input type="checkbox"/> Disheveled                 | <input type="checkbox"/> Poorly Groomed        |
|                                | <input type="checkbox"/> Casually Dressed           | <input type="checkbox"/> Malodorous                 | <input type="checkbox"/> Neatly Dressed        |
|                                | <input checked="" type="checkbox"/> Other           |   |  |
| <b>Indicate Other:</b>         | phone   |   |  |
| <b>Psychomotor Activity:</b>   | <input type="checkbox"/> No Abnormal<br>Movements   | <input type="checkbox"/> Psychomotor<br>Retardation | <input type="checkbox"/> Psychomotor Agitation |
|                                | <input checked="" type="checkbox"/> Other           |   |  |
| <b>Indicate Other:</b>         | phone   |   |  |

### Rate & Pattern of Speech

- |                |  |                                   |                                |
|----------------|--|-----------------------------------|--------------------------------|
| <b>Rate:</b>   | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Abnormal | <input type="checkbox"/> Other |
| <b>Tone:</b>   | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Abnormal | <input type="checkbox"/> Other |
| <b>Volume:</b> | <input checked="" type="checkbox"/> Normal | <input type="checkbox"/> Abnormal | <input type="checkbox"/> Other |

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

<b>Latency:</b>	<input checked="" type="checkbox"/> Normal	<input type="checkbox"/> Abnormal	<input type="checkbox"/> Other
<b>Articulation:</b>	<input checked="" type="checkbox"/> Normal	<input type="checkbox"/> Abnormal	<input type="checkbox"/> Other

### Mood/Affect/Range

<b>Mood:</b>	<input type="checkbox"/> Good	<input type="checkbox"/> Sad	<input checked="" type="checkbox"/> Other
<b>Indicate Other:</b>	overwhelmed		
<b>Affect:</b>	<input checked="" type="checkbox"/> Congruent	<input type="checkbox"/> Labile	<input type="checkbox"/> Reactive
	<input type="checkbox"/> Incongruent	<input type="checkbox"/> Other	
<b>Range:</b>	<input checked="" type="checkbox"/> Full	<input type="checkbox"/> Flat	<input type="checkbox"/> Broad
	<input type="checkbox"/> Constricted	<input type="checkbox"/> Blunted	<input type="checkbox"/> Other

### Orientation

<b>Person:</b>	<input checked="" type="checkbox"/> Oriented	<input type="checkbox"/> Disoriented	<input type="checkbox"/> Other
<b>Place:</b>	<input checked="" type="checkbox"/> Oriented	<input type="checkbox"/> Disoriented	<input type="checkbox"/> Other
<b>Time:</b>	<input checked="" type="checkbox"/> Oriented	<input type="checkbox"/> Disoriented	<input type="checkbox"/> Other

### Cognition

<b>Memory:</b>	<input checked="" type="checkbox"/> Intact	<input type="checkbox"/> Impaired	<input type="checkbox"/> Other
<b>Attention &amp; Concentration:</b>	<input type="checkbox"/> Intact	<input checked="" type="checkbox"/> Impaired	<input type="checkbox"/> Other

### Thought Process

<b>Thought Form/Process:</b>	<input type="checkbox"/> Logical	<input checked="" type="checkbox"/> Circumstantial	<input type="checkbox"/> Derailment
	<input type="checkbox"/> Illogical	<input type="checkbox"/> Tangential	<input type="checkbox"/> Thought Blocking
	<input type="checkbox"/> Linear	<input type="checkbox"/> Flight of Ideas	<input type="checkbox"/> Other

### Thought Content

<b>Suicide:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Homicide:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Self Injurious Thoughts/Behaviors:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Delusions:</b>	<input type="checkbox"/> Denies	<input checked="" type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Delusional Content:</b>	<input checked="" type="checkbox"/> Paranoid	<input type="checkbox"/> Jealous	<input type="checkbox"/> Other
	<input type="checkbox"/> Religious	<input type="checkbox"/> Erotomanic	
<b>Impulsivity:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Obsessions/Compulsions:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other

### Perception

<b>Auditory Hallucinations:</b>	<input type="checkbox"/> Denies	<input checked="" type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Visual Hallucinations:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other
<b>Tactile Hallucinations:</b>	<input checked="" type="checkbox"/> Denies	<input type="checkbox"/> Endorses	<input type="checkbox"/> Other

### Cognitive Functioning

<b>Indicate Cognitive Functioning:</b>	<input checked="" type="checkbox"/> At Baseline	<input type="checkbox"/> With Existing Deficits	<input type="checkbox"/> Without Existing Deficits
	<input type="checkbox"/> Other		
<b>Insight:</b>	<input type="checkbox"/> Excellent	<input type="checkbox"/> Good	<input type="checkbox"/> Other
	<input checked="" type="checkbox"/> Fair	<input type="checkbox"/> Impaired	<input type="checkbox"/> Poor
<b>Judgment:</b>			

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

☐ Excellent ☐ Good ☐ Other  
☒ Fair ☐ Impaired ☐ Poor

### Musculoskeletal Systems

**Musculoskeletal:** Assessment of Muscle Strength and Tone (e.g. flaccid, cog wheel, spastic); note any atrophy or abnormal movements and/or examination of Gait and Station  
☒ Negative/No Complaint ☐ Positive/Complaint

### Additional Information

Any additional findings of MSE? ☐ Yes

### EXAMINATION Coding Requirements

Level 1-Problem Focused: 1-5 bullets  
Level 2-Expanded Problem Focused: At least 6 bullets  
Level 3-Detailed: At least 9 bullets  
Level 4-Comprehensive: All bullets in Psychiatric & Constitutional (Vitals & Appearance) and 1 bullet in Musculoskeletal

**EXAM Coding - Indicate Level here and in Additional Services:**

☐ Level 1-Problem Focused ☒ Level 3-Detailed ☐ Level 4-Comprehensive  
☐ Level 2-Expanded Problem Focused

### Vitals Entry

Date: 07/16/2020  
11:32 AM

Unable to Collect:  
Blood Pressure: Systolic

Diastolic

Heart Rate:  
Respiration Rate:  
Temperature: Fahrenheit

Source of Height/Weight:  
Height: Field accepts inches only - be sure to convert feet to inches

Weight: Pounds

BMI: Missing Height and/or Weight

Pain Scale:

### Client Medications

Begin Date	End Date	Amount/Refills	Status
3/31/2020	10/14/2020	30/2	Inactive
Medication and Dosage: Lexapro (escitalopram oxalate) 10 mg tablet 1 tablet			
Sig: Take 1 tablet by mouth every morning			
3/31/2020	10/14/2020	30/2	Inactive
Medication and Dosage: Geodon (ziprasidone hcl) 60 mg capsule 1 capsule			
Sig: Take 1 capsule by mouth at bedtime with meals			
2/27/2020	(Not Set)	30/0	Active

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

Medication and Dosage: diazepam (diazepam) 5 mg tablet 1 tablet

Sig: Take 1 tablet by mouth once a day as needed

11/1/2012 (Not Set) 28/0 Active

Medication and Dosage: Seroquel XR (quetiapine) 50 mg tablet extended release 24 hr

Sig: 1 at hs samples

6/26/2012 (Not Set) 30/2 Active

Medication and Dosage: Valium 5 mg Tab

Sig: 1 pm hs

### Additional Medication Information (v 1)

Consumer and Family  
Verbalized an  
Understanding of Items  
Discussed: Yes  
Consumer is  
experiencing side  
effects from current  
medication(s): No  
Consumer is taking  
Medication as  
prescribed: No  
Is the consumer taking  
Medications from  
another Provider(s)? ☐ Yes  
☒ No  
Is consumer taking  
antipsychotics? ☐ Yes  
☒ No  
AIMS Assessment: N/A

### Medication Reconciliation

Prescriber has identified the most recent list of consumer's medications including name, dosage, frequency, and route, by comparing and reviewing record to external list of medications obtained from the consumer, hospital, or other provider.

Medication  
Reconciliation  
Completed by  
Prescriber: ☒ Yes  
☐ No

NJ Prescription  
Monitoring Information  
reviewed prior to CDS  
prescription: ☐ Yes  
☒ No

### INFORMED CONSENT FOR MEDICATION & MEDICATION COUNSELING PROVIDED BY PRESCRIBER (v1.0)

General Information:

All consumers receiving medication will be given the opportunity to sign this CONSENT FORM.

All voluntary consumers have the right to refuse medication. No voluntary consumer may be involuntarily medicated, except in an emergency.

On going advocates (doctor, nurse, pharmacist, therapist, family member, significant other or treatment team member) may assist consumers who have questions about their medication or who wish to refuse medication.

**The medications that have been prescribed for you are: (DCBHS Prescribers MUST include Range)**

<b>Brand Name/Generic Name:</b>	Medication #1
<b>Classification:</b>	no changes
<b>Purpose/Indication:</b>	Other
<b>Range:</b>	no changes
<b>Add Another Medication?</b>	<input type="checkbox"/> Add Medication
<b>When prescribing "off-label" only (non-FDA approved for usage, age or dosage):</b>	I have been educated about and consent to the use of "off-label" prescriptions including benefits and risks.
	<input checked="" type="radio"/> Yes
	<input type="radio"/> No

**CONSUMER'S CONSENT**

I have been informed of the nature of my illness and the name of the medication(s) including dosage that may be beneficial in treating me. The advantages (relief of symptoms) and disadvantages (side effects or possible adverse reactions) of these medications have also been explained to me.

I understand that if I refuse medication, I will not be medicated except in an emergency. I also understand that once I consent to medication, I can revoke consent at any time.

Finally, I understand that I can request the assistance of a prescriber if I want to refuse medication, or if I have complaints or questions about medication that have not been satisfactorily addressed previously.

Based on my understanding of the benefits and risks of these medications and the choices that are available to me, I consent to taking the medication(s) listed above.

**INFORMATION RECEIVED**

I have received the following medication information fact/verbal information sheets:

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Anticholinergic                     | <input type="checkbox"/> Antipsychotics                     | <input type="checkbox"/> Mood Stabilizers   |
| <input type="checkbox"/> Antidepressant                      | <input type="checkbox"/> Anxiolytic                         | <input type="checkbox"/> Other              |
| <input type="checkbox"/> Antihistamine                       | <input type="checkbox"/> Declined                           | <input type="checkbox"/> Stimulants         |
| <input type="checkbox"/> Antihypertensives                   |   |   |
| <input type="checkbox"/> Anxiety                             | <input checked="" type="checkbox"/> Hot weather precautions | <input type="checkbox"/> Other              |
| <input type="checkbox"/> Bipolar Disorder (Manic-depression) | <input type="checkbox"/> Metabolic Syndrome                 | <input type="checkbox"/> Schizophrenia      |
| <input type="checkbox"/> Depression                          | <input type="checkbox"/> Neuroleptic Malignant Syndrome     | <input type="checkbox"/> Tardive Dyskinesia |
| <input type="checkbox"/> Extrapyramidal Symptoms             | <input type="checkbox"/> OCD                                |   |

I have received the following information forms about my illness:

**PRESCRIBER'S CERTIFICATION**

I certify that:

I have explained to this consumer: the nature of his/her condition; the purpose, nature, dosage and method of administration of the medication; the anticipated benefits, risks and side effects of the medication; the consumer's prognosis with and without medication; and whether or not there are any feasible alternative treatments.

I have given the consumer an opportunity to review this CONSENT FORM and explained its contents in language and a manner that I think s/he can understand, and offered to answer questions.

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

I have advised the consumer that if s/he refuses medication, s/he will not be given medication, except in an emergency. I have also advised the consumer that s/he may contact a prescriber at any time during regular working hours and that if s/he consents to medication, s/he may revoke consent at any time.

Based on my assessment of this consumer, I have concluded that the consumer/legal guardian is capable of providing consent to medication and is willing to do so.

### Psychotherapy Note

**Psychotherapy Note:** We spoke about the reasons for medication compliance to reduce symptoms: she was fearful to take it due to fear of interactions. We have spoken about potential interactions.

### Client DSM Diagnosis as of 7/16/2020 11:00 AM

<b>Client:</b>	Fernandez, Catherine (90033327) 10/11/1969
<b>Effective Date/Time:</b>	7/16/2020 11:00 AM
<b>External Diagnosis:</b>	No
<b>Diagnosed By:</b>	Asamoah, Harriet (69927)
<b>Comments:</b>	

### Diagnosis

DSM-5	Severity/Specifier	ICD-10	SNOMED	Comments
F25.1 - Schizoaffective disorder, depressive type		F25.1 - Schizoaffective disorder, depressive type	84760002	
F41.9 - Unspecified Anxiety Disorder		F41.9 - Anxiety disorder, unspecified	197480006	
		Medical R69 - Illness, unspecified	39104002	Hypothyroidism, Asthma. She has history of tonsillectomy in 1985. Appendectomy in 1987 and hysterectomy in 2006. L Knee surgery 2020
F90.9 - Unspecified Attention-Deficit/Hyperactivity Disorder		F90.9 - Attention-deficit hyperactivity disorder, unspecified type	406506008	

The Diagnoses above display in priority order.

### Psychosocial and Contextual Factors

ICD-10 Code - Description	Comments
Z59.9 - Unspecified Housing or Economic Problem	Financial stress
Z91.19 - Nonadherence to Medical Treatment	not compliant with medications

### Disability

Disability Score	Description
17	NA

### Previous Disability Entries



**Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)**

<b>Disability Score</b>	<b>Description</b>	<b>Date</b>	<b>Staff</b>	<b>Source</b>
17	NA	10/18/2016	Usmani, Anika (11533)	Psychiatric Progress Note (E/M)
17	NA	10/31/2016	Usmani, Anika (11533)	Psychiatric Progress Note (E/M)
17	NA	10/5/2016	Biryukov, Vera (9093)	SCIP ASSESSMENT
17	NA	4/17/2017	Killion, Alyssa (63663)	Psychiatric Progress Note (E/M)
17	NA	7/18/2017	Killion, Alyssa (63663)	Psychiatric Progress Note (E/M)
17	NA	12/18/2017	Killion, Alyssa (63663)	Psychiatric Progress Note (E/M)
17	NA	8/9/2018	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	3/17/2017	Carnall, Amy (34400)	Psychiatric Progress Note (E/M)
17	NA	11/28/2016	Usmani, Anika (11533)	Psychiatric Progress Note (E/M)
17	NA	1/30/2017	D'Dumo, Wilhelmina (62253)	Psychiatric Progress Note (E/M)
17	NA	10/11/2019	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	2/27/2020	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	3/31/2020	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	3/5/2019	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	12/10/2018	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	8/9/2018	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	8/8/2019	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	5/9/2019	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	8/9/2018	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)
17	NA	5/22/2020	Asamoah, Harriet (69927)	Psychiatric Progress Note (E/M)

**Diagnostic Formulation**

No records found.

**Medical Decision Making v2**

<b>Other Pertinent Findings:</b>	(Lab Work/Medical Records/Diagnostic Tests Reviewed and/or Collaboration with Other Sources/Providers) Recent labs at labcorp had ekg done at virtua in march will attempt to get
<b>Comorbidities:</b>	<input checked="" type="checkbox"/> 1- Stable <input type="checkbox"/> 3- Independent Management Required <input type="checkbox"/> 4- Interface with Management of Primary Condition(s) <input type="checkbox"/> 2- Complications/Side Effects
<b>Treatment Plan/Recommendations:</b>	<b>Problem(s), Comment(s), &amp; Plan</b> Plan: does not want any changes in her meds 1. Restart Geodon 60mg po at dinner with food 2. Restart valium 5mg po hs prn anxiety

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

we discussed risk, assets, indic, direction for use, metabolic and cardiac risks  
and she verbalizes understanding and is agreeable  
'Has still not gotten lab done, given another script cmp, cbc with diff, lipids, tsh,  
Reinforced the need to have EKG and labs when it is safe  
FU in 6- 8 w

### MDM Coding Requirements

Level 1-Minimal: Stable/Improved, Minimal additional work-up; Minimal Risk (1 self-limiting or minor problem)

Level 2-Low Complexity: Worsening; Low Risk (one stable chronic illness)

Level 3-Moderate Complexity: Established problems worsening/New problem;  
Moderate Risk (2 or more stable chronic illnesses or 1 chronic illness with mild exacerbation)

Level 4-High Complexity: New problem, additional work-up planned or New problem + established problem(s); High Risk (Severe exacerbation or life-threatening)

MDM Coding - Indicate  
Level here and in  
Additional Services:

☐ Level 1- Straightforward ☒ Level 3- Moderate ☐ Level 4- High  
☐ Level 2- Low

### Additional Services

Setting: ☐ Inpatient  
☒ Outpatient  
☐ SNF/ALF

Client Status: ☐ New Patient ☒ Existing Patient ☐ Consultation

Was >50% of time used for counseling: ☐ Yes  
☒ No

Total Psychotherapy time (minutes): 17

Does interactive complexity apply: ☐ Yes  
☒ No

### Evaluation and Management Calculator

History Type	Exam Type	MDM Type
<input type="radio"/> None	<input type="radio"/> None	<input type="radio"/> None
<input type="radio"/> Problem Focused	<input type="radio"/> Problem Focused	<input type="radio"/> Straightforward
<input checked="" type="radio"/> Expanded Problem Focused	<input checked="" type="radio"/> Expanded Problem Focused	<input checked="" type="radio"/> Low Complexity
<input type="radio"/> Detailed	<input type="radio"/> Detailed	<input type="radio"/> Moderate Complexity
<input type="radio"/> Comprehensive	<input type="radio"/> Comprehensive	<input type="radio"/> High Complexity

E/M Level: 3

### Signatures

Signatures:

Signatory: Fernandez, Catherine (Self)

Enter New Signatory: (if unavailable)  
phone, unable to sign

Signatures:

Outpatient Services - Woodlane -  
Psychiatric Progress Note (E/M)

**Signatory:**  
**Enter New Signatory:** (if unavailable)  
hasamoah

**Signature #1:** Harriet Asamoah (Advanced Practice Nurse) - 7/16/2020  
11:33 AM

**Signature History**

Action	Date	Staff
Document Signed	7/16/2020	Harriet Asamoah, Advanced Practice Nurse (Advanced Practice Nurse)

**Addenda**

Narrative	Signed By
called consumer three times earlier today and left messages for her apt. she called back later on the office phone stating that she did not hear the phone, wants refills and another apt. Sent in refills, scheduled FU apt and left a message again on her phone FU apt made for 9/17/	Harriet Asamoah (Advanced Practice Nurse) - 8/21/2020 1:21 PM

Exhibit C



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION II

32 OLD SLIP, 26th FLOOR  
NEW YORK, NY 10003-2500

REGION II  
NEW JERSEY  
NEW YORK  
PUERTO RICO  
VIRGIN ISLANDS

March 22, 2016

Tony Trongone  
Superintendent  
Pemberton Township School District  
One Egbert Street  
Pemberton, New Jersey 08068

Re: Case No. 02-15-1358  
Pemberton Township School District

Dear Superintendent Trongone:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the Pemberton Township School District. The complainant alleged that the District discriminated against her daughter (the Student), on the bases of her disability and sex, by failing to respond appropriately to the complaints she made on or about xxxx, xxx, that a student (Student A) subjected the Student to bullying and harassment because of her disability and sex (Allegation 1); and on or about xxxx, xxxx, that a different student (Student B) subjected the Student to bullying and harassment because of her disability and sex (Allegation 2). The complainant also alleged that the District retaliated for her complaints of sex and disability harassment, by reporting her to the New Jersey State Division of Youth and Family Services (NJSDYF) in or around xxx xxxx (Allegation 3).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. In addition, OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the Department. The District is a recipient of financial assistance from the Department, and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504, the ADA, and Title IX.

In reaching a determination regarding this complaint, OCR interviewed the complainant and District staff. OCR also reviewed documentation that the complainant and the District submitted.

### **Title IX and Section 504/ADA Procedural Requirements**

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and its implementing regulation, including the investigation of any complaint communicated to such recipient alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX. The recipient must notify all of its students and employees of the name, office address, and telephone number of the employee or employees appointed. Additionally, recipients should provide the electronic mail (email) address of the designated Title IX coordinator. Further, the regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires a recipient to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any actions prohibited by Title IX and its implementing regulation.

The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students, employees, sources of referral of applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the educational programs or activities which it operates and that it is required by Title IX not to discriminate in such a manner. Such notification shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to OCR's Assistant Secretary.

Similarly, the regulation implementing Section 504, at 34 C.F.R. § 104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the requirements of Section 504 and its implementing regulation. The regulation implementing Section 504, at 34 C.F.R. § 104.8(a), also requires each such recipient to take appropriate and continuing steps to notify participants, beneficiaries, applicants, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability; and, that this notice should also include the identity of its designated coordinator(s). The regulation, at 34 C.F.R. § 104.8(b), requires recipients to publish this notice in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees. The regulation implementing the ADA has similar provisions, at 28 C.F.R. §§ 35.106 and 35.107.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. The regulation implementing the ADA has similar provisions, at 28 C.F.R. § 35.107.

### **Title IX and Section 504/ADA Coordinator(s)**

During the course of OCR's investigation, OCR determined that the District failed to designate a Title IX Coordinator as required by the regulation implementing Title IX, at 34 C.F.R. § 106.8(a). On March 4, 2016, the District informed OCR that its Board of Education (Board) had designated a Title IX Coordinator; however, the District did not provide and OCR did not find contact information for the Title IX Coordinator. Additionally, although the District identified a Section 504/ADA Coordinator to OCR, the District did not provide and OCR did not find contact information for the Section 504/ADA Coordinator.

Accordingly, OCR determined that the District failed to provide appropriate notice of the name, office address, and telephone number of the District's Title IX Coordinator, as required by Title IX and its implementing regulation, at 34 C.F.R. § 106.8(a). OCR further determined that the District failed to provide appropriate

notice of the District's Section 504/ADA Coordinator as required by Section 504 and its implementing regulation, at 34 C.F.R. § 104.8, and the ADA and its implementing regulation, at 28 C.F.R. § 35.107(a). On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to the District's Title IX and Section 504/ADA Coordinator(s). OCR will monitor the implementation of the resolution agreement.

#### Non-Discrimination Notice

During the course of the investigation, the District did not provide, and OCR did not find that the District had a notice of non-discrimination that that complied with the regulations implementing Title IX, Section 504 and the ADA, at 34 C.F.R. § 106.9(a); 34 C.F.R. § 104.8(a) and (b); and 28 C.F.R. § 35.106, respectively.<sup>1</sup> On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns with respect to the District's non-discrimination notice. OCR will monitor the implementation of the resolution agreement.

#### Grievance Procedures

OCR has identified a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for: (1) notice of the procedure, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (2) application of the procedure to complaints alleging discrimination or harassment carried out by employees, other students, or third parties; (3) adequate, reliable, and impartial investigation of complaints, including an opportunity to present witnesses and evidence; (4) designated and reasonably prompt timeframes for the major stages of the complaint process; (5) notice to the parties of the outcome of the complaint (both parties must be notified, in writing, about the outcome of both the complaint and any appeal); and (6) an assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

OCR determined that the District has a Student Harassment, Intimidation & Bullying Policy 5131.9 (the Policy) that prohibits all forms of harassment, intimidation or bullying (HIB), that is motivated by any actual or perceived characteristic such as gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability. Pursuant to the Policy, any District employee, pupil, Board Member, or volunteer who has witnessed, or has reliable information that a pupil has been subject to HIB has a duty to report the incident to the appropriately designated administrator or his/her designee; and all acts of HIB are to be reported orally to the school principal on the same day, and in writing, within two (2) school days of the date witnessed or in possession of reliable information. The Policy states that oral reports, written reports or electronic reports will be taken, and requires that all violations and complaint reports of HIB be investigated promptly by the designated administrator. The Policy provides that an investigation is to be initiated by the principal within one school day of the report of the incident and the investigation is to be completed within ten school days from the date of the written report of the incident of HIB. The results are to be reported to the Superintendent within 2 school days from the date of the completion of the investigation. The results of each investigation are to be reported to the Board no later than the date of the next Board meeting following the completion of the investigation.

<sup>1</sup> OCR further determined that the District did not have a notice of non-discrimination that would satisfy the requirements of the regulation implementing the Age Discrimination Act, at 34 C.F.R. § 110.25, and Boy Scouts of America Equal Access Act, at 34 C.F.R. § 108.9. The regulation implementing the Boy Scouts Act, at 34 C.F.R. § 108.9, requires this by reference to the regulation implementing Title VI at 34 C.F.R. § 100.6(d).

Accordingly, the Policy provides for reasonably prompt time frames for the completion of the investigation and submission of the written report of the incident to the Superintendent and to the Board. It further provides that parents/guardians of the students who are parties to the investigation are entitled to receive written notice of the outcome of the investigation, and the parties will be provided information regarding their rights if they are not satisfied with the outcome. The Policy also contains a prohibition against retaliation. OCR determined, however, that the Policy does not apply to complaints alleging other kinds of discrimination, or alleging harassment by employees or third parties; and does not provide for the parties to submit witnesses or other evidence, or an assurance that the School will take steps to correct the discriminatory effects of any harassment on the complainant and others, if appropriate.

On February 9, 2016, the District provided a copy of a "Proposed Anti-Discrimination Policy" (the Proposed Policy); however, OCR determined that the Proposed Policy does not comply with the requirements of the regulations implementing Title IX, at 34 C.F.R. § 106.8(b); Section 504, at 34 C.F.R. § 104.7(b); or the ADA, at 28 C.F.R. § 35.107(b). Specifically, while the Proposed Policy serves as a statement of the District's position that discrimination and harassment is prohibited, it is not actually a grievance procedure in that it does not provide notice to students and employees of where complaints may be filed; it does state what steps will be taken to provide for an adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence; it does not designate reasonably prompt timeframes for major stages of the complaint process; it does not indicate that written notice of the outcome will be provided to both parties; and it does not provide an assurance that the institution will take steps to prevent recurrence of any discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns with respect to the District's grievance procedures. OCR will monitor the implementation of the resolution agreement.

#### Allegations 1 and 2

The complainant alleged that the District discriminated against her daughter (the Student), on the bases of her disability and sex, by failing to respond appropriately to the complaints she made on or about xxxxx, xxxx, that Student A subjected the Student to harassment because of her disability and sex (Allegation 1); and on or about xxxxx, xxxxx, that Student B subjected the Student to harassment because of her disability and sex (Allegation 2).

Title IX and its implementing regulation, at 34 C.F.R. § 106.31, prohibit discrimination based on sex, including sexual harassment, in educational programs and activities. Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations, at 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, respectively. Harassment based on sex and disability can include verbal, written, graphic, physical, or other conduct by an employee, a student, or a third party. Harassment can create a hostile environment if it is sufficiently serious to limit an individual's ability to participate in, or receive benefits, services, or opportunities in the recipient's program. If OCR determines that harassing conduct occurred and the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to make a determination as to whether a hostile environment existed and whether the recipient took prompt and effective action to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects.

OCR determined that during school year 2014-2015, the Student was enrolled in the xxxxx grade at the District's Pemberton Township High School (the School). The Student's individualized education program (IEP) for school year 2014-2015 classified her as xxxxx, with xxxxxx. The Student's IEP states that she is "xxxxx and xxxxx xxxxxx."

The complainant alleged that on the afternoon of xxxxx, xxxxx, while the Student was about to get on the bus, another student "kicked the Student to the ground," injuring her knees and breaking the Student's cellular

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by fostering educational excellence and ensuring equal access.*  
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telephone (Incident 1). The complainant stated that as a result of her injuries, the Student missed school for five days, from xxxxx to xx xxxx, and required physical therapy.

The Assistant Principal stated that on or about xxx, xxxx, he received a telephone call from the complainant stating that Student A had "tripped" the Student in the area of the school parking lot. The Assistant Principal stated that the complainant did not allege that Incident 1 constituted harassment, intimidation or bullying on the bases of the Student's sex and/or disability.

The Assistant Principal, who is responsible for investigating violations of the School's Student Code of Conduct (the Code), initiated an investigation of Incident 1 that same day by reviewing surveillance video from the School's security system. The Assistant Principal stated that the video depicted Student A with his foot behind the Student, and the next thing that was visible was the Student running after Student A. The Assistant Principal stated that he interviewed Student A, who informed him that he and the Student are friends and that he was "playing" with the Student. On xxx, xxxx, the Assistant Principal also attempted to interview the Student and requested a written statement from her. The Student refused to be interviewed or to provide a written statement, and did not return to school until xxx, xxxx. On xxxxx, xxxx, the Assistant Principal again attempted to discuss Incident 1 with the Student, but she refused, stating that the police had her full report. The Assistant Principal stated that based on the information he obtained from Student A, and his review of the security video, he concluded that Incident 1 was a matter of two teenagers engaged in horseplay. The Assistant Principal stated that he disciplined Student A with an "in-school suspension" for "horseplay," in accordance with the Code.

In an email message dated xxxxx, xxxxx, the Assistant Principal informed the complainant of the outcome of his investigation of Incident 1, which focused on whether it involved any violations of the Code. The complainant then informed the Assistant Principal during a discussion on xxx, xxx, for the first time, that she believed Student A had bullied the Student because of her disability; however, the complainant did not raise sexual harassment in this complaint. The Assistant Principal directed the complainant to the District's website to file an HIB complaint. On or about xxx, xxxx, the complainant sent an email to the District's HIB Coordinator, stating that she had reported Incident 1 to the Assistant Principal. She also stated her intent to file an HIB complaint based on Incident 1. OCR determined that the complainant did not use the District's specific HIB complaint form, but instead spoke to the District's HIB Coordinator (the Coordinator) on or about xxx, xxxx, who followed up on her HIB complaint by opening on the same date an HIB case in HIBster, the District's computer software program used for tracking and reporting HIB investigations.

Pursuant to the Policy, Incident 1 was assigned for investigation to the School's appointed HIB counselor (the Counselor) on or about xxx, xxxx. The Assistant Principal stated that the School's practice is that the Counselor conducts the investigation, and he and the Counselor may discuss issues that arise along the way. Once the investigation is complete, the Assistant Principal reviews the Counselor's conclusions, and if he is in agreement he sends the report to the superintendent. The superintendent then reviews the HIB investigation results before submission to the Board. At a Board meeting, the Board makes the final determination about whether to accept or reject the findings, and informs the parent accordingly.

The Counselor initiated her investigation on xxx xx, xxx. The Counselor interviewed Student A, who reiterated what he had said during his interview with the Assistant Principal -- that he and the Student frequently played and he was playing with her. The Counselor also interviewed the Student, who stated that Student A "tripped her" while she was walking to the bus, and that once she got to the bus with pants torn on both knees, she called [the complainant] to report the "accident." The Counselor also reviewed the security video. She noted that another student (Student C) was in close proximity to the alleged incident; however, she did not interview Student C. Neither the Assistant Principal nor the Counselor interviewed staff or other students regarding whether the Student and Student A were actually friends and played frequently, as Student A had stated; nor did



they ask questions of anyone who may have been in the parking area at the time of the incident. The Counselor concluded her investigation on xxx, xxxx, and reported that Student A engaged in conduct that may be considered inappropriate, rude, disrespectful or unkind, but the behavior did not constitute harassment, intimidation or bullying. Therefore, she concluded that the HIB complaint was unfounded.

OCR determined that the investigation does not reflect any inquiry of the motivation for or sufficient development of the facts surrounding the reasons that the Student was tripped, including whether it was on the basis of her disability as the complainant alleged in her HIB complaint to the School. The record of the investigation reflects that District staff failed to conduct interviews of potential witnesses, including students and teachers familiar with the Student and Student A and those in close proximity to the students during the alleged incident. Further the record of the investigation reflects that District staff failed to review physical evidence, such as the Student's torn and bloody clothing and smashed phone.

Based on the foregoing, OCR determined that the District was on notice of an allegation of disability harassment, but failed to take effective action to determine if harassing conduct occurred on the basis of the Student's disability, as alleged; whether it created a hostile environment for Student, and if so, to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects. Accordingly, OCR determined that there was sufficient evidence to substantiate the complainant's allegation that the District failed to respond appropriately to the complainant's complaint of disability harassment filed on xxx, xxx. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in Allegation 1. OCR will monitor the implementation of the resolution agreement.

With respect to the portion of complainant's allegation that the District failed to respond to her complaint of sexual harassment regarding Allegation 1, OCR determined that there was no evidence to substantiate that the complainant filed the complaint on this basis. Accordingly, the evidence is insufficient to substantiate the complainant's allegation on this basis, and OCR has dismissed this portion of Allegation 1.

The complainant alleged that she reported to school personnel on xxx, xxx, that on xxx, xxxx, Student B had bitten the Student while she was in the bathroom around 11:30 a.m., leaving marks on the Student's shoulder and neck and bruises on the Student's body. OCR determined that on xxxx, xxx, the Student filled out the District's HIB Incident Reporting Form, stating that on xxx, xxxx, at 11:30 a.m., she had gone to the bathroom, and upon entering, Student B came behind her, bit her on left shoulder, and then bit her on right side of neck. The Student did not indicate at this time that she believed that this alleged incident was harassment because of her sex and/or disability. OCR determined that the School's principal delegated the investigation of this complaint to another assistant principal (Assistant Principal 2); however, there is no evidence that the complaint was assigned to an HIB counselor or that an HIB case was opened for this complaint in accordance with the District's HIB procedures.

On xxx, xxxx, Assistant Principal 2 conducted an investigation of the information provided by the Student in her HIB complaint. Assistant Principal 2 interviewed teachers who may have witnessed the incident, and the teachers stated that Student B was absent on xxx, xxx. Assistant Principal 2 also determined that the bathroom in which the incident allegedly occurred had been closed for repairs for the past two weeks, including on the day of the alleged incident. The Student's HIB complaint was subsequently deemed unfounded.

The complainant informed OCR that the Student recanted her story and she learned that the Student had been on school premises (on a field) after school on xxxxxx, xxxx, with a male (Student D) and had received the bite marks at that time. The complainant alleged to OCR that she informed District staff that the Student did not go to math tutoring after school on xxxxxx, xxxx, and instead went behind the School building to a field with Student D. The complainant alleged to OCR that the Student was lured by Student D to go behind the School building, and Student D then took advantage of the Student and subjected her to sexual harassment by biting

and bruising her. The complainant alleged to OCR that xxxxxx students were nearby, witnessed the interaction, and ultimately intervened.

District staff acknowledged to OCR that they also learned that the Student had recanted her story and asserted that the Student had been with a male student with whom she had a romantic relationship and that male had given her "love-bites" on her neck while the two were "necking" on the field that afternoon. Further, the District acknowledged that District staff did not open an HIB case, or conduct any investigation in response to the complainant's complaint regarding the incident with Student D on xxxx, xxxx. The Superintendent explained that an HIB case was not opened because it was not a harassment, intimidation or bullying incident; rather, the incident involved the Student spending time with her boyfriend and a parent not wanting her to spend time with Student D.

On xxx, xxxx, the complainant spoke during the public comment period at a Board meeting and generally expressed her concerns regarding the District's procedures for investigating HIB complaints. She also expressed concerns about the Student's safety. Subsequently, on xxxxxx, xxxx, at the direction of the Superintendent, the HIB Coordinator and a District Case Study Team (CST) case manager met with the complainant to discuss the complainant's concerns regarding her HIB complaints and the District's HIB procedures. District staff expressed to the complainant their belief that the Student and Student D were involved in a romantic relationship; and acknowledged that the Student and Student D were seen on a video leaving the School together on xxx, and that the Student had "xxx" visible on her neck. At the meeting on xxxxx, xxxx, the complainant expressed her concerns that Student D, who she believed was from another school, was with the Student on school property after school on xxx, xxxx. The HIB Coordinator and the case manager informed the complainant that video footage showed the Student and Student D "meeting by the gym and exiting the rear doors and moving across the field out of view," but did not capture any additional images of them. According to the District's HIB Coordinator's memorandum of her meeting with the complainant on xxxxx, xxx, the complainant stated, "[Student D] put his hands on my daughter in Pemberton Township HS like it's a club. You don't think it's a big problem that a boy almost 18 years old is luring my daughter." The Coordinator's memorandum states that she repeated what was noted on the video and said there is no indication of force or luring, and then "the complainant became irate." The Coordinator's memo also contains an addendum from the District's HIB Coordinator, dated xxxxxxxx, xxxx, which states, "The incident at that time [mentioned]... a boy from [another program in the District] and entailed [the Student] being beaten and bruised and bitten." OCR determined that the District thereafter did not conduct any additional investigation based on the new information received regarding the alleged incident.

Based on the above, OCR determined that the complainant expressed her concern that Student D lured the Student to a field behind the School building, and then bit the Student in a manner which the District acknowledged to be "xxxxx." District staff assumed, based on the video footage and the Student's acknowledgement that her initial report of the incident was false, that the Student willingly went with Student D to the field and participated in activity that resulted in "xxxxx" to her neck and shoulder; and for those reasons, the District did not follow up on the complainant's oral complaint. OCR determined that the District should have probed further prior to concluding that no additional action was warranted; such as by re-interviewing the Student, conducting an interview with Student D, and conducting interviews of other potential witnesses who may have been in the vicinity of the field at the relevant time, including the xxxxxxxxxx members who may have been present and who allegedly intervened.

Therefore, OCR determined that the District was on notice of an allegation of sexual harassment, but failed to take effective action to determine if sexually harassing conduct occurred, as alleged; whether it created a hostile environment for the Student; and if so, to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects. Accordingly, OCR determined that there was sufficient evidence to substantiate the complainant's allegation that the District failed to respond appropriately to the complainant's complaint of

sexual harassment made on xxx, xxxx. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in Allegation 2. OCR will monitor the implementation of the resolution agreement.

With respect to the portion of complainant's allegation that the District failed to respond to her complaint of disability harassment regarding Allegation 2, OCR determined that there was no evidence to substantiate that the complainant reported the complaint on this basis. Accordingly, the evidence is insufficient to substantiate the complainant's allegation on this basis, and OCR has dismissed this portion of Allegation 2.

### Allegation 3

The complainant alleged that the District retaliated for her complaints of sex and disability harassment, by reporting her to the NJDYFS in or around xxx xxxx. The regulations implementing Section 504, at 34 C.F.R. § 104.61, and Title IX, at 34 C.F.R. § 106.71, incorporate by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in protected activity by complaining to District staff on or about xxxxxx, that the Student was subjected to harassment because of her disability; and on or about xxxxxx, xxxx, that the Student was subjected to sexual harassment. OCR determined that the District was aware of the complainant's protected activity.

OCR determined that on xxx, xxxx, at 2:31 p.m., a District employee contacted the New Jersey Department of Children Protection and Permanency (DCPP),<sup>2</sup> and reported information indicating possible abuse by the parent of the Student. The Special Services DCPP Call Guide Sheet (Call Sheet) the District provided to OCR did not indicate the identity of the employee who reported the incident. District staff informed OCR that employees were not required by District regulations or policy to provide their names when they made a report to DCPP and could do so anonymously. District staff could not confirm the identity of the employee who made the report to DCPP. The Call Sheet stated that "mom was upset that [the Student] missed the bus and was verbally abusive and attacked [the Student] with a stick and threw water on her. Mom threatened to punch her in the face." The District asserted that its employee was required to report possible verbal and physical abuse of the Student in accordance with District regulations and New Jersey law.<sup>3</sup>

<sup>2</sup> The DCPP was formerly known as NJDYFS, an agency within the New Jersey Division of Children and Families (DCF).

<sup>3</sup> District regulation 5141.4 requires District employees to report cases of suspected abuse or neglect to the former DCF; and pursuant to New Jersey State Law, District employees are mandated reporters of suspected child abuse and neglect.

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On xxx, xxxx, the Guidance Counselor completed and submitted a report containing information concerning the Student at DCPD's request. In the report, the Guidance Counselor stated that the Student informed a faculty member that her mother was verbally abusive and attacked the Student with a stick and threw water on her because she missed her bus. The Guidance Counselor asserted that she provided this information because she was required to do so pursuant to District policy and in accordance with state regulations. The complainant advised OCR that she previously told the Child Study Team (CST) chair that she and the Student were having problems; and acknowledged that the Student had reported to an unidentified member of the CST that the complainant had hit the Student with a stick. The District provided information to OCR indicating that for school year 2014-2015, District staff reported incidents of alleged abuse/neglect to DCPD regarding approximately 54 students whose parents/guardians had not engaged in protected activity.

Based on the above, OCR determined that the District proffered a legitimate, non-retaliatory reason for reporting the complainant to the DCPD on xxxxxxxxxx; namely, the Student had reported to a faculty member that the complainant had hit her with a stick. OCR determined that the District's reason was not a pretext for retaliation, as its actions were consistent with District policy and applicable state regulations requiring District staff members to report cases of suspected abuse; the complainant acknowledged that the Student had reported to school staff that the complainant hit her with a stick; and, the District had reported incidents of alleged abuse/neglect for other students whose parents had not engaged in protected activity. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District retaliated for her complaints of sex and disability harassment, by reporting her to the DCPD in or around xxxx. Accordingly, OCR will take no further action with respect to Allegation 3.

This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this should occur, the complainant may file a separate complaint alleging such harassment or intimidation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.





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

TIMOTHY C. J. BLANCHARD  
DIRECTOR  
NEW YORK OFFICE

March 22, 2016

Catherine Fernandez  
24 Carpenter Lane  
Brown Mills, New Jersey 08015

Re: Case No. 02-15-1358  
Pemberton Township School District

Dear Ms. Fernandez:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint you filed against the Pemberton Township School District. You alleged that the District discriminated against your daughter (the Student), on the bases of her disability and sex, by failing to respond appropriately to the complaints you made on or about January 14, 2015, that a student (Student A) subjected the Student to bullying and harassment because of her disability and sex (Allegation 1); and on or about May 12, 2015, that a different student (Student B) subjected the Student to bullying and harassment because of her disability and sex (Allegation 2). You also alleged that the District retaliated for your complaints of sex and disability harassment, by reporting you to the New Jersey State Division of Youth and Family Services (NJSDYF) in or around May 2015 (Allegation 3). Hereinafter, you will be referred to as "the complainant."

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. In addition, OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the Department. The District is a recipient of financial assistance from the Department, and is a public elementary and secondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504, the ADA, and Title IX.

In reaching a determination regarding this complaint, OCR interviewed the complainant and District staff. OCR also reviewed documentation that the complainant and the District submitted.

### **Title IX and Section 504/ADA Procedural Requirements**

The regulation implementing Title IX, at 34 C.F.R. § 106.8(a), requires a recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and its implementing regulation, including the investigation of any complaint communicated to such recipient alleging its noncompliance with Title IX or alleging any actions which would be prohibited by Title IX. The recipient must notify all of its students and employees of the name, office address, and telephone number of the employee or employees appointed. Additionally, recipients should provide the electronic mail (email) address of the designated Title IX coordinator. Further, the regulation implementing Title IX, at 34 C.F.R. § 106.8(b), requires a recipient to adopt and publish procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any actions prohibited by Title IX and its implementing regulation.

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The regulation implementing Title IX, at 34 C.F.R. § 106.9(a), requires each recipient to implement specific and continuing steps to notify applicants for admission and employment, students, employees, sources of referral of applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of sex in the educational programs or activities which it operates and that it is required by Title IX not to discriminate in such a manner. ~~Such notification shall state at least that the requirement not to discriminate in the~~ education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of Title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to OCR's Assistant Secretary.

Similarly, the regulation implementing Section 504, at 34 C.F.R. § 104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the requirements of Section 504 and its implementing regulation. The regulation implementing Section 504, at 34 C.F.R. § 104.8(a), also requires each such recipient to take appropriate and continuing steps to notify participants, beneficiaries, applicants, employees, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability; and, that this notice should also include the identity of its designated coordinator(s). The regulation, at 34 C.F.R. § 104.8(b), requires recipients to publish this notice in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees. The regulation implementing the ADA has similar provisions, at 28 C.F.R. §§ 35.106 and 35.107.

The regulation implementing Section 504, at 34 C.F.R. § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and

its implementing regulation. The regulation implementing the ADA has similar provisions, at 28 C.F.R. § 35.107.

*Title IX and Section 504/ADA Coordinator(s)*

During the course of OCR's investigation, OCR determined that the District failed to designate a Title IX Coordinator as required by the regulation implementing Title IX, at 34 C.F.R. § 106.8(a). On March 4, 2016, the District informed OCR that its Board of Education (Board) had designated a Title IX Coordinator; however, the District did not provide and OCR did not find contact information for the Title IX Coordinator. Additionally, although the District identified a Section 504/ADA Coordinator to OCR, the District did not provide and OCR did not find contact information for the Section 504/ADA Coordinator.

Accordingly, OCR determined that the District failed to provide appropriate notice of the name, office address, and telephone number of the District's Title IX Coordinator, as required by Title IX and its implementing regulation, at 34 C.F.R. § 106.8(a). OCR further determined that the District failed to provide appropriate notice of the District's Section 504/ADA Coordinator as required by Section 504 and its implementing regulation, at 34 C.F.R. § 104.8, and the ADA and its implementing regulation, at 28 C.F.R. § 35.107(a). On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified with respect to the District's Title IX and Section 504/ADA Coordinator(s). OCR will monitor the implementation of the resolution agreement.

*Non-Discrimination Notice*

During the course of the investigation, the District did not provide, and OCR did not find that the District had a notice of non-discrimination that that complied with the regulations implementing Title IX, Section 504 and the ADA, at 34 C.F.R. § 106.9(a); 34 C.F.R. § 104.8(a) and (b); and 28 C.F.R. § 35.106, respectively.<sup>1</sup> On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns with respect to the District's non-discrimination notice. OCR will monitor the implementation of the resolution agreement.

*Grievance Procedures*

OCR has identified a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for: (1) notice of the procedure, including where complaints may be filed, that is easily understood, easily located, and widely distributed; (2) application of the procedure to complaints alleging discrimination or harassment carried out by employees, other students, or third parties; (3) adequate, reliable, and impartial investigation of complaints, including an opportunity to present witnesses and evidence; (4) designated and reasonably prompt timeframes for the major stages of the complaint

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<sup>1</sup> OCR further determined that the District did not have a notice of non-discrimination that would satisfy the requirements of the regulation implementing the Age Discrimination Act, at 34 C.F.R. § 110.25, and Boy Scouts of America Equal Access Act, at 34 C.F.R. § 108.9. The regulation implementing the Boy Scouts Act, at 34 C.F.R. § 108.9, requires this by reference to the regulation implementing Title VI at 34 C.F.R. § 100.6(d).



process; (5) notice to the parties of the outcome of the complaint (both parties must be notified, in writing, about the outcome of both the complaint and any appeal); and (6) an assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

OCR determined that the District has a Student Harassment, Intimidation & Bullying Policy 5131.9 (the Policy) that prohibits all forms of harassment, intimidation or bullying (HIB), that is motivated by any actual or perceived characteristic such as gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability. Pursuant to the Policy, any District employee, pupil, Board Member, or volunteer who has witnessed, or has reliable information that a pupil has been subject to HIB has a duty to report the incident to the appropriately designated administrator or his/her designee; and all acts of HIB are to be reported orally to the school principal on the same day, and in writing within two (2) school days of the date witnessed or in possession of reliable information. The Policy states that oral reports, written reports or electronic reports will be taken, and requires that all violations and complaint reports of HIB be investigated promptly by the designated administrator. The Policy provides that an investigation is to be initiated by the principal within one school day of the report of the incident and the investigation is to be completed within ten school days from the date of the written report of the incident of HIB. The results are to be reported to the Superintendent within 2 school days from the date of the completion of the investigation. The results of each investigation are to be reported to the Board no later than the date of the next Board meeting following the completion of the investigation.

Accordingly, the Policy provides for reasonably prompt time frames for the completion of the investigation and submission of the written report of the incident to the Superintendent and to the Board. It further provides that parents/guardians of the students who are parties to the investigation are entitled to receive written notice of the outcome of the investigation, and the parties will be provided information regarding their rights if they are not satisfied with the outcome. The Policy also contains a prohibition against retaliation. OCR determined, however, that the Policy does not apply to complaints alleging other kinds of discrimination, or alleging harassment by employees or third parties; and does not provide for the parties to submit witnesses or other evidence, or an assurance that the School will take steps to correct the discriminatory effects of any harassment on the complainant and others, if appropriate.

On February 9, 2016, the District provided a copy of a "Proposed Anti -Discrimination Policy" (the Proposed Policy); however, OCR determined that the Proposed Policy does not comply with the requirements of the regulations implementing Title IX, at 34 C.F.R. § 106.8(b); Section 504, at 34 C.F.R. § 104.7(b); or the ADA, at 28 C.F.R. § 35.107(b). Specifically, while the Proposed Policy serves as a statement of the District's position that discrimination and harassment is prohibited, it is not actually a grievance procedure in that it does not provide notice to students and employees of where complaints may be filed; it does state what steps will be taken to provide for an adequate, reliable, and impartial investigation of complaints, including an opportunity for both the complainant and respondent to present witnesses and other evidence; it does not designate reasonably prompt timeframes for major stages of the complaint process; it does not indicate that written notice of the outcome will be provided to both parties; and it does not provide an assurance that the institution will take steps to prevent recurrence of any

discrimination or harassment found to have occurred, and to correct its discriminatory effects on the complainant and others if appropriate. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns with respect to the District's grievance procedures. OCR will monitor the implementation of the resolution agreement.

### **Allegations 1 and 2**

The complainant alleged that the District discriminated against her daughter (the Student), on the bases of her disability and sex, by failing to respond appropriately to the complaints she made on or about January 14, 2015, that Student A subjected the Student to harassment because of her disability and sex (Allegation 1); and on or about May 12, 2015, that Student B subjected the Student to harassment because of her disability and sex (Allegation 2).

Title IX and its implementing regulation, at 34 C.F.R. § 106.31, prohibit discrimination based on sex, including sexual harassment, in educational programs and activities. Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations, at 34 C.F.R. § 104.4 and 28 C.F.R. § 35.130, respectively. Harassment based on sex and disability can include verbal, written, graphic, physical, or other conduct by an employee, a student, or a third party. Harassment can create a hostile environment if it is sufficiently serious to limit an individual's ability to participate in, or receive benefits, services, or opportunities in the recipient's program. If OCR determines that harassing conduct occurred and the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to make a determination as to whether a hostile environment existed and whether the recipient took prompt and effective action to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects.

OCR determined that during school year 2014-2015, the Student was enrolled in the ninth grade at the District's Pemberton Township High School (the School). The Student's individualized education program (IEP) for school year 2014-2015 classified her as Other Health Impaired, with Attention Deficit Hyperactivity Disorder. The Student's IEP states that she is "naïve and socially immature."

The complainant alleged that on the afternoon of January 14, 2015, while the Student was about to get on the bus, another student "kicked the Student to the ground," injuring her knees and breaking the Student's cellular telephone (Incident 1). The complainant stated that as a result of her injuries, the Student missed school for five days, from January 15 to 21, 2015, and required physical therapy.

The Assistant Principal stated that on or about January 14, 2015, he received a telephone call from the complainant stating that Student A had "tripped" the Student in the area of the school parking lot. The Assistant Principal stated that the complainant did not allege that Incident 1 constituted harassment, intimidation or bullying on the bases of the Student's sex and/or disability.

The Assistant Principal, who is responsible for investigating violations of the School's Student Code of Conduct (the Code), initiated an investigation of Incident 1 that same day by reviewing surveillance video from the School's security system. The Assistant Principal stated that the video depicted Student A with his foot behind the Student, and the next thing that was visible was the Student running after Student A. The Assistant Principal stated that he interviewed Student A, who informed him that he and the Student are friends and that he was "playing" with the Student. On January 14, 2015, the Assistant Principal also attempted to interview the Student, and requested a written statement from her. The Student refused to be interviewed or to provide a written statement, and did not return to school until January 20, 2015. On January 20, 2015, the Assistant Principal again attempted to discuss Incident 1 with the Student, but she refused, stating that the police had her full report. The Assistant Principal stated that based on the information he obtained from Student A, and his review of the security video, he concluded that Incident 1 was a matter of two teenagers engaged in horseplay. The Assistant Principal stated that he disciplined Student A with an "in-school suspension" for "horseplay," in accordance with the Code.

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In an email message dated January 21, 2015, the Assistant Principal informed the complainant of the outcome of his investigation of Incident 1, which focused on whether it involved any violations of the Code. The complainant then informed the Assistant Principal during a discussion on January 21, 2015, for the first time, that she believed Student A had bullied the Student because of her disability; however, the complainant did not raise sexual harassment in this complaint. The Assistant Principal directed the complainant to the District's website to file an HIB complaint. On or about January 21, 2015, the complainant sent an email to the District's HIB Coordinator, stating that she had reported Incident 1 to the Assistant Principal. She also stated her intent to file an HIB complaint based on Incident 1. OCR determined that the complainant did not use the District's specific HIB complaint form, but instead spoke to the District's HIB Coordinator (the Coordinator) on or about January 22, 2015, who followed up on her HIB complaint by opening on the same date an HIB case in HIBster, the District's computer software program used for tracking and reporting HIB investigations.

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Pursuant to the Policy, Incident 1 was assigned for investigation to the School's appointed HIB counselor (the Counselor) on or about January 21, 2015. The Assistant Principal stated that the School's practice is that the Counselor conducts the investigation, and he and the Counselor may discuss issues that arise along the way. Once the investigation is complete, the Assistant Principal reviews the Counselor's conclusions, and if he is in agreement he sends the report to the superintendent. The superintendent then reviews the HIB investigation results before submission to the Board. At a Board meeting, the Board makes the final determination about whether to accept or reject the findings, and informs the parent accordingly.

The Counselor initiated her investigation on January 22, 2015. The Counselor interviewed Student A, who reiterated what he had said during his interview with the Assistant Principal -- that he and the Student frequently played and he was playing with her. The Counselor also interviewed the Student, who stated that Student A "tripped her" while she was walking to the bus, and that once she got to the bus with pants torn on both knees, she called [the complainant] to report the "accident." The Counselor also reviewed the security video. She noted that another student (Student C) was in close proximity to the alleged incident; however, she did not

interview Student C. Neither the Assistant Principal nor the Counselor interviewed staff or other students regarding whether the Student and Student A were actually friends and played frequently, as Student A had stated; nor did they ask questions of anyone who may have been in the parking area at the time of the incident. The Counselor concluded her investigation on January 30, 2015, and reported that Student A engaged in conduct that may be considered inappropriate, rude, disrespectful or unkind, but the behavior did not constitute harassment, intimidation or bullying. Therefore, she concluded that the HIB complaint was unfounded.

OCR determined that the investigation does not reflect any inquiry of the motivation for or sufficient development of the facts surrounding the reasons that the Student was tripped, including whether it was on the basis of her disability as the complainant alleged in her HIB complaint to the School. The record of the investigation reflects that District staff failed to conduct interviews of potential witnesses, including students and teachers familiar with the Student and Student A and those in close proximity to the students during the alleged incident. Further the record of the investigation reflects that District staff failed to review physical evidence, such as the Student's torn and bloody clothing and smashed phone.

Based on the foregoing, OCR determined that the District was on notice of an allegation of disability harassment, but failed to take effective action to determine if harassing conduct occurred on the basis of the Student's disability, as alleged; whether it created a hostile environment for Student; and if so, to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects. Accordingly, OCR determined that there was sufficient evidence to substantiate the complainant's allegation that the District failed to respond appropriately to the complainant's complaint of disability harassment filed on January 21, 2014. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in Allegation 1. OCR will monitor the implementation of the resolution agreement.

With respect to the portion of complainant's allegation that the District failed to respond to her complaint of sexual harassment regarding Allegation 1, OCR determined that there was no evidence to substantiate that the complainant filed the complaint on this basis. Accordingly, the evidence is insufficient to substantiate the complainant's allegation on this basis, and OCR has dismissed this portion of Allegation 1.

The complainant alleged that she reported to school personnel on May 13, 2015, that on May 12, 2015, Student B had bitten the Student while she was in the bathroom around 11:30 a.m., leaving marks on the Student's shoulder and neck and bruises on the Student's body. OCR determined that on May 13, 2015, the Student filled out the District's HIB Incident Reporting Form, stating that on May 12, 2015, at 11:30 a.m., she had gone to the bathroom, and upon entering, Student B came behind her, bit her on left shoulder, and then bit her on right side of neck. The Student did not indicate at this time that she believed that this alleged incident was harassment because of her sex and/or disability. OCR determined that the School's principal delegated the investigation of this complaint to another assistant principal (Assistant Principal 2); however, there is no evidence that the complaint was assigned to an HIB counselor or that an HIB case was opened for this complaint in accordance with the District's HIB procedures.

On May 13, 2015, Assistant Principal 2 conducted an investigation of the information provided by the Student in her HIB complaint. Assistant Principal 2 interviewed teachers who may have witnessed the incident, and the teachers stated that Student B was absent on May 12, 2015. Assistant Principal 2 also determined that the bathroom in which the incident allegedly occurred had been closed for repairs for the past two weeks, including on the day of the alleged incident. The Student's HIB complaint was subsequently deemed unfounded.

The complainant informed OCR that the Student recanted her story and she learned that the Student had been on school premises (on a field) after school on May 12, 2015, with a male (Student D) and had received the bite marks at that time. The complainant alleged to OCR that she informed District staff that the Student did not go to math tutoring after school on May 12, 2015, and instead went behind the School building to a field with Student D. The complainant alleged to OCR that the Student was lured by Student D to go behind the School building, and Student D then took advantage of the Student and subjected her to sexual harassment by biting and bruising her. The complainant alleged to OCR that junior ROTC students were nearby, witnessed the interaction, and ultimately intervened.

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District staff acknowledged to OCR that they also learned that the Student had recanted her story and asserted that the Student had been with a male student with whom she had a romantic relationship and that male had given her "love-bites" on her neck while the two were "necking" on the field that afternoon. Further, the District acknowledged that District staff did not open an HIB case, or conduct any investigation in response to the complainant's complaint regarding the incident with Student D on May 12, 2015. The Superintendent explained that an HIB case was not opened because it was not a harassment, intimidation or bullying incident; rather, the incident involved the Student spending time with her boyfriend and a parent not wanting her to spend time with Student D.

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On May 28, 2015, the complainant spoke during the public comment period at a Board meeting and generally expressed her concerns regarding the District's procedures for investigating HIB complaints. She also expressed concerns about the Student's safety. Subsequently, on June 9, 2015, at the direction of the Superintendent, the HIB Coordinator and a District Case Study Team (CST) case manager met with the complainant to discuss the complainant's concerns regarding her HIB complaints and the District's HIB procedures. District staff expressed to the complainant their belief that the Student and Student D were involved in a romantic relationship; and acknowledged that the Student and Student D were seen on a video leaving the School together on May 12, 2015, and that the Student had "love-bites" visible on her neck. At the meeting on June 9, 2015, the complainant expressed her concerns that Student D, who she believed was from another school, was with the Student on school property after school on May 12, 2015. The HIB Coordinator and the case manager informed the complainant that video footage showed the Student and Student D "meeting by the gym and exiting the rear doors and moving across the field out of view," but did not capture any additional images of them. According to the District's HIB Coordinator's memorandum of her meeting with the complainant on June 9, 2015, the complainant stated, "[Student D] put his hands on my daughter in Pemberton Township HS like it's a club. You don't think it's a big problem that a boy almost 18 years old is luring my daughter." The Coordinator's memorandum states that she repeated what was noted on the video and said there is no indication of force or luring, and then "the

complainant became irate.” The Coordinator’s memo also contains an addendum from the District’s HIB Coordinator, dated June 11, 2015, which states, “The incident at that time [mentioned]... a boy from [another program in the District] and entailed [the Student] being beaten and bruised and bitten.” OCR determined that the District thereafter did not conduct any additional investigation based on the new information received regarding the alleged incident.

Based on the above, OCR determined that the complainant expressed her concern that Student D lured the Student to a field behind the School building, and then bit the Student in a manner which the District acknowledged to be “love-bites.” District staff assumed, based on the video footage and the Student’s acknowledgement that her initial report of the incident was false, that the Student willingly went with Student D to the field and participated in activity that resulted in “love bites” to her neck and shoulder; and for those reasons, the District did not follow up on the complainant’s oral complaint. OCR determined that the District should have probed further prior to concluding that no additional action was warranted; such as by re-interviewing the Student, conducting an interview with Student D, and conducting interviews of other potential witnesses who may have been in the vicinity of the field at the relevant time, including the junior ROTC members who may have been present and who allegedly intervened.

Therefore, OCR determined that the District was on notice of an allegation of sexual harassment, but failed to take effective action to determine if sexually harassing conduct occurred, as alleged; whether it created a hostile environment for the Student; and if so, to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects. Accordingly, OCR determined that there was sufficient evidence to substantiate the complainant’s allegation that the District failed to respond appropriately to the complainant’s complaint of sexual harassment made on June 9, 2015. On March 20, 2016, the District agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in Allegation 2. OCR will monitor the implementation of the resolution agreement.

With respect to the portion of complainant’s allegation that the District failed to respond to her complaint of disability harassment regarding Allegation 2, OCR determined that there was no evidence to substantiate that the complainant reported the complaint on this basis. Accordingly, the evidence is insufficient to substantiate the complainant’s allegation on this basis, and OCR has dismissed this portion of Allegation 2.

### **Allegation 3**

The complainant alleged that the District retaliated for her complaints of sex and disability harassment, by reporting her to the NJDYFS in or around May 2015. The regulations implementing Section 504, at 34 C.F.R. § 104.61, and Title IX, at 34 C.F.R. § 106.71, incorporate by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The regulation implementing the ADA contains a similar provision at 28 C.F.R. § 35.134.

In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in protected activity by complaining to District staff on or about January 14, 2015, that the Student was subjected to harassment because of her disability; and on or about May 28, 2015, that the Student was subjected to sexual harassment. OCR determined that the District was aware of the complainant's protected activity.

OCR determined that on May 28, 2015, at 2:31 p.m., a District employee contacted the New Jersey Department of Children Protection and Permanency (DCPP),<sup>2</sup> and reported information indicating possible abuse by the parent of the Student. The Special Services DCPP Call Guide Sheet (Call Sheet) the District provided to OCR did not indicate the identity of the employee who reported the incident. District staff informed OCR that employees were not required by District regulations or policy to provide their names when they made a report to DCPP and could do so anonymously. District staff could not confirm the identity of the employee who made the report to DCPP. The Call Sheet stated that "mom was upset that [the Student] missed the bus and was verbally abusive and attacked [the Student] with a stick and threw water on her. Mom threatened to punch her in the face." The District asserted that its employee was required to report possible verbal and physical abuse of the Student in accordance with District regulations and New Jersey law.<sup>3</sup>

On May 29, 2015, the Guidance Counselor completed and submitted a report containing information concerning the Student at DCPP's request. In the report, the Guidance Counselor stated that the Student informed a faculty member that her mother was verbally abusive and attacked the Student with a stick and threw water on her because she missed her bus. The Guidance Counselor asserted that she provided this information because she was required to do so pursuant to District policy and in accordance with state regulations. The complainant advised OCR that she previously told the Child Study Team (CST) chair that she and the Student were having problems; and acknowledged that the Student had reported to an unidentified member of the CST that the complainant had hit the Student with a stick. The District provided information to OCR indicating that for school year 2014-2015, District staff reported incidents of alleged abuse/neglect to DCPP regarding approximately 54 students whose parents/guardians had not engaged in protected activity.

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<sup>2</sup> The DCPP was formerly known as NJDYFS, an agency within the New Jersey Division of Children and Families (DCF).

<sup>3</sup> District regulation 5141.4 requires District employees to report cases of suspected abuse or neglect to the former DCF; and pursuant to New Jersey State Law, District employees are mandated reporters of suspected child abuse and neglect.

Based on the above, OCR determined that the District proffered a legitimate, non-retaliatory reason for reporting the complainant to the DCPD on May 28, 2015; namely, the Student had reported to a faculty member that the complainant had hit her with a stick. OCR determined that the District's reason was not a pretext for retaliation, as its actions were consistent with District policy and applicable state regulations requiring District staff members to report cases of suspected abuse; the complainant acknowledged that the Student had reported to school staff that the complainant hit her with a stick; and, the District had reported incidents of alleged abuse/neglect for other students whose parents had not engaged in protected activity. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the District retaliated for her complaints of sex and disability harassment, by reporting her to the DCPD in or around May 2015. Accordingly, OCR will take no further action with respect to Allegation 3.

This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this should occur, the complainant may file a separate complaint alleging such harassment or intimidation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Genara Necos, Compliance Team Attorney, at (646) 428-3828 or [genara.necos@ed.gov](mailto:genara.necos@ed.gov); Jane Tobey Momo, Senior Compliance Team Attorney, at (646) 428-3914 or [jane.momo@ed.gov](mailto:jane.momo@ed.gov); or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy C.J. Blanchard', with a stylized, sweeping flourish extending to the right.

Timothy C.J. Blanchard



## **RESOLUTION AGREEMENT**

### **Pemberton Township School District OCR Case No. 02-15-1358**

In order to resolve Case No. 02-15-1358, the Pemberton Township School District (District) assures the U.S. Department of Education, New York Office for Civil Rights (OCR), that it will take the actions detailed below pursuant to the requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104; Title II of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35; and, Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106.

#### **Action Item 1: Title IX and Section 504/ADA Coordinator(s)**

By April 30, 2016, the District will designate at least one person to coordinate its efforts to comply with the requirements of Title IX, Section 504, the ADA and their implementing regulations; and, take steps to ensure that all students, parents or guardians, and employees are notified of the name and/or title, office address, telephone number, and electronic mail (email) address of the person(s) so designated. Notification may occur by the methods usually employed by the District for distributing District/School policies and procedures, including posting on the District/School's website.

#### **Reporting Requirements:**

- (a) The District has informed OCR that the Board of Education, at their meeting of February 25, 2016 appointed Rita Jenkins as the District's Title IX coordinator. By April 30, 2016, the District will provide to OCR the name and title of the person(s) designated as the District's Section 504 and ADA coordinator(s). The School District will prominently announce the appointment of the Title IX coordinator on the School District's website.
- (b) By April 30, 2016, the District will provide documentation to OCR demonstrating that the District has taken steps to ensure that all parents or guardians, and employees are notified of the name and or/title, office address, telephone number, and email address of the person(s) so designated; such as copies of the printed versions of publications disseminated to student, parent/guardians and employees containing the required information, and printouts or a link to all on line publications containing the required notification. Inserts may be used pending reprinting of publications. The District may also publish notification of the persons designated prominently on its website.

## Action Item 2: Notice of Nondiscrimination

By April 30, 2016, the District will adopt and publish a notice of nondiscrimination to state that the District does not discriminate on the basis of race, color, national origin, disability, sex, or age, or under the Boy Scouts of America Equal Access Act (the notice may include other bases) in its programs and activities; and, that this requirement not to discriminate extends to employment and admission as applicable. Additionally, the notice will identify the District's designated coordinator(s) and state that inquiries concerning the application of regulations prohibiting discrimination may be referred to the District's designated to coordinate(s) or to OCR. The District will ensure that the notice of nondiscrimination is included in each announcement, bulletin, catalog, or application form which the District makes available to students, parents, employees, applicants for employment, unions, and professional organizations holding collective bargaining or professional agreements with the District.

### Reporting Requirements:

- (a) The District has submitted to OCR for its review and approval a Policy Against Discrimination and Harassment & Affirmative Action Policy (Policy 8000) that the District represents is an appropriate and complete anti-discrimination policy that it has adopted at its February 25, 2016 Meeting. While OCR has not yet reviewed Policy 8000, the District represents that Policy 8000 sets forth a non-discrimination notice that includes at a minimum, the following: that the District does not discriminate on the basis of race, color, national origin, disability, sex, or age, or under the Boy Scouts of America Equal Access Act (the notice may include other bases) in its programs and activities; and, that this requirement not to discriminate extends to employment and admission as applicable. Additionally, that the notice will identify the District's designated coordinator(s) and state that inquiries concerning the application of regulations prohibiting discrimination may be referred to the District's designated coordinator(s) or to OCR.
- (b) The District additionally may submit a proposed draft non-discrimination/non-harassment notice to OCR on or before April 30, 2016.
- (c) Within 30 days of OCR's approval of the District's notice of non-discrimination, the District will provide documentation to OCR demonstrating that the approved notice has been adopted and published on the District's website. By Sept. 1, 2016, the District will provide OCR documentation demonstrating that the approved notice has been adopted and published; including a list of the titles and of the publications in which the notice of nondiscrimination appears (e.g. Student Handbook, Employee Handbook) and a copy of at least one publication disseminated to the campus community, or printouts or a link to an on-line publication containing the notice. The final approved non-discrimination/non-harassment notice will be placed on the School District's web-site and incorporated into all student handbooks for the 2016-2017 school year.

### **Action Item 3: Grievance Procedures**

By April 30, 2016, the District will adopt and publish a grievance procedure that provides for the prompt and equitable resolution of complaints alleging all forms of discrimination (including harassment), on the basis of sex and/or disability (and may include other bases). The procedures will include the following provisions at a minimum:

- Notice that the procedures apply to complaints alleging all forms of discrimination (including harassment) on the basis of sex and/or disability (and may include other bases) by employees, students, or third parties;
- An explanation as to how to file a complaint pursuant to the procedures;
- the name, title, office address, email address, and telephone number of the individual(s) with whom to file a complaint;
- definitions and examples of what types of actions may constitute discrimination (including harassment);
- designated and reasonably prompt timeframes for major stages of the grievance process;
- the right of the parties to provide witnesses and other evidence;
- written notice to parties of the outcome;
- an assurance that the District will take steps to prevent the recurrence of discrimination and harassment, and to correct its discriminatory effects if appropriate;
- examples of the range of possible disciplinary sanctions and the types of remedies available;
- a statement that the District prohibits retaliation against any individual who files a complaint or participates in a complaint investigation;
- a statement that responsible employees are expected to promptly report harassment that they observe or learn about;
- provisions indicating the availability of interim measures during the District's investigation of possible harassment (such as how to obtain counseling and academic assistance in the event of a sexual assault, and what interim measures can be taken if the alleged perpetrator attends classes with the complainant), and that such interim measures will not disproportionately impact the complainant;
- notice of the opportunity of both parties to appeal the findings, if the procedures allow appeals; and
- an assurance that any appeal will be conducted in an impartial manner by an impartial decision maker.

### **Reporting Requirements:**

- (a) The District has submitted to OCR for its review and approval a Policy Against Discrimination and Harassment & Affirmative Action Policy (Policy 8000) which the District represents is an appropriate and complete anti-discrimination policy that it has adopted at its February 25, 2016 Meeting. While OCR has not yet reviewed Policy 8000, the District represents that Policy 8000 sets forth grievance procedures which includes at a minimum, the following:

- Notice that the procedures apply to complaints alleging all forms of discrimination (including harassment) on the basis of sex and/or disability (and may include other bases) by employees, students, or third parties;
- An explanation as to how to file a complaint pursuant to the procedures;
- the name, title, office address, email address, and telephone number of the individual(s) with whom to file a complaint;
- definitions and examples of what types of actions may constitute discrimination (including harassment);
- designated and reasonably prompt timeframes for major stages of the grievance process;
- the right of the parties to provide witnesses and other evidence;
- written notice to parties of the outcome;
- an assurance that the District will take steps to prevent the recurrence of discrimination and harassment, and to correct its discriminatory effects if appropriate;
- examples of the range of possible disciplinary sanctions and the types of remedies available;
- a statement that the District prohibits retaliation against any individual who files a complaint or participates in a complaint investigation;
- a statement that responsible employees are expected to promptly report harassment that they observe or learn about;
- provisions indicating the availability of interim measures during the District's investigation of possible harassment (such as how to obtain counseling and academic assistance in the event of a sexual assault, and what interim measures can be taken if the alleged perpetrator attends classes with the complainant), and that such interim measures will not disproportionately impact the complainant;
- notice of the opportunity of both parties to appeal the findings, if the procedures allow appeals; and
- an assurance that any appeal will be conducted in an impartial manner by an impartial decision maker.

(b) The District additionally may submit proposed draft non-discrimination/non-harassment grievance procedures to OCR by April 30, 2016. The final approved non-discrimination/non-harassment grievance procedures will be placed on the School District's web-site and incorporated into all student handbooks for the 2016-2017 school year.

(c) Within thirty (30) calendar days after the District's receipt of OCR's approval of the grievance procedures, the District will provide documentation to OCR to substantiate that it has adopted the OCR-approved procedures and updated its printed publications and on-line publications with the procedures (inserts may be used pending reprinting of these publications). This documentation will include at a minimum, (i) printouts or a link to all on-line publications containing the grievance procedures; and (ii) if not yet finalized, copies of inserts for printed publications. If inserts were used for any publications, then by September 15,

2016, the District will provide to OCR copies of the printed versions of all publications disseminated to students and employees containing the grievance procedures. Dissemination may occur by the methods usually employed by the District for distributing District/School policies and procedures, including posting on the District/School's website.

#### **Action Item 4: Supplemental Investigation**

The District represents to OCR that the prior investigations of the incidents of January 14, 2015 and May 12, 2015 were complete and thorough. In the interest of resolving this matter and without admitting any liability by or on the part of the District, by April 30, 2016, the District will complete a supplemental investigation of the allegations raised by the complainant on January 21, 2015, and June 9, 2015, and ensure that the investigation complies with regulations implementing Title IX and Section 504. Specifically, the investigation of the complainant's allegations will involve a limited, review by the District of all information previously provided to School staff; review of all physical evidence and police and/or medical reports available to District staff; and the interviewing or re-interviewing of student and staff witnesses, as appropriate; and a determination of whether the evidence presented, together with such additional information and witnesses as may be identified or presented, supports a finding of a hostile environment based on sex and/or disability. The outcome of the supplemental investigation will be communicated to the complainant and the parents/guardians of the accused students, in writing. The District will ensure that it responds to any additional alleged incidents of harassment involving the Student of which it has notice, in a prompt and effective manner; with action that is reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

#### **Reporting Requirements:**

- (a) As stated above, the District represents to OCR that the prior investigations were complete and thorough, however, in order to resolve this matter the District will conduct the supplemental investigation in Action Item 4 above.
- (b) By May 15, 2016 the District will submit to OCR, for review and approval, a report documenting the procedures used to conduct its supplemental investigation as outlined in Action Item (4) above, as well as the outcome of the supplemental investigation; any corrective actions deemed necessary; and a timeline for implementation of the corrective actions, if necessary. The School will also provide documentation supporting the supplemental investigation.
- (c) By June 30, 2016, the District will report to OCR any incidents of alleged sex and/or disability discrimination and/or harassment that occurred during school year 2015-2016 involving the Student and any other student, of which it had notice. The report to OCR will include, at a minimum, (a) a copy of the complaint or a description of any orally reported alleged incident(s) of sex and/or disability discrimination or harassment; (b) the date(s) of receipt of the written complaint or oral report; (c) a description of the District's findings and response

to the incident(s); and, (d) the date(s) that the District provided notice of the outcome of its investigation in writing to the parties.

#### **Action Item 5: Training for Staff**

By December 31, 2016, and periodically thereafter, the District will provide training to the Title IX and 504/ADA coordinator(s), and any other coordinators, and any Pemberton Township High School (School) officials and administrators who will be directly involved in processing, investigating, and/or resolving complaints of discrimination (including harassment) based on sex and/or disability. The training will cover the District's grievance procedures, and provide attendees with instruction on recognizing and appropriately addressing allegations and complaints of discrimination on the basis of sex and/or disability. At a minimum, the training will be provided to School Principals, Assistant Principals, Anti-Bullying Coordinators, Anti-Bullying Specialists, School Safety Team members, teachers, guidance counselors, school social workers, special education directors, and special education case managers. The training will, at a minimum, cover the following: (1) the requirements of Title IX, Section 504, and the ADA, including that discrimination and/or harassment based on sex and/or disability is prohibited and will not be tolerated; (2) the range of behaviors that constitute discrimination and/or harassment based on sex and disability; (3) the disciplinary sanctions applicable to anyone who engages in discrimination and/or harassment based on sex and/or disability; (4) the responsibility of staff to report incidents of possible discrimination and/or harassment and the procedures for doing so; and, (5) where, how and to whom instances of discrimination and/or harassment are to be reported. Additionally, the training for the Coordinator(s) will include instruction on how to conduct and document adequate, reliable, and impartial investigations; including utilizing the appropriate legal standard of a preponderance of the evidence to apply in an investigation. The District will distribute copies of its grievance procedures to all attendees.

#### **Reporting Requirement:**

By December 31, 2016 the District will provide documentation to OCR demonstrating that it provided the training in accordance with Action Item 5 above. This documentation will include, but will not be limited to, the date(s) of the training; the name and credentials of the trainer; copies of any training materials used, including any handouts, guides, or other materials; and a list of the individuals who attended the training and their positions.

#### **Action Item 6: Training for Students**

By December 31, 2016, and periodically thereafter, the District will provide training to all students at the School, appropriate to the students' ages and disabilities, regarding discrimination and harassment on the basis of sex and/or disability (other bases may be included). The training will include (a) the requirements of Title IX, Section 504 and the ADA, including that discrimination and/or harassment is prohibited and will not be tolerated; (b) the range of behaviors that constitute discrimination and/or harassment on the basis of sex and/or disability (other bases may be included); (c) the disciplinary sanctions applicable to anyone who engages

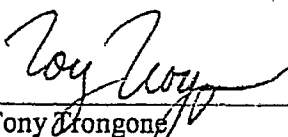
in discrimination and/or harassment; and (d) where, how, and to whom instances of discrimination and/or harassment are to be reported.

**Reporting Requirement:**

By December 31, 2016 the District will provide documentation to OCR demonstrating that it provided the training in accordance with Action Item 5 above. This documentation will include, but will not be limited to, the date(s) of the training; the name and credentials of the trainer; copies of any training materials used, including any handouts, guides, or other materials; and a list of the individuals who attended the training and their positions.

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 the regulations implementing Section 504, at 34 C.F.R. §§ 104.7 and 104.8; the ADA, at 28 C.F.R. §§ 35.106 and 35.107; and, Title IX, at 34 C.F.R. §§ 106.8 and 106.9, which were at issue in this case. The District also 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 the regulations implementing Section 504, at 34 C.F.R. §§ 104.7 and 104.8; the ADA, at 28 C.F.R. §§ 35.106 and 35.107; and, Title IX, at 34 C.F.R. §§ 106.8 and 106.9, which were at issue in this case. The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (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 sixty (60) calendar days to cure the alleged breach.

3/20/16  
Date

  
\_\_\_\_\_  
Tony Drongone  
Superintendent of Schools  
Pemberton Township School District

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-3157

Fernandez v. Board of Pemberton Township

To: Clerk

- 1) Appellant's "Motion for the Reconsideration of the Denial of Petition for Rehearing"
- 2) Appellant's Amended "Motion for the Reconsideration of the Denial of Petition for Rehearing"

---

No action will be taken on the foregoing motions because this appeal has concluded. The Court's judgment was entered on June 20, 2023, rehearing was denied on October 30, 2023, and the mandate issued on November 8, 2023. With that, the Court's decision became final, and the Court lost any authority to alter or change its decision. Any legal or factual arguments that could have been made to the Court as to why this Court's decision was legally erroneous must have been made prior to the conclusion of the appeal. Any further review must be sought in the United States Supreme Court.

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For the Court,

s/ Patricia S. Dodszuweit  
Clerk

Dated: November 30, 2023  
Sb/cc: Catherine Fernandez



OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT  
21400 UNITED STATES COURTHOUSE  
601 MARKET STREET

PHILADELPHIA, PA 19106-1790

Website: [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)

TELEPHONE

215-597-2995

December 16, 2021

Catherine P. Fernandez  
24 Carpenter Lane  
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Mark W. Strasle, Esq.  
Madden & Madden  
108 Kings Highway East  
Suite 200  
Haddonfield, NJ 08033

RE: Catherine Fernandez v. Board of Pemberton Township, et al

Case Number: 21-1820

District Court Case Number: 1-20-cv-08600

ENTRY OF JUDGMENT

Today, **December 16, 2021** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Catherine Fernandez appeals from an order of the United States District Court for the District of New Jersey, which dismissed her complaint for failure to state a claim upon which relief could be granted. We will affirm the District Court's judgment.

Fernandez filed a complaint in July 2020, alleging that the Board of Education of Pemberton Township and the Pemberton Township High School discriminated and retaliated against her from September 2005 to 2018, when Fernandez's daughter was a student at Pemberton High School. Dkt. #1. The District Court noted that her claims appeared to be time-barred, as the complaint was filed more than two years after Fernandez' daughter graduated in June 2018. Order, Dkt. #2. The District Court also noted that the complaint failed to comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires a "short and plain statement of the claims" asserted. *Id.* The Court gave Fernandez 30 days to amend the complaint, and later granted her additional time to file an amended complaint. Dkt. #5.

Fernandez's amended complaint raised federal civil rights claims of discrimination and retaliation and state law claims against the defendants. Fernandez stated that the complaint was based on incidents that "happened from 2005 to 2020," but the complaint only mentions dates past 2018 in four places: (1) "The defendants hired a lawyer to express their disregard to the plaintiff until 2020," Dkt. #7 at 51; (2) "The plaintiff engaged in a protected activity to intervene to protect her child by reporting injuries, sexual assault, sexual harassment, and disability harassment against her child from 2005-

2020,” id. at 58; (3) “The plaintiff’s disabled child graduated in 2018; however, the defendants engaged in disregard to the plaintiff through the defendant’s lawyer until 2020,” id.; and (4) “They used an attorney until February 2020 to continue to cause the plaintiff distress. Where the plaintiff learned in February 2020 the extent her disabled child’s demoralization and low self-esteem from the defendant’s many years of deliberate indifference,” which caused Fernandez to have “thoughts of suicide for failing to protect her disabled child from the defendants,” id. at 60.

The District Court determined that Fernandez’s claims were time-barred and that equitable tolling of the period of limitations was not warranted. Opinion, Dkt. #12 at 3-4. The District Court also concluded that the amended complaint did not meet the requirements of Fed. R. Civ. P. 8, as the complaint consisted largely of legal conclusions that were not connected to any conduct by the defendants. Dkt. #12 at 5-6. The District Court dismissed the amended complaint with prejudice for failure to state a claim. Id. at 6. The Court also determined that because the claims were time-barred, further leave to amend would be futile. Id. Fernandez timely appealed.<sup>1</sup>

We have jurisdiction under 28 U.S.C. § 1291. Our review of the District Court’s sua sponte dismissal of the amended complaint under 28 U.S.C. § 1915(e)(2)(B) is

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<sup>1</sup> Fernandez also filed a motion for reconsideration in the District Court. We lack jurisdiction to review the District Court’s denial of that motion, as Fernandez did not appeal from that order. See Fed. R. App. 4(a)(4)(B)(ii).

plenary. See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). “We may affirm a district court for any reason supported by the record.” Brightwell v. Lehman, 637 F.3d 187, 191 (3d Cir. 2011).

We agree with the District Court that Fernandez’s constitutional claims and state law claims are all governed by a two-year statute of limitations. See Dique v. New Jersey State Police, 603 F.3d 181, 185 (3d Cir. 2010); Save Camden Public Sch. v. Camden City Bd. of Educ., 186 A.3d 304, 309 (N.J. Super. Ct. App. Div. Apr. 2018).

Fernandez argues that the District Court erred in dismissing her suit as untimely mainly for two reasons.<sup>2</sup> First, she argues that the District Court should have applied equitable tolling to the two-year period of limitations. But we agree with the District Court that even if Fernandez were having some mental health difficulties during the limitations period, they did not prevent her from making filings in her daughter’s federal lawsuit during that period. Second, she argues that the District Court should have applied a six-year period of limitations that applies to breach-of-contract claims. But even if

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<sup>2</sup> To the extent that Fernandez argues that any incidents occurred within the period of limitations, or that some type of continuing violation doctrine should apply to render her claims timely, we disagree. Fernandez’s vague allegations that the defendants used an attorney in 2020, or that she discovered the extent of her daughter’s emotional damage within the period of limitations, cannot state a claim for relief. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (explaining that a plaintiff’s complaint must contain more than “labels and conclusions”).

Fernandez had pleaded a valid, timely, breach-of-contract claim in her amended complaint (she did not),<sup>3</sup> such a claim would arise under state law. Because the only claims over which the District Court had original jurisdiction—that is, her federal claims—were time-barred, the District Court could properly decline to exercise supplemental jurisdiction over any state law claims that might be timely. See 28 U.S.C. § 1367(c)(3).

We also agree with the District Court that even if the claims were timely, Fernandez's amended complaint did not state a claim upon which relief could be granted. Fernandez did not make any plausible claims that the defendants discriminated against her or retaliated against her. Fernandez' amended complaint explained the emotional distress that she felt because of the way she believed the school treated her and her daughter. But no allegations support her conclusory statements that the defendants discriminated against her because of a protected ground or retaliated against her in some way prohibited by the Constitution or federal statutes. See Iqbal, 556 U.S. at 678-80.<sup>4</sup>

For these reasons, we will affirm the District Court's judgment.<sup>5</sup>

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<sup>3</sup> Fernandez's conclusory statement that "[t]he defendants breached a Parent-Student-School agreement" is not sufficient to state a claim. See Twombly, 550 U.S. at 555.

<sup>4</sup> Fernandez also challenges the District Court's order denying her motion for appointment of counsel. Because her claims are all time-barred, the District Court did not abuse its discretion in denying her motion. See Tabron v. Grace, 6 F.3d 147, 153, 155 (3d Cir. 1993).

<sup>5</sup> Fernandez has filed a motion to extend the time to file a reply brief, App. Dkt. #15, and

a motion for appointment of pro bono counsel, App. Dkt. #16. Appointment of counsel is not warranted, as her claims are time-barred. See Tabron, 6 F.3d at 153. And because she seeks an extension of time in order for appointed counsel to file a reply brief, we deny that motion, too.

ATTEST:

s/ Patricia S. Dodszeit  
Clerk

Dated: December 16, 2021

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## Appendix B

US Court Appeals For Third Circuit  
Opinion October 30, 2023



## Appendix D

US District Court of NJ  
Opinion November 3, 2022

Appendix A  
Exhibits A, B, and C

## Appendix E

Catherine Fernandez Petition  
for Rehearing September 11, 2023

Catherine Fernandez  
Appellant

V.

Board of Pemberton Township.  
Pemberton Township Highschool  
Appellee

District Court Civil No: 1-20-cv08600

~~Appeals Court No: 22-3157~~

**Motion for the reconsideration of the denial of petition for rehearing**

Catherine Fernandez  
24 Carpenter Lane  
Browns Mills, NJ 08015  
(609) 248-5748  
fernandezc1969@gmail.com  
*Pro~Se*

United States Court of Appeals  
for the Third Circuit  
601 Market St.  
Philadelphia, Pa 19106  
(215) 597-2995  
emergency\_motions@ca3.uscourts.gov

Appeals Court No: 22-3157

I am motioning the Appeals Court to reconsider the denial of the rehearing petition for my case. With all due respect to the majority, I filed my petition for rehearing under Fed. R App. P. 40: Loc, R. 40(a) & (b). I filed my petition for rehearing on the grounds: 1) material factual or legal matter was overlooked in the decision 3) the opinion conflicts with Supreme Court decision, this court, or another court the conflict is not addressed in the opinion 4) the proceeding involves one or more questions of exceptional importance. On June 1, 2023, new material facts were omitted from the appeals court discussion. Exhibit A is a document that contradicts the District Courts opinion of statute of limitation in my case where it was believed upon my daughters graduation, I did not have further contact with the defendants. The document proves the Pemberton Township Highschool was still

decision to dismiss my claim conflicts with 4<sup>th</sup> Circuit Court in the ruling in *Armstrong v. Rushing*.

The new evidence that was presented in my appeal was not distinguished from previous details of past appeals. The Appeals Court noted in their opinion that I have argued the same positions that they have previously rejected; but the Appeals Court overlooked the new material fact document from the defendants. (See Exhibit A) The document raises a Statute of Limitation question in regards to the District Court's decision to time-bar my complaint sometime in June of 2018 upon my daughter's graduation. My daughter's graduation did not end the defendant's obligation or contact with me as previously thought by the District Court. (See Exhibit A) "The Appeals Panel's opinion did not raise the question of whether Exhibit A extends the statute of limitation." If so, then I filed my complaint within a timely manner. The Appeals Panel may vacate and remand the District Court's decision to dismiss my complaint for being time barred by the new material fact. Therefore, allowing me to amend my complaint for further deficiencies.

Under Fed. R. App. P. 40: Loc. R. 40(a) & (b), I am petitioning for a rehearing because the proceeding involves more than one question of exceptional importance that Appeals Panel overlooked material facts in my appeal in their decision. First, Exhibit B is a noted document from my psychiatrist. She notes my cognition was impaired (page 4) in July 16, 2020. I am noting I stopped taking the medication in



concern of a health risk I may face under anesthesia. Also Exhibit B (page 4) raises the question about my cognitive impairment, "Was my ability to file on behalf of my daughter in 2017 unlike my ability to file on my own behalf in June of 2020 since Exhibit B notes I was impaired because I stopped taking my medication in June of 2020." Exhibit B (page 4) raises a question about my cognition ability, "Did I have the ability to have established facts and complete thoughts at the time I filed my complaint on July 8, 2020; my psychologist notes on page 4 my cognition was impaired. The above questions are important in establishing whether Exhibit B (page 4) is evidence to Toll the Statute of Limitation for cognition impairment, auditory hallucinations, and paranoia.

I am petitioning the Appeals Court under Fed. R. App. P. 40: Loc. R. 40(a) & (b), the District Court's opinion conflicts with the 4<sup>th</sup> Circuit Court Ruling in the case Armstrong and Rushing. The District Court said I failed to state a claim in my amending complaint. The Armstrong Protection states (5) an opportunity to amend for complaint the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment. The District Court justifies dismissing my complaint without leave to amend as futile because my claim was time barred and failed to state a claim. My discrimination allegation was not time barred. I was not given the same opportunity to amend my complaint as in the Armstrong v. Rushing rule. Even though my attempted amendment would have





been a third time for me. It is not unheard of like in the case of the case of Keith McHenry: Eric Warren, and Plaintiff-Appellants v. Louise Renne; John Willet; Charles Gillman; Frank Reed; etc... In fact, the Armstrong v. Rushing ruling comes with a string of rulings that conflict with the District Court dismissing of my complaint for failure to state of claim as futile under 1915(d). For example: The Ninth Circuit ruling of Noll v. Carlson- 1. Failing to state a claim could be characterized as frivolous and could be dismissed under 1915(d) and 2. the claim would receive the benefits of the Armstrong protections. I was not given the Armstrong Protection. Furthermore, the Supreme Court said in the case of Neitz v. Williams; it was incorrect to dismiss under rule 1915(b) complaints for failure to state a claim without leave to amend the complaint. Despite the perception by some that Congress wanted push the dismissal of a PLRA complaint without leave to amend for failure to state a claim under 1915(d). Judge Lay of the 11<sup>th</sup> Circuit ruled in the case of Mitchell v. Farcass. He said the Supreme Court observed that dismissing a complaint for failure to state a claim without leave to amend was an error and denied an indigent plaintiff (like me) the protection of unwarranted dismissal under federal law. In addition, Judge Lay said the change in the PLRA does not properly reflect Congresses' intent to dismiss a claim under rule 1915(d) without amending deficiencies. In repetition, after Noll, 1. complaints with only defect failure to state a claim and could be classified frivolous and dismissed under

~1915(d) and 2. would receive benefits of the Armstrong Protection. The District Court's dismissal of my complaint for failing to state a claim conflict with the 4<sup>th</sup> Circuit, Eleventh Circuit, and the Supreme rulings. I should be given the Armstrong Protection to amend my deficiencies for my Federal 1983 discrimination allegation even though it is a third time to amend. My allegation of discrimination was not time barred even without Exhibits A and B, the claim has merit by the OCR investigation, and the decision to dismiss my claim conflicts with 4<sup>th</sup> Circuit Court in the ruling in Armstrong v. Rushing.  
(See Exhibit C)

Finally, the District Court and the Appeals Panel omitted my allegation of Breach of Contract under Title 2A: 14~1 from their opinions. I signed a Parent, Student, School agreement to adhere to school rules. Signing this agreement is a requirement for parents who have children attending district schools yearly. The defendants breached this agreement by violating my rights specifically ignoring my complaints of abuse to my daughter.

My appeal was brought about by Rule 60. I sought relief from the unfavorable decision of the District Court. Exhibits A and B were not available to me when I filed the rule 60 in the District Court. In addition, I was unaware that the District Court did not have jurisdiction to make a favorable decision because I had already filed in Appeals Courts. I appealed the District Court's decision about the Rule 60 and asks the Appeals Court to vacate and remand my case back to the District

Court considering Exhibit A and B. My Exhibits were overlooked by the Appeals Panel. The Exhibits A and B raised legal questions for the Appeals Panel. The Exhibits raised questions of exceptional importance about my mental health. The District Court's opinion to dismiss my discrimination claim under Fed 1983 for conflicts with the 4<sup>th</sup> Circuit Court Ruling in the case Armstrong and Rushing. I was denied the Armstrong Protection. My Breach of Contract allegation was never addressed by the District Court or the Appeals Panel. I am asking the Appeals Court for a rehearing for all the reasons above. In addition, I am asking the Appeals Court to vacate and remand my case back District Court to Amend my complaint.

Catherine Fermanf  
September 11, 2023

I am certifying that my rehearing appeal has only 1,488 words.

Thank you,

Catherine Fernandez

September 11, 2023


A handwritten signature in black ink that reads "Catherine Fernandez". The signature is written in a cursive style with a large, looping "C" at the beginning and a long, trailing flourish at the end.

I am certifying that I have emailed a copy of the rehearing appeal to the  
defendant's attorney Madden and Madden 108 Kings Hwy E, Haddonfield, NJ  
08033 via email: [dianea@maddenmadden.com](mailto:dianea@maddenmadden.com)

Thank you.

Catherine Fernandez

September 11, 2023

A handwritten signature in black ink that reads "Catherine Fernandez". The signature is written in a cursive style with a large, looping initial "C" and a long, sweeping underline.

## Appendix F

Catherine Fernandez Motion  
for Reconsideration November 7,  
2023 and US action

Catherine Fernandez

Appellant

V.

Pemberton Township Board of Education etc...

Defendants

No. 22-3157

Petition for Rehearing



With all due respect, I am petitioning the Appeals Court Third Circuit for a rehearing under Fed. R. App. P. 40: Loc. R. 40(a) & (b). The appeals court overlooked new material facts in their opinion dated June 1, 2023. The opinion of the Appeals Panel did not discuss the new material facts, Exhibits A and B. The new material facts raise legal questions for the Appeal Panel. The opinion of the District Court to dismiss my Fed 1983 discrimination claim for failure to state a claim conflict with the 4<sup>th</sup> Circuit ruling *Armstrong v Rushing*. First, the merit of my complaint begins with the investigation of the Office of Civil Rights. Where the OCR found that the defendants where unmotivated to find facts surrounding the HIB complaints on behalf of my daughter to the defendants. Furthermore, OCR found that there was disability harassment, sexual harassment, physical sexual assault, and disability harassment to my daughter. My complaints to the defendants were legitimate in which the defendants discriminately ignored. Second, the 1983 discrimination claim has a 6-year statute of limitation. Since, the Ninth Circuit Court had determined the case of *Keith McHenry: Eric Warren, and Plaintiff-Appellants v. Louise Renne; John Willet; Charles Gillman; Frank Reed; etc...* had been given 3 times to amend their complaint by the District Court. I should have been given the same opportunity to amend my complaint for deficiencies because my allegation of discrimination was not time barred, the claim has merit, and the

investigating my claims and still in contact with me on July 8, 2018.

Superintendent Toni Trongone directed the document to confirm the Board of Education and he met on August 23, 2018 to review their findings on an ongoing complaint. Exhibit B provides insight about my mental instability due to a surgery I had at the end of June of 2023. Both Exhibits A and B were overlooked during my appeal on June 1, 2023. The Appeals Court did not address the District Court's conflicted decision with the Supreme Court, the 4<sup>th</sup> Circuit Court, and the 11<sup>th</sup> Circuit Court by not allowing me to amend my complaint for failing to state a claim even though my allegation of discrimination was not time barred.

Respectfully, I am asking the majority to reconsider my petition for a rehearing on the 3<sup>rd</sup> Circuit grounds for a rehearing. Exhibit A and B were overlooked which raises the important questions about the District Courts opinion of the Statue of Limitation in my case. The District Court's decision conflicts with Supreme Court, 4<sup>th</sup> Circuit, and the 11<sup>th</sup> Circuit by not allowing me to amend my complaint for failure to state a claim even though my discrimination allegation was within the statute of limitation.

Catherine Fernandez  
11/7/2023

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-3157

Fernandez v. Board of Pemberton Township

To: Clerk

- 1) Appellant's "Motion for the Reconsideration of the Denial of Petition for Rehearing"
- 2) Appellant's Amended "Motion for the Reconsideration of the Denial of Petition for Rehearing"

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---

For the Court,

s/ Patricia S. Dodszuweit  
Clerk

Dated: November 30, 2023  
Sb/cc: Catherine Fernandez