

July 26, 2017

U.S. Department of Education  
Office for Civil Rights, *Philadelphia Office*  
100 Penn Square East, Suite 515  
Philadelphia, PA 19107-3323

Dear Director Wendella P. Fox:

The Education Law Center-PA (“ELC”) is a non-profit public interest law firm whose mission is to ensure access to quality public education for all children in Pennsylvania. We pursue this mission by advocating on behalf of the most vulnerable students—children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English Language Learners, those experiencing homelessness, and LGBTQ students. Our strategies include advocating for legislative, regulatory, and policy reforms, undertaking impact litigation, and providing individual legal representation. ELC handles over 1,000 calls to its helpline each year from parents, students, and other stakeholders.

ELC files this Complaint on behalf of PARENT<sup>1</sup> concerning the education of STUDENT (“XX”), for whom PARENT is legal guardian as well as others similarly situated, including Ms. XX, Ms. XX, and Ms. XX. The Complaint challenges systemic inadequacies with respect to the School District of Philadelphia’s (“District”) response to allegations of bullying of students, particularly where those allegations involve the bullying of students with disabilities. Additionally, this Complaint challenges the District’s discriminatory use of Truancy Court as an intervention for students with disabilities whose truant behavior is related to their disabilities. Accordingly, as detailed herein, this Complaint seeks both individual relief on behalf of STUDENT and other individually named students, as well as systemic relief on behalf of all students similarly situated. We specifically request that the Office for Civil Rights (“OCR”) apply a systemic approach to its investigation of this matter as the complaint allegations themselves warrant an expansive investigation and the development of a commensurate remedy to protect the rights of all students with disabilities educated in the District.

## I. BACKGROUND

### **Individual Allegations on Behalf of STUDENT**

STUDENT is an African-American student in the fourth-grade at SCHOOL (“SCHOOL”) in the District. STUDENT is a student with a disability under the Individuals with Disabilities Education Act (“IDEA”) who has been identified as a child with a Specific Learning Disability (“SLD”). He has also been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) by a psychologist at Dunbar Community Counseling Services (“Dunbar”) and Children’s Hospital of Pennsylvania (“CHOP”), and asthma by his primary care physician, for which he takes Albuterol. The Dunbar evaluation, dated December 29, 2016, additionally states that STUDENT exhibits anxious behavior due to peer victimization at school.

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<sup>1</sup> This is a redacted version of the Complaint filed by ELC with the Office for Civil Rights. The document has been redacted to protect the privacy of the students involved.

In December 2015, STUDENT began to tell PARENT that students were bullying him at school. His allegations of bullying included being pushed down the stairs by two peers, being persistently called derogatory names, being repeatedly pushed and punched, and more. At that time, PARENT notified XX, the school Principal, and made other SCHOOL staff aware of the bullying that STUDENT reported. Throughout the winter of the 2015-16 school year, STUDENT continued to complain to PARENT about being bullied at school and started to show signs of school refusal behavior. PARENT tried to bring STUDENT to school, but he was extremely resistant. In the mornings, PARENT drove STUDENT to school, but when they arrived, STUDENT often refused to get out of the car—he cried and held onto the seat, begging PARENT not to make him go to that school. STUDENT did not have any attendance issues prior to this time, and seemed to enjoy school, as reported by PARENT and reflected in STUDENT’s special education records. On several occasions, Principal XX and other SCHOOL staff witnessed this behavior, but did not intervene or offer support. Despite PARENT’s repeated attempts, over the course of several months, to get SCHOOL officials intervene, they did not. At no point during this entire process did SCHOOL officials ever offer to convene STUDENT’s Individualized Education Program (“IEP”) Team to discuss these alarming and unusual behaviors. Nor did anyone from SCHOOL ever encourage PARENT to complete a formal Bullying & Harassment Reporting & Investigation Complaint Form (“Bullying Complaint”), which is the District’s official complaint form.

Eventually, having gotten nowhere with her direct complaints to SCHOOL officials and Principal XX, PARENT began exhausting the chain of command at the District’s Education Center at 440 North Broad Street. She called the Office of Attendance & Truancy and spoke with Mr. Maurice West regarding STUDENT’s absences. After hearing STUDENT’s story, Mr. West told her not to worry: because STUDENT was being bullied, the District would not refer her to Truancy Court. PARENT also contacted the Office of Student Enrollment & Placement. She spoke with Mr. Darnell Deans and requested that the District laterally transfer STUDENT to another school based on her concerns about ongoing and persistent bullying that he was experiencing, and the related attendance issues that the bullying was causing. PARENT desperately wanted to send STUDENT to school in a safe and supportive learning environment. However, the Office of Student Enrollment & Placement refused to grant PARENT’s request for such a transfer for reasons that were never explained to her. Because the District did not make public or accessible its procedures and policies with respect to school transfers for bullying and safety purposes, PARENT had no way of knowing what the District relied on in denying her request.<sup>2</sup>

PARENT next attempted to contact Assistant Superintendent, Deborah Carrera, who did not return her several calls. Eventually, PARENT contacted the Superintendent, Dr. William Hite, but again, to no avail.

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<sup>2</sup> Upon information and belief, the District revised its internal policy and procedure for granting administrative lateral transfers prior to the 2016-17 school year in order to limit the number of transfers for safety purposes that the District authorizes. A copy of the District’s general “Administrative Transfers” directive is attached to this Complaint as **Exhibit A**. This document is not available on the District’s website. The directive clearly indicates that the District does not permit parents to request transfers for bullying and/or safety purposes.

On March 3, 2016, after researching the District’s Bullying Complaint procedures online, PARENT returned to the Education Center and filed both a formal Bullying Complaint and completed an Intake Form at the District’s Office of Family & Community Engagement (“FACE”). On both forms, PARENT indicated that STUDENT was being bullied at school and that the effects of the bullying were causing him to miss school.<sup>3</sup> PARENT hoped that someone from the District would investigate her Complaint and provide relief so that STUDENT could attend school in a safe and supportive environment. Unfortunately, like her complaints to SCHOOL and her direct attempts to contact the District’s central office administrators, the District failed to investigate her formal Bullying Complaint, let alone offer a solution to the ongoing school refusal behavior that STUDENT was exhibiting due to his fears associated with the bullying he experienced in school. In fact, PARENT waited nearly three months before the District responded to her Bullying Complaint. In May, Ms. XX, who is a Parent Coordinator in the District’s FACE Office, agreed to convene a meeting to address the concerns PARENT raised in her complaints. By this time, STUDENT had already missed over 90 school days because PARENT feared putting STUDENT in harm’s way.

On May 5, 2016, PARENT met with Principal XX and Ms. XX at SCHOOL to discuss her Complaint. STUDENT was present for this meeting. Unfortunately, but unsurprisingly, given STUDENT’s low working memory functioning<sup>4</sup> and the length of time that had lapsed between the allegations of bullying and the District’s response, STUDENT was unable to articulate with specificity to Ms. XX the bullying he had experienced earlier in the school year. Instead, STUDENT told Ms. XX that he was being bullied by two students—a set of twins. As it turned out, those students had indeed bullied him in the past (during the 2015-16 school year, STUDENT told his teacher, XX, that “the persons bullying him were a set of twin boys”<sup>5</sup>), but no longer attended SCHOOL. Nonetheless, Ms. XX created a Safety Plan at the meeting that was meant to “lessen any interactions that [STUDENT] may have with individuals bullying him, and to lessen [any] discomfort or anxiety [he] may feel during the school day.”<sup>6</sup> However, SCHOOL never implemented the Safety Plan—let alone amended STUDENT’s IEP to include specific interventions and supports with respect to peer victimization—because school officials determined that the identified students who had previously bullied STUDENT were no longer students at SCHOOL. The District did not offer STUDENT any other supports—like counseling—to help him overcome the effects of past bullying or prevent adverse effects of future bullying. STUDENT later told PARENT that he had been confused and that there were other students who bullied him at school in addition to the students he named at the meeting. XX verbally conveyed this information to school officials.

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<sup>3</sup> These forms are attached to this Complaint as **Exhibit B**.

<sup>4</sup> According to the District’s most recent evaluation of STUDENT, completed in 2011, his working memory is in the **third percentile (3%)**. Specifically, the evaluation report states that “[XX] **experienced difficulty in recalling numbers backwards and this is evidence of weak mental control. This weakness may slow the processing of difficulty information for [XX] and slow novel learning.**” Later in the report, the evaluator explains that “[c]hildren with low working memory tend to take much longer to process information. Hence, **timed activities and quick presentation of information becomes a difficult task. Working Memory is important in higher-order thinking, learning and achievement. It can tap concentration, planning ability, cognitive flexibility, and sequencing skill, but is sensitive to anxiety too.**” This Evaluation Report is attached to this Complaint as **Exhibit C**.

<sup>5</sup> XX’s statement is attached to this Complaint as **Exhibit D**.

<sup>6</sup> This Safety Plan is attached to this Complaint as **Exhibit E**.

Fearful of ongoing bullying at SCHOOL and the school's lack of commitment to addressing these concerns in light of STUDENT's disabilities, PARENT did not want to send STUDENT back to school there for the next school year. During the first few weeks of September 2016, she considered her options—including local charter schools and formal home schooling. Eventually, in mid-September, PARENT decided that it was important that STUDENT have social interactions with his peers, so she decided to send him back to SCHOOL. On September 22, 2016, PRINCIPAL and COUNSELOR, for the very first time, came to STUDENT's home—unannounced—to discuss the absences from the 2015-16 school year and 2016-17 school year. PARENT was not prepared for this meeting, so did not personally speak with PRINCIPAL and COUNSELOR at this time. The very next day, September 23, 2016, PARENT received a summons from the District to attend Truancy Court. PRINCIPAL and COUNSELOR did not make any further attempts to discuss STUDENT's absences with PARENT. The summons to appear in Truancy Court explained that PARENT's failure to comply with Pennsylvania's Compulsory School Attendance Law may result in a court levying fines against her up to \$300, referring her child to Family Court for possible disposition as a dependent child under Pennsylvania's Juvenile Act, and jailing her.<sup>7</sup>

PARENT attended Truancy Court without the benefit of counsel on November 11, 2016. The Truancy Court Master<sup>8</sup> heard testimony from PARENT about the reasons for STUDENT's excessive absences—namely, the bullying he experienced at SCHOOL and his serious fears associated with school attendance. No one from SCHOOL was present at the hearing—only a “court representative” from the District who had never met STUDENT nor PARENT. The Truancy Court Master issued an Attendance Improvement Plan (which functions as a Court Order in the Regional Truancy Court system) that stated: “Child is to attend school daily. No lateness, cutting or suspensions. Absences may only be excused with a Physician's Note.” The Master also ordered “AGENCY” assigned to STUDENT's case. AGENCY<sup>9</sup> is a private, non-profit agency with whom the City of Philadelphia's Department of Human Services (“DHS”)

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<sup>7</sup> The consequences of a referral to Truancy Court in Philadelphia are substantial: Under Pennsylvania's Juvenile Act, judges may adjudicate children dependent for habitual truancy and remove them from their homes into placements like foster care and group homes (*see* 42 Pa.C.S. § 6351). In ELC's experience, this is a frequent response to habitual truancy in Philadelphia's Family Court, even though placing a child out of his or her home for issues related to absenteeism has not been proven to be effective in addressing the root causes of truancy, and is, in fact, harmful to a child's educational progress. *See, e.g.,* Jessica Gunderson, et al., *Rethinking Educational Neglect for Teenagers: New Strategies for New York State*, VERA INST. OF JUSTICE, at 10-11 (Nov. 2009), available at [http://ocfs.ny.gov/main/reports/Rethinking%20Educational%20Neglect\\_final.pdf](http://ocfs.ny.gov/main/reports/Rethinking%20Educational%20Neglect_final.pdf) (finding no research indicating that placing a child in foster care improved the child's attendance, and explaining that the child protective system and the family court are ill-equipped to address barriers to school attendance). In 2015-16, 17.8% of all cases heard in Truancy Court were referred to Family Court, based on data retrieved by ELC through a Right to Know Law request. Thus, it is high stakes for families who are referred to Truancy Court. Significantly, the District disproportionately refers families of color to Truancy Court. In 2015-16, the District referred approximately 5596 families to Truancy Court: 3511 of these families were Black, 1242 were Hispanic, and 297 were identified as “multiracial,” compared with only 451 white families. Thus, of the cases referred to Truancy Court, 62.7% were Black families and an *overwhelming* 90.2% were families of color. Only 5.3% of families referred to Truancy Court were white. This disparity is not reflective of the District's enrollment, as approximately 50% of students enrolled in the District are Black and 14% are white.

<sup>8</sup> Pa.R.J.C.P. §§ 1182—1192 (relating to Masters). In Philadelphia, there are four Regional Truancy Courts which are overseen by Hearing Officers/Masters appointed by the Administrative Judge of the Philadelphia Family Court.

<sup>9</sup> NAME OF AGENCY REDACTED.

contracts to provide truancy prevention and intervention services. There is no mention of the root causes of STUDENT's absenteeism anywhere in the Attendance Improvement Plan, nor does the Order provide strategies for alleviating the attendance barriers that STUDENT was facing. Similarly, the Order did not address the ongoing and persistent bullying that STUDENT was experiencing, let alone how it might be impacting his access to the free appropriate public education ("FAPE") to which he is entitled as a student with a disability.<sup>10</sup>

Soon after the first Truancy Court listing, Mr. AGENCY CASE MANAGER, a AGENCY truancy case manager, conducted a home visit with PARENT and STUDENT, PARENT expressed frustration that the school's failure to address the bullying of her son that had led to the District's treatment of her as a neglectful parent, and expressed to Mr. AGENCY CASE MANAGER that she did not want or need his services. Shortly after this home visit, PARENT contacted ELC, seeking legal advice. Prior to the second Truancy Court hearing, ELC met with PARENT and Mr. AGENCY CASE MANAGER at PARENT's residence. PARENT explained to ELC and Mr. AGENCY CASE MANAGER that the absences were related to STUDENT's fears about attending school due to bullying, and that he was still being bullied. Mr. Song agreed to advocate for a school transfer to another neighborhood school so that STUDENT could attend school in a safe and supportive learning environment. PARENT explained that she had tried that already, and did not see how AGENCY would be of any assistance, but nonetheless agreed to give it a try.

After the meeting, Mr. AGENCY CASE MANAGER'S supervisor, Ms. SUPERVISOR, wrote to Ms. XX, who is a staff person in the District's Office of Attendance & Truancy, explaining the circumstances and requesting a school transfer. In response, Ms. XX explained, in bold print, that the District has a policy of *not* granting school transfers.<sup>11</sup> Ms. XX encouraged Ms. SUPERVISOR to assist PARENT in filing a Bullying Complaint. Of course, PARENT had done just that nearly a year prior, which the District did not investigate for over three months, let alone take steps reasonably calculated to alleviate the alleged bullying or its effects on STUDENT.

At the second listing in Truancy Court on January 6, 2017, PARENT explained to the Master again that the absences were due to bullying and that the bullying was still occurring. The Master advised PARENT to continue to file Bullying Complaints each time STUDENT disclosed to her that he was bullied. Acknowledging that the bullying was still unresolved, the Master nonetheless dismissed the matter because STUDENT had not accrued additional absences since returning to school in September.<sup>12</sup>

After the truancy matter was discharged, STUDENT continued to complain to PARENT that he was being bullied at SCHOOL. He told her that he wanted to go to a different school, and was mad that PARENT had not listened to this request and was still making him go to SCHOOL (in fact, she had tried to effectuate a transfer, but was unsuccessful in securing the result). The very week after the truancy petition was discharged, STUDENT came home from

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<sup>10</sup> The November 14, 2016 "Truancy Court Order" is attached to this Complaint as **Exhibit F**.

<sup>11</sup> Ms. XX's response is attached to this Complaint as **Exhibit G**.

<sup>12</sup> The January 6, 2017 "Truancy Court Order" is attached to this Complaint as **Exhibit H**.

school crying to PARENT about ongoing and persistent bullying, pleading with her to send him to a different school.

On January 10, 2017, ELC sent Ms. Rachel Holzman, Esq., who is the Deputy Chief of Student Rights & Responsibilities, a copy of the March 2, 2016 Bullying Complaint that PARENT had filed, as well as a list of new bullying incidents from the 2016-17 school year that PARENT had documented, dating from December 8, 2016 through January 4, 2017. The incidents of bullying included: being punched in the back by another student; having another student throw a chair at him; being told by another student to “move, bitch, get out of my way”; being repeatedly pushed in the back during a lineup at recess and told to “shut the f\* up” and “get to the back of the line”; being kicked in the leg at recess; being hit with a lunch bag at recess; being told by another student that “he has a disease” and “needs to brush his teeth”; being punched in the stomach; and being repeatedly called derogatory names by other students.<sup>13</sup> ELC requested that the District formally and urgently investigate the incidents of bullying alleged by PARENT in her documentation.

Shortly thereafter, Ms. Holzman informed ELC that SCHOOL had investigated the Bullying Complaint, and found that it was “unsubstantiated.” It was suggested that PARENT might be fabricating the bullying. It is unclear what motive PARENT would have to lie about bullying, since it was no longer causing STUDENT to miss school and because her truancy court case was already dismissed for substantial compliance. She just wanted STUDENT to be able to attend school in a safe setting. Furthermore, STUDENT disclosed that he was being bullied to both the Dunbar psychologist who evaluated him and his therapist with whom he spoke on a weekly basis, outside the presence of PARENT. In any event, Ms. Holzman denied the request for the safety transfer and closed the District’s investigation into the Bullying Complaint. ELC requested the Bullying Complaint & Investigation Report that SCHOOL was required to complete pursuant to the District’s Bullying & Harassment Procedures (“Procedures”),<sup>14</sup> but the District never furnished this report, nor, for that matter, any documentation supporting SCHOOL’s finding that the bullying was “unsubstantiated.”

Subsequently, PARENT learned from STUDENT how SCHOOL conducted the investigation into the January 10, 2017 Bullying Complaint. SCHOOL officials, including the counselor, XX, pulled STUDENT from his class and walked him around the school building to point out his bullies. When he did, SCHOOL officials made STUDENT confront his bullies face-to-face. In front of STUDENT, SCHOOL staff asked the students whether they had bullied STUDENT. They all responded that they had not. SCHOOL also interviewed STUDENT, but did not inform PARENT of this interview, let alone allow her to participate. Both of these actions—(1) forcing a child to confront his bullies during an investigation and (2) failing to permit a parent to participate in the investigation process—expressly violated the District’s own Procedures. Specifically, the Procedures state that “the complainant shall not be required to meet face-to-face with the accused” and that the complainant may be accompanied by a parent or guardian “during all steps of the complaint procedure.”

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<sup>13</sup> A full list of the alleged incidents, recorded contemporaneously by PARENT at the time STUDENT told her of the incidents, is attached to this Complaint as **Exhibit I**.

<sup>14</sup> The District’s Procedures are attached to this Complaint as **Exhibit J**.

ELC made Ms. Holzman aware of these procedural flaws in SCHOOL’s investigation. Acknowledging these flaws, Ms. Holzman indicated that SCHOOL would redo the investigation—properly this time, in accordance with District policy. While SCHOOL officials did not make STUDENT confront his bullies face-to-face, they again failed to conduct the “do-over” investigation in conformity with the District’s Procedures. Specifically, SCHOOL officials again failed to inform STUDENT that he may have his guardian present at all times. Unsurprisingly, the District deemed the second investigation—like the first—unsubstantiated, and closed the investigation. Despite repeated requests, the District failed for over a month to furnish the Investigation Report or any documentation regarding SCHOOL’s investigation of PARENT’s January 10 Complaint.

Despite the District’s finding that the bullying was unsubstantiated, STUDENT continued to disclose incidents of bullying to PARENT. During this period, STUDENT repeatedly told his Dunbar therapist, Ms. XX, M.S., that he was being bullied at school, which she recorded in treatment notes.<sup>15</sup> The treatment notes explain that STUDENT was not coping well with the bullying that he was experiencing, and that he told his therapist that he was planning to respond to his bullies by fighting back. To address this ongoing bullying, on January 30, 2017, PARENT filed a third Bullying Complaint, through a formal letter authored by counsel,<sup>16</sup> regarding new incidents of bullying that occurred after the District closed its second investigation of the January 10 Complaint. In this Complaint, STUDENT alleged to have experienced the following incidents of bullying: being punched in the stomach; being jumped on by another student and swung around by his hood; being called names; being chased by another student who told him “if I catch you I’m going to kill you”; and more.<sup>17</sup> PARENT, through counsel, specifically requested that the District’s investigation conform in all respects to the District’s Procedures. The letter asserted that the District’s failure to appropriately address the ongoing bullying was impacting its ability to offer STUDENT a FAPE. Accordingly, through this letter, PARENT reiterated her request that the District immediately transfer STUDENT to a new neighborhood school.

Again, SCHOOL officials conducted an inappropriate investigation. While this time, SCHOOL staff, namely, XX and XX, invited PARENT to be present during SCHOOL’s interview of STUDENT, it also invited two school police officers to the meeting. It is not at all clear why school police were included in the meeting—there is nothing in the District’s Procedures which indicates that school police are to be present. It appears, then, that SCHOOL requested the police to be present, at best, to suggest to PARENT that she needed to be controlled, and, at worst, to intimidate her.<sup>18</sup> During the interview, PARENT objected to the manner in which SCHOOL officials asked STUDENT questions, citing his low working memory and difficulty understanding abstract questions—facts which are supported by District’s own

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<sup>15</sup> These notes are attached to this Complaint in redacted form as **Exhibit K**.

<sup>16</sup> This letter is attached to this Complaint as **Exhibit L**.

<sup>17</sup> A full list of the alleged incidents, recorded by PARENT at the time STUDENT told her of the incidents, is attached to this Complaint as **Exhibit M**.

<sup>18</sup> This behavior is consistent with how SCHOOL officials have treated PARENT for years—as a liar, neglectful parent, and threat—when all she has ever done is attempted to advocate for the education needs of STUDENT, to whom she is legal guardian.

2011 Evaluation of STUDENT.<sup>19</sup> Specifically, PARENT expressed that STUDENT has a very difficult time answering open-ended questions about incidents that occurred weeks prior. SCHOOL accused PARENT of feeding STUDENT answers and closed the investigation before the interview could be completed. The District never completed the interview of XX, and again failed to promptly furnish any documentation with respect to its investigation of the January 30 Bullying Complaint.

Eventually, at counsel's urging, the District agreed to convene a multi-disciplinary meeting, which included IEP Team members to address PARENT's ongoing concerns related to STUDENT's education and safety.<sup>20</sup> This meeting took place on March 30, 2017, over a year after PARENT had filed her original Bullying Complaint. At this meeting, SCHOOL staff and District administrators continued to deny that STUDENT had been bullied at all. ELC advocated for additional accommodations to be incorporated into STUDENT's IEP to prevent future bullying, including a check-in, check-out activity, which mandates that STUDENT's special education teacher ask him a specific set of questions about his day at three critical times: in the morning, after lunch, and at the end of the day. These reports were to be provided to PARENT on a daily basis. Additionally, the IEP Team decided to add thirty minutes of counseling per week. The District agreed to include these specially designed instructions and related services in his IEP. However, SCHOOL never implemented the check-in, check-out intervention, nor provided STUDENT with counseling.

While these modifications to STUDENT's IEP are important, they do not make up for the District's utter failure to appropriately address the ongoing and pervasive bullying that STUDENT experienced during the 2015-16 and 2016-17 school years, nor do they compensate for the District's unfounded treatment of PARENT as a neglectful parent by referring her and STUDENT to Truancy Court, despite PARENT's repeated attempts to use legitimate channels to ensure that STUDENT received a FAPE in a safe learning environment.

Ultimately, PARENT continued to feel that both she and STUDENT were unsafe at SCHOOL.<sup>21</sup> Since the District refused to approve a lateral transfer to another school, she finally moved her family to another neighborhood in Philadelphia and enrolled STUDENT in the local District school, where he is thriving in a learning environment free from bullying.<sup>22</sup>

### **Systemic Allegations**

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<sup>19</sup> See note 3, *supra*. The District's own evaluation clearly indicates that because of STUDENT's disability, he struggles to remember and recite information, particularly abstract concepts. It is no surprise then that STUDENT was unable to effectively respond to questions posed to him by school officials during their several investigations.

<sup>20</sup> Also in attendance was Ms. Wanda Cummings, who is a Parent Advocate at the Parents Involved Network of the Mental Health Association of Southeastern Pennsylvania.

<sup>21</sup> PARENT contemporaneously documented additional mistreatment both she and STUDENT experienced from staff at SCHOOL, including hostile treatment by the school secretary and principal, as well as inappropriate conduct toward STUDENT by his teacher. PARENT's written documentation of some of these incidents, as well as her correspondence with Principal XX and SCHOOL, are attached to this Complaint as **Exhibit N**.

<sup>22</sup> There are still issues related to STUDENT's IEP, including the fact that the District never implemented the bullying prevention interventions and counseling; is past due on STUDENT's three-year re-evaluation; and has failed to correct inaccuracies in STUDENT's attendance records.

## **Failure to Promptly and Appropriately Address Bullying of Students with Disabilities**

Unfortunately, we know that STUDENT’s experiences are not unique, but rather are emblematic of systemic harm that has impacted many students with disabilities across the District. During the 2016-17 school year, ELC heard from an increasing number of parents about severe and pervasive bullying of students with disabilities at different schools in the District. More so than in past years, parents have repeatedly complained that their attempts to advocate for a resolution to the bullying of their child were unaddressed at all levels—by both local schools and the District. For instance, parents attempted to call the District’s Bullying Hotline, but the District often failed to return their calls. Similarly, parents filed formal Bullying Complaints, but the District rarely investigated their complaints in a timely and appropriate manner, if at all. This systemic failure to appropriately respond to parents’ complaints about bullying means that discriminatory and harmful bullying goes unchecked in schools all across the District.

Many of these stories involved bullying of students with disabilities, and facts suggest that the District’s failure to intervene deprived the student of his or her entitlement to a FAPE. It is well-known that students with disabilities are more likely to be bullied than students without disabilities.<sup>23</sup> Bullying or harassment can amount to a denial of FAPE when it adversely affects a student's ability to participate in or benefit from their educational program.<sup>24</sup> Both OCR and the Office of Special Education and Rehabilitative Services (“OSERS”) have provided clear guidance to local educational agencies (“LEAs”), since 2014, that the failure to effectively address bullying of students with disabilities—even when the bullying is not on the basis of a student’s disability—is discriminatory to the extent that it deprives a child of a FAPE.<sup>25</sup>

The District’s Bullying Complaint form does not seek information about whether the child alleged to have been bullied or harassed is a child with a disability (only whether the alleged bullying or harassment was *based on* a child’s disability), so even when the District does complete investigations, they are often procedurally and substantively inappropriate in light of the child’s disability. Moreover, there seems to be no commitment from the District to address bullying through the IEP Team or Section 504 Team processes.

### **Failure to Permit Parents to Request School Transfers When the District Fails to Promptly and Appropriately Address Bullying**

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<sup>23</sup> U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (OCR), *Dear Colleague Letter on Bullying of Students with Disabilities under Section 504 and Title II*, at 1 n.1 (Oct. 21, 2014), available at, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> (“[Students with disabilities] are bullied or harassed more than their nondisabled peers.”) [hereinafter, “OCR Dear Colleague Letter”].

<sup>24</sup> *Id.* at 5-7.

<sup>25</sup> See *OCR Dear Colleague Letter*; U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, *Dear Colleague Letter on Bullying of Students with Disabilities under IDEA* (Oct. 21, 2014), available at, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf> (failure of a local education agency to address bullying of students with disabilities on any basis may result in the deprivation of educational benefit under IDEA).

Relatedly, ELC has heard from many parents who, in response to the District’s failure to timely and appropriately respond to the allegations of bullying, sought to have their child transferred to a new neighborhood school, away from the harmful environment at the local school. In almost all of these cases, the District denied the parent’s request for a school transfer. Unlike other large school districts, the District does not have a formal policy that permits parents to seek “safety” transfers at all. In fact, it has just the opposite.

While parents may file complaints regarding bullying, there is no specific process by which parents or students may formally request and obtain a school transfer based on any objective and knowable criteria. Rather, the District has issued an *internal* directive with respect to school transfers that strips parents of any right to seek such relief and vests total control with regard to safety transfers with individual school administrators and the District’s administrative officers. This directive states that school transfers will not be effectuated unless and until the building principal (1) documents alleged bullying and harassment or other safety concerns; (2) delivers that information to the District’s administrative offices; (3) the District’s Division of Student Support Services puts interventions for a sufficient—but unspecified—period of time; (4) interventions are proven unsuccessful; and (5) the staff person from Student Support Services (*not the parent*) submits a formal transfer request to the District’s Office of Student Enrollment & Placement. Thus, parents have no right at all to request a transfer—other than to alert building administrators of the problem and then hope for the best—let alone appeal the District’s denial of a parent’s request for a safety transfer. This policy is particularly flawed because administrators are unlikely to approve transfers, lest they admit to central office administrators that they have failed to foster a positive school climate, free from bullying. Nor is there a clear and transparent policy that stipulates how school safety transfer decisions will be made (*i.e.* what standards apply), what documentation should be provided, or who makes the decision.

In contrast, many other school districts across the country, and in Pennsylvania, maintain objective, transparent, and accessible safety transfer policies that apprise parents of their rights, applicable standards, and provide a mechanism for relief, including an appeal process. For instance, New York City and Pittsburgh both maintain administrative safety transfer policies that permit parents to request a school transfer and stipulate a formal process for decision-making and appeals.<sup>26</sup> Rather than supporting students to remain in school, the District’s rigid position opposing school transfers and its lack of transparency with respect to the transfer process, coupled with its failure to appropriately respond to allegations of bullying in an appropriate and consistent manner, create the opportunity for unchecked bullying and harassment to flourish in violation of students’ civil rights, particularly since it is well-established that students with disabilities in the District and elsewhere are more likely to be bullied than their peers without disabilities. The District is legally obligated to ensure that students with disabilities receive a FAPE under federal and state laws.

### **Inappropriate and Discriminatory Referrals to Truancy Court**

Finally, instead of proactively and appropriately addressing bullying in a timely manner, including permitting parents to transfer their children to safer schools, the District refers many

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<sup>26</sup> The New York City and Pittsburgh transfer policies are attached to this Complaint as **Exhibits O** and **P**, respectively.

students with disabilities who have been bullied to Truancy Court, as occurred in XX’s case (as well as XX’s case, discussed below). As a result of unchecked bullying, students with disabilities become fearful of school, and sometimes refuse to go at all.<sup>27</sup> The result is that students with disabilities who have been bullied often miss a substantial amount of instruction. Instead of addressing student truancy through the processes for providing accommodations to students with disabilities set forth in IDEA and Section 504 of the Rehabilitation Act (“Section 504”), schools reflexively refer students and their families to Truancy Court—resulting in additional lost instruction time.

Not only is the referral to Truancy Court discriminatory, but, as evidenced by this case and others, Truancy Court is ineffective in resolving, or even considering, the underlying causes of a child’s truancy when those causes relate to bullying and the denial of FAPE. That is because Truancy Court is simply not designed to identify and address disability-related issues. First and foremost, the District does not screen its referrals to Truancy Court to determine whether the truancy is related to a child’s known or unidentified disability. Pursuant to a recent Right to Know Request, ELC learned that the District does not disaggregate referrals to Truancy Court based on the student’s disability status—under either IDEA or Section 504. Therefore, students with disabilities are funneled into Truancy Court for behavior that may be and often is caused by or related to their disabilities, or the failure of the District to provide accommodations or services with respect to a child’s disability. This appears to be in direct contravention of the requirements of Section 504 and the IDEA.<sup>28</sup> Second, no qualified District staff are present at Truancy Court hearings to address disability-related issues and concerns as they arise in the course of proceedings. Thus, even if the Master presiding over the hearing identifies that the truancy relates to the child’s disability, the Master has no means to resolve it other than to hold the matter open or discharge it without resolution of the underlying barrier to attendance. The result is that students with disabilities are ensnared in a court system that is unable to address their needs with respect to attendance, which leads to prolonged and unaddressed deprivations of FAPE, as occurred here.

### **Case Vignettes Demonstrating the Widespread Nature of the Foregoing Systemic Allegations**

The following case vignettes are included to illustrate that the District’s failure to timely and appropriately address severe and pervasive bullying of students with disabilities is not isolated to STUDENT’s experience at SCHOOL, but rather, is symptomatic of a systemic failure by the District to address bullying of students with disabilities. Specifically, each of these cases

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<sup>27</sup> In 2016, for the first time, the U.S. Dep’t of Education publish civil rights data that shows that students with disabilities are 1.5 times more likely to be chronically absent than their non-disabled peers. See U.S. DEP’T OF EDUC., *Chronic Absenteeism in the Nation’s Schools*, <https://www2.ed.gov/datastory/chronicabsenteeism.html#one> (last visited July 26, 2017). Thus, the District should expect that students with disabilities will be overrepresented in its “truant” population. However, as discussed below, the District does not have a mechanism for tracking students with disabilities who are referred to Truancy Court, nor a policy to ensure that they are not inappropriately referred to Truancy Court where absences are related to the child’s disability.

<sup>28</sup> See *OCR Dear Colleague Letter*, at 7 n.27 (“[I]f a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student’s evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances).

reflect the District's failure to: (1) adopt, implement and adhere to policies to ensure that schools promptly and appropriately address bullying; (2) train building-level staff to create positive and inclusive school climates that are free from bullying; (3) permit student transfers for safety purposes; and (4) ensure that students with disabilities who have been bullied are not deprived of a FAPE, including that IEP or Section 504 Team meetings are held in a timely manner to address the impact of bullying on a child's educational program. This Complaint also seeks individual relief for each of the named students to remedy the deprivations of FAPE they experienced due to the District's failure to timely and appropriately address bullying they experienced in the context of their IEPs/Section 504 Service Agreements.

### ***Student XX***

STUDENT (DOB 10/17/2007) is a Hispanic third-grade student at the SCHOOL ("SCHOOL") in the District, which he has attended since the beginning of second grade. STUDENT has been diagnosed with Asperger's Syndrome and Pervasive Development Disorders ("PDD") by Northwestern Human Services ("NHS"), a community-based provider of services to individuals with special needs, as well as Post-Traumatic Stress Disorder and Asthma, by a family doctor. In its 2015 Psychoeducational Evaluation Report, the District determined that, despite NHS's Asperger's diagnosis, his behavior was neither indicative of Asperger's nor Autism. Instead, the District determined that STUDENT has a Specific Learning Disability.<sup>29</sup>

STUDENT has been the victim of chronic bullying over the years, which the District has entirely failed to address. The District has been on notice since 2015 that STUDENT has experienced bullying in school. In fact, in the 2015 Psychoeducational Evaluation Report, the District noted that STUDENT experienced bullying and physical abuse by peers in school.<sup>30</sup> While the Report recommended a Positive Behavior Support Plan ("PBSP"), the evaluator's recommendations for that PSBP did not include interventions related to bullying and attendance, nor have STUDENT's subsequent IEPs addressed bullying and attendance in any meaningful way. Over the years, STUDENT's mother, PARENT, specifically made the principal at SCHOOL, teachers, and other school staff aware of the bullying, but nothing was ever done. As a result, STUDENT continued to be bullied, which culminated in several incidents of intense victimization that occurred during the 2016-17 school year.

On one occasion, during the fall of 2016, after STUDENT's mother, PARENT, dropped STUDENT off for school, she observed several older students surround her son as he walked through the playground toward the school building. The students demanded that STUDENT give them his sneakers and backpack. Having observed this entire transaction, PARENT rushed to help STUDENT and to intervene in the bullying. She yelled at the older students and told them to leave her son alone. A nearby school police officer saw the incident and told PARENT

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<sup>29</sup> There are outstanding concerns related to the District's evaluation and provision of a FAPE to STUDENT, unrelated to bullying, that are being addressed by PARENT's attorney, Ms. Franca Palumbo. At the time of filing, PARENT was seeking an Independent Educational Evaluation ("IEE") at District expense.

<sup>30</sup> "He is frequently absent from school because, he "gets bull(ied) and gets hit by other students and complains of kids throwing away his lunch." Elsewhere in the Report, the evaluation noted that PARENT reported that he was absent "due to being sick and because of his asthma." This Evaluation Report is attached to this Complaint as **Exhibit Q**.

that she was “on her side” and that she should speak to the Principal, PRINCIPAL. When PARENT entered the school building, PRINCIPAL refused to meet with her. Later that day, PRINCIPAL called PARENT and told her that she was “wrong” to have approached the students in the playground. PARENT responded that the school should have responded in a better and more proactive manner because STUDENT “has a disability.” In response, PRINCIPAL told PARENT that her son “does not have Autism.” PRINCIPAL refused to schedule a meeting with PARENT and the parents of the other students involved. Other than this phone call, the school failed to take any steps to prevent future bullying of STUDENT or to remediate the effect this incident had on him.

A few weeks later, a student in STUDENT’s class kicked him in his genitals. STUDENT complained to his teacher that he was in extreme pain. In response, however, STUDENT’s teacher told him to leave it alone and it would be better within an hour. When STUDENT came home from school, he told his mother what happened, and that he could not breathe after it happened because it hurt so bad. When PARENT examined the injury, she saw that his penis was inverted and extremely swollen. PARENT took STUDENT to St. Christopher’s Hospital for Children (“St. Christopher’s”), where doctors told her that once the swelling went down he would be fine, but to bring him back to the hospital if it worsened.

The bullying at school persisted, occurring on a regular basis. STUDENT stated that he used to like school and enjoyed going, but since the bullying began, he no longer wants to attend and wishes he could stay home. STUDENT explained that students in his class laugh at him and call him names like “retard,” “dumbass,” and “fat,” and hit, trip, and push him on a regular basis. STUDENT told his mother that he has informed his teachers when he has been bullied, but that they did not seem to care. At one point, three girls in STUDENT’s class pushed him onto a table and held him down. When he tried to defend himself, his teacher threatened to call the cops on him. As a result of school bullying, STUDENT has expressed a desire to take his own life. His school phobia and anxiety about school is so severe that he vomits before school and begs his mother to stay home.

Instead of convening his IEP Team to discuss the growing absences, SCHOOL referred STUDENT and his mother to Truancy Court. As a result, the IEP Team never met to discuss the root causes of STUDENT’s absenteeism, which were, namely, the pervasive and severe bullying that he experienced at school, as well as the school’s failure to offer him a FAPE. In fact, PARENT explained that, during the 2016-17 school year, the majority of STUDENT’s absences occurred on days when, due to the bullying, he was terrified of going to school. According to PARENT, she had to plead with him to get him to go to school—to force him to go, even though he expressed fear of school. She said that on many days he cried, shook, and complained of stomach pain when faced with the prospect of attending school.<sup>31</sup> SCHOOL passed these

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<sup>31</sup> In a recently-proposed IEP, SCHOOL special education staff indicated that XX’s attendance had been a problem last year, not just this year. However, XX—as well as Ms. Ortiz and Ms. Studevan—have repeatedly made SCHOOL staff aware that the 2016-17 absences were due to XX’s school avoidance behavior, and that the absences from the prior school year were due to the fact the XX and his mother were in hiding to a difficult domestic violence dispute. Notably, the proposed IEP, although acknowledging that attendance is a barrier to meaningful education progress for XX, provides little in the form of services or accommodations—other than quarterly reminders to XX about the importance of school attendance—to help XX overcome his fears associated with school that are directly related to the bullying he experienced during the 2016-17 school year and beyond.

problems along to Truancy Court, which was simply unequipped to resolve these complex school-based issues, or issues relating to STUDENT's qualifying disabilities.

At the first Truancy Court listing on March 7, PARENT explained the nature of the ongoing bullying that STUDENT was experiencing at SCHOOL, as well as his complex disability-related needs. The Master, Mr. George Twardy, ordered a SEAMAAC truancy case manager, Ms. Kathy Ortiz, assigned to the case. The Master also suggested that PARENT file a Bullying Complaint with the District and contact Mr. Maurice West at the District's Office of Attendance & Truancy.

Upon orders of the Truancy Court, PARENT called the District's Bullying Hotline. PARENT spoke with someone on the phone who asked questions about the bullying that STUDENT had experienced. PARENT told the District about all of the bullying STUDENT had experienced, the nature of his disabilities, and SCHOOL's failure to intervene, but, to her knowledge, no one from the District ever followed up with her on her Complaint. Unsurprisingly, the bullying continued.

Not only did the District fail to address alleged bullying through STUDENT's IEP, but school staff served to exacerbate it. In early-March, STUDENT had a stomach virus, which caused frequent bowel movements. PARENT kept STUDENT home from school on March 9. However, because of concerns about truancy, PARENT sent STUDENT back to school the next day. She wrote a note to his teacher explaining that STUDENT was sick and that if he had an accident, the teacher should call PARENT to pick him up, give him a bath, and bring him back to school. That day, STUDENT had a bowel movement in class and, instead of calling PARENT, his teacher left him to sit in his own feces for the remainder of the school day. The other students made fun of him and his teacher commented that he "smelled like a dead person." When PARENT picked STUDENT up after school, she noted that the smell was so strong it made her sick. She then realized her son had been sitting in his own feces for the entire day and that he had developed a severe rash. PARENT took pictures of STUDENT after this occurred and it was clear that he had been bleeding from the incident.

On March 13, Ms. Ortiz contacted the school Principal via email on behalf of PARENT to inquire as to why the school had failed to call PARENT about this or any of the previous incidents that had occurred at school. Ms. Ortiz received a "read receipt" indicating that PRINCIPAL viewed the email, but nevertheless failed to respond. PARENT kept STUDENT home from March 15-17 because he was still sick and she did not want him to go through the same humiliation and physical pain as before. When STUDENT returned to school, PARENT sent notes to the school, which she has retained copies of, explaining why she kept him home from school. At the time, the school refused to excuse the absences. Ms. Ortiz emailed the Principal again on April 3 to address these unexcused absences and again received no response. Eventually, after Ms. Ortiz's persistent advocacy, the school changed these absences from unexcused to excused.

The bullying issues persisted and, on April 26, STUDENT was physically attacked by two students. While he was playing tag on the playground, one student tripped him and another jumped on his back and punched him in the head. STUDENT blacked out from the blow to his

temple and remembers very little of the incident. When PARENT arrived at SCHOOL, the Principal had no idea about the incident. STUDENT's head was swollen, and had been vomiting. Later that day, PARENT took STUDENT to St. Christopher's, where he spent hours in the trauma center. St. Christopher's doctors noted that STUDENT had blacked out and was vomiting; they diagnosed him as the victim of physical bullying and with a concussion.<sup>32</sup> PARENT kept STUDENT home for a few days, but again was forced to send him back due to truancy concerns.

When PARENT returned to Truancy Court on May 1, she again explained to the Master, Mr. Michael Delbonifro, that STUDENT was being bullied at school and SCHOOL was failing to provide him with any help. She showed the Master pictures of STUDENT's rash and school-based injuries. The Master, however, referred the matter to Family Court, apparently due to its complexity. PARENT was satisfied with this outcome, believing that more attention on the matter from a legitimate court would achieve justice for her son.

In mid-May, PARENT, her mother, and Ms. Naomi Studevan, who is a Parent Advocate at Philadelphia HUNE, Inc., went to SCHOOL to discuss the ongoing bullying with PRINCIPAL. Ms. Studevan had sent several emails to the PRINCIPAL to try to resolve ongoing issues and set up a meeting, but PRINCIPAL never responded to her. Upon arriving at the school, the school secretary told PARENT and Ms. Studevan that the Principal was too busy and would not be able to meet with them. Eventually, however, Ms. Studevan demanded that PRINCIPAL meet with them. The meeting included PRINCIPAL, the school counselor, and one of STUDENT's teachers. Ms. Studevan and PARENT raised concerns about the ongoing bullying, as well as SCHOOL's denial of STUDENT's Autism and failure to implement STUDENT's IEP over the course of the school year. In response to PARENT's questions to the school officials about her complaints about bullying, PRINCIPAL stated that they handled the matter by suspending the child who gave STUDENT a concussion.

Since the meeting in May, the District has continued to fail to implement STUDENT's IEP, thereby denying him access to the FAPE to which he is entitled. After weeks of failing to respond to Ms. Studevan's May 15 email requesting an IEP Team Meeting, SCHOOL sent PARENT a letter informing her of a June 13 IEP Team Meeting. However, given SCHOOL's past treatment of STUDENT and the utter lack of concern they demonstrated for his safety at school, it appears that this meeting was organized solely due to pressure from PARENT's attorney, Ms. Franca Palumbo, whom PARENT was referred to by Ms. Studevan, rather than a genuine desire to provide services to address or remediate past and ongoing bullying. SCHOOL officials have been entirely unresponsive to the bullying that they knew STUDENT had experienced, and which caused him to miss many days of school. Instead of addressing this bullying through the IEP Team or appropriate programming and interventions,<sup>33</sup> the school simply referred STUDENT and his mother to Truancy Court, which, as is evidenced by the Court's failure to compel SCHOOL to resolve the bullying, is wholly unequipped to address

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<sup>32</sup> The St. Christopher's discharge paperwork is attached to this Complaint as **Exhibit R**.

<sup>33</sup> The recently-proposed IEP states that "[t]here are no school reports of bullying; although, parent has reported that [STUDENT] is being bullied." The IEP provides no strategies to prevent future bullying, nor remedy the effects that the bullying has had on STUDENT, including, but not limited to, his fears associated with school attendance. This Proposed IEP is attached to this Complaint as **Exhibit S**.

these complex issues of educational programming for students with disabilities like STUDENT. Notably, throughout this process, the District was repeatedly made aware of the bullying STUDENT experienced, yet failed to undertake any action to remedy the situation. The facts of this case reflect the absence of any viable system for addressing the deprivations of FAPE that result from bullying of students with disabilities and related absenteeism.

### ***Student XX***

STUDENT is a white, nine-year-old student in third grade at SCHOOL (“SCHOOL”) in the District. She received an IEP in first grade for Other Health Impairment (“OHI”) based on a diagnosis of ADHD. STUDENT’s classmates began bullying her in October of 2016; girls who sat in the same desk cluster as STUDENT grabbed her pencils and called her names like “idiot” and “stupid” and told her they hoped she never came back to school. They said they hated her and made fun of her for attending “special” classes. PARENT, STUDENT’s mother, apprised school officials, including the school counselor, Ms. XX, of this disability-based bullying, but the school failed to address it. SCHOOL did not open an official investigation, nor did they convene STUDENT’s IEP Team to discuss how the bullying might have impacted her and her right to a FAPE.

In December, the bullying worsened, at which point PARENT again contacted COUNSELOR, this time requesting that the school move STUDENT to a different desk cluster, away from the girls who bullied her. COUNSELOR stated that she would look into this, but the school again failed to make the simple, requested change. Despite PARENT’s regular contact via phone and email with the guidance counselor, the school failed to make changes to STUDENT’s educational program or the educational environment to prevent the bullying, so the bullying continued.

During this period, STUDENT often came home from school very upset, complaining of constant bullying by the same two students. PARENT saw her daughter’s mental health deteriorating before her eyes. STUDENT told her mother that she often worried about what the two students would say or do to her, and, as a result, was constantly distracted in class. Additionally, STUDENT’s behavioral problems worsened; regular behavioral reports that the school produced and sent home to PARENT pursuant to requirements in STUDENT’s IEP indicated that redirection was required far more often than before. These changes in STUDENT’s behavior corresponded with the bullying she experienced. PARENT made SCHOOL officials aware of what STUDENT told her, and the changes she witnessed, but SCHOOL failed to take any affirmative or proactive steps to remedy the ongoing bullying.

Worried about changes in her daughter’s mental and emotional health and academic performance, PARENT had STUDENT evaluated by a neuropsychologist at CHOP in late March, who diagnosed her with Autism. During this evaluation, STUDENT told the neuropsychologist that she hated her life, although she was later determined not to be at risk for suicide. STUDENT also told the CHOP evaluator that the bullying distracts her and she is always worried about what might happen at school, even feigning stomach aches to stay home. Accordingly, CHOP acknowledged that STUDENT’s Autism manifested in significant school avoidance and social anxiety.

Immediately after receiving the CHOP report, PARENT made SCHOOL officials aware of its findings. PARENT contacted COUNSELOR and, crying to her on the phone, explained what STUDENT told the CHOP evaluator about hating her life. In response, COUNSELOR removed the student responsible for bullying STUDENT from class to explain to her how serious the situation was based on what STUDENT's mother told her. After repeated denials, the girl admitted that she was bullying STUDENT and cried, saying that she did not know why she acted the way that she did, and that she just wanted to be STUDENT's friend.<sup>34</sup> Despite this concerning statement, COUNSELOR seemed to consider the matter settled and pursued no further action, including re-assigning the student who admitted to bullying STUDENT to a different classroom.

PARENT also made school officials aware that the CHOP evaluation diagnosed STUDENT with Autism, which might explain STUDENT's inability to cope with the bullying and her educational regression during the period of bullying. However, at no time did SCHOOL officials seek to reconvene STUDENT's IEP Team to discuss the bullying in the context of her disability—for instance, to make amendments to her IEP or to request a re-evaluation to address the identification of Autism by CHOP.

The bullying continued into April. STUDENT told PARENT that that the student who was bullying STUDENT told her classmates that STUDENT better stop telling her mom on her, “or else.” COUNSELOR called STUDENT and the other girl into her office simultaneously to discuss this threat. Once again, the student responsible for the bullying first denied, then admitted, to bullying STUDENT. Other than this meeting, the school took no action to prevent the bullying, or to address the effects of the bullying on STUDENT or any other students, including the bully.

Fed up with ongoing bullying and the school's failure to respond,<sup>35</sup> and fearful for her daughter's mental health, PARENT contacted the District's Bullying Hotline, describing the situation and how it had affected STUDENT: although she had not missed school, she dreaded going and often felt anxious and sick, behaviors consistent with the conclusions of the CHOP evaluation. The representative who answered the District's Bullying Hotline explained that the District would order SCHOOL to conduct a bullying investigation, but did not inquire as to whether STUDENT was a student with a disability, or whether STUDENT's IEP Team had met to discuss the impact of the bullying on her right to a FAPE.

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<sup>34</sup> This was apparently SCHOOL's way of addressing all bullying. It is not clear how confronting the student-bully alone would prevent future bullying. Moreover, based on the student-bully's reaction, it appears as if the reasons why the student was engaging in bullying behavior should have been explored for her own sake, and in accordance with civil rights and disability laws.

<sup>35</sup> Apparently, STUDENT was not the only child who was being bullied by the same student. In fact, on April 24, the parent of another child, upset that her own child had been bullied by the same student who bullied STUDENT, hit STUDENT in the face in the school playground while the students were lining up to go inside, mistaking STUDENT for the girl responsible for bullying her daughter. This parent screamed in STUDENT's face that she had better stop bullying the woman's daughter, flailing her arms and striking STUDENT in her eye. STUDENT stated that she was fearful of this parent, and her desire to stay home from school worsened. The school informed the parent that she could no longer return to school property, but did not pursue the matter further.

After calling the Bullying Hotline, PARENT emailed the school principal, Mr. XX, to explain that she made a formal complaint. PRINCIPAL responded that he had no idea about the bullying and that he would look into it. After that conversation, SCHOOL officials—for the first time, despite being on notice of bullying for over five months—conducted a formal investigation into the bullying. Neither the District nor SCHOOL provided PARENT with a copy of the Investigation Report, if one was ever created, or otherwise explained its findings.

PARENT met with PRINCIPAL and other school officials on April 26, 2017 to discuss the matter. At this meeting, PRINCIPAL stated that he was unable to disclose anything about the investigation, but that he was “handling it.” He also told PARENT that the bullying was “not as bad” as STUDENT described, and that she was simply “too sensitive”; it was not really that serious or even necessarily considered “bullying.” PRINCIPAL asked PARENT if STUDENT was her first child. She said “yes,” to which PRINCIPAL responded that second and third children usually have “tougher skin.” COUNSELOR was also in attendance at this meeting. Not one school official suggested that perhaps her reaction to the bullying was related to her disability. PRINCIPAL informed PARENT that he would be meeting with the bully’s parents the following day, but refused to reveal anything more about the investigation to PARENT.

According to PARENT, things have been better since the April 26 meeting. Apparently, COUNSELOR checks in with STUDENT once per week to make sure that she has not been bullied. However, this is simply further evidence that timely and appropriate investigations are critical to resolving school bullying and preventing children with disabilities from being denied access to a FAPE due to bullying. Most importantly, at no point during this process did the school convene STUDENT’s IEP Team to discuss the effect of bullying on STUDENT’s education, whether and to what extent it interfered with learning and provision of a FAPE, or attempt to amend the IEP in response to known problems.<sup>36</sup> This caused STUDENT to suffer educational harm for approximately seven months.

### *Student XX*

STUDENT (DOB 4/12/2006) is a Black student in fifth grade who currently attends the SCHOOL (“SCHOOL”) in the District. Prior to attending SCHOOL, STUDENT attended SCHOOL (“SCHOOL”), which is also in the District. During STUDENT’s fourth-grade year, STUDENT’s mother, PARENT, inquired about having STUDENT evaluated for special education, but the school told her she would need to “acquire a diagnosis” before they could conduct an evaluation. At times during fourth grade, SCHOOL staff suggested that STUDENT exhibited behaviors related to ADHD and Oppositional Defiant Disorder (“ODD”), but never evaluated him as possibly qualifying for accommodations to ensure that he made educational progress despite these behaviors, which are consistent with qualifying disabilities. One of STUDENT’s teachers stated to PARENT that she believed that STUDENT exhibited signs of Autism. PARENT claims to have signed a Permission to Evaluation form, but the District never completed an evaluation of STUDENT to determine eligibility for an IEP or a Section 504 Service Agreement.

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<sup>36</sup> SCHOOL is currently re-evaluating STUDENT based on CHOP’s Autism diagnosis.

In April 2016, during the latter half of fourth grade, STUDENT became the victim of bullying at SCHOOL. On an almost daily basis, other students hit him, harassed him, called him names, and isolated him. The same group of students called STUDENT names like “bitch,” “pussy,” and “dickhead.” They pushed him, smacked him, and punched him. Most of this behavior occurred in STUDENT’s elective courses, in the hallways, and at recess. Each time this occurred, STUDENT came home visibly upset, crying to his mother that he did not want to return to school.

PARENT made SCHOOL officials aware of the bullying by completing numerous (8-10) Parent Concern forms that the school made available in the main office. SCHOOL never formally investigated the bullying incidents that STUDENT claimed had occurred. Instead, SCHOOL officials repeatedly told PARENT that what was occurring was “not bullying,” and that “STUDENT was part of the problem” and was “not innocent.” At one point, PARENT contacted the Assistant Superintendent, who directed her to file a formal Bullying Complaint. When she showed the SCHOOL administration the complaint form, the Principal told her that he had never seen the form before. At no point did the school conduct an evaluation of STUDENT or discuss this as a possibility, even though his mother had previously inquired about his eligibility for special education services. Nor, during this time, did SCHOOL offer STUDENT accommodations through a Section 504 Service Agreement to address the impact the bullying was having on his health and education.

The next year, STUDENT began fifth grade at SCHOOL and, after a few weeks, the bullying continued just as it had in the previous school year. The same students continued to physically and verbally bully STUDENT to the point where he was once again desperate to stay home from school. PARENT informed the new school Principal, Ms. XX, about the bullying, and even showed her the Bullying Complaint she filed last year. PRINCIPAL told PARENT that she would look into it and talk to the kids. In response to being shown the Bullying Complaint, PRINCIPAL similarly expressed that she had never seen it.

PRINCIPAL did not follow up on her promise to look into the bullying that STUDENT had alleged, let alone formally investigate it. As a result, the bullying continued. Students continued to call STUDENT names; they pushed him, and even pulled a chair out from under his seat. Because of this bullying, STUDENT felt isolated in school.

The severity of the physical bullying escalated, and, on September 23, 2016, another student assaulted STUDENT on school property at the end of the school day. PARENT personally witnessed this assault, as it occurred at the end of the day and PARENT was at the school to pick up STUDENT. PARENT, observing that there were no school staff around, intervened to stop the fight and pulled the children apart from each other. STUDENT had some swelling from being punched, but was not bleeding. PARENT went to PRINCIPAL to demand that the school take some sort of action. After being told to wait outside for several minutes, PRINCIPAL informed PARENT that she was not permitted on school property because she had intervened in a student fight.

On October 13, 2016 PARENT filed the first of many Bullying Complaints regarding incidents of bullying that occurred during the 2016-17 school year. She submitted this

Complaint directly to the FACE Office at the District’s Education Center, bypassing SCHOOL, as SCHOOL had failed to investigate the September 23 incident. PARENT did not hear back from the District about her October 13 Complaint.

On October 26, 2016, STUDENT was again assaulted at school. PARENT took her son to the family doctor at Kids First in Chestnut Hill, who instructed her to bring him to the emergency room. At Chestnut Hill Hospital, the E.R. doctor placed STUDENT in a neck collar after taking x-rays and noting significant swelling. The following day, PARENT told the Principal that STUDENT had visited the hospital, and pleaded with her to intervene in the bullying. However, upon examining the medical paperwork, PRINCIPAL stated that the tests looked normal so there was no need to pursue further action. It was at this time that PARENT first requested that STUDENT be transferred to a different school. PRINCIPAL informed her that she would have to speak with District officials at the Education Center about that request.

PARENT again visited the Education Center, where she filed another Bullying Complaint. This time, she conveyed her story to a different staff person in the FACE Office, who was sympathetic to PARENT’s plight and developed a ticket to initiate an investigation. The “ticket” PARENT received from the FACE Office indicates the following:

- Parent was issued an “exclusionary letter” by SCHOOL after she followed proper protocol for requesting meetings with the administration;
- Principal at SCHOOL informed the Parent that “if it wasn’t safe at SCHOOL last year, you should have transferred him”;
- Parent requests: (1) an investigation into the alleged bullying; (2) a plan to address and eliminate the bullying; (3) mediation with parents, children, and school; (4) either an administrative transfer to a new school, or a re-assignment to a different classroom.

The FACE staff person informed PARENT that the District had 72 hours to complete the investigation into her Bullying Complaint (in fact, the District’s policy states 48 hours). PARENT never heard back from anyone about her Complaint, nor did she receive a copy of an Investigation Report.

While at the Education Center, PARENT also spoke with Mr. Darnell Deans in the Office of Student Enrollment & Placement, who told her it was the responsibility of the school principal to seek a transfer, and that parents had “no right to request a transfer” independent of the school Principal. Since PRINCIPAL gave her conflicting information—that, as a principal, she had no authority to authorize a school transfer, and that it was the parent’s responsibility to seek one from the District—STUDENT remained at SCHOOL, in the same dangerous school environment, without any supports, services, or accommodations.

PARENT then began to seek support from both advocacy organizations and the Pennsylvania Department of Education. At one point, PARENT connected with a parent advocate from an organization called Parents United for Better Schools. This advocate contacted PRINCIPAL on PARENT’s behalf and requested information about STUDENT, but PRINCIPAL never responded to the advocate. Next, the advocate contacted the District.

Someone at the District informed the advocate that Ms. Shakia Forman's unit was looking into STUDENT's case. PARENT informed the advocate that she had never heard of Shakia Forman, and did not know that the District was looking into STUDENT's case.

Eventually, in December 2016, PARENT secured a meeting with several officials from the District, including Ms. Bridget Taylor-Brown, who is the Director of the District's Office of Prevention & Intervention, Ms. Shakia Forman, and Mr. James Adams, who is a Liaison in the District's Office of Prevention & Intervention. At this meeting, the District officials told PARENT that they would schedule a meeting with XX and PRINCIPAL to put a Safety Plan in place and that a representative from the District would be in attendance. After several attempts to schedule this meeting, the District eventually convened a meeting at SCHOOL to discuss a Safety Plan for STUDENT. In attendance at this meeting were: XX, Ms. Taylor-Brown, Ms. Forman, Mr. Adams, XX, the Dean of Students at SCHOOL, a special education teacher, a school counselor, a school psychologist, and individuals from the STS behavioral health program. Instead of discussing the alleged bullying and how to prevent it, the meeting focused on XX's behaviors. School officials cited several incidents in which XX exhibited problematic behaviors in school. The District offered XX a Safety Plan and STS services, but did not consider whether either the bullying XX experienced or whether and to what extent his behaviors were related to an unidentified disability which impeded his ability to make meaningful educational progress. The District offered only a Safety Plan and behavioral health services, which were not incorporated into a formal Section 504 Service Agreement. Nor did the District issue a Permission to Evaluate form for XX to determine eligibility under the IDEA or address the delinquent evaluation from 2015-16.

Ultimately, this Safety Plan proved inadequate to prevent the persistent bullying that STUDENT was experiencing at SCHOOL. As a result, PARENT filed additional Bullying Complaints directly to the District on December 12, 2016; December 19, 2016; December 20, 2016; December 22, 2016; January 11, 2017; January 13, 2017; and January 17, 2017. The District failed to formally investigate any of these complaints. During this time, STUDENT became angry and sad. He said that he hated school. He became more argumentative at home, and more withdrawn. He spent a lot of time alone in his room. Shortly after the December meeting, he refused to go to school for a week.

Since the District failed to investigate any of her formal Bullying Complaints in December and January, PARENT directly contacted Mr. Jermall Wright, the Assistant Superintendent assigned to SCHOOL. In late January, she emailed Mr. Wright to inquire as to whether the District planned to do anything to resolve the bullying that STUDENT had experienced for nearly a year at SCHOOL. Mr. Wright responded that he would speak with other school officials and get back to her. Mr. Wright later told PARENT that a meeting would be convened within the next few days to discuss and resolve the situation. However, PARENT was not invited to any meeting and was not told where it would be held.

By this time, PARENT had contacted ELC seeking legal representation. ELC contacted Ms. Rachel Holzman, Esq. and specifically demanded that PARENT be informed of all meetings related to STUDENT and that the District respect PARENT's request to have STUDENT transferred to a safe school environment. Eventually, Ms. Holzman put PARENT in contact with

Ms. Lori Paster, who is the Deputy Chief of the District's Office of Prevention & Intervention. Ms. Paster spoke with PARENT and informed her that in fact there was no meeting, but that she would contact the school. Ms. Paster also tried to persuade PARENT to give her a chance to make things better at SCHOOL and thus forego her demand for a school transfer. PARENT declined, citing her months of struggles to resolve the bullying and safety concerns, which proved unsuccessful, as STUDENT continued to experience bullying.

Finally, on January 27, 2017 after significant pressure from PARENT and ELC, the District authorized a transfer of STUDENT from SCHOOL to SCHOOL, where he receives accommodations through a Section 504 Service Agreement and is succeeding in school, free from bullying.<sup>37</sup>

Despite this positive outcome for STUDENT, it is not at all clear why the District approved a safety transfer for XX but not XX. There are no standards or criteria—at least that are available to the public—that explain the transfer decision-making process, what the District considers or relies on, and what a parent must provide to establish the need for a transfer. In fact, there are few indications that a transfer to another school is ever even an option. Accordingly, the District's actions with respect to considering or authorizing school transfers appear to be arbitrary and capricious as applied across the District, which opens the door for bias to impact the District's decision-making. The lack of a fair, objective and transparent policy and procedure governing school transfers leaves parents with no recourse to address continuing bullying, regardless of its severity and persistence.

## **II. LEGAL ANALYSIS**

### **a. OCR Has Jurisdiction Over This Complaint**

The Office for Civil Rights of the U.S Department of Education has jurisdiction over this Complaint because it alleges that the District discriminated against XX on the basis of his disability and denied him a FAPE, in violation of Section 504, which OCR enforces. This Complaint is timely because many of the alleged discriminatory events occurred within 180 days of the filing of this Complaint. Specifically, the District discriminated against XX in the following ways in the past 180 days:

- Conducting an ineffective and inappropriate investigation into alleged acts of bullying that XX claimed to have experienced in school during the 2016-17 school year, which further exacerbated the effects of bullying on XX and deprived XX of a FAPE;
- Failing to act to remedy bullying that XX alleged to have occurred in school, including by failing to transfer him to a new school, which permitted the bullying against XX to continue and deprived XX of a FAPE; and
- Failing to convene XX's IEP Team at any time to address the impact of bullying on XX's access to FAPE; and
- Prosecuting XX for truant behavior that was caused by or related to his disability.

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<sup>37</sup> Where bullying has occurred at Fittler, the administration has handled it promptly and appropriately.

Additionally, the District discriminated against XX, XX, and XX in the past 180 days by failing to address the deprivation of a FAPE they experienced as a result of severe and pervasive bullying. Thus, this Complaint alleges both individual and systemic violations of Section 504 and Title II occurring within the past 180 days.

**b. The District Discriminated Against XX by Failing to Appropriately Address and Remedy Alleged Bullying, Which Deprived XX of His Right to a FAPE under Section 504**

Section 504 prohibits discrimination against persons on the basis of their disabilities. School children who are deemed to have a qualifying impairment under Section 504 are entitled to a FAPE. The failure of an LEA to ensure a FAPE to a qualifying student constitutes discrimination under Section 504. Similarly, under Title II of the Americans with Disabilities Act (“ADA”), public institutions, like schools, must not discriminate against qualifying students with disabilities. Bullying on any basis—*whether related to student’s disability or not*—is discriminatory under Section 504 if it deprives a student with a disability access to the FAPE to which he or she is entitled.

To establish a violation of Section 504, a plaintiff must demonstrate that he or she is: (1) disabled, as defined by the Act; (2) otherwise qualified to participate in school activities; (3) the school or board of education receives federal financial assistance; and (4) the student was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *C.G. v. Pennsylvania Dep’t of Educ.*, 888 F. Supp. 2d 534, 573 (M.D. Pa. 2012). XX is a student with a disability as defined by Section 504; he is otherwise qualified to participate in school activities; the District receives federal financial assistance; and XX was excluded from participation in school activities—namely, attending school in a safe, bullying-free environment—and thus discriminated against by the District in violation of Section 504.

*i. XX Is a Student with an Impairment that Substantially Limits One or More Major Life Activities*

Under both Section 504 and the ADA, a student who has a mental or physical impairment<sup>38</sup> that substantially limits one or more major life activities<sup>39</sup> must not be discriminated against on the basis of that impairment. Section 504 entitles qualifying students to

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<sup>38</sup> The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on an individual basis. Section 504’s regulatory provision, 34 C.F.R. § 104.3(j)(2)(i), broadly defines a physical or mental impairment to include any physiological disorder or condition, neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

<sup>39</sup> Major life activities, as defined in the Section 504 regulations at 34 C.F.R. § 104.3(j)(2)(ii), include functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In the amended Americans with Disabilities Act of 2008, Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, reading, concentrating, thinking, and communicating. The list of examples of major life activities in Section 504’s regulatory provision is not exclusive, and an activity or function not specifically listed in the regulation can nonetheless be a major life activity.

accommodations to ensure a FAPE. *See* 34 C.F.R. § 104.33. In Pennsylvania, accommodations are typically set forth in a Section 504 Service Agreement. 22 Pa. Code § 15.7. Another way to comply with Section 504 is to provide a student with an IEP—the formal educational program required under the federal IDEA. 34 C.F.R. § 104.33(b)(2); *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008).

XX has several impairments that substantially limit his ability to perform the major life activities of learning, concentrating, thinking, and more. First, XX has a Specific Learning Disability, which the District has accommodated through an IEP since first grade. Second, XX has a diagnosis of ADHD. As many courts have expressly held, ADHD is a qualifying impairment under Section 504. *North v. Widener University*, 869 F. Supp. 2d 630, 635 (E.D. Pa. 2012) (“Plaintiff indisputably meets the first and fourth prongs of the [Section 504] test: he has submitted evidence that he suffers from ADHD, a recognized disability under Section 504 . . . .”); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 155 (1st Cir. 2009); *Batchelor v. Rose Tree Media Sch. Dist.*, 2012 WL 7990542, at \*1 (E.D. Pa. 2012); *Centennial Sch. Dist. v. Phil C. ex rel. Matthew C.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011). XX’s ADHD clearly interferes with learning and requires accommodations in school even though the District has not provided these accommodations. XX informed SCHOOL on several occasions of XX’s ADHD—including through several written notes, in addition to conversations with his teachers—but the District never created a plan to address XX’s behaviors that were associated with his ADHD and need for accommodations. Finally, the District has been aware for over a year that XX exhibits anxious behavior, particularly related to school attendance. On multiple occasions, Principal XX and other staff witnessed XX holding onto the car door, shaking, and crying when XX attempted to bring him to school. Furthermore, the Dunbar psychologist and therapist both identified that XX exhibits anxiety related to peer victimization at school based on disclosures that XX made to them during the course of evaluation and treatment, and XX made SCHOOL officials aware of this. It is clear that XX’s anxious behavior substantially impeded his ability to learn, as it resulted in excessive absenteeism and school-related stress. *See, e.g., A.W. ex rel. H.W. v. Middletown Area Sch. Dist.*, 2015 WL 390864, at \*16 (M.D. Pa. 2015) (holding that student’s “anxiety . . . substantially limited his ability to learn in physical school environment.”); *Krebs v. New Kensington-Arnold Sch. Dist.*, 2016 WL 6820402, at \*5 (W.D. Pa. 2016) (holding that child who suffered from anxiety, depression, and anorexia nervosa had a disability that “severely impacted a major life activity including, at a minimum, her education.”). Based on his SLD, ADHD, and anxiety, XX is a student with a qualifying impairment under Section 504.

ii. *The District Discriminated Against XX by Failing to Address and Remedy the Alleged Bullying, Which Impeded XX’s Access to an Appropriate Education under Section 504*

1. Failure to Address Alleged Bullying During the 2015-16 and 2016-17 School Years

A FAPE under Section 504 is an education that is “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.” 34 C.F.R. § 104.33(b)(1); *see also Mark H.*, 513 F.3d at 933. Both OCR and OSERS have provided clear guidance to LEAs, since 2014, that the failure to address bullying of students

with disabilities—even when the bullying is not on the basis of a student’s disability—is discriminatory to the extent that it deprives a child of a FAPE. *See generally Dear Colleague Letter*. Federal courts, including the Third Circuit, have affirmed that a failure to address bullying may deprive a student of a FAPE in the IDEA context. *See Shore Regional High Sch.* 381 F.3d at 199-202 (3d Cir. 2004) (affirming decision of administrative hearing officer that the school could not offer the child a FAPE due to a “legitimate and real fear that the same harassers who had followed [the student] through elementary and middle school would continue to [bully him] [if he attended Share Regional High School]); *T.K. v. New York City Dep’t of Educ.*, 810 F.3d 869, 876 (2d Cir. 2016) (holding that the educational entity denied the student a FAPE “by violating her parents’ procedural right to participate in the development of her IEP, when school officials refused to discuss concerns about bullying raised by the student’s parents, who had reason to believe that the bullying was impacting their daughter’s educational progress).

Under Section 504, “as part of a school’s appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team[] to determine whether, as a result of the effects of bullying, the student’s needs have changed such that the student is no longer receiving FAPE.” *Dear Colleague Letter* at 5-6. OCR has stated that “[t]he effects of bullying could include, for example, adverse changes in the student’s academic performance or behavior.” *Id.* at 6. Once a school “suspects [that, due to bullying,] the student’s needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed,[] to ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.” *Id.*

With respect to how much of a change in academic performance or behavior is necessary to trigger a school’s obligation to convene the IEP team or Section 504 team, OCR has stated that there are “no hard and fast rules,” but that “a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sections of Section 504 services would generally be sufficient.” *Id.* In fact, a school’s obligation to a student who is entitled to a FAPE and who demonstrates adverse changes to his or her academic performance or behavior may be triggered “regardless of the school’s knowledge of the bullying conduct.” *Id.* at 6 n.26.

Schools must “address[] . . . bullying [both] under the school’s anti-bullying policies,” and must also “promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided . . . .” *Id.* at 6-7. To ensure a “student’s ongoing receipt of FAPE,” “unless it is clear from the school’s investigation into the bullying conduct that there is no effect on the student with a disability’s receipt of FAPE, the school should . . . promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: (1) the student’s educational needs have changed; (2) the bullying impacted the student’s receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly.” *Id.* at 7.

In responding to and investigating complaints that claim a deprivation of FAPE under Section 504 or IDEA due to an educational entity’s failure to appropriately respond to bullying,

OCR has applied the following analysis,<sup>40</sup> which seeks to answer two questions: (1) “Did the school know or should it have known that the effects of bullying may have affected the student’s receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student’s academic performance or behavior indicating that the student may not be receiving FAPE?” If the answer is “yes,” OCR next asks: (2) Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student’s educational needs were still being met, and if not, making changes, as necessary to his or her IEP or Section 504 plan?” If the answer is “no,” then “OCR would find that the school violated its obligation to provide FAPE.”

With respect to STUDENT, the answer to the first question is clearly “yes,” and the answer to the second question is clearly “no.” Thus, there is no conclusion other than that the District denied STUDENT a FAPE in violation of Section 504.

First, beginning in the 2015-16 school year, STUDENT began to demonstrate “adverse changes” in his academics and behavior. STUDENT’s behaviors were not a mere “one low grade”; rather, STUDENT began to demonstrate severe antisocial and anxious behaviors, especially with respect to fears associated with school attendance. Not only did PARENT make several SCHOOL officials aware of this behavior, but SCHOOL officials, including PRINCIPAL, personally witnessed this behavior when PARENT attempted to bring STUDENT to school. Moreover, STUDENT began to miss significant amounts of school, which alone should have triggered a response from SCHOOL. Clearly, STUDENT’s behavioral changes should have triggered SCHOOL’s obligation to reconvene his IEP Team.

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<sup>40</sup> This analysis is set forth in the 2014 *Dear Colleague Letter* and has been employed by OCR in various cases across the country. See, e.g., Letter from U.S. Dep’t of Educ., OCR to Mr. Rick Fauss, Superintendent, Redding Sch. Dist. (Mar. 7, 2016) (available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151224-a.pdf>) (school district violated Section 504 when it failed to convene the student’s Section 504 service team to discuss changes to the child’s education program in light of the district’s knowledge that the bullying had an adverse effect on the child’s anxiety and depression, resulting in frequent absences and hospital admissions for mental health reasons); Letter from U.S. Dep’t of Educ., OCR to Dr. Fred Hayes, Superintendent, Nacogdoches Indep. Sch. Dist. (Mar. 20, 2014) (available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06141285-a.pdf>) (school district’s failure to “reevaluate the Student’s individual educational needs in light of the alleged bullying/harassment,” even where it could not be determined that the bullying was on the basis of the child’s disability, constituted a violation of Section 504 and Title II); Letter from U.S. Dep’t of Educ., OCR to Dr. Bruce Harter, Superintendent, West Contra Costa Unified Sch. Dist. (Jul. 29, 2014) (available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09131251-a.pdf>) (school district violated Section 504 where it failed to “initiate its uniform complaint procedure that was specifically identified as the District’s process for resolving complaints of discrimination, or otherwise conduct an inquiry to reliably determine what occurred and take effective remedial action” in response to parent’s repeated complaints about bullying of her daughter; also holding that the district’s investigation procedures, which forced students to confront each, “could exacerbate or create a hostile environment for a student,” and therefore was discriminatory); Letter from U.S. Dep’t of Educ., OCR to Ms. Pam Able, Superintendent, Modesto City Elementary Sch. Dist. (May 12, 2016) (available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151212-a.pdf>) (school district deprived the child of a FAPE where school principal failed to keep written record of investigation into alleged harassment; the district violated its own non-discrimination policy and complaint procedures; and failed to evaluate the student for a Section 504 Service Agreement and provide reasonable accommodations).

At no point during this process—let alone promptly—did the District ever seek to convene STUDENT’s IEP Team to discuss these “adverse changes” to STUDENT’s academics and behavior, and make changes to his IEP to better support him in school in light of the bullying. During this period, STUDENT developed severe anxiety with respect to school attendance. Due to the bullying—and the District’s failure to appropriately address it—STUDENT did not make educational progress,<sup>41</sup> and likely regressed, during these school years, which constitutes a deprivation of FAPE under Section 504.<sup>42</sup>

In addition to reconvening the IEP or Section 504 Team, OCR’s expectation is that schools shall address bullying of a student with a disability under a school’s own anti-bullying procedures. Here, the District’s attempts to adhere to its own anti-bullying Procedures at best prolonged the deprivation of FAPE, and, at worst, made it substantially more profound.

First, the District failed to investigate PARENT’s March 2, 2016 within two days, which is the District’s stated policy.<sup>43</sup> In fact, the District *never* investigated the allegations in the Complaint. Only after over three months of PARENT’s repeated phone calls and visits to the District’s Education Center did the District intervene, by which time STUDENT could not clearly articulate what had happened to him and he had already missed a tremendous amount of school. Second, during the investigation into the January 10, 2017 Complaint, SCHOOL officials made STUDENT confront his bullies face-to-face and did not inform PARENT of her right to be present during any part of the investigation involving STUDENT, in direct contravention to the District’s own Procedures. Lastly, in investigating the January 30, 2017 Complaint, SCHOOL forced STUDENT to answer questions in front of two school police officers, and failed to let PARENT meaningfully participate in the process. SCHOOL’s failure

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<sup>41</sup> STUDENT’s lack of educational progress is demonstrated, in part, by his grades and reports of progress towards his IEP goals. Importantly, the District has not maintained consistent progress reports, as required by his IEP, so there is no way to determine whether he was progressing towards his IEP goals. The District has provided STUDENT with an IEP since the beginning of first grade; his IEP mandates quarterly progress reporting. The District has failed to provide both counsel and PARENT with any progress reports for first grade. In second grade, the only quarter to include a progress report was the second quarter; there are no reports for the first, third, and fourth quarters. There are no progress reports *at all* for third grade, when STUDENT began to demonstrate emotional outbursts related to bullying and school attendance. And there are only two progress reports—third and fourth—for fourth grade. Coupled with additional evidence that his emotional health was deteriorating, it is clear that the District was depriving STUDENT of a FAPE, both from an academic and functional standpoint.

<sup>42</sup> Courts in the Third Circuit have held that the promise of FAPE under the IDEA is nearly-identical to the concept of FAPE under Section 504, which is an anti-discrimination statute. *See, e.g., C.G.*, 888 F. Supp. 2d at 573 (explaining that “while the IDEA is couched in an affirmative duty to provide a FAPE, Section 504 and the ADA achieve, in essence, the same end by prohibiting entities from denying a FAPE to qualified individuals.”) (citing *Andrew M. v. Del. Cnty. Office of Mental Health & Mental Retardation*, 490 F.3d 337, 350 (3d Cir.2007) (explaining that “violations of Part B of the IDEA are almost always violations of the [Rehabilitation Act]”); *W.B. v. Matula*, 67 F.3d 484, 492–93 (3d Cir. 1995) (“There appear to be few differences, if any, between IDEA’s affirmative duty and § 504’s negative prohibition.”)). As the Supreme Court recently held, the hallmark of a FAPE under the IDEA, is “progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017). *In the most basic of ways, the District deprived XX of a FAPE, as not only did he fail to make progress due to the ongoing, persistent, and unchecked bullying, but he regressed in terms of his academics and emotional well-being.*

<sup>43</sup> *See supra* note 2 for **Exhibit B**, a copy of the District’s Bullying & Harassment Reporting & Investigation Form, which contains the two-day investigation provision. All of the District’s forms and policies relating to bullying can also be found here: <http://webgui.phila.k12.pa.us/offices/a/attendance--truancy/bullying-prevention/bullying-prevention-policy-and-procedures>.

to adhere to the District's own anti-bullying Procedures only made matters worse—by subjecting STUDENT to further bullying and exacerbating the negative impact in light of his disability.

A review of the narratives presented concerning XX, XX, and XX reflect a similar pattern of discrimination based on disability. In each of these cases, a student with a qualifying disability experienced bullying that was made known to the District which resulted in absenteeism, changes in each child's educational needs, and receipt of FAPE. However, in each case, the District failed to address the bullying and consequent changes in educational needs through an IEP Team or Section 504 Team meeting. The failure of the District to promptly address bullying and implement effective anti-bullying policies and procedures deprived XX, XX, and XX of programming and accommodations to enable them to make meaningful educational progress in violation of their right to a FAPE.

## 2. The District's Referral of XX to Truancy Court Was Discriminatory in Violation of Section 504

Ultimately, the District's only formal response to XX's school refusal behavior and complaints of bullying was to prosecute XX and XX for his absences. Student XX and his parent endured a similar fate. Adverse treatment of a student's impairment through punitive action or discipline is discriminatory under Section 504. OCR, *Disability Rights Enforcement Highlights*, at 10 (Oct. 2012), available at <https://www2.ed.gov/documents/news/section-504.pdf> ("Under Section 504 and Title II, students with disabilities *may not be punished* for behavior that is caused by or is a manifestation of their disabilities.") (emphasis added). OCR has repeatedly interpreted Section 504 to require schools to determine whether a student's behavior is related to or caused by the student's disability before taking disciplinary action against him or her. *See, e.g., Sher v. Upper Moreland Sch. Dist.*, 481 Fed.Appx 762, at \*2 (3d Cir. 2012) (unpublished); *Centennial Sch. Dist. v. Phil L. ex rel. Matthew L.*, 559 F. Supp. 634, 642, 645 (E.D. Pa. 2008) (explaining that while nothing in the text of the statute requires a manifestation determination, Section 504's mandate of a provision of FAPE has led courts to impose similar safeguards in the discipline context).

Clearly, XX's truant behavior was related to the bullying he experienced, which caused him to be severely anxious about attending school. XX did not have any problems with school attendance during his three years as a SCHOOL student prior to the onset of the bullying. However, instead of convening XX's IEP Team to discuss his school refusal behavior (of which the District was aware—both because he was truant and because SCHOOL officials personally witnessed his emotional response to having to attend school at SCHOOL), the District instead chose to refer XX and XX to Truancy Court. This both embarrassed and humiliated XX and XX, and caused XX to miss even more school for court appearances. The District's punishment of XX for truancy that was related to his emotional disability was discriminatory in violation of Section 504. Similarly, XX, who has documented disabilities and suffered severe and pervasive physical and verbal bullying, which debilitated his mental and emotional health, was also punished by a referral to truancy court.

### III. PRAYER FOR RELIEF

To remedy the violations of Section 504 and the ADA set forth above, we respectfully request that OCR issue the following relief:

- Individual relief to XX and all other students named in this Complaint in the form of compensatory education services to make them whole for the District's discrimination against them and failure to provide them with a FAPE under Section 504; and
- Systemic relief to ensure that all schools named in this Complaint and the District cease continuous and ongoing violations of Section 504 and ADA that have the effect of discriminating against students with disabilities and depriving them of their right to a FAPE. Specifically, we request the following remedies:
  - Require the District to adopt and make public a school transfer policy that permits students and their parents to request administrative transfers to ensure that all students may access education in a safe, bullying- and harassment-free environment which includes clear standards governing such transfers, advises parents of any documentation to be provided to support a requested transfer, identifies time limits for acting on a request, and establishes an appeal process;
  - Review and revise the District's Bullying & Harassment Procedures and adoption of a new policy to include special considerations for students with disabilities and specific steps for school-level staff to take action utilizing the IEP and Section 504 process when a student with a disability is being bullied or has alleged to have been bullied. Such policies shall include strict timelines for conducting a bullying investigation and referring a matter to an IEP or Section 504 Team, and a requirement that the District maintain data regarding the number of bullying complaints filed and investigated, the timeliness of investigations completed, and action undertaken by a school, and a prohibition against punishing parents by excluding them from entering schools or participating in bullying investigations;
  - Mandatory and ongoing school-wide training to staff at all schools named in this Complaint and across the District regarding bullying of students with disabilities, including evidence-based practices in prevention, intervention, investigations, and accommodations to support students with disabilities who have experienced bullying;
  - Require the District to establish a mechanism for screening all referrals made by District schools to Truancy Court to ensure that schools do not discriminatorily punish students with disabilities and other students who may have disabilities by referring them to Truancy Court when absences are related to a child's recognized, perceived or suspected disability, or the fact that the child experienced discriminatory bullying and harassment in school or at school-related activities; and

- Require the District to address any deprivations of FAPE caused by their failure to address bullying of students with disabilities during the 2016-2017 school year and beyond.

Sincerely,

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Alex M. Dutton, Esq.  
Maura McInerney, Esq.  
Education Law Center – PA  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
[adutton@elc-pa.org](mailto:adutton@elc-pa.org)  
215-800-0349

*On behalf of Parents,*  
Ms. XX  
Ms. XX  
Ms. XX  
Ms. XX

cc:  
Judith O’Boyle  
Chief Civil Rights Attorney

Miles Shore  
General Counsel  
School District of Philadelphia