



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

August 17, 2015

Mr. Bill Sturgill  
Superintendent  
Galax City Public Schools  
223 Long Street  
Galax, Virginia 24333

Re: OCR Complaint No. 11-14-1215

Dear Mr. Sturgill:

This letter is to notify you that the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) has completed its investigation of the above-referenced complaint filed against Galax City Public Schools (the Division) on May 8, 2014. The Complainant filed the complaint on behalf of her son (the Student), who attended XXXX School (the School), and alleged that the Division discriminated against him on the basis of disability (XXXX when:

1. The Division inappropriately discontinued the Student's 504 Plan while enrolled at the School and, subsequently, failed to evaluate him or provide appropriate services as a student with a disability;
2. School staff inappropriately removed the Student from class as a disciplinary action;<sup>1</sup>
3. The School secretary and a School math teacher harassed the Student by taunting him for his disability-related behavior and poor academic performance; and
4. The Division retaliated against the Student based on Complainant's disability-related advocacy when it disciplined him differently from another student, although both students used the word "retard" during a verbal altercation.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance from the

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<sup>1</sup> The Complainant used the term "seclusion" to describe the Division's treatment of the Student. The Department's Resource Document addressing restraint and seclusion (available at <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>) defines seclusion as the "involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving." Here, however, the Student was placed at a desk in the office, was not confined or physically prevented from leaving the space where the desk was located and he was not alone in a closed room or area. The desk is visible by office staff and from the nurse's office. Therefore, while OCR investigated the disciplinary removals of the Student from class, the issue was not one of seclusion, and OCR has modified the language of the allegation for clarity.

Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation, at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public educational systems, regardless of whether they receive Federal financial assistance from the Department. The Section 504 regulation, at 34 C.F.R. § 104.61, incorporates the prohibitions against retaliation in the Department's regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI). The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from retaliating against an individual because that person has exercised a right or privilege secured by the laws OCR enforces or has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws OCR enforces. The Title II regulation, at 28 C.F.R. § 35.134, provides a similar prohibition against retaliation. Because the Division receives Federal financial assistance from the Department and is a public entity, it is subject to the provisions of Section 504 and Title II.

In investigating the allegations, OCR reviewed data provided by the Division and conducted interviews of the Complainant, Division Superintendent, and the School Principal, Assistant Principal, Secretary, and seventh grade Math Teacher. OCR found sufficient evidence to support the finding of a violation of Section 504 and Title II in relation to Allegation 1, regarding the Division's inappropriate discontinuance of the Student's 504 Plan and the Division's failure to evaluate the Student as a student with a disability. OCR found insufficient evidence to support a violation with regard to Allegations 2 through 4.

Below is a discussion of the facts related to each allegation, the legal standards applied, and our findings and conclusions.

### **Analysis**

#### **Allegation 1: Inappropriate Discontinuance of Student's 504 Plan and Failure to Evaluate**

During investigation, OCR found sufficient evidence that the Division's actions as they relate to Allegation 1, with respect to the Division's failure to re-evaluate and provide disability-related services to the Student, violated Section 504. The violation began when the Division improperly discontinued the Student's 504 Plan and continues to the present because the Student remains unevaluated for services.

The implementing regulation of Section 504, at 34 C.F.R. § 104.33, requires that school districts provide students with disabilities a free appropriate public education (FAPE). This means that school districts must provide to students with disabilities regular or special education and related aids and services that are designed to meet the individual educational needs of a student with a disability as adequately as they meet the needs of non-disabled students. The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires school districts to evaluate any student who, due to disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement.

The Section 504 implementing regulation, at 34 C.F.R. § 104.35(c), states that an evaluation of an individual who is believed to need special education or related services must use established

standards and procedures, including (1) drawing upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establishing procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) ensuring that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensuring that the placement decision is made in the least restrictive environment. OCR interprets Title II standards similarly to those of Section 504; therefore, we will apply the Section 504 standards in our analysis.

### ***Inappropriate Discontinuation of the Student's 504 Plan***

OCR identified concerns that the Division inappropriately discontinued the Student's 504 Plan when it did not implement the Student's 504 Plan developed by the elementary school when the Student began fifth grade at XXXX School (School).<sup>2</sup>

The Student was first evaluated for disability services during second grade in XXXX, but he was found ineligible for special education under the Individuals with Disabilities Education Improvement Act of 2008 (IDEA) at that time, despite the elementary school receiving documentation from his doctor that he was diagnosed with, and taking medication for, XXXX). The Student was reevaluated in third grade (XXXX) when he continued to have disciplinary and academic issues at school. At that time, the Division found the Student eligible for services as a student with a disability under Section 504 and developed a 504 Plan, for which his parents signed consent. Also in the Student's third grade year, the elementary school nurse began administering the Student's XXXX medication at school.

In XXXX, the Division reviewed the Student's 504 Plan in fourth grade and, just before the end of the school year, developed a new 504 Plan that modified the progress benchmarks for the Student's goals and objectives based on his progress during the 2010-2011 school year. The Student's parents, however, failed to sign the new 504 Plan. The Division reports that School staff attempted to reach the Complainant by telephone. The Complainant reported that she did not receive any messages inviting her to come to either school to sign the 504 Plan. In XXXX, after the Student transitioned from the elementary school to the School at the beginning of fifth grade, the Division's Special Education Director informed the School that they could not implement services without parental consent. The Division indicated that it was following its Section 504 Procedures in discontinuing services. Thus, the School did not implement the 504 Plan created at the end of fourth grade when the Student began fifth grade at the School. The Student has received no services to support his disability since XXXX.

As discussed above, the Section 504 regulation, at 34 C.F.R. § 104.35(a), requires school systems to evaluate a student before any subsequent significant change in placement. Discontinuing the Student's 504 Plan would constitute a significant change in placement, and as

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<sup>2</sup> OCR was unaware that the allegation regarding discontinuation of the Student's 504 Plan was untimely when it was raised, and during investigation OCR discovered that the 504 Plan was discontinued more than 180 days prior to the complaint being filed. However, when OCR uncovers a violation during the course of investigation it may address the issue, even if untimely.

such the services should not have been discontinued without reevaluating the Student. The parents' failure to sign the Student's revised 504 Plan, whether or not the Complainant was informed, does not amount to the Complainant's revocation of consent for Section 504 services. The Special Education Director was mistaken when she informed the School that they could not provide the Student services without parental consent, and the School's reliance on this information caused them to inappropriately discontinue the Student's 504 Plan.<sup>3</sup> The Division never determined that the Student no longer had a disability. Indeed, the Division had just determined that the Student continued to need services and updated his Section 504 Plan to reflect his then-current needs. Rather than continuing the Student's 504 Plan, the Division reported that it made informal modifications to help the Student while he was attending the School. These informal supports were insufficient to satisfy Section 504.

Moreover, the Division failed to provide notice to the Student's parents about decisions relating to evaluation and placement, which is necessary under Section 504's requirement for procedural safeguards. The Division stated only that it tried to reach the Complainant by telephone regarding her signature on the Student's 504 Plan but that it was unable to do so. Documentation of the Division's attempts includes undated, typewritten notes that list the dates of three telephone calls that the Division stated it made to invite the Complainant to sign the 504 Plan. The Division provided no documentation that it gave notice to the Complainant of its decision to discontinue disability-related services.

OCR found that the Division failed to comply with the regulation implementing Section 504 at 34 C.F.R. §§ 104.35(a) and 104.36 by not conducting an evaluation of the Student prior to a significant change in his placement (discontinuing his services) and by not providing notice to the Complainant of that change in placement.

### ***Failure to Evaluate the Student as a Student with a Disability***

OCR identified continuing concerns that the Division failed to evaluate whether the Student is a student with a disability who needs related aids and services during the period since the discontinuation of the Student's services.

The Student has XXXX, a diagnosis of which the Division has been on notice since at least his second grade year. The Student takes medication for his XXXX, which the Division has knowledge of based on his elementary school records, his discipline records from the School, and reports from the Complainant that she sent his XXXX paperwork with the Student's older brother to give to the front office. Furthermore, the School Principal and Assistant Principal, Division Superintendent, and one of the Student's teachers all reported during individual interviews that they knew that the Student had XXXX, but none of them perceived the Student to have a disability.

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<sup>3</sup> Section 504 does not require parental consent to implement a revised 504 Plan. Here, although the Student was not eligible for services under the IDEA, the Division relied on its understanding of the IDEA in discontinuing disability services; however, neither the IDEA nor applicable state laws permit the cessation of services in the event a parent does not provide consent to revisions to a student's individualized plan. See 34 C.F.R. § 300.300(d)(3) and 34 C.F.R. § 300.305(e)(1). See also 8 VAC 20-81-90.

In addition to the Division's actual knowledge that the Student had XXXX, there were several reasons to believe the Student had a disability, which should have led them to evaluate him. First, the Student's attendance records show that the Student missed a considerable amount of school each year he was at the School, and the number of days he missed grew significantly each year. Second, the Student had an extensive discipline record, and the disciplinary action assigned to the Student became more frequent and severe each year. Finally, the Student's report cards show that the Student struggled, although, despite failing the majority of his core classes, he continued to pass on to the next grade level.

The Student's attendance record showed a significant number of attendance issues during his time at the School, and the number of incidences of absence increased each year. During fifth grade (2011-2012), the Student had XXXX attendance issues. Attendance issues encompass the wide range of reasons that a student might miss school, including excused and unexcused absences, suspensions, medical absences, early dismissals due to disciplinary incidents, and tardies. In fifth grade, Student had XXXX. During sixth grade (2012-2013), the Student had XXXX attendance issues, including XXXX, and XXXX days of suspension. During seventh grade (2013-2014), the Student had XXXX attendance issues, including XXXX unexcused absence, XXXX unexcused absences, and XXXX days of suspension. The attendance record from seventh grade does not reflect the entire school year because the Student withdrew from the School in the middle of XXXX.

Similarly, Student's discipline record is extensive: XXXX incidents over his time at the School with the consequences becoming more severe over time. In XXXX grade (2011-2012), the Student was suspended for XXXX days. In XXXX grade (2012-2013), the Student was suspended for XXXX days. In XXXX grade (2013-2014), the Student was suspended for XXXX days, and, as noted above, the Student only attended the School through the middle of XXXX. Additionally, the Student received several In-School Suspensions and lunch detentions during his time at the School, and was even removed from his Physical Education class as a disciplinary consequence. The vast majority of disciplinary incidents were the result of "defiance" and a refusal to cooperate in the classroom. Witness interviews suggested that teachers regularly sent the Student to the office for periods of a few minutes to several hours, where he sat at a student desk without supervision or instruction. He was regularly sent to this location in lieu of attending his chorus class because he could not successfully participate.

Furthermore, the fact that the majority of Student's disciplinary incidents involve the Student being defiant, causing disruption, refusing to do work or be quiet in class, or generally being rude or disrespectful suggests that many of the Student's behaviors may be related to his disability, XXXX. In 2010 and 2011, the records show that the Section 504 team considered behaviors such as defiance, disruption, outbursts, and refusal to complete assignments to be related to the Student's disability and specifically addressed these behaviors in the Student's 504 Plan and behavior plan.

Despite the Student's behavioral patterns, the Division did not conduct a Functional Behavioral Assessment to analyze his repeated behaviors or the reasons for them, and the Division did not develop a Behavioral Intervention Plan to determine strategies to address the Student's behaviors.

Additionally, in a review of the Student's academic performance during his time at the School, OCR found that the Student had a history of failing classes. In XXXX grade (2011-2012), the Student failed all of his core subjects, which included Reading, English, Science, History, and Math. The Student received "C's" in Library and Art, "B's" in Tech and Math, and an "A" in Physical Education. Similarly, in XXXX grade (2012-2013), the Student failed the majority of his core subjects, which included Math, Language Arts, and Science. The Student received a "C" in History, "B's" in Tech and Spanish, and "A's" in Music, Art, and Physical Education. Because the Student left the School during the XXXX grade year (2013-2014), he only received grades for his first semester. During that semester, the Student failed Civics and Math, and received a "D" in Science. No grades were recorded for the Student's other classes, which were Language Arts, Spanish, Art, and Physical Education.

Finally, during individual interviews with School and Division staff, the Division reported that it had been providing the Student informal services and had an informal behavior plan in place. The behavior plan was a letter to the Complainant dated XXXX, which required student to meet a list of seven conditions to be allowed to advance to XXXX grade, including completing summer school without discipline issues or refusal to do work; making up 4 hours of math during summer school; being prohibited from eating in the cafeteria for summer school; being on social probation, meaning that the Student would not be allowed on school grounds outside of the regular school day without permission from the Assistant Principal or the Principal; that the School would enforce a zero tolerance discipline policy, meaning any instance of defiance, disrespect, or refusal to do work would result in a suspension and referral to court services; having a current phone number for the Student's mother; and enrolling in a local day treatment program. Contrary to the Division's suggestion, the content of this letter does not constitute a Behavior Intervention Plan that addresses the Student's disability-related needs as it does not specify strategies to address specific behaviors identified and analyzed through a Functional Behavior Assessment.

During witness interviews, the Student's teachers and administrators stated that the Student was disciplined for defiance and disruption causing a serious loss of instructional time in the classroom. They felt that his behaviors were largely a result of a lack of effort put forth on the Student's part, most frequently demonstrated by his refusal to do work. To address these behaviors, the Student was frequently removed from class to work in the main office at a small student desk. Administrators cited that this gave the Student a chance to "cool down" and "reset." Additionally, the Student was invited to Saturday school, homework help before and after school, and math tutoring at lunchtime to complete assignments. Both teachers and administrators attempted to involve the Complainant in discussing the Student's behaviors. The Student's math teacher said he moved the Student's seat, gave him extra time to complete tests, and used redirection when necessary. Despite these informal accommodations, the Division failed to conduct an evaluation to determine if the Student needed other supports and services required by Section 504. Even assuming that the Division implemented interventions informally, these interventions do not take the place of the protections offered and services provided by Section 504. Had a meeting been held with the Student's teachers and administrators to carefully consider documented information about the Student, including his grades, attendance, and discipline records, the Student's needs could have been identified and a plan could have been

made to meet the Student's needs. Further, these informal interventions illustrate that the Division should have known of the Student's need for support.

Next, as part of our investigation, OCR reviewed the Division's policies and procedures and its handbook related to Section 504. We note that the Division relied on its Section 504 procedures to guide its handling of the Student's situation. OCR found concerns about the Division's procedures for evaluating students with disabilities. Specifically, the procedures inadequately describe when and in what circumstances an evaluation is necessary, and what the standard is for determining whether a student has a disability under Section 504 (i.e., the procedures inaccurately define major life activity and substantial limitation). The procedures also inaccurately define free appropriate public education, which the Division must provide to students with disabilities. Finally, the Division provided information to OCR showing that it has two Section 504 grievance procedures. Which of those grievance procedures applies to address complaints of alleged disability discrimination is not specified.

Based on notice of the Student's diagnosis, past evaluations and 504 Plans, frequent absences, frequent disciplinary incidents, and consistently failing grades, OCR finds that the Division had sufficient information to warrant evaluating the Student for a disability as required under Section 504 and to determine whether the Student may need regular or special education or related aids and services due to a disability. As a result of the Division's failure to evaluate the Student, OCR concludes that the Division denied the Student appropriate educational services in violation of Section 504. The Division signed a Resolution Agreement to remedy this violation.

### **Allegation 2: Removal of the Student from class**

The Complainant told OCR that the Student was frequently placed at a student desk in the School's main office when he was removed from class due to his inability to focus, disruptive behavior, or as consequence for some other disciplinary infraction. She described the desk as being located in a "little cubbyhole storage space," approximately three feet long and two feet wide where he sat unsupervised and sometimes without assignments. She said the Student was placed at the desk frequently and that he would sit facing the wall. The Complainant believed the Student was placed there as a result of behavior related to his disability.

During interviews with the School Principal, Assistant Principal, and Secretary, OCR learned that the desk was used by many students, including the Student, and it was used for many purposes, including discipline. The Principal described the desk as being located in a "little nook" linking the main office with the nurse's office. The School frequently used the desk as a waiting area for students to see the nurse, a waiting area for students to speak with Assistant Principal when removed from class for misbehavior, a work station to complete assignments or tests, a place for silent lunches, and occasionally a place for in-school suspensions (ISS). The Principal also told OCR that the desk was used as a space for upset students to cool down. She said that a student may sit there for a few minutes or for a few hours. When a student was at the desk, he or she was not under the supervision of a particular staff person, although the Principal and Assistant Principal, secretary, and nurse were nearby. The School also informed OCR that students use the desk regardless of whether they have a disability.

The School confirmed that the Student was at the desk frequently. He would sit there when he was removed from class, or if he refused to do his work in class. The Student would also sit there in lieu of ISS if ISS were closed or if he refused to go to the ISS room. The Secretary reported that the Student spent a lot of time at the desk during 7<sup>th</sup> grade. She said he was removed from several of his classes, not just one. The Student's discipline record shows that the Student sat at the desk during his Chorus class until his schedule could be changed as the teacher no longer wanted him in the classroom. Additionally, the discipline record shows that, on more than one occasion, the Student was removed from his Physical Education class and sat at the desk instead of going to class.

As explained above, the Section 504 regulation, at 34 C.F.R. § 104.35(a), requires school districts to evaluate any student who, due to disability, needs or is believed to need special education or related aids and services before initially placing the student and before any subsequent significant change in placement. Under OCR's Section 504 policy, a single disciplinary suspension of a student with a disability of more than ten (10) days constitutes a significant change in placement. Moreover, a series of suspensions or disciplinary removals that is each 10 days or less in duration but that exceeds 10 days in the aggregate and that creates a pattern of exclusion also constitutes a significant change in placement.

Here, the Student was not identified as a student with a disability during the time of the removals. That said, as explained above, OCR found that the Division violated Section 504 by failing to evaluate the Student as a student with a disability, and the frequent use of the desk for the Student suggests that the strategies being used by his teachers were not effective at changing or minimizing the problematic behavior that may have been related to the Student's disability. Moreover, once the Student was removed from any classroom, he was effectively denied educational instruction or access to the curriculum for the duration of the removal. The Resolution Agreement signed by the Division pertaining to Allegation 1 remedies this concern by requiring that the Division evaluate the Student and, if he is found to be a qualified student with a disability, to provide compensatory educational services for the period from April 2011 forward.

### **Allegation 3: Harassment of the Student based on his disability**

During investigation, OCR found that there was insufficient evidence to conclude that the Division's actions, as they relate to Allegation 3, amounted to disability-based harassment under Section 504.

Section 504 prohibits discrimination against students with disabilities. Disability-based harassment is a form of discrimination prohibited by Section 504. Disability-based harassment creates a hostile environment when the conduct is sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. OCR looks at the incidents raised in a complaint individually and in combination; OCR considers the conduct from both an objective and subjective standard. Whether such conduct constitutes a hostile environment is determined from an analysis of the totality of the circumstances involved. In evaluating the seriousness of the conduct, OCR considers factors such as the context, nature, scope, frequency, duration, and location of incidents, as well as the



identity and relationships between the persons involved. Harassment must consist of more than casual or isolated incidents to constitute a hostile environment. Furthermore, there must be evidence that the alleged conduct was based on disability. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating.

Disability-based harassment of a student by a teacher or other school employee can be discrimination in violation of Section 504. Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed.

The Complainant alleged three incidents during which the Student was subject to what she believed to be disability-based harassment by the Secretary and two teachers.

The Complainant alleged that the Secretary made comments to the Student regarding his poor academic performance. Specifically, according to the Complainant, when the Student asked for a calculator the Secretary told him it “would be a waste of her time to get him one because she had better things to do.” Additionally, the Secretary allegedly asked the Student why he bothered coming to school because she had seen his report card and knew what his grades were. The Complainant believed these statements to be based on the Student’s disability as she believed the Secretary knew about his XXXX because she distributed the Vanderbilt Assessment Scale to the Student’s teachers and collected it from them for the Complainant.

OCR interviewed School staff, including the staff member who was alleged to have made the comments to the Student. During an interview, the Secretary told OCR that she knew nothing about the Student’s academics and that she did not know if he had XXXX. She said that they did not give the Student medication so there was no way for her to know about his XXXX. She acknowledged that she once asked the Student if he was going to do the work she got for him to which he replied no, and she said she would not get his work anymore.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, there must be more evidence that discrimination occurred than not. When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law. As noted above, School staff and the Complainant provided conflicting information about the alleged comments, and OCR was unable to reconcile the different accounts.

As to the Secretary’s acknowledged comment to the Student that she would not provide assignments to him because he would not complete them, which could refer to the Student’s inability to focus, OCR cannot conclude that the comment was sufficiently serious to create a hostile environment. OCR considered the scope and frequency of the incident (one time in the middle of the year); the identity of the participants (staff member and student); the location (in the School’s main office); and the duration (less than one minute). Although the comment was unprofessional and inappropriately made by an adult to a child, OCR does not have sufficient

information to indicate that the comment targeted the Student because of his disability, that it was more than casual and isolated, or that the comment actually limited the Student's ability to participate in the educational program. For these reasons, OCR found insufficient evidence to support a finding that the Student was subject to harassment based on disability, as alleged.

The Complainant further alleged that the seventh grade Math Teacher had thrown markers at the Student on one occasion. During an interview with the Math Teacher, OCR was told that there was an incident where he tossed a marker at a student's desk to get her attention. He said that the Student was not near the area and the marker did not hit anyone. Furthermore, the Math Teacher stated that he was aware that the Student had XXXX but "did not know anything about a disability."

Finally, the Complainant alleged that another teacher had told the Student and two other boys that they would look great wearing orange, suggesting that the Student was a troublemaker and referring to the typical orange jumpsuit of an inmate in prison. OCR was unable to interview the teacher because she was no longer working for the Division. The School's administrators denied that such an event had occurred and said the Complainant had not reported the incident.

In determining whether harassment based on disability has occurred, OCR must first find that the Student was subject to conduct based on his disability. Here, the preponderance of the evidence does not show that the conduct toward him was based on his disability. OCR could not corroborate through interviews or other evidence that the comments and actions of the teachers were directed toward the Student or were made because of his disability. Thus, OCR is unable to establish that the conduct of the Math Teacher or the other teacher toward the Student was based on the Student's disability, and OCR must find that the evidence is insufficient to conclude that the Student was subject to disability-based harassment in violation of Section 504.

#### **Allegation 4: Retaliation against the Student based on Complainant's disability-related advocacy**

OCR found insufficient evidence to conclude that the Division retaliated against the Student because the Division had a legitimate non-retaliatory reason for its actions that does not appear to be pretext.

To determine whether a school unlawfully retaliated against a person for advocating for a person's rights as a person with a disability, OCR first considers whether 1) the person alleging retaliation engaged in a protected activity by asserting or protecting a right or privilege secured by Section 504 or Title II, 2) the Division took a materially adverse action against the person, and 3) there is some evidence of a causal connection between the protected activity and the adverse action. OCR then examines whether the school has a legitimate, non-retaliatory reason for taking the adverse action. Finally, OCR determines whether the school's reason for its action amounts to a pretext or excuse for unlawful retaliation.

The Complainant alleged that the School retaliated against the Student by assigning him a different consequence from the one assigned to the other student involved in an argument. According to the Complainant, the Student had returned to the School after being gone for

several weeks and another student called him a “retard” while asking why he had been absent. The Student responded by calling her brother, who has a disability, a “retard.” As a consequence, the Division assigned the Student to a half day of In-School Suspension (ISS). The Complainant alleged that the School took this action after she requested a 504 Plan and voiced concerns that the Student’s needs were not being met. There is insufficient evidence for OCR to find that the School retaliated against the Student, in violation of the Section 504 and Title II regulations. Applying the retaliation factors listed above to the available evidence, OCR has made the following determinations.

***Protected Activity of Which the School Had Knowledge***

First, we find that the Complainant engaged in protected activity under Section 504 when she requested a 504 Plan for the Student and raised concerns that his needs were not being met in February 2014.<sup>4</sup> Further, the Complainant suggested that she advocated for the Student’s disability-related needs at various meetings and in communication with the School administrators. The Division confirmed a discussion of the Student’s needs between the Principal and Complainant in February 2014.

***Adverse Action against the Student***

Next, OCR considered whether the School took materially adverse action against the Student. An adverse action is one that denies or significantly disadvantages the student or other person as to his or her status as a student or his or her ability to gain the benefits of the educational program or activity. It impacts the person’s well-being in a serious, tangible, and lasting manner. Even if the challenged action does not objectively or substantially restrict an individual’s educational opportunities, the challenged action could be adverse if it could or did reasonably act as a deterrent to further protected activity, or if the individual was precluded from pursuing his or her discrimination claims because of the challenged action. OCR finds the suspension given to Student for his involvement in the argument was an adverse action because the Student was precluded from receiving educational benefit during the period of suspension and because such a disciplinary action could reasonably deter further protected activity.

***Causal Connection between Protected Activity and Adverse Action***

OCR finds that there is sufficient information to infer that the Complainant’s protected activities had a causal relationship to the School’s actions. One of the factors considered in establishing such a relationship is how close in time the events occurred to one another. The incident between the students occurred on XXXX, soon after the Complainant met with the Principal in XXXX. These events are sufficiently close in time to suggest a causal relationship.

***Legitimate Non-Retaliatory Reason***

OCR finds that the School offered a legitimate, non-retaliatory reason for assigning the Student one half day of ISS for his participation in a verbal altercation in the cafeteria. The Assistant

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<sup>4</sup> The Complainant said the Principal said that a 504 Plan was too expensive and wanted her to sign a Medicaid waiver in order for the Student to participate in a local therapeutic day treatment program.

Principal told OCR that the Student had several discipline issues, one fairly recently. The Assistant Principal decided it was appropriate to assign the Student to one half day of ISS. The Principal dealt with the other student, who ultimately was held in the main office for a few class periods. The Assistant Principal, in recalling the incident, reported that both students acknowledged that the Student had been harassing the other student extensively about her brother, who has a disability. The Assistant Principal did not recall the other student using the word “retard” regarding the Student, but said there was “a heated argument.” The Assistant Principal told OCR that the Student received one half day of ISS because he had an extensive discipline log, whereas the other student received a lesser consequence because she only had four discipline incidents in her log.

### ***Pretext***

OCR then examined whether the offered explanations were pretext, or an excuse, for retaliation. As evidence of pretext, the Complainant pointed to the fact that the other student, who she claimed had also used the word “retard” during the argument, was treated differently than the Student. OCR was not able to corroborate that the other student in fact used that word. The Assistant Principal did not recall the other student using the word “retard” regarding the Student, and the other student’s disciplinary record regarding the incident does not reflect that she used that word. The Student received consequences for using the word “retard,” but the other student could not receive the same consequence where it could not be shown that she took the same action. In addition, the two students have different discipline histories at the School so they are not similarly situated. The Student had an extensive discipline log, and the other student had only four incidents in her discipline log spread over the course of several school years. Thus, because the Assistant Principal routinely takes past behavior into consideration when assigning consequences, the two students would not likely have received the same consequence. OCR finds that the assignment of different consequences is not pretext for retaliation given different disciplinary records of the students. Next, OCR notes that the Principal, not the Assistant Principal, assigned consequence to the other student involved. Because the Assistant Principal did not give out both consequences, the difference in treatment is less significant as evidence of pretext. Additionally, OCR did not obtain evidence to show that the Assistant Principal knew about the February 2014 meeting between the Complainant and the Principal. If he did not know about the meeting, he could not have retaliated against the Student for his mother’s advocacy at that meeting.

OCR concludes that the evidence is insufficient to support that the Division retaliated against the Student by assigning him one half day of ISS for his participation in a verbal altercation with another student. Although the consequence the Student received was materially adverse, the Division had a legitimate non-retaliatory reason for assigning the consequence.

### **Conclusion**

On August 14, 2015, the Division signed the enclosed resolution agreement (Agreement), which when fully implemented will resolve the concerns identified in this complaint.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. This letter is not intended, nor should it be construed, to cover any other issues regarding the University's compliance with the regulations enforced by OCR that may exist and are not discussed herein. Please be advised that the Complainant may file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records, upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. In accordance with agency procedures, OCR is required to remind you that intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint or participated in any manner in an investigation in connection with a complaint.

If you have any questions concerning OCR's determination please contact the attorney assigned to this complaint: Amy Schumacher Williams at (202) 453-5933 or via e-mail at [amy.williams2@ed.gov](mailto:amy.williams2@ed.gov).

Sincerely,

/S/

Alessandro Terenzoni  
Team Leader, Team II  
District of Columbia Office  
Office for Civil Rights