

October 11, 2012

Ms. Michelle Roper  
1803 Bridget Drive  
Murfreesboro, TN 37129

Re: OCR Complaint No. 04-12-1277

Dear: Ms. Roper:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint which you (Complainant) filed on April 17, 2012, against the Rutherford County School District (District), and in particular, XXXXX (School). Specifically, you alleged that the District discriminated against XXXX (Student) on the basis of race and retaliated against him. You made the following allegations:

- 1) In March of 2012, the District discriminated against the Student when a teacher (Teacher) called the Student a monkey;
- 2) In March of 2012, the Teacher retaliated against the Student by writing a disciplinary referral on him for tardiness;
- 3) In April of 2012, the Teacher retaliated against the Student by giving him a zero on an in class assignment; and,
- 4) In April of 2012, the Principal at the School (Principal), the SRO, and the Assistant Principal of the School (Assistant Principal) subjected the Student to racial discrimination and retaliated against the Student when they grabbed the Student's cell phone and forced him to unlock it so they could read his text messages aloud.

OCR is responsible for enforcing:

- Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the basis of race, color or national origin by recipients of Federal financial assistance.

Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether the District discriminated against the Student on the basis of race when the Teacher called him a “monkey” in noncompliance with the Title VI implementing regulation at 34 C.F.R. §§ 100.3(a) and (b).
2. Whether the District retaliated against the Student by writing a disciplinary referral on him in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.7(e).
3. Whether the District retaliated against the Student by giving him a zero on an in class assignment in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.7(e).
4. Whether the Principal, the SRO, and the Assistant Principal subjected the Student to racial discrimination and retaliation when they grabbed the Student’s cell phone, forced him to unlock it, and read his text messages aloud, in noncompliance with the Title VI implementing regulation at 34 C.F.R. §§ 100.3(a) and (b), and 34 C.F.R. § 100.7(e)?

In reaching its determination, OCR reviewed and analyzed documents pertinent to the complaint issues and conducted interviews with the Complainant, the Principal (Principal) of XXXX (School), the School’s Assistant Principals (Assistant Principal 1) and (Assistant Principal 2), and the School’s Resource Officer (SRO). OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient, such as the District, failed to comply with the laws or regulations enforced by OCR or the evidence is insufficient to support such a conclusion. Based on its investigation, OCR has determined that there is insufficient evidence to support a finding of noncompliance with respect to Issues 1 through 3. However, there is sufficient evidence to support a finding of non-compliance with Title VI with respect to Issue 4. The bases for this determination are set forth below.

**Applicable Regulatory Authority:**

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) states that no person shall on the basis of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program that the recipient operates.

The Title VI implementing regulation at 34 C.F.R. § 100.3(b)(1)(i)-(vi) states that a recipient under any program to which the regulation applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin: (i) deny an individual any service, financial aid, or other benefit provided under the program; (ii) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program; (iii) subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; (iv) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; (v) treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or

condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program; or (vi) deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him an opportunity to do so which is different from that afforded others under the program.

According to the Title VI implementing regulation at 34 C.F.R. § 100.7(e), no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title VI, or because that person has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VI.

### **Background**

The Complainant informed OCR that the Student XXXX at the School. The Complainant stated that in February 2012, the Student's Teacher called the Student a "monkey" in front of the entire class. The Complainant filed a complaint with the School about the incident. The complaint was ultimately investigated by the District. The Complainant stated that the Teacher's use of the word "monkey" subjected the Student to racial discrimination. The Complainant informed OCR that the District conducted an internal investigation regarding the name calling incident; and the investigation determined that the Teacher had in fact called the Student a "monkey."

The Complainant then informed OCR that in March 2012, the Student received a discipline referral for being tardy. The March 2012 tardy referral resulted in the Student receiving one day of In School Suspension (ISS). The Complainant stated that the Student was tardy because he changed clothes after a pie throwing event at the School. The Complainant believes that the Teacher wrote the tardy referral on the Student in retaliation for the Complainant's complaint of racial discrimination against the Teacher. According to the School there was not a pie throwing event at the School on the date the Student was issued the tardy referral.

The Complainant then informed OCR that in April 2012 the Teacher retaliated against the Student by giving him a zero on an assignment that he submitted. The Complainant stated that she was made aware of the zero by the Student. The Complainant believes that the Teacher was again retaliating against the Student because she filed a complaint of race discrimination against the Teacher.

The Complainant also informed OCR that on April 16, 2012, the Principal, the SRO, and Assistant Principal 2 confiscated the Student's cell phone, forced the Student to unlock the phone, and then read his text messages aloud. The Complainant stated that the phone incident occurred outside of the ISS classroom. The Principal confirmed that he confiscated the Student's cell phone, but stated that he did so pursuant to the School's non-cell phone use policy (Policy).

According to the Principal, on the day at issue, the Student was in ISS for excessive tardies. The Principal stated that he received a message from the Student's grandmother (Grandmother) asking why the Student was in ISS. The Principal stated that he asked the Assistant Principal who administered the Student's ISS (Assistant Principal 2) if she had contacted the

Grandmother. Assistant Principal 2 responded in the negative. The Principal stated that at this time he suspected that the Student may have used a cell phone to contact the Grandmother. The Principal stated that he and Assistant Principal 2 went to the ISS classroom, got the Student out of classroom, and asked him whether or not he used a cell phone to contact his Grandmother. According to the Principal the Student initially denied using his phone; but ultimately admitted to using it to text home. The Principal stated that the Student had the cell phone in his pocket; but gave it to the Principal. The Principal stated that he asked the Student to see his phone and a message was showing on the screen. According to the Principal the message instructed the Student to put his cell phone away. The Principal stated that he asked the Student about other messages in the cell phone. According to the Principal, the Student then took the cell phone out of his hand, and unlocked it. The Principal confirmed that he did read the Student's text messages; but added that he did so only for the purpose of confirming that the messages were related to the ISS that the Student received.

The Complainant confirmed that the Student had in fact used the cell phone to contact home; and added that the Principal took the cell phone from the Student. According to the Complainant the Principal told the Student "if [the Student] did not unlock the phone he would receive 3 days of ISS and that then he [the Principal] would get someone from the School's Technology Department to unlock the cell phone." The Complainant stated that the Student unlocked his cell phone in response to this ultimatum. The Principal denies that he made a statement to the Student regarding three days of ISS. The Complainant believes that the Student was subjected to racial discrimination and retaliation when the Principal grabbed the Student's cell phone, forced him to unlock it, and read his text messages aloud.

### **Factual Finding and Analysis**

#### **Issue 1**

**Whether the District discriminated against the Student on the basis of race when the Teacher called him a "monkey" in noncompliance with the Title VI implementing regulation at 34 C.F.R. §§ 100.3(a) and (b).**

Section 110 (a)(2) of OCR's Complaint Processing Manual provides that where a complainant has filed the same complaint with another federal, state, or local civil rights enforcement agency or through a recipient's internal grievance procedures, including due process proceedings, OCR generally will not conduct its own investigation; instead, OCR reviews the results of the other entity's determination and determines whether the other entity provided a comparable process and met appropriate legal standards.

OCR determined that District employed a comparable investigation that met OCR's standards with respect to Issue 1. Thus, by letter dated August 28, 2012, the Complainant was notified that Issue 1 was administratively closed.

## **Issue 2**

### **Whether the District retaliated against the Student by writing a disciplinary referral on him in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.7(e)?**

In investigating allegations of retaliation, OCR examines whether: 1) the Complainant engaged in a protected activity and whether the District was aware of the Complainant's participation in the protected activity; 2) whether the District took an adverse action against the Complainant contemporaneous with or subsequent to the participation in the protected activity; and 3) whether a causal connection between the adverse action and the Complainant's participation in the protected activity can be reasonably inferred. If these elements are established, OCR determines whether the District has a legitimate, non-retaliatory reason for its actions that are not a pretext for retaliation.

#### **1. Protected Activity and the School's Knowledge of Protected Activity**

In the instant case, the Complainant engaged in a protected activity when she filed a discrimination complaint with the School. The Principal of the School stated that he had personal knowledge of the protected activity. In fact, the Principal informed OCR that he had a meeting with the Complainant to discuss the protected activity. Additionally, the Teacher was notified of the complaint as she was the person who the complaint was filed against. Consequently, OCR finds that the Complainant engaged in protected activity of which the District had knowledge.

#### **2. Adverse Action**

In examining whether an action is adverse, OCR considers whether the alleged action significantly disadvantaged the individual in his or her ability to gain the benefits of the educational program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims. To make this determination, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had or could reasonably have a deterrent effect. Merely unpleasant, transient, or inconvenient incidents usually are not considered adverse. OCR makes this determination on a case-by-case basis and in light of all the facts and circumstances of the case.

In the instant case, both the Complainant and the District acknowledge that the Teacher wrote a discipline referral on the Student for being tardy to class. OCR finds that a discipline referral constitutes adverse action.

#### **3. Causal Connection between Adverse Action and Protected Activity**

In order to establish that a complainant has been a victim of retaliation there must be a causal

connection between the adverse action that occurred and the protected activity engaged in. To determine whether a causal connection exists between the protected activity and the adverse action, OCR considers: (a) closeness in time between knowledge of the protected activity and the adverse action; (b) change in treatment after the School had knowledge of the protected activity; or (c) treatment of the Student compared to other similarly situated persons.

The Complainant's protected activity occurred in February 2012. The Student's tardy referral was written on March 6, 2012. Hence, there is sufficient temporal proximity to establish a causal connection.

#### **4. School's Legitimate Non-retaliatory Reasons for the Adverse Action**

The School asserted that the referral against the Student was a valid one, and was not made in retaliation against the Complainant for filing a complaint against the Teacher with the School. According to the Teacher, she wrote a referral on the Student for being tardy because she is required to write referrals on students that have been tardy more than three times in a given semester. The Teacher stated that according to the Tardy Policy a student receives a referral after the fourth unexcused tardy in a given semester. The Teacher wrote a referral on the Student after he had been tardy for the fourth time in the semester.

A review of the Tardy Policy confirmed the Teacher's assertion that students are to receive referrals if they are tardy to class more than three times in a given semester. According to the Tardy Policy when a student is tardy for the fourth time in a given semester he/she is to receive a referral for detention. Additionally, a review of the Student's discipline report shows that the Student had fourteen unexcused tardies during the 2011-2012 school year. In addition to the tardy referral written by the Teacher; the Student has also received a tardy referral from another teacher. The data submitted by the School also shows that the Student only received a tardy referral after his fourth tardy for the semester.<sup>1</sup>

As a part of its investigation OCR asked the Complainant if the Student was, in fact, tardy to class on the day in question. The Complainant confirmed that the Student was tardy on the in which he received a referral. However, the Complainant stated that the reason he was tardy is because he changed clothes between classes after participating in a pie throwing contest. According to the School, there was no such pie throwing contest on that day.

#### **5. Pretext**

OCR next analyzed whether the School's proffered non-retaliatory reason was a pretext for retaliation. Pretext may be shown with evidence showing, among other things: (1) that the School's reasons for its actions were not believable; or (2) similarly situated persons who did not file complaints were treated differently from the Student.

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<sup>1</sup> Prior to receiving his first tardy referral the Student was tardy on (9/7/2011, 9/29/2011, 11/29/2011, and 12/13/2011).

OCR asked the Teacher if she could remember how many students she wrote tardy referrals on for the 2011-2012 school year. The Teacher stated that she did not remember an exact number. A review of the Teacher's referrals showed that there was another student (Classmate) who received a tardy referral from the Teacher during the 2011-2012 school year. The Classmate's parents had not previously filed a complaint against the Teacher. Both the Student and the Classmate were tardy to class at least four times in a given semester, and both of them received tardy referrals. Thus, there is evidence that shows the Teacher applied the Tardy Policy to the Student in the same manner as she did to another individual who had not engaged in protected activity.

## **Conclusion**

For the foregoing reasons, OCR has concluded that there is insufficient evidence to support a conclusion that the District subjected the Student to retaliation in noncompliance with Title VI as alleged in Issue 2. OCR's investigation found that the Complainant established a *prima facie* case by showing that she engaged in a protected activity which the School had knowledge of, and that the District took an adverse action against the Student subsequent to the Complainant's participation in the protected activity. OCR found evidence of a causal connection between the adverse action and the Complainant's participation in the protected activity. The District, however, proffered a legitimate non-retaliatory reason for its action. The Teacher stated, and the Complainant confirmed, that the Student was, in fact, tardy on the day in question. The Teacher wrote a referral on the Student pursuant to the Tardy Policy. OCR did not find the Teacher's proffered reasons to be a pretext for retaliation as evidenced by the fact that the Teacher also wrote a referral on a Classmate. Unlike the Student, the Classmate's parents had not filed a complaint against the School; however, the Classmate received a tardy referral just as the Student did.

## **Issue # 3**

**Whether the District retaliated against the Student by giving him a zero on an in class assignment in noncompliance with the Title VI implementing regulation at 34 C.F.R. § 100.7(e)?**

### **1. Protected Activity and the School's Knowledge of Protected Activity**

As previously mentioned, the Complainant engaged in a protected activity when she filed a complaint of discrimination with the School. The Principal and the Teacher stated that they had personal had knowledge of the protected activity.

### **2. Adverse Action**

In the instant case, the Complainant alleged that the Student was subjected to the alleged adverse action of receiving a zero on an in class assignment. The Complainant alleged that the Teacher gave the student a zero on an assignment in retaliation for the Complainant filing a

discrimination complaint against her. The Teacher denied that she gave the Student a zero for an in class assignment. The Teacher stated that the only reason a student would get a zero is if he did not turn in an assignment. The Teacher asserted that she keeps a grade report of students' grades for each assignment.

OCR reviewed the Teacher's grade report as a part of its investigation. The Teacher's grade report does not show an assignment for which the Student received a zero. OCR gave the Complainant an opportunity to respond to the Teacher's position and offer any proof she had that the Student received a zero for an in-class assignment. The Complainant offered no evidence that Teacher gave the Student a zero for an in class assignment and could not identify the assignment on which the Student allegedly received a zero.

### **Conclusion**

OCR determined that there is insufficient evidence to support a conclusion that the School subjected the Student to the alleged adverse action of Issue 3. OCR's investigation found that the Complainant engaged in a protected activity, which the School had knowledge of, but OCR determined that the evidence is insufficient to conclude that the alleged adverse action, in fact, took place.

### **Issue # 4**

**Whether the Principal, the SRO, and the Assistant Principal subjected the Student to racial discrimination and retaliation when they grabbed the Student's cell phone, forced him to unlock it, and read his text messages aloud, in noncompliance with the Title VI implementing regulation at 34 C.F.R. §§ 100.3(a) and (b), and 34 C.F.R. § 100.7(e)?**

### **RETALIATION**

#### **1. Protected Activity and the School's Knowledge of Protected Activity**

The Complainant engaged in a protected activity when she filed a discrimination complaint with the School. The Principal of the School stated that he had personal knowledge of the protected activity.

#### **2. Adverse Action**

The Principal's actions did not objectively or substantially restrict the Student's educational opportunities; nevertheless, the action could have reasonably acted as a deterrent to further protected activity. The Principal admits that he confiscated the Student's phone and read his text messages aloud.

#### **3. Causal Connection between Adverse Action and Protected Activity**

The Complainant's protected activity occurred in February 2012. The Student's phone was

confiscated and his messages subsequently read on April 16, 2012. Hence, there is sufficient temporal proximity to establish a causal connection.

#### **4. School's Non-retaliatory Reasons for the Adverse Action**

The School asserted that its reasons for confiscating the Student's cell phone were not retaliatory. The Principal stated that he went to the ISS classroom and confiscated the Student's phone pursuant to the School's cell phone policy; and that the only reason he asked to view, and subsequently read, the Student's text messages was to confirm that the text messages were to the Grandmother and in relation to the Student's ISS.

#### **5. Pretext**

OCR next analyzed whether the School's proffered non-retaliatory reason was a pretext for retaliation. Pretext may be shown with evidence showing, among other things: (1) that the School's reasons for its actions were not believable; or (2) similarly situated persons who did not file complaints were treated differently from the Student.

The Complainant and the School's administrators have conflicting accounts of what occurred. According to the Complainant, the Principal and Assistant Principal 2 forced the Student to unlock his cell phone. OCR also interviewed the SRO about what occurred. The SRO stated that he was walking to his patrol car and noticed the three (Principal, Assistant Principal, and Teacher) standing in the hallway and the Principal asking the Student for his cellphone. The SRO remembers the Principal asking the Student if there were any messages on his phone. The Student answered in the affirmative and then took the phone from the Principal and unlocked it. The SRO then proceeded to walk to his patrol car. The Complainant also stated that one of the administrators grabbed the Student's cell phone and read his text messages aloud. The Complainant stated that the Principal told the Student that "if [the Student] did not unlock the phone that [the Student] would receive three days of ISS and that the [the Principal] would get someone from the School's Technology Department to unlock the cell phone."

The Principal confirmed that he confiscated the Student's cell phone but stated that he only did so pursuant to the Policy. The Principal confirmed that he asked the Student about text messages in the phone, but denies that he gave the Student an ultimatum to unlock his phone. According to the Principal, the Student took the phone out of the Principal's hand and voluntarily unlocked it, without being asked to do so. The Principal stated that he did read the Student's text messages but only for the purpose of confirming that the messages were related to the Student's ISS. OCR asked the Principal if he could not remember if he read the messages aloud. The Principal stated that he could not remember if he read the messages aloud. However, Assistant Principal 2 stated that she remembered that the Principal read the messages aloud.

OCR examined each of the Principal's actions in determining whether the Principal's proffered reason, of acting pursuant to Policy, was a pretext for retaliation. OCR first looked at the act of confiscating the cell phone. The Principal stated that he confiscated the phone pursuant to the Policy. OCR asked the administrators if they remembered a time when they did not initially

view a student in violation of the Policy, but rather acted on a tip or suspicion which ultimately led to a cell phone confiscation. All three responded in the affirmative. Assistant Principal 2 again gave the example regarding a dress code violation. Assistant Principal 2 stated that often times, prior to contact from an administrator, parents will show up at the School with an item of clothing for their child for the purpose of remedying a dress code violation. Assistant Principal 2 stated that when this occurs it instantly raises suspicion that a student may have used a cell phone to contact a parent. In this instance the Assistant Principal would ask the student's parent if he or she was contacted by their student. If the answer is affirmative then the Student would receive a referral for using their cell phone.

According to the Policy: "A person who discovers a student using, accessing, or displaying a personal communication device in violation of this policy shall report the violation to the principal. The device will be confiscated." A review of the School's discipline file confirmed that there were several instances in which cell phones have been confiscated initially based on a tip or suspicion. Additionally, these instances involved students who did not engage in protected activity.

The Policy does not limit administrators to the confiscation of phones that are readily visible. According to the Policy, when an administrator discovers a student has used a cell phone the administrator can confiscate it. When the Principal confiscated the Student's phone he was acting pursuant to Policy. OCR does not view the Principal's proffered reason for confiscating the phone as a pretext for retaliation in light of the fact that he did not act contrary to the Policy but acted in a manner similar to other administrators in the past.

OCR next examined the Principal's proffered reason, for reading the text messages aloud. The Principal stated that he read the text messages to confirm that they were to the Grandmother. OCR asked each administrator if they remembered a time in which any of them read another student's text messages. None of the administrators informed OCR that they could remember a time in which they read a student's text messages. Additionally, when the Principal read the Student's text messages he was not acting pursuant to Policy. Furthermore, unlike the Principal's confiscation of the cell phone, when the Principal read the Student's text messages he was not acting in a manner similar to what administrators had done in the past. Moreover, none of the administrators interviewed could remember a time when they read another student's text messages.<sup>2</sup> OCR views the Principal's proffered reason, of reading the text messages to confirm that the text messages were to the Grandmother as a pretext for retaliation. The Principal read the Student's text messages *after* already confirming that the Student violated that Policy, and as such should have only confiscated the phone. Moreover, the evidence shows that the Principal not only read the messages, but made a written record of the content of the messages. The Principal told OCR that he asked the Assistant Principal to record the messages because the Student's mother had denied having exchanged text messages with the Student on that day.

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<sup>2</sup> Assistant Principal 2 stated that she once looked at pictures in a student's phone while investigating an allegation that the student was taking pictures of other students in the bathroom.

## **Conclusion**

With respect to the retaliation allegation for Issue 4, OCR's investigation found that the Complainant established a *prima facie* case by showing that she engaged in a protected activity which the School had knowledge of and the School took an adverse action against the Student subsequent to the Complainant's participation in the protected activity. OCR found evidence of a causal connection between the adverse action and the Complainant's participation in the protected activity. The School proffered a non-retaliatory reason for its action; however, OCR viewed the School's non-retaliatory reason as pretextual in light of the fact that none of the administrators interviewed could remember a prior time when they read the text messages of a student, and the Principal did not act pursuant to the Policy in reading the Student's text messages. Further, the evidence shows that the Student's commission of an infraction – use of the phone during the school day -- was established prior to the Principal's review of the messages and the Principal made a written record of the messages in addition to recording them. To remedy the noncompliance, the District has entered into the attached Resolution Agreement.

## DISCRIMINATION

A conclusion that “different treatment” has occurred requires a finding of intentional discrimination on the basis of an individual's race, color, or national origin. Evidence of discriminatory intent may be direct or circumstantial, and “intent cases” usually involve a highly fact-intensive inquiry. Absent direct proof of discriminatory motive, a disparate treatment inquiry frequently focuses on: (1) whether the recipient, in excluding or denying the aggrieved person a program, service, or benefit, or limiting the person's education services, benefits, or opportunities, treated the person differently than individuals of another race; and (2) whether the recipient can provide a legitimate nondiscriminatory justification for the different treatment. Also, a recipient's rebuttal/nondiscriminatory justification can be overcome with a showing of pretext.

### ***Different Treatment***

The Complainant contends that the Student was subjected to racial discrimination when the Principal confiscated his phone and read his text messages. The Principal confirmed that he confiscated the Student's phone, but stated that he did so pursuant to the Policy. OCR asked each administrator if there were times in the past when they confiscated a cell phone based on a tip or suspicion that a student used a cell phone while on campus. Each administrator interviewed stated that there were other cases in which they sought out a student based on a tip or suspicion. Both assistant principals stated that they typically confiscate cell phones based on suspicion when students violate the School's Dress Code Policy (Dress Policy). Assistant Principal 2 stated that, often a student's parent will bring clothing to the School to remedy that student's breach of the Dress Policy prior to being contacted by the School. Assistant Principal 2 stated that when this occurs, there is a strong suspicion that the student contacted the parent using a cell phone; which is prohibited by the Policy. The School's discipline records support the administrators' assertion that in some cases administrators seek out students they believe have violated the Policy.

OCR then asked each administrator if they remembered a time in which they reviewed the contents of a student's phone subsequent to confiscation. Each administrator answered in the affirmative. A review of the School's discipline files shows two other instances of administrators going through students' phone subsequent to confiscation. In these two instances, Assistant Principal 2 reviewed the contents of the phone of two white students. However, in both instances, she indicated that when she went through the phones of the white students to determine whether another discipline infraction (e.g., taking photographs of another student in the restroom) in addition to cell phone use had occurred. Conversely, in the Student's case, there was no such indication that he committed a discipline infraction in addition to the cell phone use.

During the 2011-2012 school year, there were 184 student incidents in which a cell phone or electronic device was confiscated. One hundred fifty-six of these incidents involved nonblack students and 28 involved black students. The evidence reveals that the School's administrators have confiscated students' cell phones when there is a suspicion that a student has used the phone in violation of the Policy. This is similar to the confiscation of the Student's cell phone. However, the Student's cell phone was not merely confiscated; rather, the contents of the Student's cell phone were examined although it was not necessary to do so to determine if the Student had violated the policy. The evidence reveals that there have been no other instances in which a student's phone contents have been examined in the absence of a need to do so to establish a violation of the District's policy. Since 154 non-black students had their cell phones confiscated without having the contents examined OCR finds, for purpose of analysis, that the review of the contents of the Student's cell phone constitutes different treatment.

### ***Legitimate Non-Discriminatory Reason and Pretext***

As a part of its investigation OCR examined the Principal's legitimate nondiscriminatory reason for scrolling through the text messages and reading them aloud. The Principal stated that he read the text messages to confirm that they were to the Grandmother and related to a previous in-school suspension. However, as mentioned above, the Principal read the Student's text messages *after* already confirming that the Student violated that Policy. Moreover, while the time that he transmitted text messages was relevant, it was not necessary to know the content of the Student's text messages to confirm that he violated the Policy. Consequently, OCR views the Principal's reason for scrolling through and reading the Student's text messages as pre-textual. Nevertheless, the evidence is insufficient to support a conclusion that the difference in treatment was motivated by the Student's race. During the 2011-2012 school year, 27 other black students had their cell phones confiscated without examination of the phone contents; this more favorable treatment of other black students weakens any inference of race discrimination with respect to the Principal's acts. Further, the Principal's explanation for having the content of the messages documented indicates that his actions were not directed at the Student, but rather were responsive to his dialogue with the Student's mother. As noted above, OCR has determined that the evidence supports a conclusion that the Principal's actions were retaliatory.

## Conclusion

Based on the foregoing OCR's investigation determined that the Student was not subjected to different treatment on the basis of race. OCR's investigation did find that the Student was subjected to different treatment when the Principal scrolled through the Student's cell phone subsequent to discovering that the Student violated the Policy. OCR also found the Principal's proffered legitimate non-discriminatory reason is pre-textual. However, OCR concluded that the different treatment of the Student was not motivated by the Student's race. Thus OCR has determined that the evidence is insufficient to determine that the District is in noncompliance with Title VI with respect to this allegation.

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This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. The Complainant may file a private suit in federal court whether or not OCR finds a violation. OCR is committed to a high quality resolution of every case. You may send an appeal of OCR's failure to find noncompliance with respect to Issues 1-3, to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's letter of finding(s) at the following address or via electronic mail to [OCRAppeals@ed.gov](mailto:OCRAppeals@ed.gov):

Office of the Deputy Assistant Secretary for Enforcement  
U.S. Department of Education  
Office for Civil Rights  
400 Maryland Avenue, S.W.  
Washington, DC 20202-1100

Should you choose to appeal, you must explain why you believe the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, and how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal. A written decision in response to an appeal will be issued as promptly as possible. The decision of the Deputy Assistant Secretary constitutes the agency's final decision.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This 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. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

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, testified, assisted, or participated in any manner in an investigation in connection with a complaint.

If you have any questions, please contact Brandon Washington, Investigator, at (404) 974-9442 or Arthur Manigault Esq., Compliance Team Leader at (404) 974-9376.

Sincerely,

Cynthia G. Pierre, Ph.D.  
Regional Director

Enclosure