



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, D.C.

November 7, 2013

Sean Aiken  
Head of Schools  
BASIS DC Charter School  
410 8<sup>th</sup> Street, NW  
Washington, DC 20004

Re: OCR Complaint Nos. 11-13-1119;  
11-13-1139; 11-13-1140  
Letter of Findings

Dear Mr. Aiken:

This letter is in reference to complaints that were filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department) on February 14, 2013, February 19, 2013, and March 5, 2013. The Complainants alleged that the BASIS DC Public Charter School (the School) discriminates against students on the basis of national origin, race, and disability. Specifically, the Complainants alleged that:<sup>1</sup>

**OCR Complaint No. 11-13-1119:**

1. The School discriminates against English Language Learner (ELL) students based on national origin by failing to identify all ELL students;
2. The School discriminates against ELL students based on national origin by failing to provide an alternative language program that is effective in meeting the educational needs of those students;
3. The School discriminates against African American and Hispanic students by incorrectly placing these students in math courses that do not correspond to their ability levels and placement exams.

**OCR Complaint No. 11-13-1139:**

4. The School discriminates against students on the basis of race by placing a disproportionate number of African American and Hispanic students in segregated, remedial courses, which allegedly provided students with fewer educational opportunities than students in racially-integrated courses; and

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<sup>1</sup> Different complaints raised some of the same issues, which OCR investigated under the complaint numbers indicated above.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

**OCR Complaint No. 11-13-1140:**

5. The School denies students a free appropriate public education (FAPE) by failing to provide them with related aids and services.

OCR is responsible for enforcing certain federal civil rights statutes and regulations, including Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and its implementing regulation, at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in activities or programs that receive federal financial assistance (FFA). OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive FFA from the Department and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, 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. Because the School is a recipient of FFA and is a public entity, it is subject to the provisions of Title VI, Section 504, and Title II.

In reaching a determination on these complaints, OCR requested and reviewed data responses from the School. OCR conducted two onsite visits to the School where OCR interviewed remedial and non-remedial students and ELL students in student focus groups and also interviewed School personnel. In addition, OCR conducted interviews with the Complainants and their witnesses. As discussed more below, OCR identified compliance concerns and found sufficient evidence that the School failed to identify ELL students, failed to provide ELL students with an alternative language program that is effective in meeting their educational needs, and denied students a FAPE. OCR obtained a resolution agreement with the School which, when implemented, will resolve the compliance concerns identified. OCR will monitor the School's implementation of the agreement. OCR found insufficient evidence that the School's math placement and remedial placement processes and practices discriminated against students based on race, as alleged. OCR's specific findings and conclusions are discussed below.

***ELL Allegations: The School fails to identify all ELL students and to provide an alternative language program that is effective in meeting the educational needs of ELL students.***

**Legal Standard**

The Title VI implementing regulation at 34 C.F.R. § 100.3(a) and (b) provides that recipients of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin, exclude persons from participation in its programs, deny them any service or the benefits of its programs, or subject them to separate treatment.

The Departmental Policy Memorandum issued on May 25, 1970, entitled "Identification of Discrimination and Denial of Services on the Basis of National Origin" (the May 1970 memorandum), 35 Fed. Reg. 11,595, clarifies OCR policy under Title VI on issues concerning

the responsibility of schools to provide equal educational opportunity to language minority students. The May 1970 memorandum states in part: “[w]here the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” The May 1970 memorandum, as affirmed by the U.S. Supreme Court in *Lau v. Nichols*, 414 U.S. 563 (1974), continues to provide the legal standard for the Department’s Title VI policy concerning discrimination on the basis of national origin against language-minority students.

In December 1985, OCR issued a document entitled “The Office for Civil Rights Title VI Language Minority Compliance Procedures” (December 1985 memorandum). In September 1991, OCR issued a Memorandum entitled “Policy Update on Schools Obligations toward National Origin Minority Students with Limited-English Proficiency” (September 1991 memorandum). These documents outline the standards and procedures used to evaluate school districts for compliance with Title VI in this area. In summary, a school must identify which of its national-origin minority students have limited English proficiency, and provide them with an effective program that affords them meaningful access to the school’s educational program.

Where an inability to speak and understand the English language excludes national-origin language-minority children from effective participation in the educational program offered by a school, the school must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. *See* May 1970 Memorandum. A school must provide alternative language services to all national-origin language-minority students who need such services. *See* December 1985 Memorandum.

## **Background**

During the 2012-2013 school year (the first class of students at the School), there were seven identified ELL students in the School XXXX. The School’s Program Manager (PM) XXXX informed OCR that parents/guardians were issued a home language survey (HLS) at the outset of the school year and that he then communicated with the Office of the State Superintendent of Education (OSSE) to see if OSSE has any “existing data” on students, including their WIDA-ACCESS scores. The PM confirmed to OCR that he was able to obtain WIDA-ACCESS scores for all seven identified ELL students. In addition to the HLS, the School also requires parents/guardians to fill out a registration form that asks whether “the student [was] born in the United States,” the student’s “country of birth,” and “years residing in the United States.”

When discussing the seven identified ELL students, the teachers mentioned four *additional* students whom they believed had language concerns, but had not been identified by the School. One of the teachers informed OCR that she knew that XXXX. The School provided OCR with copies of the registration forms, including the HLS, for these four students. According to the HLS that each of these students’ parents/guardians submitted to the School prior to the 2012-2013 school year, all four parents/guardians indicated “yes” when asked whether there was a language other than English spoken in the home and whether the child communicates in a language other than English. Though the HLS form states that “if the answer to [the above

questions] is ‘yes,’ the law requires that your child’s English language proficiency be assessed,” there is no indication that these students’ language proficiency was assessed.

The Head of School (HOS) informed OCR that he is not sure how ELL students are served in the School. The School, through its counsel, informed OCR that it serves ELL students under a Specifically Designed Academic Instruction in English (SDAIE) model. However, the HOS admitted to OCR that he is not aware of this model as it is not under his “purview.” The HOS was also unsure which School personnel implement the SDAIE model.

The PM, who is responsible for providing services to ELL students, informed OCR that the SDAIE model includes classroom supports, such as graphic organizers, explicit instruction in vocabulary, labeled models, and alternative presentation of material. He clarified that these supports are primarily provided to students in the classroom, but that he also provides pullout language support “if needed.” <XXXX Two Sentences Redacted XXXX> The PM informed OCR that when he learns of ELL students, through HLS surveys and their WIDA-ACCESS scores, he administers a self-designed reading test<sup>2</sup> to them as he believes that the WIDA-ACCESS scores that all ELL students have received can be outdated and inaccurate. If the PM determines that an ELL student is “on grade level,” he will then talk to the student’s teachers “to see if accommodations are needed.” If he believes that the students are struggling with reading, he will “give accommodations in reading based on what [s/he] need[s].” Despite this account, none of the teachers who OCR interviewed (all of whom serve ELL students) informed OCR that they were ever consulted about providing students with ELL services.

The documentation that the School provided to OCR also states that ELL students who need additional reading and language supports were provided “pullout in our Reading Lab.” Of the seven identified ELL students in the School, the PM explained that four of them were placed in Reading Lab. The documentation that the School provided to OCR indicates that XXXX and the PM provided pullout services to these four ELL students. However, XXXX informed OCR that she is not aware that any of the students that she serves is even identified as ELL. She opined to OCR that she thought one of them may be ELL, but that she does “nothing” with regard to ELL services. She clarified that she is unaware if they receive any specific services. When asked if she had any concerns about students’ receipt of ELL services, she stated: “I don’t; but I don’t know what [ESOL] services means.”

It is not clear whether parents/guardians of ELL students are provided with notice that their children are receiving services. The documentation provided by the School states that parents/guardians “do not make final decisions as to whether students are provided with ELL services and support. Parents are not required to provide consent for ELL services or support. Parents are not given the opportunity to opt out of ELL services or support.” Despite the School’s written position to OCR, the HOS informed OCR that he does not know whether parents/guardians are required to consent to students’ receipt of services or whether they can refuse these services. The PM informed OCR that parents were informed of their child’s ELL eligibility in June 2013, and that they were notified to “check back” in August 2013 when their

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<sup>2</sup> XXXX, it does not appear that this assessment was validated for the purpose of assessing the needs of ELL students, particularly as the assessment was described to assess their “reading,” but did not appear to include the other three skill areas for English proficiency: speaking, comprehension, and writing.

WIDA-ACCESS scores would be available. He is not aware of any policy where parents can provide consent to ELL services or can reject services.

The HOS informed OCR that teachers have the responsibility to ensure that ELL students are receiving their services. The PM told OCR that teachers are provided with “cheat sheets” that outline the “accommodations” that ELL students should receive. The sheets also are used to notify teachers of the related aids and services that students with disabilities are eligible to receive. In situations where the student is both ELL and has a disability, the sheet does not differentiate ELL-specific services from disability-related services. If a student is only ELL, then the teachers receive a sheet for each ELL student listing the student’s “ELL accommodations,” such as providing a student with “preferential seating” and “small group testing, if needed.” <XXXX Two Sentences Redacted XXXX>

Though the teachers received these “ELL accommodations” cheat sheets, they were not provided with instruction or training on the significance of the sheets (i.e., that they are to provide these “ELL Accommodations”) or any information about the SDAIE Model. The written response that the School’s counsel provided to OCR states that “[c]ontinued professional development for teachers to assist them in supporting ELL students has been provided on an ongoing basis as needed by [the PM]. Additional consultation and support has been provided by [the PM] to individual teachers based on specific needs of individual students.” However, the PM clarified to OCR that teachers are *not* provided with “ongoing training,” but do receive “general training” about ELL services at the beginning of the year. This “general training” discussed both ELL students and students with disabilities. The training did not discuss any interventions or services that are specific to ELL students. While the training provided examples of the types of “accommodations” or related aids and services that can be appropriate for ELL students *with disabilities*, the presentation did not specifically discuss ELL services.<sup>3</sup>

Most of the teachers who were aware that they were teaching ELL students informed OCR that they did not provide any ELL services for these students. The teachers generally informed OCR that they do not recall receiving information about specific services for ELL students and instead were provided with a list of students’ disability-related related aids and services. Many of the teachers informed OCR that they were unaware of the ELL-identified students in their classes, making it impossible for them to provide these ELL students with any specific services. When asked about a specific ELL student, the teacher admitted that the student XXXX.

Finally, the written information that the School’s counsel provided to OCR states that the HOS evaluates the quality of the ELL program and is responsible for overseeing the day-to-day operations. However, the School did not provide OCR with documentation showing that such an evaluation had been done. In fact, the HOS informed OCR that he is unsure whether the School has a formalized process for ensuring that ELL students are accessing the curriculum. OCR reviewed the ELL students’ grades and test scores. Three of the five identified ELL students

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<sup>3</sup> The training is also not provided to teachers who join the School after the school year started. One of the teachers informed OCR that because she joined the School in XXXX, she never received training on ELL students. Also, even though the PowerPoint presentation used in the training at the beginning of the year states that “accommodations for ELLs are usually NOT the same for students with disabilities,” the PM informed OCR that “a lot of the accommodations from the IEP are the same” for ELL services.

who are receiving specific services consistently earned “D” and “F” grade averages for each grading period of the 2012-2013 school year. <XXXX Sentence Redacted XXXX>. Overall, identified ELL students earned an average cumulative grade of 65.2% for the 2012-2013 school year, while non-ELL students earned an average cumulative grade of 76.7%. The PM informed OCR that the School does not provide any checks-ins or review of ELL students to determine if they are accessing the curriculum. We do not have any information about how the School plans to exit ELL students from its SDAIE model.

## **Discussion**

As mentioned above, a school must identify which of its national-origin minority students have limited English proficiency, and provide them with an effective program that affords them meaningful access to the school’s educational program. OCR identified concerns with the School’s process for identifying ELL students. OCR identified at least four students whose parents/guardians indicated on the HLS that they did not speak English in the home, yet these students were never assessed to determine whether they were ELL. These four students were never evaluated by the School to determine if they are ELL. As a result, OCR identified concerns with the School’s process for evaluating ELL students. Also, the School’s enrollment forms include language that may chill or discourage the participation of students based on their actual or perceived citizenship or immigration status, as discussed in OCR’s May 6, 2011 Dear Colleague Letter. Specifically, the enrollment form asks parents/guardians to indicate whether “the student [was] born in the United States,” the student’s “country of birth,” and “years residing in the United States.” Because these inquiries on the registration form may chill or discourage the participation of students based on their actual or perceived citizenship/immigration status, it is possible that parents/guardians did not accurately indicate their children’s language proficiency.

OCR also considered whether the School provided the identified ELL students with meaningful access to the School’s educational program. In evaluating whether a school is providing ELL students access to the educational program, OCR determines whether the school has chosen a program model for providing educational services to ELL students that is based upon a sound educational approach or upon a legitimate experimental strategy. OCR then assesses whether the school is effectively implementing the educational theory it adopted. A school must allocate adequate and appropriate staff and resources to implement its chosen program properly. Finally, OCR considers whether the school has taken action if the program, after a legitimate trial, fails to produce results indicating that the language barriers confronting students are actually being overcome. A school will be in violation of Title VI and its implementing regulation if it does not provide services designed to overcome effectively the language barriers of all its ELL students.

OCR first determined that the School chose a program model for providing educational services to ELL students: the SDAIE model. As mentioned above, this model is based primarily on classroom supports provided by general education teachers and some pull-out services as needed.

OCR then considered whether the School allocated adequate and appropriate staff and resources to effectively implement the SDAIE model. As mentioned above, the School did not provide the teachers with training about the SDAIE model. Instead, the teachers were provided with “cheat

sheets” that listed “ELL accommodations,” without any instruction about how to implement these “ELL accommodations.” The instructors providing pullout services were also unaware of their obligations to provide specific services to ELL students, especially XXXX. As stated above, she informed OCR “I don’t know what [ESOL] services means.” Instead of providing separate pullout services to ELL students, the PM provided ELL students with disability-related services required under their IEPs. He did not provide any pullout services to ELL students without disabilities.

Based on teachers’ and ELL students’ accounts, teachers were not providing ELL students with specific services. Teachers overwhelmingly informed OCR that many of them were not even *aware* of the ELL students in their classroom, and consequently did not provide these students with any specific services or classroom supports. Also, because parents/guardians are not provided with notice of the services that their ELL children are eligible to receive, they are not in any position to raise complaints or concerns about whether the services are provided. As a result, OCR identified concerns with the School’s failure to properly and effectively implement the SDAIE model.

OCR also notes that it obtained some evidence that any specific services provided to ELL students were not effective in overcoming language barriers. ELL students reported to OCR that they experienced difficulty understanding the classroom lessons. One ELL student informed OCR that s/he understands the classroom lessons “85% of the time,” while another ELL student informed OCR that “I don’t understand English a lot [in class].” A third ELL student explained that if s/he does not understand a lesson, “they move on without you. You can get help after school but some of us can’t stay after.” XXXX ELL students – on average – performed about 10 percentage points lower than their non-ELL peers. There does not appear to be any assessment of the students’ ability to access the curriculum. Finally, OCR considered that the School has taken no action to determine if the program, after a legitimate trial, failed to produce results indicating that the language barriers confronting students are actually being overcome.

As a result, OCR identified sufficient evidence that the School failed to identify and to provide services designed to overcome effectively the language barriers and to access the educational program of all its ELL students. OCR obtained a resolution agreement with the School which, when implemented, will resolve the compliance concerns identified. OCR will monitor the School’s implementation of the agreement.

**504 Allegation: The School denies students a FAPE by failing to provide with them related aids and services.**

**Legal Standard**

The Section 504 regulation, at 34 C.F.R. § 104.33, requires a school to provide a FAPE to each qualified individual with a disability in the school’s jurisdiction, regardless of the nature or severity of the individual’s disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met and are based upon adherence to the procedural

requirements of Section 504 pertaining to the educational setting, evaluation and placement, and the provision of procedural safeguards. OCR interprets the regulation implementing Title II as imposing substantially similar requirements to those found in the regulation governing Section 504. Implementation of an individualized education program (IEP) is one means of satisfying the FAPE requirement under Section 504.

## **Discussion**

### *Documentation of Related Aids and Services*

As mentioned above, Section 504 requires the School to provide special education and related aids and services to students with disabilities. The PM XXXX informed OCR that as the Section 504 Coordinator who attends IEP and Section 504 meetings, he drafted the language for most of the related aids and services in students' individualized plans (i.e., individual education programs (IEPs); behavioral intervention plans (BIPs); and Section 504 plans). The School provided OCR with documentation of 36 students who have been identified as having a disability and are served under an individualized plan. As written, the specific related aids and services in the individualized plans are vague and it is not clear how a teacher would implement some of the services required in the plans.<sup>4</sup> For example, plans indicated that certain students are eligible to receive a "modified workload," but did not specify what that meant and how it could be implemented. When asked how teachers would learn how to implement this service for an individual student, the PM clarified that they would know this if they attended the IEP or Section 504 meeting that discussed "modified workload." However, he did not clarify how this information would be conveyed to teachers who did not attend these meetings or in situations where these meetings occurred at the students' previous schools – where the School's teacher would not have been present. In another example, many plans included "test administered at the best time of day," without an explanation about the students' best time of day. The PM clarified that this service is "very individualized per class, per student, per situation." When asked how teachers would know how to implement this testing service, he admitted that he does not know. He said that he would rely on the teachers to determine the best time of day for each student.

In addition, many plans required "tests administered over several days," without specifying the number of days. The PM informed OCR that he treats this service "flexibly," with the School working with the parents and student "to figure out what to do." However, it does not appear that this flexible approach with the parents and student and the School actually happens as the PM did not convey this flexible approach to teachers. OCR also identified at least one IEP with inconsistent services, where a student was to receive XXXX. The PM acknowledged to OCR that one of those services should have come out of the student's IEP.

As a result of the vague language in students' individualized plans, many teachers did not understand how to implement some specific related aids and services. OCR spoke with teachers who collectively taught all of the 36 students with disabilities serviced under individualized plans. The teachers informed OCR that they were unclear about how to implement some of the

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<sup>4</sup> While OCR normally doesn't second guess educational decisions, the prevalence of vaguely worded plans and the resulting documented difficulties in implementing represents the sort of "extraordinary circumstance" that warrants OCR intervention.

related aids and services and, consequently, did not fully implement the plans. For example, a teacher informed OCR that she did provide XXXX. A different teacher informed OCR that one of her students told her that XXXX. Three teachers separately informed OCR that they would provide a student with extended time on tests by permitting the students to finish their tests after school, instead of during the school day. This is problematic as the student should not be required to come to school outside of the school day to receive his/her related aids and services and can result in students not receiving this service if they are unable or even forget to finish their tests after school. Two different teachers separately informed OCR that they did not know what “flexible scheduling” meant – though it was listed in their students’ individualized plans. Another teacher informed OCR that he had XXXX. Because many services documented in the students’ individualized plans are vague and unclear, teachers are unable to implement many of these services. As a result, students who are not receiving related aids and services under their individualized plans are being denied a FAPE.

### *Implementation of Section 504 Plans, IEPs, and BIPs*

While the PM provided a one-time, general training on Section 504 and gave teachers “cheat sheets” of students’ approved related aids and services, these efforts fell short of providing students with a FAPE. In addition to the above-mentioned examples of teachers not providing students with services that are not clearly described on students’ individualized plans, the teachers overwhelmingly admitted to OCR that they were not implementing many of these related aids and services to students in their classrooms. In fact, the interviews with the teachers strongly suggested to OCR that the teachers did not understand the significance of students’ related aids and services and the requirement that each and every service/related aid listed in a student’s individualized plan must be implemented for each student.

When asked about three specific students, at least three teachers separately informed OCR that they were unaware that these students have disabilities and are served under individualized plans. <XXXX Sentence Redacted XXXX>. Another teacher admitted that one student “never got services,” and that two other students were not receiving services. Three teachers informed OCR that a specific student was not receiving “services” that he was required to receive under his individualized plan. Despite receiving the cheat sheets, other teachers informed OCR that they were unaware of the specific related aids and services that their students with individualized plans were approved to receive. One teacher informed OCR that one of her students “didn’t seem to need [approved] accommodations” and therefore did not receive them. Though many students are approved to receive “breaking of assignments into smaller segments” and “testing at the best time of day,” none of the teachers that OCR interviewed provided these services. Very few students who were required to receive small group testing received this service and instead tested with their entire class. <XXXX Sentence Redacted XXXX>

Many of the teachers also did not provide related aids and services to students who refused these services or who did not specifically request such services. One teacher informed OCR that she did not provide a student with XXXX (though it was required under the student’s IEP) because he “declined.” <XXXX Sentence Redacted XXXX>. Two other teachers informed OCR that they only read test questions aloud if the specific students in their classes who required this related service wanted them to read the questions. The teachers did not inform the PM or any

other School personnel about these refusals. This is problematic because if the students are refusing their related aids and services, their IEP is not being implemented. In that situation, the School should notify the student's parents/guardians and, if necessary, consider whether to convene a group of knowledgeable persons in accordance with the procedural requirements of Section 504 to determine whether any changes should be made to students' individualized plans.

There is also evidence that students with disabilities serviced under individual plans were not performing well. Of the 36 students served under individualized plans, 18 (50%) earned average grades of Ds and Fs in all of their courses throughout the school year. Overall, students with disabilities earned an average 64.6% GPA during the 2012-2013 school year, while students without disabilities earned an average GPA of 77.9%. In fact, as early as December 2012, the School placed 7 (19%) of the 6-8<sup>th</sup> grade students with disabilities in a remedial program for students who were identified as failing the entire grade and not eligible for promotion to the next grade. However, the School placed 13 (5%) of the 6-8<sup>th</sup> grade students without disabilities. As a result, OCR found sufficient evidence that the School failed to provide students with related aids and services.

#### *Section 504 Coordinator*

The Section 504 regulation at 34 C.F.R. § 104.7 requires the School to designate an individual to coordinate the School's compliance with Section 504. While the School has designated the PM as the Section 504 Coordinator, he does not have any background, experience, or training in complying with Section 504 and fails to understand the School's responsibility to provide students with a FAPE. As mentioned above, the Section 504 Coordinator framed the specific related aids and services in most individualized plans for students. Many of the students' related aids and services contained in students' individualized plans were vague, making them difficult for teachers to implement. He was unable to articulate to OCR how he expected the related aids and services to be implemented and was clearly unable to provide such guidance to teachers. As a result, OCR identified concerns with the ability of the School's designated Section 504 Coordinator to coordinate the School's compliance with Section 504.

#### *Unilateral determinations of appropriate related aids and services*

Finally, when making placement decisions, including any determinations about the specific services and related aids to provide to a student with a disability, the Section 504 regulation at 104.35(c) requires that such determinations are to be made by a group of persons, including persons knowledgeable about the student, the meaning of evaluation data, and the placement options. Despite this requirement, many of the students' individualized plans require "extended time on subtests," but do not specify the amount of extended time. The PM informed OCR that he believed it is "usually standard" for students to receive time and a half. He informed OCR that he does not believe that individualized plans typically include the specific length of extended time. He then said that he would give double time as a "default." When asked about the meaning of "flexible schedule," the PM admitted that he "can't remember" what this meant. It appears that the PM often unilaterally determined the specific services and related aids that students should receive and did not always make individualized determinations as to the nature of the related aids and services that students were eligible to receive. As a result, OCR identified

concerns with the School's process for making placement decisions. OCR obtained a resolution agreement with the School which, when implemented, will resolve the compliance concerns identified. OCR will monitor the School's implementation of the agreement.

### **Math Placement Allegation**

The Complainants informed OCR that African American and Hispanic students were frequently misplaced in math courses; meaning they were either placed in math courses that were inconsistent with their placement scores (including placement in math courses that were *less* rigorous or *more* rigorous than prescribed by their placement scores), or they were placed in math courses without taking a placement exam.

The School provided OCR with detailed information about how it assigned students to math courses. For each grade level, the School set cutoff test scores that corresponded to specific math courses: Math 8/7, Pre-Algebra, Algebra 1, and Algebra II. Under this process, if 5<sup>th</sup> grade students scored 20 or higher on the 5<sup>th</sup> grade math placement test, they would receive a second assessment. If they scored 7 or higher on the second assessment, they would be placed in Pre-Algebra. Otherwise, all other 5<sup>th</sup> graders were placed in Math 8/7.<sup>5</sup>

If 6-8<sup>th</sup> grade students scored higher than 30 on their placement tests, they were to receive a second assessment. If they scored 7 or higher on the second assessment, then the School would place them in Algebra 2, otherwise, they would be placed in Algebra 1. Students who scored between 27-29 on the 6-8<sup>th</sup> grade assessment were to be placed in Algebra 1 automatically. Students who scored between 24-26 were considered to have scored in a grey area, and were placed in either Pre-Algebra or Algebra 1. According to a School math teacher (Math Teacher A), he reviewed these grey area students' assessments to see if they showed their work and if they did well on certain questions that involved fractions. Based on Math Teacher A's review, these grey area students were referred to either Pre-Algebra or Algebra 1. Finally, all 6-8<sup>th</sup> grade students who scored 23 and below were supposed to be automatically placed in Pre-Algebra.

OCR reviewed the placement scores and math placements of each student enrolled in the School during the 2012-2013 school year. OCR identified several students who were placed outside of the School's math placement process:

- 4 5<sup>th</sup> graders did not receive a second assessment even though they scored above 20 on the initial assessment;
- Many 5<sup>th</sup> graders received the second assessment even though they did *not* score above 20 on the initial assessment;
- 16 6-8<sup>th</sup> graders who scored 23 or below were placed in Algebra 1 instead of Pre-Algebra;

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<sup>5</sup> As discussed more under the remedial course section, the School later created Math 7/6 for fifth grade students performing poorly in Math 8/7. OCR did not identify any concerns with the School's process for placing students in Math 7/6.

- 6 students who scored between 27-29 on the initial assessment were misplaced, as some were placed in Pre-Algebra (a less rigorous course than their scores suggested) while others were placed in Algebra 2 (a more rigorous course than their scores suggested); and
- 30 students were placed in math courses with either no initial placement test scores or no scores on the second assessment.

These misplaced students include African American, Hispanic, and White students.

When asked about these misplacements, the Head of School (HOS) informed OCR that any situations where students did not receive initial or second placement tests were administrative errors that occurred while the School was opening for its first year during the placement test process. One of the other math teachers involved in making math placements (Math Teacher B) informed OCR that any situation in which a student failed to receive a second assessment was a “proctor error.” Math Teacher A informed OCR that he believes that students were not required to take the second assessment, and some of them may have opted out of taking it.

With regard to the 5<sup>th</sup> grade students who scored under 20 but took the second assessment, Math Teacher B informed OCR that the reason why these students received the second assessment is because the School changed its cutoff score for the second assessment midway through the math placement process. Math Teacher A explained that the cutoff score for the second placement test was initially set at 18 for 5<sup>th</sup> grade students. However, because the students took the math placement tests throughout the summer of 2012, both math teachers observed that many of the 5<sup>th</sup> grade students scored 19 and 18 on the placement tests, and so they readjusted the cutoff score to 20 midway through the assessment process. As a result, several 5<sup>th</sup> grade students who scored under 20 took a second assessment. With regard to any other inconsistent placements, Math Teacher B stated that there is “some possibility of human error.”

OCR did not find that the School considered students’ races in placing students outside of its math placement process. Instead, the School primarily relied on students’ placement scores in making math course assignments. The School informed OCR that situations where students were placed in math courses that were inconsistent with their placement scores were a result of administrator errors involved with the School opening for its first year. Also, because White, Hispanic, and African American students were similarly placed in math courses in a manner that was inconsistent with the School’s placement process, OCR did not find sufficient evidence that Hispanic and African American students were treated less favorably than their similarly situated White peers in the School’s math placement process. As a result, OCR found insufficient evidence to substantiate this allegation.

### **Remedial Course Placement Allegation**

OCR reviewed the School’s remedial courses and other remedial programs to determine whether the School placed students in segregated, remedial courses that provided these students with fewer educational opportunities than other students based on race. Specifically, OCR reviewed the Targeted Intervention Program (TIP) and the following courses: English Foundations, Math

Lab, Reading Lab, and Math 7/6. For the reasons discussed below, OCR found insufficient evidence to substantiate this allegation.

### *TIP*

About mid-way through the 2012-2013 school year, the School initiated the Targeted Intervention Program (TIP) to provide remedial instruction to 6<sup>th</sup>-8<sup>th</sup> grade students who were expected to be retained in the same grade.

Ultimately, 20 students entered TIP halfway through the school year. Entry into the program required parental consent and many parents did not consent to TIP placement. Of the original 20 students placed in TIP, XXXX. Seventeen students finished the school year in TIP. Of these 17 students, 14 (82%) were African American, XXXX. In the 6<sup>th</sup>-8<sup>th</sup> grade overall in 2012-2013, 165 students (56%) were African American (non-Hispanic); 27 students (9%) were Hispanic, and XXXX.

### *TIP Analysis*

Under a disparate impact analysis, OCR must establish that the recipient utilized a facially neutral policy, process or practice that had a disproportionate adverse effect on a group protected by Title VI. This effect must be statistically significant. As TIP was a facially neutral program,<sup>6</sup> OCR analyzed the data regarding the students placed in TIP to determine whether there was a disparate impact on African American and Hispanic students. Because the School opened in 2012 and thus only had one year of TIP enrollment data<sup>7</sup> and also because very few parents consented to place their children in TIP, the number of students placed in TIP was extremely small (17 students in TIP overall, out of 265 White, African American and Hispanic 6<sup>th</sup>-8<sup>th</sup> graders). OCR found that any racial disparity for TIP was not statistically significant and therefore concluded that TIP did not have a disparate impact on African American and Hispanic students.

Although OCR did not find a statistically significant adverse impact based on race with respect to TIP, the information gathered in the course of OCR's investigation showed that the School failed to consistently apply the same criteria to all students in its TIP admission process. Given the ramifications of entering TIP (e.g., students were retained in the same grade level as soon as they entered TIP; students no longer received letter grades; students no longer attended electives of their choice with their non-TIP peers; students no longer ate lunch with their non-TIP peers; etc.), OCR encourages the School to consider the implications of developing a remedial program that has such ramifications on students and to ensure that the School applies consistent criteria in identifying students for such a program.

### *English Foundations, Math Lab, Reading Lab, Math 7/6*

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<sup>6</sup> OCR did not find sufficient evidence that the School treated students differently based on race in its placement process.

<sup>7</sup> The School represented to OCR that it is discontinuing TIP and will not use this program for the current 2013-2014 school year.

OCR reviewed the following remedial courses: English Foundations, Math Lab, Reading Lab, and Math 7/6. Students were placed in the English Foundations course based on the results of their English placement tests. During the school year, the School added additional courses (Math Lab, Reading Lab, and Math 7/6) to assist students who were struggling with math and reading. With regard to Math Lab and Reading Lab, the School relied on teacher recommendations, students' placement test scores, and course grades when making student assignment decisions. As mentioned earlier, Math 7/6 was also created after the school year began to serve students struggling in the Math 8/7 course. Students who averaged below 75% in Math 8/7 and were recommended for a lower-level class by their teachers, were placed in Math 7/6. OCR reviewed the placement of each student in these remedial courses, and did not find sufficient evidence that race was considered when making remedial course placements. Through interviews with teachers, School administrators, and students and by reviewing the School's placement of all students in these remedial courses, OCR found that the School offered an educational justification for placing students in such classes (i.e., the students were struggling in math and/or reading and these courses provided these students with necessary instruction so that they could access the School's accelerated curriculum).

OCR also did not find sufficient evidence to support that students in these remedial courses were provided with fewer educational opportunities than students in non-remedial courses, as alleged. After all, students were placed in English Foundations and in Math 7/6 because they demonstrated through either assessment tests or course grades that they required a lower level curriculum for math and English than their peers. Had they been placed in a higher level English or math class, the School was concerned that they would do poorly and not be able to access the curriculum. The students in Math Lab and Reading Lab remained in their initially assigned math and English courses. These Lab courses provided students who had been struggling in their math and English courses with extra support and assistance. If anything, the evidence suggests that these courses provided students with increased educational opportunities. As a result, OCR found insufficient evidence that students in remedial courses were provided with fewer educational opportunities than their peers who were not placed in remedial courses.<sup>8</sup> Because OCR did not find that students in remedial course were treated adversely, there was no need to determine whether students were treated differently in the assignment of remedial courses based on race. OCR therefore found insufficient evidence to substantiate this allegation.

## **Conclusion**

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<sup>8</sup> OCR also reviewed the assignment of students to specific elements, which are cohorts of students in the same grade who are grouped together and take core academic courses together, to determine whether any of the elements provided students with remedial instruction. The Complainants informed OCR that they believed that certain elements, particularly fifth grade elements of Magnesium and Neon, provided students with remedial instruction. These elements were formed when Math 7/6, as discussed above, was created during the school year. The students in Neon and Magnesium were grouped together because they were all enrolled in Math 7/6, which is the lower-level math course for fifth graders, the students were enrolled in the same core courses as other fifth graders. One of the fifth grade teachers who taught the students in one of these elements clarified that the teachers were never provided with any instruction to give the Magnesium or Neon students a different curriculum in their core courses, other than math, and OCR did not find, through interviews other School personnel, that the students in Neon and Magnesium were given a different curriculum. As a result, OCR found insufficient evidence that students received remedial instruction as a result of element assignment.

This concludes OCR's investigation of the complaint and should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

Please be advised that the School may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainants may file another complaint alleging such treatment. 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.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

If you have any questions or concerns regarding this letter, please contact Kay Bhagat at (202) 453-6598 or [Kay.Bhagat@ed.gov](mailto:Kay.Bhagat@ed.gov); Sebastian Amar at (202) 453-6023 or [Sebastian.Amar@ed.gov](mailto:Sebastian.Amar@ed.gov); or Jane Ehrenfeld at (202) 260-0790 or [Jane.Ehrenfeld@ed.gov](mailto:Jane.Ehrenfeld@ed.gov).

Sincerely,

Dale Rhines  
Acting Team Leader  
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