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

April 10, 2015

Agnella Katrise Perera, Superintendent
Isle of Wight County Public Schools
820 W Main St.
Smithfield, Virginia 23430

RE: OCR Complaint No. 11-15-1013
Letter of Findings

Dear Dr. Perera:

The purpose of this letter is to inform you of our disposition of the above-referenced complaint, which was filed with the District of Columbia Office of the Office for Civil Rights (OCR), U.S. Department of Education, on October 14, 2014, against Isle of Wight County Public Schools (the Division). The Complainant filed the complaint on behalf of her daughter (the Student), who attends the Division's XXXX School (the School). The Complainant alleged that:

1. The Division discriminated against the Student on the basis of disability XXXX by failing to promptly and properly reevaluate her and provide her with appropriate regular or special education and related aids and services (e.g., by amending her Section 504 Plan):
   a. In September 2014, based on a May 3, 2014 Psychological Report and a September 17, 2014 letter from the Student's neurologist; and
   b. In October 2014, based on the above Report and letter, as well as an October 20, 2014 letter from the Student's neurologist; and
2. The Division discriminated against the Student on the basis of disability and retaliated against her by, on October 2, 2014, removing her from the Junior Varsity (JV) field hockey team for missing two practices and not staying for at least half of two Varsity field hockey team games (which take place after the JV games).

As we informed you in our previous letter, OCR enforces 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 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 education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. These laws also prohibit recipients of Federal funding and public entities from retaliating against individuals who make efforts to assert or protect their rights or privileges under these laws. Because the Division receives Federal financial assistance from the Department and is a public entity, it is subject to the provisions of the above laws and we have jurisdiction over it. Because the Complainant has alleged discrimination and retaliation under the above laws, we have jurisdiction over the allegations.

In making our determinations concerning the allegations, we reviewed the information provided by the Complainant in: her complaint; her email submissions; and during telephone interviews, including separate interviews of her and her husband on December 8, 2014. We also considered the information provided by the Division in its January 19, 2015 and subsequent submissions, and during two telephone interviews on April 10, 2015. What follows is a discussion of our findings and conclusions regarding the allegations.

<u>Allegation 1</u>: Division discriminated against the Student on the basis of disability XXXX by failing to promptly and properly reevaluate her and provide her with appropriate regular or special education and related aids and services (e.g., by amending her Section 504 Plan): (a) in September 2014, based on a May 3, 2014 Psychological Report and a September 17, 2014 letter from the Student's neurologist; and (b) in October 2014, based on the above Report and letter, as well as an October 20, 2014 letter from the Student's neurologist.

The standard governing our consideration of allegation 1 is that Section 504 and Title II require that public school systems provide students with disabilities with a free and appropriate public education (FAPE), that is, regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the school systems meet the needs of students without disabilities. OCR's investigation of an allegation that a school system has failed to include particular services and/or provisions in a Section 504 or similar plan is normally limited to ensuring that the school system has complied with the FAPE process requirements of Section 504 and Title II relating to educational setting, evaluation and placement, and procedural safeguards. For example, in reevaluating a student with a disability, a school system is required to promptly evaluate evidence indicating that the student *may be* in

need of a change in the disability-related aids or services the school system is providing to the student. If the school system has evidence that a change in the student's plan *may be* needed, the school system must have reevaluated the student and, in doing so, (1) drawn upon a variety of sources in the evaluation process; (2) established and followed procedures to ensure that information obtained from all sources was documented and carefully considered; (3) ensured that the placement decision was made by a group that included persons knowledgeable about the student, the meaning of the evaluation data, and the placement options; and (4) notified the parent or guardian of his or her due process rights.

Except in extraordinary circumstances not present in this case, OCR does not investigate individual placement and other educational decisions made by a school system, but merely ensures that such decisions are made consistent with the above process requirements (individuals have the option of filing for a due process proceeding to challenge the substance of such decisions). We interpret Title II as imposing similar requirements.

The evidence indicates that the Complainant and Division staff attended Section 504 meetings for the Student on September 18 and 26 and October 21, 2014. Applying the above FAPE requirements to these meetings and the reevaluation of the Student that took place at this time, we first look to whether the Division drew upon a variety of sources in the reevaluation process. The evidence indicates that the evidence considered by the Division at these meetings included the September 17 and October 20, 2014 letters from the Student's pediatric neurologist, the Student's test grades and classroom performance, the disability-related aids or services which the Division was providing to the Student, and input from the Complainant and the Student's teachers, Principal or Assistant Principal, and guidance counselor/Section 504 case manager. We find that, in reviewing the evidence, the Division drew upon a variety of sources in the reevaluation process.

We next examine the evidence in light of the second FAPE requirement: that the Division must have established and followed procedures to ensure that information obtained from all sources was documented and carefully considered. The Division's "Section 504 Procedures Manual" provides that the Section 504 Eligibility Committee should consider "information provided and considered by the [Child Study] committee." At page 5. See http://www.iwcs.k12.va.us/uploads/docs/section_504_procedures_manual.pdf. The Manual also provides (at page 4) that the Child Study Committee:

> . . . should review information from variety of sources. The information reviewed should pertain to the student's functioning in the school environment and should

> include, as available: the referral, relevant educational records, any specialty reports, teacher comments, and parent information.

We find that the above procedures ensure that information obtained from all sources is documented and carefully considered, as required by Section 504 and Title II, and that the Division's submissions demonstrate that, with one exception, it followed these procedures in this case in connection with the three September/October 2014 Section 504 meetings. For example, it not only considered but amended the Student's Section 504 Plan based on the September 17 and October 20, 2014 letters from the Student's pediatric neurologist.

The above-referenced exception relates to the Division's review of the May 3, 2014 Psychological Report. The Report (at pages 3 & 4) included the following observations concerning the Student.

> Analysis of her General IQ score with her WRAT 4 scores indicates a significant discrepancy between her overall cognitive ability and her Math Computation score. This type of discrepancy suggests that an unusual process is interfering in her learning in this area. . . . While [the Student's] Math Computation score is average compared to that of same-aged peers, it is not commensurate with her IQ, her current grade level in school, or with her other achievement scores. A math learning disorder may be present. She is likely to struggle in math through her high school and college years without assistance.

In its March 6, 2015 supplemental narrative response (at pages 1 and 2), the Division stated that, although it considered the Report, it did not amend the Student's Section 504 Plan because the Student had received a "B" in each of the two math courses she had taken, and that that "B" was commensurate with the final grade of "B" that she had received in each of her other courses. Consequently, the Division concluded (at page 2) that "additional achievement testing in the area of math was not warranted at that time." However, grades alone are an inadequate basis on which to conclude that further testing or a change in services is not needed. For example, as a result of the "significant discrepancy between her overall cognitive ability and her Math Computation score" (see above quote from the Report) and the lack of math-related services, the Student may have been required to work much harder in her math classes to achieve the same grade ("B") in those courses as she did in her other courses. Therefore, we have concerns regarding whether the Division "carefully considered" the Report. On April 9, 2014, the Division signed an agreement that will resolve these concerns (enclosed). OCR will monitor the Division's implementation of the agreement to ensure that it fully complies with it.

We note that one of the Complainant's specific assertions was that the Division failed to consider the following text in the September 17, 2014 letter from the Student's pediatric neurologist.

> [The Student] is on a fairly regimented sleep schedule, and should be allowed to leave activities with her family rather than ride a bus which ultimately could interfere with her sleep.

In response to OCR's request, the Division submitted statements from two of the individuals who attended the September 18, 2014 Section 504 meeting for the Student at which the September 17th letter was reviewed. The School Assistant Principal and Section 504 Case Manager, in separate April 3, 2015 statements, both stated that, although the above text of the September 17th letter was considered, no changes were made to the Student's Section 504 Plan because all students are permitted to take personal transportation to and from extracurricular activities rather than riding a bus.

We now examine the evidence in light of the third FAPE requirement: that the Division must have ensured that the placement decision was made by a group that included persons knowledgeable about the Student, the meaning of the evaluation data, and the placement options. The evidence indicates that the following individuals attended the September 18 and 26 and October 21, 2014 meetings: the Complainant, the Student's teachers, the Principal or Assistant Principal, a guidance counselor and a Section 504 case manager. We find that these individuals were knowledgeable about the Student, the meaning of the evaluation data, and the placement options.

The fourth and final FAPE requirement is that the Division must notify the parent or guardian of due process rights. The Division's submissions indicate that the Complainant was provided with a copy of the Division's "Section 504 Procedural Safeguards (http://www.iwcs.k12.va.us/uploads/docs/section_504_procedural_safeguards.pdf), following the September 18 and 26 and October 21, 2014 meetings. We find that this constituted notice to the Complainant of her due process rights at each of these meetings.

Neither the Complainant's February 6, 2015 rebuttal of the Division's narrative responses to OCR's December 18, 2014 request for information nor her other submissions support a finding that the Division is in violation of Section 504 or Title II in any respect other than the one discussed above, which latter issue will be resolved upon the Division's completion of the relevant parts of the resolution agreement for this case.

<u>Allegation 2</u>: **The Division discriminated against the Student on the basis of disability and retaliated against her by, on October 2, 2014, removing her from the JV field hockey team for missing two practices and not staying for at least half of two Varsity field hockey team games (which take place after the JV games).**

As stated above, Section 504 and Title II prohibit disability discrimination and retaliation in educational programs and activities receiving Federal financial assistance and by public school systems. Because there cannot be a finding of discrimination or retaliation when a school system has a legitimate, nondiscriminatory, nonretaliatory, nonpretextual reason for taking its action, and we find that the Division had several such reasons, we will limit our analysis to that issue. However, we first note that the Division treated the Student less favorably than other students on the JV field hockey team (the Team) because she was the only student it removed from the Team in Fall 2014, as she was the only student who committed three or more offenses.

The Division's submissions indicate that it removed the Student from the Team because she:

1. On September 17th, failed to stay for at least half of the Varsity field hockey team game without the Coach's permission;
2. Wrongfully accused her teammates of stealing her safety goggles;
3. Talked over and argued with the Coach on several occasions;
4. Posted negative comments about her teammates on social media;
5. Changed positions during a game without the Coach's permission;
6. Failed to bring equipment (a mouth guard and safety goggles) to practice;
7. Failed or refused to follow the Coach's directions during drills on several occasions;
8. Quit playing during a game;
9. Failed to put forth any effort during several practices;
10. On September 11th, missed a practice without the Coach's permission;
11. On September 26th, left a practice early to babysit without the Coach's permission; and
12. On October 1st, failed to stay for at least half of the Varsity field hockey team game without the Coach's permission.

See the Coach's Statement (a copy of which was provided to the Complainant) and the School Principal's October 16, 2014 "Confidential Report" concerning the Student's dismissal from the Team (a copy of which the Complainant indicated she had received from the Division). In the latter document, the Principal added that: (1) the Student's conduct violated seven of the ten commitments made by the Student when she signed the

"SHS Field Hockey Team Agreement" on August 20, 2014; (2) the Student's "Physical Examination" form (which was signed by the Complainant's husband as the Student's physician on July 2, 2014) represented that the Student was "Cleared [to participate] Without Restrictions" rather than any of the four other options, e.g., "Cleared with Following Notation" and "Not Cleared for Participation."

Because the Complainant's submissions and those of the Division indicate that students may be dismissed from the Team for three offenses, we will discuss only whether the Division's first three reasons for removing the Student from the Team were legitimate, nondiscriminatory and nonretaliatory.

With respect to the Division's first reason for removing the Student from the Team (that she failed to stay for at least half of the Varsity field hockey team game without the Coach's permission on September 17th), the Complainant stated, in her November 19, 2014 narrative response to OCR's request for information (at page 3), that:

> A further example of discrimination and disparate treatment can be found when, following the JV game at XXXX on 9/17/2014, [the Complainant] requested from [the] Coach . . . that [the Student] be allowed to leave early. A verbal team policy states that the JV members must stay for at least half of the Varsity [field hockey] game in order to show their support. It is not written in the team contract. However, the Varsity game had started late, [the Student] was experiencing side effects including nausea and headaches from a new anti-seizure medication, and had a great deal of homework to do. Riding home with her mother instead of the team bus would allow for more time to complete homework, take her evening medication on time, and get sleep, which is crucial to preventing more seizures and which was clearly recommended to the District by her Neurologist. [The Complainant] asked [the Coach] if this would be ok. [The Coach's] response included highly offensive, ignorant, and insensitive statements. These include "I mean, what is she doing with her time? Last week she had the flood day (day off school due to severe weather), that doctor's appointment…I don't know, maybe she just needs to learn to manage her time better."

At the time of the September 17, 2014, game, the Student's Section 504 Plan did not include any provisions related to her participation in athletics and, in particular, did not indicate that she needed to leave games early. There is also no documentation indicating that, at that time (or at any other time prior to the Student's October 2, 2014 removal from the Team), the Complainant had provided the Division with any medical information that indicated the Student may have needed any modifications or services related to athletics.[1]

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[1] Although the Complainant did later provide the Division with an October 20, 2014 letter from

The Complainant submitted emails that she had sent to the Coach on May 15, August 12 and August 13, 2014 in which the Student's Epilepsy was mentioned in the contexts of: (1) the Student missing a practice because of a seizure-related medical appointment (the May 15th email); (2) a question concerning whether the trainer had adequate knowledge of "heat injury, sodium and electrolyte imbalances" and the Student's "seizure disorder" when she responded to the Student's feelings of nausea and dizziness during an August 12, 2014 practice (the August 12th email), and (3) a follow-up to the August 12th email in which the Complainant informed the Coach that the Student had reassured the Complainant that the trainer was aware of the Student's Epilepsy diagnosis and "had discussed hydration status and diet with her" (the August 13th email). However, neither the context nor substance of these emails evidenced an explicit or implicit indication to the Coach that, as a result of her XXXX, the Student was in need of athletics-related services or modifications (as discussed below, they also did not include any mention of XXXX).

The Complainant also submitted a June 10, 2014 email that she stated she sent to the Coach, which email provided information about the Student's XXXX and could possibly be interpreted as having indicated that the Student might have been in need of disability-related services or modifications relative to her Team participation. However, the email was sent to herself, neither the Coach's name nor email address appears in either the "To" or "Bcc" line of the email, and the Complainant was unable, in response to an OCR request, to provide documentation that this email was sent to the Coach. Moreover, the Division has informed OCR that the Coach denies having ever received that email.

The Complainant also asserted that the need for athletics-related services or modifications was discussed at the Student's Section 504 meetings. However, there is no documentation indicating that such a discussion took place at either of the two such meetings in September 2014 (the only 2014 meetings that preceded the October 2, 2014 removal of the Student from the Team). For example, none of the documentation relating to these meetings (e.g., the notices and notes of -- and the Section 504 Plans discussed at -- these meetings) indicates that such a discussion took place. Additionally, statements were received from the School Assistant Principal and the Student's guidance counselor/Section 504 case manager (the latter of whom the Complainant asked be contacted about this issue) concerning the two September 2014 Section 504 meetings (which both attended). These submissions indicate that both recalled a few disparaging statements by the Complainant about the coaches, their offer of a meeting with the coaches and the Complainant to discuss her negative opinion of the coaches, and the Complainant

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the Student's neurologist in which he recommended that the Student be excused from non-competitive game activities due to her seizure activity, that letter was not submitted to the Division until well after the Division removed her from the Team).

declining that offer. However, neither recalled any discussion of "accommodations" for the Student in connection with the Team or athletics in general.

In light of the above discussion and evidence, the Division was not required to apply the Team's rules differently to the Student than it did to other students.

The Complainant further challenged the Division's first reason for removing the Student from the Team by stating that:

> In fact, [the] Vice Principal . . . did state that no coach could bench a student who had missed practice for academic reasons, nor could a coach require JV players stay to attend some or all of the Varsity game, particularly when academic study time in the evening was of a concern.

See page 2 of the Complainant's December 2, 2014 rebuttal of the School Principal's October 16th Confidential Report. In a statement by the Vice Principal (a copy of which was provided to the Complainant), he provided the following information relating to the Complainant's above assertion.

> I met with the parents on October 2, 2014 to discuss their concerns about the field hockey team. At no time did I state that my understanding was that the Student was benched due to staying after school to complete academic obligations. That was the parents' position. I stated to the parents that, in my opinion, it would not be best practice for a coach to penalize a player for missing practice due to completing academic requirements such as attending a tutoring session or making up a missed test. I also stated, however, that whether any student's absence from practice for personal reasons us is excused would be within the discretion of the coach.

Another basis on which the Complainant challenged the Division's first reason for removing the Student from the Team was the following.

> The SHS Field Hockey Team Agreement (aka "Contract") – we were given this agreement just prior to the start of the season and did sign it after reviewing it. While it does outline several expectations about behavior, effort, and attitude, it utilizes vague and subjective terms that leave much to the coach's discretion and opinion. It does not lend itself to the use of clear guidelines or rules which can be more objectively proven. Importantly, it DOES NOT address staying until half-time of the varsity game, though this was a key initial reason for her being removed from the team.

See page 3 of the Complainant's December 2, 2014 rebuttal. The evidence indicates that staying for at least half of Varsity games was required of JV athletes. In the Complainant's November 19th narrative response (quoted above), she acknowledged that: "[a] verbal team policy states that the JV members must stay for at least half of the Varsity [field hockey] game in order to show their support." Consequently, the fact that this requirement did not also appear in the "Team Agreement" is not a basis for finding that the Student's failure to attend at least half of the Varsity game was not a legitimate, nondiscriminatory, nonretaliatory reason for removing the Student from the Team.

The Complainant also challenged the validity of the requirement that Team athletes stay for at least half of two Varsity field hockey team games by, at page 5 of her February 6th rebuttal, posing the following question:

> Why do coach [the Coach], [another coach], and the AD feel that they can make a requirement that she stay until half-time of the varsity game when principal says academics come first, the vice principal says they can't, and when [the Student's] neurologist recommends against it?

The Complainant's question was addressed above in response to her other reasons for challenging the requirement.

Finally, at page 9 of the Complainant's February 6th rebuttal, she stated the following:

> Asking her to stay for half of the varsity game is irrelevant to her participation on the team. . . . Put another way, watching the varsity team play is not an essential aspect of the activity.

OCR is not in a position to second-guess the Division's requirements for participation on the Team, so long as those requirements do not discriminate against students in violation of one of the laws enforced by our agency. As discussed above, the Student's Section 504 Plan at the time did not entitle her to any modification of the team's rules and the Complainant had not provided information to the Division indicating that modifications were necessary. Also, the evidence does not support a finding that the team rules were applied differently to the Student than to students without disabilities or to students who had not, as far as Division personnel knew, engaged in protected activities. [2]

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[2] A protected activity is the assertion of a right under the laws we enforce, for example, the right to be free of disability discrimination or to receive disability-related aids and services.

Based on the above evidence and analysis, we find that the Student's failure to stay for at least half of the Varsity field hockey team game without the Coach's permission on September 17th was a legitimate, nondiscriminatory, nonretaliatory reason for removing the Student from the Team.

Concerning the Division's second reason for removing the Student from the Team (that she wrongfully accused her teammates of stealing her safety goggles), the Complainant asserted, at pages 9 and 10 of her December 2, 2014 rebuttal of the School Principal's October 16th Confidential Report, that:

> When [the Student] reported her field hockey safety goggles missing, [the] Coach . . . directed her to go check her bag again because she was "often misplacing her belongings" or words to that effect. The goggles were not there, though [the Student] knew that because she had already checked. . . . Two players (. . .) reported to [the Student] that theirs were missing as well. . . . Other players (. . . and several other teammates) stated that they had seen another teammate (. . .) with [the Student's] goggles in her possession. . . . [The Student's] attempts to resolve the matter were seen by the coaching staff as "accusing another player of theft" and "stirring up drama."

The Complainant's statement indicates that she and the Student were the only individuals to pursue the issue of whether missing goggles had been stolen, even though two other students were initially unable to locate their goggles and one never did locate them. The Coach, in her statement, asserted that the Student's "actions on these two occasions [the other occasion being when the Student purportedly posted negative comments about her teammates on social media] negatively impacted team morale for nearly a week." Although such conduct need not be specifically prohibited by the "Team Agreement" to constitute a reason for removing an athlete from the Team (see above discussion),[3] the "Team Agreement" does include the following relevant provisions.

2. I will be an encouraging person to all my teammates.
3. I will not speak badly of another teammate while we are on the field during practice/game/school.
4. I will have a positive attitude everyday that we have [a] field hockey practice/game/meeting.

[3] For example, conduct such as having drugs at an activity, physically attacking another student during an activity or possessing a weapon during an activity are not prohibited by the Team Agreement, but could constitute legitimate nondiscriminatory, nonretaliatory reasons for removing a student from an activity.

. . . .

6. I realize that my actions are a true reflection of my attitude and I will work hard to maintain a positive attitude about my teammates during the entire season of field hockey.

Based on the above evidence and provisions of the Team agreement, we find that the Student's wrongful accusation that one of her teammates stole her safety goggles and the impact that this had on the Team was a legitimate, nondiscriminatory, nonretaliatory reason for removing the Student from the Team.

Regarding the Division's third reason for removing the Student from the Team, the Coach's and Assistant Coach's statements both indicate that the Student talked over and argued with the Coach on several occasions, and that the Student was unwilling to accept directions from the Coach. The Complainant indicated (at page 5 of her February 6th rebuttal) that, assuming this happened, "interrupting, blurting out, and poor verbal impulse control are all associated with ADHD." However, again, the Student's Section 504 Plan did not include services related to these behaviors or indicate that she required modifications to team rules based on her disability, and the Complainant did not provide the Division with any documentation indicating that such services or modifications were necessary.[4]

Based on the above evidence and discussion, we find that the Student talking over and arguing with the Coach on several occasions was a legitimate, nondiscriminatory, nonretaliatory reason for removing the Student from the Team.

We will now examine whether any of the Division's three above reasons for removing the Student from the Team were a pretext or excuse for discriminating or retaliating against the Student. Evidence of pretext in this case may include: (1) statements by Division staff that lack credibility, express disability-related stereotypes, or refer to a protected activity engaged in by the Complainant, her husband or the Student; (2) inconsistency of the removal with applicable policies, procedures or practices; (3) other instances of the School's application of its policies, etc., governing the removal of athletes from the Team in which similarly situated students without disabilities or students who had not, as far as Division personnel knew, engaged in protected activities were treated more favorably than the Student; (4) a change in the criteria governing the removal of students from athletic teams during the pendency of this complaint that favored students without disabilities over students with disabilities; (5) previous discriminatory or retaliatory

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[4] For example, neither the May 15th, August 12th, nor August 13th email discussed above mention the Student's ADHD and, although ADHD is mentioned in the June 10th email, the evidence does not support a finding that it was sent to the Coach (as also discussed above).

treatment of the Complainant, her husband or the Student by the Division; and (6) suspicious timing of the Division's actions.

The Complainant made many assertions concerning the bias and/or lack of veracity of statements made by Division staff. For example, she stated that the bases:

> . . . offered by the District to [the Complainant, her husband and the Student] on 10/9/14 as the reasons for which they removed the Student from the team are easily discredited as [a] pretext for the real reason: because the Student has disabilities and the team would not acknowledge that her 504 extended to athletic participation.

There is no evidence indicating that the Division refused to acknowledge that Section 504 covers athletic participation. Moreover, in the single context within which the Division's duty to provide the Student with particular modifications is addressed in this letter (in the discussion of the Division's first reason for removing the Student from the Team), we found that it was not required to provide such modifications because, at that point, the Complainant had not yet provided the Division with any information indicating that the Student needed such modification.

The Complainant also quoted several of the Coach's statements, for example:

> Make sure you all have your equipment because you all know [the Student] has misplaced her goggles. [the Complainant's November 19th narrative statement, at page 3, and her December 2nd rebuttal, at page 10]

> [F]rom now on, anyone stirring up this type of drama [which referred to the Student's actions] will be dismissed from the team. [the Complainant's November 19th narrative statement, at page 4]

We find that these comments do not "lack credibility, express disability-related stereotypes, or refer to a protected activity engaged in by the Complainant, her husband or the Student" (the first type of evidence of pretext described above).

The Complainant also disagreed with many comments by Coach and other Division staff. For example:

> Coaches felt they went "out of their way" to help [the Student]. [the Complainant's December 2nd rebuttal, at page 11]

> Coaches requested a parent meeting but parents declined to meet. [the Complainant's December 2nd rebuttal, at page 11]

Additionally, the Complainant asserted that:

> The evidence proves that the Division wrongfully refused to communicate or meet with the parents despite multiple attempts and then inaccurately claimed that the parents did not communicate or meet. [the Complainant's February 6th rebuttal, at page 1]

Conflicting recipient and complainant characterizations of the evidence do not, on their own, establish pretext. A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, sufficient evidence to prove that it is more likely than not that unlawful discrimination or retaliation occurred or is occurring. When there is a significant conflict in the evidence or assertions by the parties and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witnesses or evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law. Because the Complainant and the Division are making contradictory assertions concerning the issues quoted above and a preponderance of the evidence does not support the Complainant's positions, there is insufficient evidence that the Division's positions are wrong or that its articulation of those positions is pretextual.

Another challenge the Complainant made to the credibility of the statements of Division staff relates to the assertion that the Division informed her of additional reasons (to those it initially provided to her) for the removal of the Student from the Team, and did so well after the removal took place. For example, in the Complainant's December 2nd rebuttal, at pages 5 & 8, and her February 6th rebuttal, at page 3. We find that the subsequent addition of reasons for a school system's actions is not, on its own, a sufficient basis on which to find that those reasons are pretextual.

Finally, the Complainant challenged the timing of the Division's removal of the Student from the Team in the following manner.

> IV. Timing. She was dismissed on 02 Oct. The "two week" period of poor performance and behavior that the coach mentioned then is framed by two incidents, two weeks apart. Both involve requesting and then taking [the Student] home after her game was over and before Varsity had reached half-time even though the coach refused our request.

The Complainant's February 6th rebuttal, at page 5. This challenge appears to be in the nature of the evidence of pretext described in item 6, above ("suspicious timing of the Division's actions"). We do not consider the fact that the removal took place immediately after the Student's second premature departure from a field hockey game to be "suspicious" or, on its own or in combination with other evidence, pretextual. We note here that actions such as removals from athletic teams logically occur very soon after conduct justifying a removal takes place.

Based on the above findings and conclusions and the enclosed resolution agreement, we are closing our investigation of the complaint effective the date of this letter.

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

Please be advised that the Division may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

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

If you have any questions about this letter or the outcome of this complaint, please contact Peter Gelissen, the OCR attorney assigned to this case, at (202) 453-5912 or peter.gelissen@ed.gov.

Sincerely,

/S/
Dale Rhines
Program Manager
District of Columbia Office
Office for Civil Rights

Enclosure