



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

XXXX

Dr. James Roberts
Superintendent
Chesapeake Public Schools
312 Cedar Road
Chesapeake, Virginia 23322

Re: OCR Complaint No. 11-16-1090
Letter of Findings

Dear Dr. Roberts:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on XXXX, against Chesapeake Public Schools (the Division). The Complainant alleges that the Division discriminated against the Student on the basis of disability, and retaliated against the Student. Specifically, the complaint alleges the following:

Allegation 1: The District retaliated against the Student for the Complainant requesting a Section 504 plan in XXXX when:

- a. On XXXX, the Student's XXXX teacher (the Teacher) took the Student's mobile phone away from her and sent her to the Assistant Principal's Office, recommending her for in-school suspension;
- b. On XXXX, the Teacher locked the Student's epipen, benedryl, and XXXX in a XXXX closet and referred the Student to two assistant principals to have her written up and suspended for "XXXX;"
- c. From XXXX-XXXX, the District denied the Complainant's request to remove the Student from the XXXX class;
- d. From XXXX through XXXX, the District placed the Student in the XXXX or the XXXX during the period she would have been in XXXX class, and the Teacher did not provide her with work to do;
- e. On XXXX, the District placed the Student in the XXXX for half the period she would have been in XXXX class and placed her in the XXXX for the second half and provided her with no work;

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- f. The District placed the Student in the XXXX on XXXX with a packet of assignments for XXXX class, but did not provide the Student with a workbook to complete the packet of assignments until XXXX;
- g. On XXXX, the Teacher claimed that the Student did not turn in several pages of an assignment and told the Student that she will have to redo the assignment or receive a 0;
- h. Throughout the latter part of XXXX, throughout XXXX, and into early XXXX, the Teacher took XXXX weeks to enter grades for several of the Student's XXXX assignments and several instances of XXXX participation, even though these grades were supposed to be entered daily;
- i. From the beginning of the XXXX school year until the present, any time the Student missed class for a medical reason in her XXXX or XXXX classes, the Teacher gave the Student an unexcused absence, requiring you to petition to have it changed to an excused absence.
- j. On XXXX, and XXXX, the Teacher gave the Student unexcused absences in her XXXX or XXXX classes because she was in the XXXX or the XXXX, requiring you to petition to have them changed to excused absences.

Allegation 2: The District failed to timely evaluate the Student for a 504 plan when the School did not hold an initial 504 meeting until XXXX, despite first being placed on notice of a potential disability on XXXX.

Allegation 3: The District failed to implement the Student's Section 504 plan when:

- a. Beginning on XXXX and continuing throughout XXXX, the Student's teachers did not place allergy warnings in their substitute teacher plans;
- b. On XXXX, the Student's XXXX teacher did not have industrial wipes available in the classroom;¹
- c. On XXXX, the School's assistant nurse did not administer the Student's epipen when she was having an allergic reaction.

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

¹ This allegation, as originally written in the Notification Letter dated XXXX, referred to the Student's XXXX teacher. The Complainant has since informed OCR that she mistakenly told OCR it was the XXXX teacher but it was actually the XXXX teacher who did not have industrial wipes available.

whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, or participates in an OCR proceeding. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

In reaching a determination, OCR reviewed documents provided by the Complainant and the Division; and interviewed the Complainant, the Student, and Division staff and administrators.

After carefully considering all of the information obtained during the investigation OCR found insufficient evidence to support Allegation 1a- j, Allegation 2, and 3c. OCR's findings and conclusions with regard to these allegations are discussed below. However, before OCR completed its investigation of Allegations 3a and 3b, the Division expressed willingness to resolve those allegations by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Background

The Student, a XXXX grade student, enrolled in the Division on XXXX. At that time, the Complainant told the Guidance Director at the School, who assisted when the Complainant enrolled the Student, that the Student carried an eipipen because the Student was allergic to XXXX.

Legal Standards and Analysis

Allegation 1: Retaliation

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, or participates in an OCR proceeding.

When analyzing a claim of retaliation, OCR will look at: 1) whether the Complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the Division took a materially adverse action against the Complainant; and 3) whether there is some evidence that the Division took the adverse action as a result of the Complainant's protected activity. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the Division has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the Division's reason for its action is a pretext, or excuse, for unlawful retaliation.

In considering whether retaliation occurred, OCR must first consider whether the Complainant engaged in a protected activity upon enrolling the Student on XXXX. An individual engages in a protected activity if he/she opposes an act or policy that he/she reasonably believes is

discriminatory or unlawful under one of the laws that OCR enforces, or makes a complaint, testifies, assists, or participates in any manner in an OCR investigation, proceeding, or hearing.

OCR determined that in an email dated XXXX, the Complainant requested a Section 504 Plan “to help address her special situation, and to help prevent future occurrences of her allergic reaction.” OCR determined that this constitutes a protected activity.²

Next, OCR will consider whether the Division took adverse action against the Student, as alleged by the Complainant. An adverse action is something that could deter a reasonable person from engaging in further protected activity. Petty slights, minor annoyances, and lack of good manners do not constitute materially adverse actions. Then, OCR will examine whether the Division has a legitimate, non-retaliatory reason for its actions and, if so, whether this rationale is pretextual.³

Allegation 1a

- a. The Complainant alleged that on XXXX, the Student’s XXXX teacher (the Teacher) took the Student’s mobile phone away from her and sent her to the Assistant Principal’s Office, recommending her for in-school suspension.

The Complainant alleged, and the Teacher does not dispute, that the Teacher took the Student’s mobile phone away from her on XXXX. OCR finds that taking the Student’s cell phone away and referring the Student for discipline was an adverse action against the Student, because, given the Student’s need for the phone for emergency purposes related to a severe allergy, these actions could deter a reasonable person in the Complainant’s situation from engaging in further protected activity.

The Complainant alleged that the Teacher took the Student’s cell phone as the Student was transferring it from her waist pouch to her back pack at the end of class. The Complainant stated that when the Student explained that she has to have her cell phone at all times because of her allergy the Teacher responded, “XXXX.”

In an interview with OCR, the Teacher gave a different version of events than those described by the Complainant. The Teacher stated that on XXXX, she made an announcement to all her students that they were in a “red zone,”⁴ to put away all electronic devices, and to take out a notebook and paper for a test. The Teacher stated that during the test, she noticed the Student

² The Complainant told OCR that when she enrolled the Student in the Division on XXXX, she notified the Director of Guidance that the Student had a life threatening allergy. Evidence provided by the Division corroborates this. OCR finds that the Complainant also engaged in a protected activity under Section 504 on this date by putting the Division on notice that the Student had a potential disability and inquiring about the Division’s process for ensuring that the Student’s needs with respect to the allergy would be met.

³ OCR notes that each of the adverse actions occurred within a relatively close period of time after the protected activities; thus, it finds sufficient causation for each allegation to establish a prima facie case.

⁴ The XXXX teacher confirmed in an OCR interview that the School implements a “red zone/green zone” system by which there are designated red zones where electronics and cell phones must be put away and must not be used. In the classroom it is left to a teacher’s discretion as to when a “red zone,” is implemented. According to the XXXX grade XXXX teacher, there are posters around the School indicating red zones and green zones.

holding a cell phone under the Student's desk and asked the Student to bring the phone to her. The Teacher told OCR that the Student asked her why she was taking away the phone, and she told the Student that it was a "red zone." The Teacher told OCR that the Student then said that she needed her cell phone because her notes for XXXX class were on the phone. The Teacher explained that she took the cell phone and turned it in to the security guard in front of the main office and wrote a referral for a violation of the Bring Your Own Device (BYOD) Policy. Thus, OCR finds the Division had a non-retaliatory reason for taking the Student's cell phone and referring her for discipline.

The Division's regulation regarding the use of privately-owned electronic devices (R 9-20.2) allows the Superintendent or designee to authorize students to possess devices at school for specific educational purposes under the direct supervision of a professional staff member. The regulation goes on to list the parameters of the use and possession of these devices, one of which is that the use of any device in the classroom is up to the discretion of the teacher, that the teacher may request at any time that the device be turned off and put away, and that failure of a student to heed this request may result in disciplinary action. The regulation is explained and clarified via the School's Bring Your Own Device (BYOD) policy published in the School's student handbook. In addition, students learn about the BYOD policy and "red zone/green zone" system at a beginning of the year assembly presentation of which one slide outlines the "Dos and Don'ts of the BYOD policy and reminds students to "adhere to zones." The Teacher's actions are consistent with this regulation and with the School's BYOD policy and "red zone/green zone" system.⁵

In addition, the Division provided OCR with a list of all students who the Teacher referred to the administration for violation of the BYOD policy. None of the XXXX students referred filed a complaint of discrimination against the Division during the XXXX school year. This is evidence that the Teacher referred students for discipline under the BYOD policy regardless of whether a student filed a complaint of discrimination against the Division.

OCR asked the Complainant if she had further information to support her allegation, and the Complainant stated that the XXXX Teacher's version of events was incorrect. Rather, the Student was transferring her phone from her waist pouch to her back pack at the end of XXXX class. The Complainant further asserted that the Student's Section 504 Team, including the XXXX Teacher, met earlier in the day on XXXX and signed a Section 504 Plan that allowed the Student to have her cell phone on her person at all times. In light of this, the Complainant questioned the XXXX Teacher's motive for taking away the phone.

OCR reviewed a copy of the minutes from the initial Section 504 meeting and a copy of the Section 504 Plan developed and signed at that meeting and determined that, although the Complainant requested a Section 504 Plan for the Student in an email to the Section 504 Coordinator dated XXXX, the Section 504 Team meeting was not scheduled until XXXX, and

⁵ The Division explained that some Division schools explicitly incorporate the "red zone/green zone" system into their written policies and others, like the School, do not. Rather students at the School learn about the system through reminders/descriptions from each teacher on the first day of school, direction in course syllabi, and through an opening school year assembly presentation.

the Section 504 Plan was only signed on XXXX, four days after the XXXX Teacher took the Student's phone away. Moreover, contrary to the Complainant's assertion, the XXXX Section 504 Plan did not include a provision allowing the Student to carry her cell phone on her person at all times. Lastly, the Complainant was unable to provide, nor could OCR find, evidence to indicate that the Student's handling of her cell phone was not in contravention of the BYOD Policy. Therefore, OCR finds that a preponderance of the evidence indicates that the Student's action were in violation of the BYOD Policy, and that at the time of the incident, the Teacher was not obligated to disregard that Policy pursuant to the Student's Section 504 Plan.

Thus, OCR finds that the reason given by the Division for taking the Student's cell phone and referring her for discipline is not a pretext for retaliation, since a preponderance of the evidence indicates that the Teacher's version of events is credible, the actions were consistent with District and School policy, and similarly situated students who had not asserted a prior protected activity were treated in a similar manner. Based on the above, OCR finds insufficient evidence to conclude that the Division retaliated against the Student when the Teacher took her cell phone and referred her for discipline, and it will take no further action with respect to Allegation 1a.

Allegation 1b

- b. On XXXX, the Teacher locked the Student's epipen, benedryl, and mobile phone in a media closet and referred the Student to two assistant principals to have her written up and suspended for "XXXX."

The Student told OCR that she was in XXXX class participating in an activity, and her XXXX bag with her cell phone and epi pen was on the floor next to her. The Student said that the XXXX Teacher told her that she had to put her bag out of the way, and the Student asked if she could put it on the XXXX Teacher's utility cart. The Student told OCR that before she put her bag on the cart, she asked the XXXX Teacher whether the cart was going to be out of the closet during class, and the XXXX Teacher indicated that it would be. The Student said that she was participating and she saw the XXXX Teacher put the cart in the closet, so she told the XXXX Teacher that she needed to have her bag with her at all times. According to the Student, the XXXX Teacher then called the XXXX to ask him if the Student had to have her bag with her at all times, and the XXXX indicated that she did not because then everyone would be allowed to have their bags at all times. The Student told OCR that she responded "everyone else does not have a life-threatening allergy." She stated that the XXXX Teacher gave her back her bag and sent her to the office to see Assistant Principal 2.⁶

The XXXX Teacher gave OCR a different version of the events that occurred on XXXX. She stated that at the beginning of class, the Student came to her and said she needed her epi pen and cell phone with her at all times, and she asked if she could place her XXX bag on the utility cart. The XXXX Teacher allowed her to do so, she said, because she often allows students to put items on her cart. The XXXX Teacher told OCR that after she got the students started on an activity, she moved the cart into the closet because it is a department-wide practice to keep carts out of way of students participating in the XXXX to prevent injury. She stated that after the cart

⁶ The Complainant told OCR that the XXXX Teacher returned the bag to the Student after the class was over and after the XXXX Teacher sent the Student to the Assistant Principal's office to be suspended.

had been in the closet for approximately ten minutes, the Student ran over to her and said that she needed to have her bag with her at all times. The XXXX Teacher told OCR that it took her approximately ten or twenty seconds to unlock the closet, retrieve the bag, and give it to the Student. When OCR asked the XXXX Teacher why she put the bag in the utility closet if she knew the Student needed her epi pen and cell phone with her at all times, she responded that the Student asked to put the bag on her cart and that her cart belongs in the closet during instructional time. She emphasized that she was trying to give instructions to a large group of students, more than 45 students just in her class, and that there were multiple classes using the XXXX at the same time. The XXXX Teacher stated that she knew the bag was easily accessible if the Student needed it. The Teacher denied having referred the Student for discipline.

According to the XXXX Teacher, who also was in the XXXX with his class when the incident occurred, he observed the XXXX Teacher and the Student talking but was not close enough to hear what was being said. He said that after the incident occurred, the XXXX Teacher asked him to watch her class while she went to see someone. He asked her what was going on, and she told him there was an issue with the backpack being in the closet. The XXXX teacher also told OCR that XXXX teachers routinely put their carts into the utility room closet before starting activities because the carts could be a safety hazard during XXXX activities.

OCR interviewed the XXXX, who said that the XXXX Teacher did not call him to the XXXX during the incident as alleged by the Student, but rather walked with the Student from the XXXX to his office. He stated that the XXXX Teacher explained to him that there was a situation with where the Student could put her book bag during XXXX class. He told OCR that he suggested to the XXXX Teacher that the Student sit out for the rest of the class period until it could be determined where she should put her book bag during future classes. The XXXX stated that he did not recall whether the XXXX Teacher said anything about the Student “XXXX” her or asked him whether the Student “XXXX.” He denied that the XXXX Teacher mentioned anything to him about referring the Student for discipline.

OCR interviewed Assistant Principal 2, who stated that on XXXX, the XXXX Teacher called her from a phone in the main office near the XXXX. Assistant Principal 2 recounted what the XXXX Teacher told her at the time, which was substantially similar to what the XXXX Teacher told OCR. Specifically, Assistant Principal 2 noted that when the Student realized that the cart was in the closet, she asked the XXXX Teacher for it back and received it. The Assistant Principal told OCR that she gave them some suggestions as to where the Student could put her bag that would not be a safety hazard. She said that every suggestion she made was unsatisfactory to either the Student or the XXXX Teacher. She said that ultimately she told them that the Student should sit out of the activity with her bag until they could determine what to do. Upon inquiry by OCR, Assistant Principal 2 denied that the XXXX Teacher sent the Student to her office to be disciplined. OCR further asked Assistant Principal 2 whether the XXXX Teacher mentioned anything to her about the Student being “XXXX.” She responded that she, not the XXXX Teacher, was the one who told the Student not to be “XXXX,” or disrespectful to the XXXX Teacher the day before the bag was locked in the closet. Assistant Principal 2 explained that on XXXX, the day before the incident occurred in XXXX, the Nurse called her to tell her that the Student came to the clinic to change for XXXX because the Student refused to change in the locker room. Assistant Principal 2 went to the XXXX class to make sure the Student was

o.k. and spoke to the Student outside the locker room. She told OCR that they discussed that the Student should not just announce to the XXXX Teacher that she is going somewhere else to dress, but rather she should explain the situation to the XXXX Teacher and ask permission. She further told the Student not to be “XXXX” to the XXXX Teacher.

In a follow-up conversation with the Complainant, she confirmed that the Student was ultimately not disciplined for the XXXX incident. She disputed the fact that the XXXX Teacher immediately returned the Student’s bag, noting that it was not given back until after the 45 minute class concluded. Nonetheless, the Complainant was unable to provide, nor was OCR able to find, any evidence indicating that the XXXX Teacher failed to give back the bag immediately after the Student’s request for it.⁷

Based on the above, OCR found sufficient evidence to conclude that the XXXX Teacher wheeled the cart with the bag holding the Student’s epi pen, phone, and Benadryl into the utility closet. OCR found, however, that there is insufficient evidence to conclude that the XXXX Teacher referred the Student to two assistant principals to have her written up and suspended for “XXXX.”⁸ Moreover, multiple witnesses indicated that the XXXX Teacher gave back the epipen as soon as the Student requested it. Given these facts, OCR finds that there is insufficient evidence of an adverse action. Specifically, OCR finds that because there is insufficient evidence of Student discipline or a prolonged period without her emergency medications or cell phone, the incident would not deter a reasonable person from engaging in further protected activity. Accordingly, OCR will take no further action with respect to Allegation 1(b).

Allegation 1 c-f and i-j

- c. From XXXX-XXXX, the District denied the Complainant’s request to remove the Student from the XXXX class;
- d. From XXXX through XXXX, the District placed the Student in the main office or the media center during the period she would have been in XXXX class, and the Teacher did not provide her with work to do;
- e. On XXXX, the District placed the Student in the main office for half the period she would have been in XXXX class and placed her in the media center for the second half and provided her with no work;
- f. The District placed the Student in the media center on XXXX with a packet of assignments for XXXX class, but did not provide the Student with a workbook to complete the packet of assignments until XXXX;

⁷ Rather, in an interview with the Student, she stated that after what appears to be a brief discussion with the XXXX, the Teacher “XXXX.”

⁸ All of the witnesses interviewed about this allegation denied that the Student was referred for discipline for this incident. Neither the XXXX nor Assistant Principal 2 had the authority to suspend the Student because the former is not an upper-level administrator and the latter was not the assistant principal for XXXX grade. Finally, OCR reviewed the Student’s discipline file and confirmed that there was no referral for this incident.

- i. From the beginning of the XXXX school year until the present, any time the Student missed class for a medical reason in her XXXX or XXXX classes, the Teacher gave the Student an unexcused absence, requiring you to petition to have it changed to an excused absence.
- j. On XXXX, the Teacher gave the Student unexcused absences in her XXXX or XXXX classes because she was in the main office or the media center, requiring you to petition to have them changed to excused absences.

Allegations c-f and i-j arise out of the same facts. Thus, OCR will discuss these alleged actions together and determine whether each constitutes retaliation.

OCR reviewed copies of emails that the Complainant provided to OCR. In an email to the Assistant Principal, dated XXXX, the Complainant writes, in part, “XXXX SENTENCE REDACTED XXXX. If [the XXXX Teacher] is not able to ensure [the Student’s] safety in her class, [the Student] needs to be with a teacher who will be able to ensure her safety. Pls [sic] advise.” OCR interviewed the Assistant Principal and the Principal about the Complainant’s request to remove the Student from the XXXX class. The Assistant Principal told OCR that the XXXX Teacher came to his office on XXXX to talk to him about an incident, as discussed previously, during which the XXXX Teacher placed the Student’s school bag, including her epipen, in the closet. While the XXXX Teacher was there, the Student also came to his office, and the Complainant called on the phone at the same time. The Complainant told the Assistant Principal that she did not believe that the XXXX Teacher was acting in the best interest of the Student and that she wanted the Student out of that XXXX class.

The Assistant Principal explained that he told the Complainant that he would try to find a way to move the Student out of that XXXX class, but then realized that there was only one other teacher teaching XXXX on the same day as the Student was currently taking XXXX. In order to transfer into the other teacher’s class, the Assistant Principal explained, the Student would have had to drop XXXX, and it was too far into the semester for the Student to be able to pick up another class to replace XXXX. The Assistant Principal told OCR that on XXXX, the Student came to the main office and wanted to talk to him and Principal. The Student told them that she did not feel that the teacher had her best interest in mind and that she did not feel safe in the XXXX Teacher’s class. The Student was permitted to stay in the office for the rest of XXXX period. The Principal scheduled a meeting for XXXX, at which time he told the Complainant that the Student should go to the main office during XXXX for that day and that beginning on XXXX, the Student could go to the media center during XXXX. The Assistant Principal told OCR that on XXXX, he brought work to the Student in the media center and that from XXXX, the Student went to the media center during XXXX class.

On XXXX, the Student’s 504 team met. At that meeting, the Complainant said that she would not put the Student back into the XXXX class. The Principal told OCR that, in order to prevent the Student from getting an “E” in XXXX and in order to ease the difficult relationship between the parent and the XXXX Teacher, he decided to allow the Student to attend XXXX with a XXXX grade class which met during the same time as the XXXX Teacher’s class. The

Complainant confirmed to OCR that the Student began attending the XXXX class with the other teacher as of XXXX.

OCR finds that while, from XXXX, the District did not grant the Complainant's request to remove the Student from the XXXX Teacher's class, it did place the Student in an alternate location during this time period, thus addressing the Complainant's concerns about the health and safety of the Student. Beginning XXXX, the District granted the Complainant's request and moved the Student to a XXXX grade XXXX class held at the same time as the XXXX Teacher's class. OCR finds that not granting the Complainant's request for XXXX days, while School administrators came up with a solution by which it could grant Complainant's request to remove the Student from the XXXX Teacher's class, was not adverse to the Complainant because this action would not deter a reasonable person from engaging in further protected activity. In fact, the District treated the Complainant more favorably than other parents/guardians that make such a request outside the add/drop period by working to find a solution that would allow the Student to be removed from the XXXX Teacher but still stay in the class so she could receive credit. Thus, OCR finds there is no prima facie case of retaliation with respect to Allegation 1c.

The Complainant alleged that on XXXX, when the Student was in the main office or the media center during the period she would normally be in XXXX, the District retaliated against the Student by not providing her with work to do. She further alleged that on XXXX, during the same period, the District retaliated against the Student by providing her with a packet of work but not providing the necessary workbook until XXXX. As stated above, the Student came to the Principal's office on XXXX, during the period she had XXXX, to tell him that she did not feel comfortable going to the XXXX Teacher's class any more. She was permitted to stay in the main office for that period. On XXXX, the Principal met with the Student and the Complainant and said that the Student could again come to the main office during XXXX class that day and could go to the media center during XXXX class on XXXX. According to the Assistant Principal, the Student's class rotated weekly between XXXX activities in the XXXX and XXXX education in the classroom. On XXXX, the class was in the XXXX doing physical activities so there was no written work to do. OCR reviewed a copy of the course syllabus, which corroborated that the Student's XXXX class was in the XXXX rotation during the week XXXX. The Assistant Principal recalled that the XXXX Teacher gave the Student an alternate assignment on XXXX. The Assistant Principal explained that, at first, he was responsible for providing work to the Student in the alternate location. The XXXX Teacher would put work in his box, he would bring it to the Student in the alternate location and then collect it from the Student at the end of the period and turn it in to the Teacher.

OCR finds that failure to provide work on XXXX is not adverse to the Student. The Student went to the Principal's office instead of going to XXXX class. This was not a scheduled meeting and neither she nor the School administration notified the XXXX Teacher that she would not be in class that day. OCR further finds that the School's failure to provide work for XXXX days, from XXXX is not an adverse action because during those days the class was doing physical activities XXXX and there were no alternate written assignments to provide to the Student. In addition, OCR finds that the Teacher providing the Student with a packet of assignments on XXXX, for XXXX, but not providing the Student with a workbook to complete the assignments until the next day, is not an adverse action because not having the workbook for one day is a

minor annoyance and would not deter a reasonable person from engaging in further protected activity. Furthermore, the Student did not miss any other subject matter besides XXXX and ultimately received a grade of “A” for the course. Thus, OCR finds there is no prima facie case of retaliation with respect to Allegation 1(d), (e), and (f).

The Complainant further alleged that the District retaliated against the Student when the XXXX Teacher marked her as unexcused absent on XXXX, when she was permitted to be in the front office or media center before the Principal removed her from the XXXX Teacher’s class to the XXXX grade XXXX teacher’s class. The Complainant also alleged that the District retaliated against the Student when the XXXX Teacher marked the Student as unexcused absent every time the Student missed XXXX or XXXX class for a medical reason.

The XXXX Teacher confirmed that she marked the student as not in the classroom on some or all of the days identified by the Complainant. The XXXX Teacher explained that on XXXX, the Student was not in class, and she had not been informed by anyone that the Student had gone to the main office to speak to the Principal and Assistant Principal, so she marked the Student absent. The XXXX Teacher said that after XXXX, she was told that someone would let her know if the Student was in school. She further said that after XXXX, she was able to observe the Student in the XXXX in the other XXXX teacher’s class, and during the XXXX rotation, if the Student did not come into the classroom to pick up her folder she marked the Student absent. Thus, OCR found that the Division took an adverse action against the Complainant when the XXXX Teacher marked the Student as absent when she was in the office or media center because being marked absent when the Student was permitted to be in an alternate location could deter a reasonable person from engaging in further advocacy.

Section 110 of OCR’s *Case Processing Manual* states that OCR will close a complaint if we obtain credible information indicating that the allegations are resolved and there are no systemic allegations. In an interview on XXXX, the Complainant informed OCR that the Student’s absences have now all been excused, but said it was because she “fought to have them removed.” The Complainant provided copies of emails she wrote to the Principal informing him that the Student had erroneously been marked absent from XXXX class and asking him to rectify the mistake. In each instance, the Principal promptly responded to the Complainant that he would do so. OCR reviewed a copy of the Student’s Period Student Attendance Profile dated XXXX, approximately a month after the Complainant told OCR that the absences had been excused. The document indicated that the Student had XXXX excused absences and zero unexcused absences. Accordingly, OCR is closing allegations 1(i) and (j) because they have been resolved.⁹

Allegation 1g

⁹ OCR further found that the XXXX Teacher had a legitimate, non-retaliatory justification for marking the Student absent from class. Several witnesses explained to OCR in interviews that the District’s attendance system, which was new at the time, allowed teachers to indicate whether a student was absent but did not allow teachers to indicate whether an absence was excused or unexcused. Indicating whether an absence was excused or unexcused was done by the Attendance Clerk, upon receiving documentation about the absence from the parent. The requirement to provide documentation of the reason for an absence is outlined in the Student Handbook, which the parent received at the beginning of the school year. According to the Division, as of XXXX, the School attendance database was modified to allow teachers to indicate whether a Student’s absence is excused or unexcused.

- g. On XXXX, the Teacher claimed that the Student did not turn in several pages of an assignment and told the Student that she will have to redo the assignment or receive a 0

Beginning on XXXX, when the XXXX class was in the XXXX for a week, the Student was in the XXXX grade teacher's classroom doing work provided by the XXXX Teacher. The Student told OCR in an interview that after she was moved to the XXXX grade class for XXXX, the XXXX teacher gave her a packet of work each Monday that was due on Friday. According to the Student, XXXX. The XXXX Teacher said that the Student needed to finish the packet. XXXX 3 SENTENCES REDACTED XXXX.

In an interview with OCR, the XXXX Teacher corroborated the Student's account of the interaction, except she denied having told the Student that she must redo the assignment or get a "0." Rather the XXXX Teacher told OCR she asked the Student to look for the assignment because she did not have it in the folder, or to re-do the assignment.

Regardless of whether the XXXX Teacher told the Student she would receive a "0" for the assignment if she did not re-do the work, OCR finds that the XXXX Teacher did not take an adverse action against the Student when she asked the Student to redo an assignment that the XXXX Teacher did not find in the folder with other completed work. Having to re-do one page of a packet amounts to a minor annoyance and would not deter a reasonable person from engaging in further protected activity. Moreover, the Student XXXX the page the XXXX Teacher said the Student had not turned in. The Assistant Principal spoke to the XXXX Teacher, and the Student received 100% on the assignment without having to redo any part of the assignment.

Based on the above, OCR finds there was no prima facie case of retaliation and so insufficient evidence with respect to Allegation 1g.

Allegation 1h

- h. Throughout the latter part of XXXX, throughout XXXX, and into XXXX, the Teacher took XXXX weeks to enter grades for several of the Student's XXXX assignments and several instances of XXXX participation, even though these grades were supposed to be entered daily.

The Complainant alleged that the Student Handbook says that grades are supposed to be entered daily but that it took several weeks for the XXXX Teacher to enter grades for some of the Student's XXXX and XXXX assignments. In an interview, the Student told OCR that the XXXX Teacher told the class at the beginning of the year that she would enter grades daily because it is a school policy. The XXXX Teacher told OCR in an interview that she tries to enter grades at least by XXXX of each week. She stated that she told the students in her class that the student database is a new program by which students and parents can check grades. The XXXX Teacher said that she has almost 100 other students in her classes and that she inputs all of her students' grades at the same time, without singling anyone out. The District told OCR that there is no policy about how often grades must be updated in the Student database.

OCR asked the Student how the XXXX Teacher not inputting her grades daily impacted her educational experience in class. The Student responded that because she was removed from the XXXX Teacher's class, she was essentially teaching herself the material the XXXX Teacher was teaching in class. She said that she found this very overwhelming and stressful and that she had no idea how she was doing in the class unless the XXXX Teacher inputted the grades

OCR finds that the XXXX Teacher did not take adverse action against the Student when she did not input her grades every day. The Student not knowing how she was doing in the class on a daily basis amounted to an annoyance and would not deter a reasonable person from engaging in further protected activity. Thus, there was no prima facie case of retaliation, and OCR finds insufficient evidence with respect to Allegation 1h.

Allegation 2: The District failed to timely evaluate the Student for a 504 plan when the School did not hold an initial 504 meeting until XXXX, despite first being placed on notice of a potential disability on XXXX.

The Section 504 regulation, at 34 C.F.R. § 104.35(a), requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. A district must conduct an evaluation before initially placing the student in regular or special education and before any subsequent significant change in placement.

While the Section 504 regulation requires a school district to conduct an evaluation of any student believed to need special education or related services before taking action toward initial placement, the regulation does not impose a specific timeline for completion of the evaluation. Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. An unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational opportunities provided to students without disabilities.

In addition to the requirement to provide FAPE, the Section 504 regulation, at 34 C.F.R. § 104.4(a), provides that no qualified person with a disability shall be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in a school district's programs or activities on the basis of disability. The Title II regulation contains a similar prohibition at 28 C.F.R. § 35.130(a). The Title II regulation, at 28 C.F.R. § 35.130(b)(7), also requires school districts to make reasonable modifications to policies, procedures, or practices when necessary to avoid discrimination on the basis of disability, unless the modification would fundamentally alter the nature of the service, program, or activity.

OCR interprets the above provisions to require that school districts ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of students without disabilities do not face a significant possibility of experiencing serious or even life-threatening reactions to their environment while they attend school, Section 504 and Title II require that school districts provide students with serious medical conditions (including allergy-related disabilities) with a medically safe

environment in which they do not face the possibility of serious or life-threatening reactions to their environment.

To provide FAPE to a student with an allergy-related disability and meet the standards referenced above, a school district must have a plan to meet the student's individualized needs. The plan must be based on an individualized consideration of the student's needs and should take into account procedures that limit or prevent the risk of exposure to the allergens in each type of school program or activity in which the student participates, including programs taking place in classrooms and common areas, the gymnasium, the cafeteria, and hallways, and during recess, extracurricular activities, field trips, and school-related activities. The plan should also set out procedures to follow when the student is exposed to allergens. A health care plan may comply with the provisions of Section 504, provided that the school district complies with the procedural requirements of the Section 504 regulation with respect to evaluation, placement, and procedural safeguards.

The Complainant alleged that the District failed to timely evaluate the Student for a 504 plan when the School did not hold an initial 504 meeting until XXXX, despite first being placed on notice of a potential disability on XXXX.

According to the Complainant, on XXXX, she registered the Student at the School and informed the guidance counselor, who was assisting with the registration process, of the Student's allergy XXXX. The Complainant said that the guidance counselor assured her that the School had other students with severe allergies and could handle the Student's allergy. OCR interviewed the Guidance Director at the School, who was the guidance counselor that assisted with the Student's registration during XXXX.(hereinafter referred to as Guidance Director) She confirmed that in XXXX, when the Complainant registered the Student for school, the Complainant told her that the Student carried an epipen. The Guidance Director stated that she explained to the Complainant that she should let the Nurse know and get a health plan. OCR interviewed the Nurse, who said that near the beginning of the XXXX school year, she received an email from one of the guidance counselors about the Student's XXXX allergy. The Nurse told OCR that before the school year began, she looked up the Student's class schedule and notified the Student's teachers of the XXXX allergy.

The Nurse stated that the Student brought Benedryl and an epipen to school on the first day of school, along with a completed Request for Administration of Medication form from the Student's doctor, detailing how and under what circumstances the medication should be administered. According to the Nurse, she entered the Student's medical information into a student data base and filed the forms in a binder in which she keeps information about students who have allergies. Upon inquiry by OCR, the Nurse stated that she did not refer the Student for evaluation under Section 504 because she generally does not refer students with allergies for evaluation under Section 504. She explained that a student who should be referred for evaluation under Section 504 is one "who has the potential to miss a lot of class time due to their medical condition, someone who might need extra time on assignments, someone who might be spending time in the nurse's office due to a medical condition."

Similarly, one of the assistant principals told OCR in an interview that, based on the documentation that the Complainant presented to the School, there was not enough information for the School to think that the allergy would impact the Student's education at that time and thus, no evaluation under Section 504 was necessary. She stated that the Nurse put the information about the Student's allergy into the student database to alert teachers that the Student had an allergy and implied that the teachers could have referred the Student for evaluation if they believed it was necessary. She further stated that the School has had other students with allergies who had medical plans that outline the medication(s) they take and what, if any, medications or equipment they are permitted to self-carry, but "they do not have a 504 Plan because they have not needed one."

According to the Complainant, on XXXX, the Student was exposed to some kind of XXXX allergen in the XXXX and broke out in hives. The Student took Benadryl, and went to the Nurse's office. On XXXX, the Complainant emailed all of the Student's teachers to inform them of the severity of the Student's allergy. The next day, according to the Complainant, the Student had an allergic reaction in XXXX class when another student in the class was eating XXXX. According to the Complainant, the Student developed hives, took Benadryl, and went to the Nurse's office.

The Division provided OCR with a copy of an email from the XXXX Teacher to the Complainant, dated XXXX, in which the XXXX Teacher responded to the Complainant's XXXX, email. In this response, the XXXX Teacher stated that she "received an email from the nurse earlier last week," and informed the Complainant that the Student went to the nurse's office that day because she had an allergic reaction to something. The Complainant responded in another email the same day in which she thanked the XXXX Teacher for her "prompt response in sending [the Student] to the nurse, along with another student." She further wrote: "[m]y hope is that you can address the allergy issue with your class-no eating XXXX, XXXX, etc. due to allergies. Can you please help us in this endeavor." The XXXX Teacher responded that she would forward the Complainant's email to her Department Head as well as to Assistant Principal #3.

On XXXX, the XXXX at the School (the XXXX) responded to the Complainant's email, writing: "We are currently working on getting an additional desk put in [the XXXX Teacher's] classroom where only [the Student] will sit. Also all students in XXXX classes have been made aware of the situation and were instructed not to bring anything into the locker rooms that might compromise the safety of [the Student]. [The XXXX Teacher] will also be putting a sign on her classroom door on weeks she is in the classroom as well as the custodians cleaning the room thoroughly prior to [the Student] getting there. Hopefully these things will prevent any other reactions in class." In addition, in an email to the XXXX Teacher and the XXXX dated XXXX, Assistant Principal #3 documented a telephone conversation he had with the Complainant on the same date, in which "[s]he made [him] aware of [the Student's] life threatening allergies and sang both of your praises on how proactive you two were in ensuring [the Student's] safety."

On XXXX, Assistant Principal #1 had a phone call with the Complainant to discuss an incident in XXXX class where the Student's phone was taken from her (discussed in more detail above). The Complainant informed Assistant Principal #1 about the Student's allergy and need for the

Student to have her phone in case of an allergic reaction. Assistant Principal #1 told OCR that he informed the Complainant about Section 504 during that conversation and suggested that the Complainant contact the guidance counselor, who was also the Section 504 Coordinator for the School, to request a meeting to set up a Section 504 Plan.

In an email to the Section 504 Coordinator for the School, dated XXXX, the Complainant requested a Section 504 Plan for the Student. A Section 504 meeting was held on XXXX, and the Student was found eligible under Section 504. A Section 504 Plan was developed on the same date.

As stated above, Section 504 requires a school district to evaluate any student who needs or is believed to need special education or related services due to a disability. OCR finds, based on the information above, that the Division did not have reason to believe that the Student needed related services due to her disability until XXXX, when the Student was disciplined for having her cell phone out in a “red zone.” For example, when the Complainant initially notified Division staff in XXXX about the Student’s allergies, both the Complainant and Division staff confirmed that the communications were limited to the fact that the Student had the allergy and needed to carry an epipen; it did not relate to, or otherwise give the Division reason to believe that, the Student required specific related aids and services.¹⁰ In XXXX, when Assistant Principal #1 notified the Complainant of the Student’s disciplinary infraction, OCR determined that the Complainant informed him that the Student had a severe allergy and that she wanted the Student to have the phone on her person at all times for safety reasons. This gave Assistant Principal #1 reason to believe that the Student may need related services based on her disability and triggered the District’s obligation to evaluate the Student, i.e. to convene a group of people knowledgeable about the Student to determine the Student’s eligibility under Section 504. OCR found that this occurred less than a week later.¹¹ Based on the above, OCR finds there is insufficient evidence that the District failed to timely evaluate the Student for a 504 plan when the School did not hold an initial 504 meeting until XXXX. Accordingly, OCR will take no further action with respect to Allegation 2.

Allegation 3: Failure to Implement 504 Plan

The Section 504 regulation, at 34 C.F.R. § 104.33, requires school districts to provide a free appropriate public education (FAPE) to students with disabilities. An appropriate education is regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that are developed in compliance with Section 504’s procedural requirements.

¹⁰ OCR notes that in an email to the XXXX Teacher dated XXXX, the Complainant wrote, “[m]y hope is that you can address the allergy issue with your class.” OCR finds that this email was not enough to give the Division reason to believe that the Student may need related services for her disability. Nevertheless, the XXXX Teacher forwarded the Complainant’s email to the XXXX and an administrator at the School, they met several times to discuss the Student’s allergy-related needs in XXXX class, and within five days put in place several preventative measures in the Student’s XXXX class.

¹¹ OCR further notes that in XXXX, Division staff was trained on their obligations under Section 504, including an employee’s child find obligations and who to contact if he/she suspects that a student may have a disability requiring related aids and services.

The Complainant alleges that the District failed to implement the Student’s Section 504 plan when:

- a. Beginning on XXXX and continuing throughout XXXX, the Student’s teachers did not place allergy warnings in their substitute teacher plans;
- b. On XXXX, the Student’s XXXX teacher did not have industrial wipes available in the classroom;
- c. On XXXX, the School’s assistant nurse did not administer the Student’s epipen when she was having an allergic reaction.

The Student’s XXXX 504 Plan required teachers to post signs warning students of allergens; permission for the Student to eat in an alternate location when known allergens are being served in the cafeteria; teachers to be provided with school approved cleansing materials; teachers to put allergen warnings in substitute teacher plans; the Nurse to notify teachers of the allergens; and the Student to have an emergency health plan on file with the Nurse.

- a. Beginning on XXXX and continuing throughout XXXX, the Student’s teachers did not place allergy warnings in their substitute teacher plans.*

The Complainant told OCR that on XXXX, the day after the Section 504 Team developed the Student’s initial Section 504 Plan, the Student had an anaphylactic reaction in XXXX class when there was a substitute teacher.¹² The XXXX Section 504 Plan required teachers to put an allergen warning about the Student’s allergy in substitute teacher plans. The Complainant stated that on XXXX, she spoke to Assistant Principal 2, who told the Complainant that she had “gotten busy” and “forgot to make and place the allergy flyers in the sub folders.”

In an interview, Assistant Principal 2 told OCR that on XXXX, when the initial 504 Plan was initiated she went around and personally gave cleaning materials to the teachers, distributed signs about the allergy and checked to make sure that signs were on the doors and on the white board, and made sure there was signage in the media center and other common areas around the building.

Before OCR finished our investigation of this allegation, the Division indicated its interest in addressing the concerns raised by the Complainant. Thus, the District signed the attached Agreement to Resolve which when fully implemented will resolve allegation 2a.

- b. On XXXX, the Student’s XXXX teacher did not have industrial wipes available in the classroom.*

¹² Although the Complainant alleged that the student’s teachers did not place allergy warnings in the substitute teacher plans “throughout XXXX,” the sole example the Complainant gave to OCR of this is alleged to have occurred on XXXX. Accordingly, OCR will limit its analysis to this incident.

The Complainant further told OCR that on XXXX, when there was a substitute teacher in the Student's XXXX class, there were no industrial wipes available in the classroom to wipe down the Student's desk, and the Student had another anaphylactic reaction. The Student's Section 504 Plan required that the Student's desk would be wiped down prior to her entering classrooms and that teachers would be provided with school approved cleansing materials. According to Assistant Principal 2, she went to each teacher's classroom and brought them industrial wipes the same day the Section 504 Plan was signed, XXXX.

According to the Student, as she was going into her XXXX class at around XXXX, she saw two friends who had been in the classroom during the previous period. The Student's friends told her that someone had been eating XXXX in their class and suggested to her that she stay in the hall while they wiped down the desk. The Student told OCR that there were no wipes available in the classroom, so her friends went to get hand sanitizer and paper towels. The Student said that she went up to the substitute teacher and said that she would need to leave class if she had an allergic reaction. The Substitute Teacher told her to go if she needed to. The Student said that she started to get hives so she took Benadryl and went to the nurse's office. OCR interviewed the Substitute Teacher, who told OCR that she wiped the Student's desk down with hand sanitizer "from her purse" and sent the other two students to get soap and water with which to wipe the Student's desk.

Before OCR finished our investigation of this allegation, the Division indicated its interest in addressing the concerns raised by the Complainant. Thus, the District signed the attached Agreement to Resolve which when fully implemented will resolve allegation 2b.

- c. On XXXX, the School's assistant nurse did not administer the Student's epipen when she was having an allergic reaction.*

As stated above, the Student told OCR that she started to get hives in XXXX class so she took Benadryl and went to the nurse's office. She said that she was feeling o.k. at first, but then her chest and throat started to feel tight. She said that she told the Clinic Assistant that her chest was tight, and the Clinic Assistant responded that she was probably just having some anxiety and told her to sit down. The Student said that right then the Nurse came in and administered the epi pen.

In an interview with OCR, the Clinic Assistant stated that the Student came to the clinic on XXXX, and the Nurse evaluated her and then let her rest in a room off the main clinic area. The Nurse went to help another student. The Student was resting and trying to reach her mother on her cell phone in a room next to where the Clinic Assistant was sitting. According to the Clinic Assistant, when the Student was unable to reach her mother, she came to the room with the Clinic Assistant with tears in her eyes and breathing heavily. The Clinic Assistant told OCR that, in an effort to comfort the Student, she said "Don't get upset. Don't be anxious. We'll reach your mom." The Clinic Assistant said that the Student held up her epi pen, and the Nurse came into the room at that moment. The Clinic Assistant told OCR that the Student then handed the epi pen to the Nurse, who took her in the back and administered the epi pen. The Clinic Assistant denied that the Student told her that her throat and chest were feeling tight, but said that she could see that the Student was breathing heavily. In an interview with OCR, the Nurse confirmed the Clinic Assistant's account of what occurred. She stated that when the Student first

came in to the clinic, the Student told the Nurse that she had been exposed to XXXX and that she had taken Benadryl. The Nurse emphasized that the Student was not in medical distress when she came to the clinic, and that she felt comfortable leaving the Student in the room adjacent to the clinic area while she went into her office to help another student. The Nurse further stated that when she walked back into the clinic area, the Student told her that she could not breathe, and she asked the Student if the Student needed her to administer the epi pen. The Student said yes, and the Nurse administered the medication.

While the Student's Life Threatening Allergy Management Plan (LAMP), which is incorporated as part of the Student's Section 504 Plan, permits the Student to self-carry and self-administer the epi pen, neither the LAMP nor the Section 504 Plan specifies who must administer the epi pen in the case of a severe allergic reaction. The Student, the Clinic Assistant, and the Nurse all agree that on XXXX, the Nurse administered the epi pen to the Student when the Student was having trouble breathing. Moreover, a preponderance of the evidence indicates that this occurred in a timely fashion. Based on the above, OCR finds insufficient evidence that the Division failed to implement the Student's Section 504 Plan when the Clinic Assistant did not administer the epi pen while the Student was having an allergic reaction.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the Division signed the enclosed Resolution Agreement on March 27, 2018, which, when fully implemented, will resolve Allegations 3a and 3b of this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Division's implementation of the Agreement until the Division has fulfilled the terms of the Agreement. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Division's compliance with any other regulatory provision or to address any issues other than those addressed in 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 whether or not OCR finds a violation.

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

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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the Division's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Samantha Shofar, the OCR investigator/attorney assigned to this complaint, at 202-453-5929 or samantha.shofar@ed.gov.

Sincerely,

/s/

David Hensel
Team Leader, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Anne Mickey, Esquire