



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 28, 2018

Dr. Jeffery Smith
Superintendent
Hampton City Schools
One Franklin Street
Hampton, Virginia 23669

Re: OCR Complaint No. 11-17-1095
Letter of Findings

Dear Dr. Smith:

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 November 20, 2016 against Hampton City Schools (the Division). The Complainant filed the complaint on behalf of herself and XXXX, a student (the Student) at XXXX (the School). The Complainant alleged that the Division discriminated against the Student on the bases of his race (African American) and disability. The Complainant also alleged that the Division discriminated against her on the basis of race (African American) and subjected her to retaliation. Specifically, the complaint alleged that during the 2016-2017 school year:

1. The Division discriminated against the Student on the basis of his disability during fall 2016, by failing to provide the Student with the amount of instructional time, as required by his Individualized Education Program (IEP).
2. The Division discriminated against the Student on the basis of his race during fall 2016, by failing to provide the Student with the amount of instructional time, as required by his IEP, as described in Allegation 1 above.
3. Regarding the Complainant's role as a parent and/or teacher in the Division, the Division both (a) discriminated against her on the basis of her race, and (b) retaliated against her for her disability-related advocacy on behalf of the Student by:
 - i. Failing to provide an instructional assistant for her classes, beginning in September 2016;
 - ii. Increasing (doubling) the size of her classes in September 2016 and again in October 2016;
 - iii. The School Principal treating her "coldly" and ignoring her since the October 19, 2016 IEP meeting for the Student, by refusing to say "hello" to her while doing so for other teachers in a group setting;

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

- iv. Failing to notify her of training opportunities, including a September 2016 workshop XXXX;
- v. Failing to provide classroom materials (e.g., headphones, textbooks, and workbooks) for her students in a timely manner in September 2016;
- vi. Conducting an IEP meeting for the Student without notifying her on August 30, 2016; and
- vii. Delaying the scheduling of an IEP meeting for the Student requested in September 2016.

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. In addition, OCR enforces Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities that 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, Title II, and Title VI.

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

After carefully considering all of the information obtained during the investigation, OCR found sufficient evidence of a violation of Section 504 and Title II regarding Allegation 1, which the Division agreed to resolve through the enclosed Resolution Agreement, dated September 28, 2018, pursuant to Section 303(b) of OCR's *Case Processing Manual*. However, OCR found insufficient evidence of a violation of Title VI regarding Allegation 2 and insufficient evidence of a violation under Title VI, Section 504, and Title II regarding Allegation 3. OCR's findings and conclusions are discussed below.

Background

The Student is an African American student with a disability who receives special education services at XXXX (the School). At the time this complaint was filed in November 2016, the Student was enrolled in XXXX at the School. The Student is identified as having XXXX. He had an IEP governing his receipt of special education services in the areas of XXXX.

The Complainant was a XXXX teacher at the School, and served as the School's XXXX.

Legal Standards and Analysis

Allegation 1

The Complainant alleged that the Division discriminated against the Student on the basis of his disability during fall 2016, by failing to provide the Student with the amount of instructional time required by his IEP. The Complainant stated that the Student received some but not all of the required special education services.

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.

OCR reviewed the Student's last agreed-upon IEP, dated XXXX, 2016. The IEP stated the Student was to receive XXXX minutes per week of special education services in the area of XXXX; XXXX minutes per week of XXXX; and XXXX minutes per week of organization skills in the general education classroom. Additionally, in the special education setting, he was to receive XXXX minutes per week of XXXX; XXXX minutes of XXXX; and XXXX minutes of organization skills. Specifically, and relevant to the discussion below, the Student was to receive a total of XXXX minutes per week in special education services in the area of English.

OCR reviewed correspondence regarding this issue between the Complainant and Division staff, including the Special Education Director. As early as October 7, 2016, the Complainant raised concerns that the School was "out-of-compliance" in implementing the Student's IEP. On October 20, 2016, the Complainant alleged to the Director that the Student was receiving "less than 40 percent" of his services minutes.

OCR further reviewed documentation provided by the Division, which illustrates that the Division did not provide some special education services to the Student during the 2016-2017 school year. Specifically, the IEP Addendum dated XXXX, 2016 states, "The IEP team determined that [the Student] did not receive some special education service minutes in the area of English as identified by his IEP from September 2016 to December 2016." The Addendum further states that the School will offer additional special education services in reading in the special education classroom "where [the Student] will receive individualized support during the school day through the end of the 16/17 school year as compensatory services for the time that he missed." The document further notes that the School amended the IEP to include "additional special education services for reading in a special education setting for 450 minutes bi-weekly." The Prior Written Notice explaining the discussion at the meeting stated, "Instead of attending reading in a special education setting every other day, which is currently proposed, he will receive reading daily."¹

OCR requested documentation clarifying the amount of services the Student received, including a copy of the Student's daily schedule. The Division indicated that, according to the Student's

¹ Prior to the IEP meeting held on XXXX, 2016, the Division proposed an IEP for the Student that included additional time for the Student to receive services, purportedly, to make up for what he missed during the fall 2016; however, compensatory services are in addition to what is calculated as necessary to receive FAPE. Further, the School did not have an accurate account of the services the Student received and missed; therefore, the School's calculation as of XXXX, 2016 was not sufficient.

daily schedule, he had Language Arts for XXXX minutes per day, XXXX minutes per week. However, the Division did not document the Student's receipt of any of the required special education services during this time, including whether the services were provided in the general education setting or in the special education setting.

To clarify further the services the Division did and did not provide, OCR interviewed Division staff regarding the Student's receipt of services. Division staff explained that the reason for the Division's failure to provide special education services to the Student in the amount required by his IEP was that the Student's IEP was written based on the Student's former XXXX school's curricular schedule, and that the IEP's description of the location of services also was confusing. Several staff members stated that when the Student transitioned to XXXX school, the IEP did not reflect the XXXX school schedule. Although the Division could not provide OCR with information or documentation regarding any of the services the Student received for any of the required subjects in the special education or general education settings, OCR was able to obtain information impacting the provision of services to the Student specifically in English or Language Arts (hereinafter referred to as "ELA").

For example, the Student's IEP required XXXX minutes of ELA per week, based on the XXXX school instructional model in which students had an ELA block for almost 2.5 hours every day, but at the XXXX, students have ELA for only 90 minutes per day. As a result, the Principal explained that the Student's IEP required more ELA time than there was in the School's ELA block. The Assistant Principal indicated that one difficulty was pulling the Student from other classes to get the necessary ELA support.

During an interview, the Student's Case Manager made conflicting statements that the Student was receiving all of his service minutes because some were being provided in a class other than ELA, and staff did not know they could use those minutes toward the Student's IEP. The Case Manager provided some services in one setting while another special education teacher provided services in the special education classroom. The Case Manager also stated that, in December 2016, the IEP Team recommended that the Student move to a self-contained classroom for ELA to "take care of" all of the Student's required service minutes.² Then, the Case Manager said that the Student missed approximately 20 minutes daily of the required ELA services until mid-December 2016. He confirmed that the School did not keep a log of services provided to the Student. The Special Education Coordinator who attended the XXXX, 2016 IEP meeting stated that she did not get a good sense from the team of what services were being provided because they were not tracked, and the Student was not receiving them every day. She told OCR that the School staff had a difficult time giving her exact information about the Student's services, including how and when he was receiving pull-out and push-in services.³ As a result, she stated that she felt uncomfortable concluding that the Student had received all of his services.

Even assuming the Student received special education instruction every minute of the ELA block, he would have received XXXX minutes of service per week, rather than XXXX minutes as was required by his IEP. However, that assumption ignores the requirements of services in the general education and special education settings. The Division could not determine the

² The Case Manager stated that if the Student received more services and was placed in a self-contained classroom, he would not have need for a 1:1 aide.

³ The Assistant Principal corroborated this in his interview with OCR as well.

amount of services the Student received for any of the required subjects, including English or ELA, XXXX in the special education or general education settings and kept no record of it.

Based on the forgoing, OCR determined it has sufficient evidence to substantiate that the Division failed to provide the amount of special education services required by the Student's IEP in a push-in and pull-out setting, in violation of Section 504 and Title II. Accordingly, the Division agreed to resolve the violation through the enclosed Resolution Agreement, dated September 28, 2018, pursuant to Section 303(b) of OCR's *Case Processing Manual*.

Allegation 2

The Complainant alleged that the Division discriminated against the Student on the basis of his race, when it failed to provide the instructional time required by the Student's IEP, as discussed in Allegation 1 above. The Complainant told OCR that, as a teacher at the School, she was generally aware of white students who received all the special education services required by their IEPs.

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under the Division's programs or activities on the basis of race, color, or national origin. The Title VI regulation also prohibits recipients from denying individuals, on the basis of race, "an opportunity to participate in the program through the provision of services or otherwise afford that individual an opportunity to do so which is different from that afforded others under the program. 34 C.F.R. § 100.3(b)(1)(vi).

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the recipient subjected the student to adverse treatment and treated the student less favorably than similarly-situated individuals of a different race. If so, OCR then determines whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the recipient is a pretext, or excuse, for unlawful discrimination.

OCR determined that, as described in Allegation 1, the Division failed to provide the amount of instructional time required by the Student's IEP, resulting in a denial of FAPE. The Complainant asserted that this failure also constituted different treatment based on the Student's race. OCR found that the Division treated the Student adversely in denying him FAPE, as he was unable to access the services to which he was entitled as a student with a disability. However, OCR could not conclude that the Division treated the Student differently from similarly-situated peers of other races who also had disabilities in denying him the services required by his IEP.

The Virginia Department of Education reported that the School enrolled approximately 653 students during the 2016-2017 school year. Of those students, 77% (503) were African American, and 9% (57) were white. According to the Division's data response, approximately 135 students at the School received services as students with disabilities.⁴ Of those students,

⁴ According to VDOE, 19.4%, or 127, of students at the School had disabilities.

77% or 104 students with disabilities were African American, and 11% or 15 students with disabilities were white.

The Assistant Principal told OCR during an interview that he was aware of one other student whose IEP reflected an XXXX curricular schedule that also had to be revised to reflect the XXXX schedule, and that student also was African American. The Assistant Principal denied, however, that African American students were denied instructional time while white students received all special education services required. Similarly, the Case Manager denied that other students missed receiving special education service minutes and indicated he provided services to all his students regardless of race.⁵

Division staff noted that the Complainant is a special education teacher at the School XXXX; in her role, she was to assist in developing a master schedule and making sure a special education teacher's time was split to meet students' service requirements. OCR notes that the Complainant stated she followed the IEPs of all of her students and provided their service minutes. She stated that other teachers implemented the IEPs of her students as well. The Complainant further stated that 97% of her students were black.

As discussed above as part of Allegation 1, OCR concluded that the Division failed to provide FAPE to the Student when it did not implement the amount of services required by the Student's IEP. Given the lack of information regarding similarly-situated student comparators, OCR assumed that the adverse or less favorable treatment received by the Student was different treatment. OCR then turned to consideration of the Division's proffered legitimate, non-discriminatory reason for the different treatment. The Division explained that the discrepancy between services provided and services required by the Student's IEP resulted from School's curricular schedule, which did not easily lend to providing the required services for ELA without pulling the Student from another class. School staff also stated that they did not track the implementation of services through a log; therefore, they could not verify the services provided to the Student because of inadequate records management.

OCR next considered whether the Division's explanation for its adverse treatment of the Student was pretextual. As described above, School administrators and the Case Manager denied failing to provide services required by students' IEPs. The Complainant also stated that she implemented other students' IEPs, including those of African American and white students. OCR determined that the Division's explanation was not a pretext for discrimination based on race. Therefore, although OCR concluded that the Division's explanation constituted discrimination on the basis of disability as described in Allegation 1 above, OCR is unable to conclude that the Division's failure to provide implement the Student's IEP is discriminatory based on race. Accordingly, OCR will take no further action regarding Allegation 2.

Allegation 3

The Complainant raised multiple allegations of discrimination based on race and retaliation in her roles as a parent and as a teacher in the Division. OCR reviewed each allegation in turn.

⁵ A related service provider that OCR interviewed also stated she was not aware of other students who had been denied or otherwise missed services.

The Title VI regulation, at 34 C.F.R. § 100.3(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under a recipient's programs or activities on the basis of race, color, or national origin. The Title VI regulation also prohibits recipients from denying individuals, on the basis of race, "an opportunity to participate in the program through the provision of services or otherwise afford that individual an opportunity to do so which is different from that afforded others under the program. 34 C.F.R. § 100.3(b)(1)(vi).

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the recipient subjected the complainant to adverse treatment and treated the complainant less favorably than similarly-situated individuals of a different race. If so, OCR then determines whether the recipient had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the recipient is a pretext, or excuse, for unlawful discrimination.

Additionally, the Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against any individual who asserts rights or privileges under Title VI or who files a complaint, testifies, assists, or participates in a proceeding under Title VI. Similarly, the Section 504 regulation, at 34 C.F.R. § 104.61, incorporates the procedural provisions of the regulation implementing Title VI and prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

When analyzing a claim of retaliation, OCR will consider: 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 recipient took an adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the recipient's reason for its action is a pretext, or excuse, for unlawful retaliation.

In terms of retaliation analysis, the Complainant provided evidence that she engaged in a protected activity when she advocated for services for the Student, who had a disability and also attended the School where she taught. The Complainant stated she complained about special education services for the Student in communication with the Principal on July 27, 2016. At that time, she also advocated for several students with disabilities to be promoted to the next grade rather than to be retained; according to the Complainant, many of the students were promoted after she raised the concern to the attention of the Principal. The Complainant also engaged in protected activity when she reported concerns about the School's compliance with the Student's IEP and requested an IEP meeting in September 2016. The Division had knowledge of the Complainant's protected activity as they interacted with the Complainant during IEP meetings, including the IEP meeting held October 19, 2016, at which she advocated for the Student. OCR considered the Division's awareness of these protected activities in its analysis of each action raised below as part of Allegation 3.

Allegation 3(i): Whether the Complainant Had an Instructional Assistant

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when it failed to provide her with an instructional assistant for the self-contained special education classes she taught beginning in September 2016. The Complainant initially stated that the Division did not provide an instructional assistant for any of her classes and that she was the only teacher of a self-contained special education class who did not have an instructional assistant. Then, she clarified that the Division actually did provide an instructional assistant for each class but regularly pulled the assistant from her class to substitute for other teachers who were absent. The Complainant stated that the Principal praised one of the assistants for stepping into a substitute teacher role. The Complainant identified 22 occasions from September 2016 through January 2017 when she was without an instructional assistant for at least part of one of her classes because the assistant was absent or serving in another capacity. We note that the Complainant served as the special education department head for the School. In addition to serving in the administrative role of special education department head, the Complainant's regular teaching duties included teaching six Voyager classes, which are special education classes designed to provide supplemental math and reading remediation to students with disabilities.⁶

OCR obtained information from the Division regarding the use of instructional assistants in special education classes. The Division provided information to indicate that it had assigned an instructional assistant to each of the Complainant's classes. The Complainant did not have one instructional assistant across all classes throughout the day; rather, she had multiple instructional assistants throughout the school day as four different instructional assistants were assigned to rotate with the students in each of the six class periods. The Division acknowledged instructional assistants were absent for a full day on approximately 20 occasions and left early on 13 occasions for illness or other personal reasons. The Division also acknowledged that it did pull an instructional assistant from at least one of the Complainant's classes on 14 occasions to serve as a substitute teacher. In all but four instances when an instructional assistant was absent due to illness or other excuse, it did not assign another individual to cover the assistant's absence.

Discrimination

OCR determined that the frequency with which instructional assistants were absent from the Complainant's classes may have adversely impacted the Complainant in completing her duties and, therefore, was adverse treatment.

However, the Division stated that the School also pulled instructional assistants from classes other than the Complainant's to serve as substitutes, and that the Division pulled an instructional assistant to substitute for an entire school day, affecting multiple teachers of different races, and not only the Complainant's class period. Additionally, the Division provided information illustrating that one of the instructional assistants regularly was absent from school due to illness or other excuse for a full day (this occurred on 11 occasions). Again, because the instructional assistant who was absent regularly for whole days served the Complainant's class only one

⁶ The Complainant taught different students throughout the day and had a total of six class sections: Grade 6, 7, and 8 Language Arts; and a section of each grade of math as well.

period per day, the absences affected not only the Complainant but also the other teachers served during other class periods of the school day.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that discrimination occurred. Because the evidence OCR obtained indicated that the Complainant did have an instructional assistant assigned to each class and that the assistant's regular absences from her class similarly affected other teachers of different races, OCR could not establish that the Division treated the Complainant differently from other teachers based on race. Without the requisite different treatment, the Complainant was unable to substantiate a *prima facie* case of racial discrimination and OCR could not continue with the discrimination analysis.

Retaliation

Regarding the Complainant's allegation of retaliation, OCR determined that the frequency with which the Division pulled the Complainant's instructional assistants impaired her ability to complete her instructional responsibilities and may have been a deterrent to further protected activity. Therefore, for the purpose of OCR's retaliation analysis, OCR determined that the lack of instructional assistants was an adverse action. The assistants' absences were proximate to the Complainant's protected activity giving rise to a causal connection between the protected activity and the adverse action. Therefore, OCR determined that the Complainant has established a *prima facie* case of retaliation.

However, OCR determined that there was insufficient evidence to substantiate that the Division's proffered legitimate, non-retaliatory reason was a pretext for retaliation, as other teachers were also impacted by the absences of instructional assistants. Therefore, OCR had insufficient evidence to conclude that discrimination based on race or retaliation occurred and found no violation of Title VI or Section 504 and Title II. Accordingly, OCR will take no further action regarding Allegation 3(i).

Allegation 3(ii): Increasing Complainant's Class Size

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when it doubled the size of the XXXX classes she taught in September 2016 and again in October 2016. According to the Complainant, when she took on the role of XXXX, the School promised her smaller and fewer classes as part of her teaching responsibilities XXXX. The Complainant informed OCR that the School added students to her classes multiple times during the fall 2016 semester, doubling her class size.

The Division acknowledged that the Complainant expressed concern to the Coordinator by email dated September 21, 2016, that her class sizes were too high and that students were being added to the classes. The Coordinator responded that she would work with the School Principal to adjust the class sizes, although the adjustments apparently were slight.⁷

⁷ The Complainant suggested that the classes should have had approximately 10 students. Interviews with Division staff revealed that there was no limit on class size; however, according to the Principal, the Coordinator said that ideally Voyager classes would have 8-10 students. The Principal noted that the Coordinator told her that some of the roster numbers were high. The Coordinator urged the Principal to keep class sizes around 15 students.

OCR requested rosters of the students in the Complainant's classes from each month during the fall 2016 semester. OCR found that the Complainant's class sizes did not double during the 2016-2017 school year; rather, the School ultimately removed students from the Complainant's class. On September 6, 2016, the first day of the school year, the Complainant's smallest class, XXXX, had 14 students, while her largest class, XXXX, had 19 students. XXXX had 17 students. In October 2016, the XXXX class reduced in size by one student and XXXX remained at 19 students, while in December 2016, the class sizes changed to 13 and 17, respectively. The Complainant gained one student in XXXX so her class had 18 students. Data also showed that the Complainant's XXXX class increased from 15 students to 16 students from September to December; XXXX decreased from 18 students to 16 students; and XXXX remained the same size at 9 students. The class size dropped for XXXX, due, in part to the Complainant's complaints that students were inappropriately being placed in XXXX, and the Division's determination that other classes were better placements for some students.⁸

The Division provided documentation of class sizes in other XXXX classes throughout the Division, and OCR notes that XXXX class sizes at the School were far larger than XXXX classes at other middle schools in the Division.⁹ However, OCR also notes that the XXXX class sizes when the Complainant began teaching those classes at the beginning of the 2016-2017 school year were not significantly larger than the XXXX classes at the School during the previous 2015-2016 school year when another staff member taught the XXXX classes. The XXXX class sizes at the School during 2015-2016 were, for XXXX, for XXXX– 13, 18, and 12 students, respectively; and for XXXX– 14, 15, and 10 students, respectively.

Discrimination

Because OCR determined that the Complainant's class size decreased rather than doubled, as alleged, and because the Complainant's class sizes were comparable to those for the 2015-2016 school year, OCR cannot conclude that the Complainant experienced adverse or different treatment as necessary to establish a prima facie case of racial discrimination. As such, OCR could not continue with the discrimination analysis.

Retaliation

Similarly, with regard to retaliation, OCR determined that the Complainant was not subject to an adverse action that would deter a reasonable person from further protected activity. Although the Complainant alleged that the class sizes doubled, the allegation is not supported by the data, which shows class size to have decreased overall during the fall semester of 2016. Additionally, class sizes were comparable to the XXXX class sizes during the 2015-2016 school year, suggesting that the generally larger class sizes were not retaliation directed at the Complainant

⁸ Specifically, several students with behavioral needs were removed from the Complainant's class after she raised concerns and the School administration worked with the Complainant, acknowledging her concerns, to remove those students from the XXXXX program.

⁹ The Division provided information showing that XXXX class sizes at other middle schools in the Division ranged from 2 students to 10 students, with the average class size being approximately 6 students.

because of her protected activity. Because OCR could not determine that the Complainant was subject to an adverse action, OCR could not continue with the retaliation analysis.

Therefore, OCR has insufficient evidence to support that discrimination based on race or retaliation occurred. Accordingly, OCR will take no further action with respect to Allegation 3(ii).

Allegation 3(iii): Cold Treatment by the Principal

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when the School Principal treated her “coldly” and ignored her since the XXXX, 2016 IEP meeting for the Student, by refusing to say “hello” to her while doing so for other teachers in a group setting. Specifically, the Complainant stated that the Principal did not respond to her greeting in the hallway in early November 2016 when a Division-level administrator visited the School with her, and the Principal only greeted the Complainant after the Division-level administrator said hello to her.

OCR interviewed the Principal who denied the interaction occurred and stated that she would not, and had not, intentionally treated the Complainant coldly or ignored her greeting. She stated that she and the Complainant had a strong relationship at the beginning of the 2016-2017 school year, and that the Complainant felt comfortable bringing to her concerns about the special education needs of the Student and other students at the School. Further, the Principal stated that following the Complainant’s advocacy in October 2016, she rarely interacted with the Complainant because the Complainant stopped attending staff meetings and functions as well as stopped using the School’s main entrance or entering the School office. The Complainant acknowledged to OCR that she limited her interactions to avoid the Principal. OCR asked other staff during interviews about the Principal’s interactions with and treatment of the Complainant, and those staff members stated that they had not noticed any cold or otherwise negative treatment toward the Complainant on the part of the Principal. Rather, one staff member observed that the Complainant seemed to isolate herself and became less visible.

Discrimination

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that discrimination occurred. Based on the foregoing, OCR could not conclusively determine whether the Principal treated the Complainant “coldly” given the conflicting evidence; however, even if the evidence is considered in the light most favorable to the Complainant, OCR finds there was no adverse or different treatment. As a result, the Complainant failed to establish a *prima facie* case of racial discrimination. As such, OCR could not continue with the discrimination analysis.

Retaliation

Similarly, for the purpose of retaliation, OCR also could not determine that negative treatment occurred that would have deterred a reasonable person from further protected activity. As a result, OCR could not conclude that the Complainant experienced an adverse action necessary to establish a *prima facie* case of retaliation; therefore, OCR could not continue the retaliation analysis.

Therefore, OCR has insufficient evidence to support that discrimination based on race or retaliation occurred. Accordingly, OCR will take no further action with respect to Allegation 3(iii).

Allegation 3(iv): Failure to Provide Notice of Training Opportunities

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when the Division failed to notify her of XXXX training sessions related to the classes she was slated to teach.

The Complainant stated that the Division intentionally excluded her from the training for the XXXX that took place from XXXX, 2016, such that she only learned about it after registration had passed and the Language training session was underway. A second training for the XXXX was held on XXXX, 2016. The Special Education Coordinator contacted the Complainant by email on XXXX, 2016, asking if the Complainant had received training in XXXX because she noticed the Complainant had not signed up for two of the training sessions and wanted to confirm that the Complainant previously received training. The Complainant responded requesting to be enrolled, noting that she received training four years earlier. The Complainant stated she did not know the training was scheduled and did not receive notice of the training. She was able to attend the XXXX training on XXXX, 2016, after the Coordinator provided information to register for that training, but she missed the XXXX training.

Discrimination

OCR considered whether failing to provide notice of the training opportunity constituted adverse and different treatment on the basis of race. The Division and School failed to provide notice to the Complainant of upcoming training sessions. Teachers of other races who taught at other schools did, however, receive notice of the training sessions and had the chance to register for all relevant sessions. Because the Complainant was not invited to the training, she missed an opportunity that gave other teachers of the same classes a benefit she did not receive. The failure deprived the Complainant of the skills she could have learned from the training session. As a result, OCR determined that the Complainant established a prima facie or initial case of discrimination on the basis of race.

OCR next considered the Division's legitimate non-discriminatory reason for the action. OCR inquired about how the Division provides notice of training sessions as well as the particular circumstances that resulted in the Complainant not being notified of the training session. The Director of Special Education stated that she sent an email to all school administrators requesting that they distribute information about the training to their staff, but she did not circulate the email to individual teachers. Administrators from the Complainant's School were on the distribution list, but they did not forward the message to the Complainant or to anyone else at the School. The Principal was new to the School and to her position at the time the Coordinator's message was sent. She stated that she probably received a message, but she may not have known what it was for. She stated that she simply overlooked the message and that it must have slipped through the cracks given her new position. The Principal stated that the Coordinator contacted her to notify her that the School did not have a representative present at the first training. The

Coordinator wrote to the Principal on XXXX, 2016 that if the Principal approved, which she did, the Complainant could attend the rest of the training.¹⁰

OCR determined that the Division's proffered reasons were not pretext for discrimination. At the Division level, the Director forwarded the invitation to all schools that had XXXX for distribution to XXXX staff. She did not exclude the Complainant's school or any staff from the training because of race. In fact, the Complainant learned from the Coordinator about the training when, on XXXX, 2016, the Coordinator contacted the Complainant because the Complainant had not registered for the sessions and asked if she previously received training. After uncovering that the Complainant had not received information about the training, the Coordinator assisted the Complainant in registering for the remaining session and communicated with the Principal of the School about the Complainant's attendance.

XXXX OCR has no direct comparators to assess whether the treatment may have been based on race. At the time the training announcement was distributed to the School, the Principal was new to the School and purportedly overlooked the message. OCR has no reason to believe the reason was pretext given that, when the opportunity was brought to the Principal's attention, she immediately approved the Complainant to attend. Moreover, there is no suggestion or indication that the Principal deliberately overlooked the message in order to exclude the Complainant.

A finding that a recipient has violated one of the laws OCR enforces must be supported by a preponderance of the evidence, that is, evidence that it is more likely than not that discrimination. In the absence of additional information, OCR concluded that the Division and School's legitimate, non-discriminatory reason was not pretext for discrimination.

Retaliation

For the purposes of the retaliation analysis, for the same reason described above, OCR determined the negative and different treatment the Complainant experienced in being precluded from a training opportunity offered to others was an adverse action that could be a deterrent from further protected activity.

OCR determined that the Complainant's advocacy on behalf of the Student occurred in close proximity to the training sessions, thereby establishing a causal connection between the Complainant's protected activity and the alleged adverse action.

OCR then examined the Division's legitimate, non-retaliatory reason for its action in failing to notify the Complainant of the XXXX training opportunities. As described above, OCR verified that the Director distributed the training announcement to the Principal, who, in turn, failed to notify the Complainant. The Coordinator, on realizing the Complainant's absence, raised the issue to the Principal's attendance and assisted the Complainant in registering for the remaining session. The Principal, in turn, indicated that the failure was due to her mistake. As above, OCR has no additional information to suggest that the action was actually taken because the Complainant had engaged in protected activity. Rather, the Coordinator assisted, and the

¹⁰ Given the Principal's approval, it is not clear why the Complainant did not attend the rest of the Language training already underway or why the Coordinator did not provide information for the Complainant to register for the Language training.

Principal approved, the Complainant's attendance at the training session. OCR determined that the Division's legitimate, non-retaliatory reason was not a pretext for retaliation.

As a result, OCR determined that there is insufficient evidence to substantiate that the Division or School discriminated against the Complainant on the basis of her race or retaliated against her as alleged. Accordingly, OCR will take no further action regarding Allegation 3(iv).

Allegation 3(v): Failure to Provide Classroom Materials

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when the Division failed to fill requests for headphones, textbooks, and workbooks for her XXXX students in a timely manner in September 2016. The Complainant stated that, although she had made requests for materials, which had been fulfilled in the past, the requests she made in September 2016 were not completed in a timely manner.

The Complainant told OCR that she had to recycle and photocopy pages of old, used workbooks for students during that time. OCR found that the Complainant's requests for materials did take a longer time to fulfill than previous requests and longer than the Division reported for such requests.

During an inventory meeting at the School on September 2, 2016, the Intervention Support Assistant and the Complainant were not able to locate all of the materials that were supposed to have been left by the School's previous XXXX teacher. According to the Coordinator, after conducting the inventory on September 2, 2016, the Support Assistant provided the Complainant materials that were available at the Division's storage location. Then, during a meeting with the Coordinator on September 13, 2016, the Complainant requested materials that were missing. On Monday, September 19, 2016, the Complainant asked for an update on delivery and confirmed the level of XXXX materials she requested. The Division provided an invoice for the materials it ordered on the Complainant's behalf dated September 21, 2016 and noted a delivery date of September 27, 2016. Further, email correspondence among the Complainant, Support Assistant, and Coordinator from September 26 and September 27, 2016 shows that the Division was locating materials in stock while waiting for the order. The Division provided email correspondence between the Complainant and the Support Assistant illustrating that the morning of September 28, 2016, the Support Assistant notified the Complainant the materials had been delivered, and they ultimately agreed that the Support Assistant would deliver them the morning of September 29, 2016. During an interview with OCR, the Director stated that it usually takes up to two days to respond to a request for materials; however, she noted that it may take longer if the materials have to be ordered, which was the case here.

Discrimination

OCR determined that the Complainant established that the Division subjected the Complainant to adverse treatment that was less favorable than its treatment of teachers of other races such that the Complainant did not have appropriate instructional materials for the first 3-4 weeks of the school year. The Division indicated that it typically fulfills requests for materials more quickly.

However, OCR determined that the delay in providing materials was not the result of discrimination. The Division proffered a legitimate non-discriminatory reason for the delay: that

the Support Assistant needed to verify that the Division did not have materials in its warehouse and then had to order the necessary materials. The Division asserted that orders for materials typically take longer than if the materials are in stock. Documentation demonstrates that the Support Assistant was actively engaged in obtaining the supplies, including through her correspondence with the Complainant, such that she submitted an order within a week of the Complainant's initial request and within two days of the clarified request. One week of the delay resulted from awaiting shipment of the materials order. The Support Assistant contacted the Complainant immediately after she received the order to arrange delivery. Therefore, OCR determined that the Division's reasons were not a pretext for discrimination.

Retaliation

For the purposes of retaliation, as described above, OCR concluded that the Division took an adverse action against the Complainant when the Complainant experienced a delay in receiving teaching materials that disadvantaged her and her students for the first month of the school year. This action also may have deterred a reasonable person from engaging in further protected activity.

OCR also determined that the delay in providing materials was not retaliatory. OCR notes that the individual who was responsible for fulfilling the Complainant's request for supplies was not aware of the Complainant's protected activity, negating any causal connection between the Complainant's protected activity and the adverse action for the retaliation portion of her allegation. Even assuming the Support Assistant was made aware of the Complainant's protected activity, OCR finds that the Division's legitimate, non-retaliatory reason for the delay, that is that it needed to order the materials, was not a pretext for retaliation. As discussed above, documentation supports that the Support Assistant was seeking materials and working on the order throughout the period between the request and delivery of the materials.

Although there was a lapse in obtaining materials, OCR could not attribute the delay to different treatment because of the Complainant's race or to retaliation for the Complainant's advocacy. Therefore, OCR has insufficient evidence to support that the Division discriminated against the Complainant based on race or retaliated against her. Accordingly, OCR will take no further action regarding Allegation 3(v).

Allegation 3(vi): Conducting an IEP Meeting without notifying the Complainant

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when it conducted an IEP meeting for the Student without her presence and without notifying her of the meeting on August 30, 2016.

OCR reviewed the information provided by the Complainant and the documentation submitted by the Division as well as interviewed Division staff members. OCR could not confirm that the Division held an IEP meeting for the Student on August 30, 2016. Rather, the Division indicated that it convened the Student's teachers for a "pre-staffing" meeting to educate the Student's teachers about XXXX, on August 30, 2016, and for a "staffing" meeting to train the Student's

teachers about how to implement his IEP regarding his specific disability-related needs on August 31, 2016. Documentation provided by the Division indicates that the Coordinator contacted the Principal on August 24, 2016 to schedule the August 31, 2016 staffing meeting, and noted in her message that the Complainant was available to attend on August 31, 2016. A statement submitted by the Division indicated that the Coordinator had invited the Complainant by telephone to attend the “staffing” meeting on that date.

The Division further provided documentation to support that the School Psychologist scheduled an in-service meeting for staff to discuss XXXX on August 30, 2016.¹¹ The Complainant was not invited to this meeting. In reviewing the documentation, OCR found that on August 25, 2016, the School Psychologist wrote an email to the School administrators stating that she had been asked to hold a meeting, prior to the staffing meeting scheduled for August 31, 2016, to discuss, generally, information about XXXX. She stated the meeting would take no more than 20 minutes. In a subsequent email later on August 25, 2016, the School Psychologist clarified that she only needed to address the Student’s specific team of teachers, and noted the meeting’s limited purpose.

Discrimination

OCR determined that holding the meeting on August 30, 2016 was not an IEP meeting, as the Complainant alleged, and did not constitute negative and different treatment on the basis of race.¹² Rather, the meeting on August 30, 2016 was for the limited purpose of introducing XXXX, generally, to the staff, and did not involve discussion of the Student’s specific needs or his IEP, as that was the topic of the August 31, 2016 meeting to which the Complainant was invited. Nor was the August 30, 2016 meeting to discuss the status of, changes to, or decisions about the Student’s services as are contemplated by an IEP meeting. During interviews, staff indicated that “staffing” meetings sometimes, but not always, include the parent of a student, depending on the purpose of the meeting.¹³ OCR did not obtain information to indicate that the Division invited other parents to “pre-staffing” meetings for the limited purpose of providing general information about the type of disability a student has. Therefore, OCR could not determine that the Division denied the Complainant a benefit or opportunity provided to other parents. Given that the Division was not under any obligation to invite the Complainant and did not treat the Complainant differently from other parents, OCR finds that the Complainant did not experience an adverse or different treatment. Without the requisite different treatment, the Complainant was unable to substantiate a prima facie case of racial discrimination, and OCR could not continue with the discrimination analysis.

Retaliation

¹¹ The Coordinator indicated that the Student’s elementary school had requested that the School Psychologist share information about the type of disability to aid in his transition to the School.

¹² As such, OCR determined that the Division was not required to provide the Complainant with notice of the meeting and an opportunity to examine relevant records, as procedural safeguards required by Section 504.

¹³ Evidence provided by the Complainant indicates that the Division invited other parents to staffing meetings, including a staffing meeting for one of her own students; however, we note that the Complainant also was invited to the staffing meeting on August 31, 2016 so she was not treated differently. The meeting on August 31, 2016, was a “staffing” meeting to discuss the Student’s transition, familiarize staff who would implement the IEP about the Student’s needs, and it included the Complainant.

As discussed above, OCR determined that the meeting on August 30, 2016 was not an IEP meeting, as the Complainant alleged, and did not constitute an adverse action. There was no requirement that the Division notify the Complainant about such a meeting, and the Complainant was invited to the “staffing” meeting that occurred the following day; therefore, the Division’s decision not to include the Complainant was not an adverse action that would deter protected activity. Without the requisite adverse action, the Complainant was unable to substantiate a prima facie case of retaliation, and OCR could not continue with the retaliation analysis.

Therefore, OCR had insufficient information to conclude that discrimination based on race or retaliation occurred. Accordingly, OCR will take no further action regarding Allegation 3(vi).

Allegation 3(vii): Delaying an IEP Meeting

The Complainant alleged that the Division both discriminated against her on the basis of her race, and retaliated against her, when it delayed having an IEP meeting she requested in September 2016 to discuss the Student’s disability-related needs, particularly his need for a XXXX until October 19, 2016. The Complainant stated that she was aware of an IEP meeting for a white student being scheduled more quickly.

OCR reviewed documentation of the timeline of events and noted that on September 23, 2016, the Division scheduled an IEP meeting for the Student to occur on September 30, 2016.¹⁴ However, documentation also shows that the meeting had to be postponed on short notice when the Coordinator, who was expected to attend the meeting, had to take extended leave. On Friday, October 7, 2016, the Complainant contacted another coordinator (Coordinator 2), who was to fill in for the Coordinator, to initiate re-scheduling the IEP meeting. The Complainant and Coordinator 2 exchanged messages that afternoon, on Monday, October 10, 2016, and Wednesday, October 12, 2016, before ultimately scheduling the IEP meeting for October 19, 2016.

Discrimination

OCR considered whether the Division’s action in delaying, or stalling on, scheduling the IEP meeting denied the Complainant a benefit provided to other parents or students and was adverse treatment. Although the overall delay was less than a month, OCR determined that the delay could constitute adverse treatment because it may have resulted in a delay in providing the Student appropriate special education and related aids and services. For the purpose of discrimination analysis, OCR presumed that the Division treated the Complainant less favorably than parents of other races.

OCR then considered the Division’s legitimate, non-discriminatory reason for the delay. The Division stated that the delay from September 30, 2016 until October 19, 2016 was the result of confusion about going forward with the meeting scheduled for September 30, 2016 after the

¹⁴ The Case Manager noted in an interview with OCR that the Complainant requested a meeting in September 2016 to discuss concerns about the Student’s services and develop an IEP addendum.

Coordinator went on leave. Although the Coordinator informed OCR that the meeting could have proceeded without her, Coordinator 2 was not informed of the meeting because the School administrators and Case Manager had a miscommunication and misunderstanding about their ability to go forward.¹⁵ Ultimately, and due to scheduling difficulties, the meeting was scheduled for October 19, 2016, four weeks after it was initially scheduled.

OCR determined that the Division's delay was not a pretext for discrimination. That another student's IEP meeting was scheduled more quickly than the Student's is not determinative of discrimination because students with disabilities have unique needs, and IEP meetings involve a variety of school personnel that may differ for each student. Further, holding a meeting four weeks from the date it originally was scheduled was not an unreasonable delay, particularly when a meeting had been scheduled for September 30, 2016, and was then abruptly canceled due to the Coordinator's leave. Rescheduling within 19 days of the cancellation also is not an unreasonable delay. Finally, OCR's review of documentation, including correspondence among Division staff, indicates that the delay was simply related to confusion about going forward and not to the Complainant's race.

Retaliation

As discussed above, OCR found that the delay in holding the Student's IEP meeting may have deterred a reasonable person from engaging in additional protected activity and, thus, constituted an adverse action. For the purpose of retaliation analysis, OCR, therefore, considered whether there was a causal connection between the protected activity and the action of delaying the meeting. OCR determined that the events were proximate to one another and established a causal connection.

OCR next turned to consideration of the Division's legitimate, non-retaliatory reason for delaying the IEP meeting. As discussed above, the meeting had been scheduled for September 30; there was no delay between the request and the original date for which it was scheduled; however, the Coordinator's last-minute lack of availability required rescheduling. Rescheduling was the subject of some confusion related to the availability of parties and the Complainant's preference for attendance.

OCR determined that the Division's delay was not a pretext for retaliation. As discussed above, OCR reviewed correspondence related to rescheduling the IEP meeting and interviewed witnesses about the resulting delay and concluded that the documentation supported the Division's explanation. Moreover, the delay was not unreasonable and no other information suggested that the Division further delayed scheduling the IEP meeting with the intent of retaliating against the Complainant.

Therefore, OCR finds insufficient evidence to support that the Division discriminated against the Complainant based on race or retaliated against her when it delayed scheduling an IEP meeting for the Student. Accordingly, OCR will take no further action regarding Allegation 3(vii).

¹⁵ Additionally, another coordinator (Coordinator 3), besides Coordinator 2, initially had been assigned to fill in for the Coordinator while the Coordinator was on leave, but she, too, had to take emergency leave. Coordinator 3 returned to work October 17, just before the Student's October 19, 2016 IEP meeting. The Case Manager was aware that the Complainant did not want Coordinator 3 to attend the meeting and was looking for an alternative.

Conclusion

As discussed above, OCR found sufficient evidence of a violation of Section 504 and Title II regarding Allegation 1, which the Division agreed to resolve through the enclosed Resolution Agreement, dated September 28, 2018 pursuant to Section 303(b) of OCR's *Case Processing Manual*. OCR found insufficient evidence of discrimination on the basis of race or retaliation regarding Allegations 2 and 3.

On September 28, 2018, the Division agreed to implement the enclosed Resolution Agreement (Agreement), which commits the Division to take specific steps to address the identified areas of noncompliance. The Agreement entered into by the Division is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR's *Case Processing Manual*, a complaint will be considered resolved and the Division deemed compliant if the Division enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the Division's implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the Division has fulfilled the terms of the Agreement and is in compliance with Title VI, Section 504, and Title II with regard to the issues raised.

As stated in the Agreement entered into the by the Division on September 28, 2018, if the Division fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the Division written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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 Dwayne Bensing or Amy S. Williams, the OCR attorneys assigned to this complaint, at 202-453-6910 or Dwayne.Bensing@ed.gov, or 202-453-5933 or Amy.Williams2@ed.gov.

Sincerely,

Letisha Morgan
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure