



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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June 9, 2017

Jessica M. Stark, Esq.
Kluczynski, Girtz & Vogelzang
5005 Cascade Road S.E., Suite A
Grand Rapids, Michigan 49546

Re: OCR Docket #15-14-1250

Dear Ms. Stark:

This letter is to notify you of the resolution of the complaint filed on June 9, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR) against Waverly Community Schools (the District). The complaint alleged race discrimination: specifically, the complaint alleged that, after two students were involved in the same incident, the District discriminated against an African American student (Student A) by disciplining X more harshly than a white student (Student B). The complaint further alleged that the District denied Student A's discipline appeals in retaliation for Student A's parent's complaints about the discrepancy in treatment between the two students.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and its implementing regulation at 34 C.F.R. Part 100 (Title VI). Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance. Title VI also prohibits retaliation against individuals who seek to enforce rights protected by the statute. As a recipient of Federal financial assistance from the Department, the District is subject to Title VI and its implementing regulation. Therefore, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following legal issues:

- Whether the District, on the basis of race, denied a student any service or benefit provided under the District's program; provided services or benefits that were different from or provided in a different manner from services or benefits provided to other students; restricted the student in any way in the enjoyment of any advantage or privilege enjoyed by others; and/or treated the student differently from others in determining whether she satisfied any requirement or condition which individuals must meet in order to be provided any service or other benefit provided under the program, in violation of the Title VI implementing regulation at 34 C.F.R. § 100.3(b)(1)(i), (ii), (iv), and/or (v).

- Whether the District, in determining the types of services, facilities or other benefits to be provided, or the situations in which such services or benefits will be provided, directly or through contractual or other arrangements, utilizes criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, in violation of the Title VI implementing regulation at 34 C.F.R. §100.3(b)(2).
- Whether the District intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Title VI or because he or she made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VI, in violation of Title VI's implementing regulation at 34 C.F.R. § 100.7(e).

To investigate this complaint, OCR examined documents submitted by Student A's parent and the District, including the District's 2013-2014, 2014-2015, 2015-2016, and 2016-2017 notices of nondiscrimination, Discipline Code of Conduct (Code), and policies and practices for administering discipline. OCR also examined high school student discipline files from the 2011-2012, 2012-2013, and 2013-2014 school years. Over the course of the investigation, OCR interviewed Student A's parent and in March 2015 OCR conducted a site visit to the District at which time it interviewed Student A, District administrators and staff, and a school board member.

The District requested to enter into a Resolution Agreement (resolution agreement) pursuant to Section 302 of OCR's Case Processing Manual (CPM), prior to the completion of OCR's investigation. OCR determined that a Section 302 resolution agreement was appropriate for the discipline allegations because OCR had not completed its investigation, but the facts gathered to date raised compliance concerns. However, with respect to the retaliation allegation, based on OCR's investigation, OCR determined that the evidence was insufficient to establish that the District denied Student A's discipline appeals in retaliation for Student A's parent's race discrimination complaints.

The legal standards, facts gathered, and reasons for OCR's determinations are summarized further below. In order to address the compliance concerns identified by OCR, the District has agreed to a series of actions described in the enclosed resolution agreement.

Applicable Legal Standards

The standards for determining compliance with Title VI are set forth in the regulation at 34 C.F.R. § 100.3(a) and (b). The regulation, at 34 C.F.R. § 100.3(b)(1)(i), (ii), (iv), and (v) specifically prohibits a recipient, on the ground of race, color, or national origin, from denying students any service or benefit of its programs; providing students any service or benefit which is different or provided in a different manner from that provided to others under the programs; restricting in any way students' enjoyment of any benefits of its programs; or treating students

differently from others in determining whether they meet any requirement or condition to be provided any service or benefit under the programs. OCR applies a preponderance of the evidence standard to determine whether a recipient has violated any of the laws it enforces.

Student Discipline

To determine whether a school district has discriminated against a student on the basis of race in the discipline process in violation of Title VI and its implementing regulation at 34 C.F.R. § 100.3(a) and (b)(1), OCR looks at whether there is evidence that the student was treated differently than students of other races under similar circumstances, and whether the treatment has resulted in the denial or limitation of education services, benefits, or opportunities. If there is such evidence, OCR examines whether the school district provided a legitimate, nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination.

To determine whether a school district's disciplinary process has an unlawful disparate impact on the basis of race, OCR examines: (1) whether a discipline policy that is neutral on its face has an adverse impact on students of a particular race; (2) whether the policy is necessary to meet an important educational goal; and, (3) if so, whether there is a comparably effective alternative policy or practice that would meet the district's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group.

Retaliation

The Title VI implementing regulation, at 34 C.F.R. § 100.7(e), prohibits recipients and other persons from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured under Title VI or because the person has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VI.

To establish a *prima facie* case of retaliation, that is, one capable of creating an inference that retaliation occurred, OCR determines whether: the individual experienced an adverse action caused by the recipient; the recipient knew the individual engaged in protected activity or believed the individual might engage in protected activity in the future; and there is some evidence of a causal connection between the adverse action and the protected activity. OCR next considers whether the recipient has articulated a legitimate, non-retaliatory reason for taking the adverse action and, if so, whether there is evidence that the stated reason is a pretext for retaliation.

Background

Student A is an African American female student who, during the 2013-2014 school year, was enrolled at the District's high school as a XXXX student. At the time of OCR's investigation, Student A had only one disciplinary incident on X record, the disciplinary incident at issue in OCR's complaint investigation.

Located in Lansing, Michigan, the District student population was approximately 2,792 during the 2013-2014 school year when the complaint incident occurred involving Students A and B. The District operates a pre-Kindergarten through twelfth-grade school district that has a total of six schools:

- Colt Early Childhood Education Center (grades pre-K and K)¹;
- Winans Elementary School (grades 1-4);
- Elmwood Elementary School (grades 1-4);
- East Intermediate School (grades 5 and 6);
- Waverly Middle School (grades 7 and 8); and
- Waverly High School (grades 9-12).

The District also operates the Waverly Alternative Education Program, which provides an online-based curriculum, primarily for students in grades 9 to 12, located at the District's middle school.

The District's racial demographics for the 2013-2014 school year are captured in the table below.

Table 1 – Waverly Community Schools Total Student Enrollment

Enrollment by Race	2013-2014	
White	1122	40.19%
African American	749	26.83%
Hispanic	360	12.89%
Two or More Races	404	14.47%
Asian	145	5.19%
Native American	10	0.36%
Pacific Islander	2	0.07%
Total	2792	

OCR's investigation to date included Colt Early Childhood Center (Colt), Winans Elementary School (Winans), and Waverly High School (the high school). The racial demographics of each school are captured in the tables below.

¹ The 2014-2015 school year was the first year Colt was exclusively comprised of pre-K and Kindergarten students. During the four prior school years, Colt had pre-K, Kindergarten, and first-grade classrooms.

Table 2 – Colt Early Childhood Education Center Enrollment (2013-2014 School Year)

Race	Student Enrollment and Percentage of Enrollment	
White	177	47.96%
African American	146	39.56%
Asian	34	9.21%
American Indian	10	2.71%
Hispanic	1	0.27%
Pacific Islander	1	0.27%
Total	369	

Table 3 – Winans Elementary School Enrollment (2013-2014 School Year)

Race	Student Enrollment and Percentage of Enrollment	
White	129	49.24%
African American	105	40.08%
Asian	13	4.96%
Hispanic	12	4.58%
American Indian	3	1.15%
Pacific Islander	0	n/a
Total	262	

Table 4 –Waverly High School Enrollment (2013-2014 School Year)

Race	Student Enrollment and Percentage of Enrollment	
African American	428	40.84%
White	408	38.93%
Hispanic	142	13.55%
Asian	52	4.96%
American Indian	15	1.43%
Pacific Islander	2	.19%
Unclassified	1	.095%
Total	1048	

OCR also reviewed information related to the District’s Alternative Education Program and middle school.

The District’s Discipline Policies, Procedures, and Practices

OCR reviewed the District’s 2013-2014, 2014-2015, 2015-2016, and 2016-2017 Code of Conduct (the Code), nondiscrimination notice, and school board policies. OCR also reviewed the 2013-2014 and 2014-2015 school-specific student handbooks for Winans and the high school, and the 2014-2015 student handbook for Colt.

The District's Nondiscrimination Notice

The District's 2013-2014, 2014-2015, and 2015-2016 notices of nondiscrimination, contained in the Code, were identical. The notices of nondiscrimination prohibited discrimination on the basis of race, religion, national origin or ancestry, age, sex, marital status, disability, height, or weight in any District program or activity, and stated that the District would comply with all applicable federal and state laws that prohibited discrimination and with federal regulations that implemented these laws. The District's 2016-2017 notice of nondiscrimination was virtually identical to the previous versions with the exception that the District added that it did not condone behaviors that discriminate against individuals on the basis of genetic information and gender preferences.

The District's Code of Conduct

The school-specific handbooks reviewed by OCR all refer to the Code as the District's primary policy on school discipline. According to District witnesses, these two documents (the Code and the school-specific student handbook) are disseminated and communicated to all parents and students at the beginning of each school year. The Code is the District's primary form of notice to students and parents of expected behavior and potential consequences. The Code applies to all students and does not differentiate the applicability of sanction categories based on the age or grade of the student, except regarding attendance.

2013-2014 and 2014-2015 school years²

The Code included a list of 35 offenses with definitions and stated that it was a non-exhaustive list of offense categories. Examples from the list of prohibited conduct included academic misconduct; aggressive physical behavior; assault; dress code violations; use of drugs, narcotics, and alcohol; fighting; harassment; loitering; persistent disobedience; personally offensive behaviors; profane language and behavior; and vandalism. The Code also included a category called "criminal acts" that encompassed any act defined as a crime by state, federal, or local law.

The listed offense categories were not prioritized by degree or levels of seriousness, nor did the Code prescribe or recommend penalties or penalty ranges for the various categories of prohibited conduct. The Code did not include a formal progressive discipline policy (that is, a policy that prescribes increasingly severe penalties for repeated misconduct), except regarding attendance issues and bus conduct, and allowed administrators to consider prior offenses, at their discretion, in determining appropriate consequences for students. There were no mandatory penalties in the Code except for those prescribed by state law, such as for arson and bomb threats, which were to be reported to the police and fire authorities.

Regarding the determination of an appropriate penalty, the Code provided the following:

² The versions of the District's Code for the 2013-2014 and 2014-2015 school years were virtually identical, with minor exceptions which did not relate to OCR's investigation.

- The section entitled “Suspension” stated that suspensions were appropriate where a preponderance of ascertainable and reliable information (more evidence than not) supported the decision maker’s finding that a student engaged in misconduct warranting suspension.
- The “Due Process” section stated that students could face a possible suspension of up to three days for a first offense, a possible suspension of up to five days for the second offense, and a possible suspension of up to ten days for further offenses. It stated that multiple offenses may be considered persistent disobedience, which could carry a possible recommendation for long-term suspension or expulsion. This section also stated that, where appropriate, a report would be made to law enforcement agencies.
- The end of the “Due Process” section stated that, even for a first or second offense, more severe disciplinary actions might be initiated if, in the opinion of the building administrator and/or designee, the situation warrants.

District administrators confirmed that prior offenses (or a student’s disciplinary history) could have an aggravating or mitigating effect on the penalty imposed against a student. The Code allowed for individual discretion in defining an infraction as well as assigning an appropriate punishment for the infraction.

The Code stated that, pursuant to the “Teacher Snap Suspension Policy,” a teacher had the authority to suspend a student from a class period or activity for one school day. However, none of the teachers OCR interviewed had ever used, and most were unaware of, the policy. In addition, according to the Code, building administrators had the authority to suspend a student from school and/or school-sponsored events for up to 10 consecutive school days, and, based upon the seriousness of the offense, recommend to the superintendent a long-term suspension of up to 45 days. The superintendent could approve or deny the recommendation for a long-term suspension, and had the discretion and authority to make recommendations to the board of education for suspensions lasting longer than 45 days and/or expulsions.

For a suspension of 10 school days or less, the Code provided that a student was entitled to minimal due process protections, including oral or written notice of the accusations or charges and an opportunity to respond. The notice and opportunity to respond was to precede the student’s removal from school, unless the student’s presence posed a danger to persons or property or threatened to disrupt the academic process, in which case the notice and opportunity to respond followed the student’s removal from school as soon as possible.

According to the Code for a first or second offense, or multiple offenses where the penalty did not exceed 10 days, students were entitled to a hearing with the building administrator and notification to the parent. The Code stated that an appeal of a short-term administrative suspension (up to 10 consecutive school days) was limited to a review of whether the student received due process. According to District witnesses, the first step of filing an appeal of a short-term disciplinary suspension was to appeal the action with the highest level building administrator. After appealing to the building administrator, a parent could further appeal the disciplinary action to the superintendent or designee. According to District officials, a

suspension appeal made to the superintendent's office involved a complete and independent investigation separate from any investigation done at the building level. In practice, the superintendent named the Human Resources director (HR director) to process the investigation of these appeals, who shared his findings with the superintendent. According to administrators, following the HR director's finding a parent had the option to file an appeal with the board of education, which would then convene a committee to hear the appeal and make a final decision.

2015-2016 and 2016-2017 school years

The District's 2015-2016 Code was similar to the 2013-2014 and 2014-2015 Codes discussed above with the following exceptions: recommendations for long-term suspensions (up to 45 consecutive school days) were to be made to the board of education, not the superintendent, and gave students the opportunity to appear before the board of education, not the superintendent, to answer to the charges concerning the long-term suspensions or expulsions; the District removed references to the Teacher "Snap" Suspension Policy; and the District removed the dress code violation that prohibited the wearing of hats or other coverings during school hours.

The 2016-2017 Code was virtually identical to the 2015-2016 Code with the exception of the revisions to the nondiscrimination notice discussed above.

School Handbooks for the 2013-2014 and 2014-2015 School Years

As noted above, the school-specific handbooks reviewed at Colt, Winans, and the high school all referred to the Code as the District's primary policy on school discipline. The Code did not specifically authorize or prohibit the use of discipline enforcement charts. The Code provided that "[b]uilding administrators may develop regulations that [would] govern how to address discipline issues that support [the] Code in a manner appropriate to the student's age." The Code also provided that, "[i]n disciplinary matters, it shall be the responsibility of the building administrators to determine the degree of seriousness of all offenses and, in their judgment, assess the appropriate consequence (which may be less than the maximum)."

Colt Early Childhood Education Center (Grades Pre-K-K)

The 2014-2015 Colt handbook identified various disciplinary actions that would be used when a student's behavior interfered with his/her educational process or that of others, which included reminders, loss of recess privileges, time outs, parent contact, office visits, in-school behavior support, and out-of-school suspension (OSS). The handbook did not identify the behaviors that correlated to the listed sanctions, nor did it indicate that Colt used a progressive discipline policy. The handbook also provided that the method of disciplinary action used was at the discretion of school staff.

Winans Elementary School (Grades 1-4)

Winans used an enforcement chart in addition to the Code that the principal explained to OCR was designed to provide for the progressive application of discipline and was organized from the least severe offense and penalty to the most severe offense and penalty. The Winans principal

told OCR that she created this chart to guide her administration of discipline and to maintain consistency and fairness. However, OCR’s review of the enforcement chart noted that it explicitly stated that penalties for many offense categories, such as “inappropriate behavior” or “written or verbal assault on student,” were at the discretion of the administrator, and did not prescribe or recommend any particular penalties for the various offenses.

OCR also notes that some of the discipline offense categories contained in the enforcement chart were not defined or described in the District’s Code. For example, the enforcement chart included the offense category of “non-compliance,” which was not a discipline offense category listed in the Code. The penalty for “non-compliance” according to the Winans enforcement chart could range from a half-day in-school suspension (ISS) for the first offense to a one-day OSS for the fifth offense.

Waverly High School (Grades 9-12)

The high school handbook also included an enforcement chart. The enforcement chart classified the offense categories found in the Code by level of severity and provided a corresponding range of penalties for each of the levels of the offense categories. There were five offense levels, with level one listed as the least severe offense category and level five listed as the most severe offense category. At the time of the incident that is the subject of this complaint, penalties for level one offenses (such as littering, minor insubordination, personally offensive behavior, and aggressive physical behavior) did not include OSS. OSS was reserved for all other levels of misconduct, and ranged from one to three days for level two offenses (such as trespassing, forgery, tobacco use, and major insubordination) to ten or more days and possible expulsion for level five offenses (such as arson, bomb threat, weapons, abuse of fire, and fireworks/explosives).

The high school’s enforcement chart stated that “[a]dministrators reserve the ability to move between consequence levels at their discretion.” In determining the degree of seriousness of an offense and corresponding punishment, high school administrators stated varying factors that they consider including the specific circumstances surrounding the offense and its impact on overall safety; the expression of remorse by the student; whether the student understands that what they did was wrong; not punishing a student for a parent’s misbehavior; whether parents come in to meet with them; whether the behavior is a first-time offense; other mitigating circumstances (for example, homelessness); and whether the referring teacher described the behavior as repeated.

The Incident

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The HR director told OCR that the high school did not have ISS at the time of the incident, so ISS was not a discipline option for either of the students involved in the incident. However, OCR's review of the District's discipline data showed that approximately 77 high school students were given ISS during the 2013-2014 school year, including X students who were given ISS in September 2013 prior to this incident. The District's discipline data for the 2012-2013 and 2013-2014 school years also showed that several students who were listed as being involved in physical altercations or fights were given ISS as a penalty.

The student records for Student A and Student B indicated that neither had any discipline infractions during the 2013-2014 school year.³

After Student A's parent filed the appeals with the principal and superintendent, which were denied, she filed a complaint with the District's board of education. According to Student A's parent and the records submitted by the District and Student A's parent, her complaint to the school board was that there was a disparity in discipline between Student A and Student B. OCR's review of the documentation provided concerning the first two appeals the Student A's parent made did not find, however, that Student A's parent specifically alleged that the two students were treated differently based on race or otherwise raised a complaint of race discrimination. According to the superintendent, the appeals did not, at all, concern racial discrimination. The HR director told OCR that he knew the appeal involved the alleged unfair treatment of Student A as compared to Student B; he did not believe, however, that the appeal constituted a complaint of racial discrimination.

XX PARAGRAPH REDACTED XX

XX PARAGRAPH REDACTED XX

OCR provided Student A's parent with an opportunity to provide additional information to support that the District's denied her appeals in retaliation; she did not provide any further information to support this allegation.

³ At the time of OCR's investigation, Student A's file indicated that she had no disciplinary record throughout her first three years in the high school. OCR did not have access to Student B's complete student file.

The District's Discipline Data

Colt Early Childhood Education Center (Grades Pre-K-K)

The District initially asserted to OCR that there were zero instances of exclusionary discipline at Colt for the 2011-2012 through 2013-2014 school years, citing the young age of the students. Following OCR's March 2015 onsite, the District submitted additional data showing that students were assigned ISS and/or OSS at Colt in each of the school years from 2011-2012 through 2014-2015.

Winans Elementary School (Grades 1-4)

During the 2013-2014 school year, African American students comprised approximately 45% of the combined enrollment of African American and white students, while white students comprised the remaining 55% of the combined enrollment at Winans. Although African American students and white students represented roughly equal proportions of the student enrollment relative to each other, the majority of the discipline referrals (involving either African American or white students) were for African American students (62% as compared to 38% for white students at Winans), a disproportionality which was statistically significant.

OCR found at Winans that the rate at which African American students were referred for certain offenses, relative to the total African American enrollment, exceeded the rate at which white students were correspondingly referred in the same offense categories. In many cases, discipline for the offense categories that were (1) not defined or (2) not clearly defined in the Code or (3) subject to varied staff interpretation—such as defiance, other, aggressive physical behavior, inappropriate language, and disruption—showed disparities between African American and white students. For instance, African American students at Winans were referred at a rate 2.15 times greater than the rate at which white students were referred for “defiance,” an offense that was not defined or described in the Code. Winans teachers provided varied and inconsistent examples of behavior which qualified as “defiance”: some teachers identified this behavior as refusing to follow instructions, while others described it as name-calling, acting out, using a “sassy tone,” or rolling one's eyes. Similarly, African American students were referred at a rate 1.84 times greater than the rate at which white students were referred for the offense of “other,” an offense that was similarly not defined in the Code, and at a rate 1.64 times greater than the

rate at which white students were referred for “disruption,” which also was not a specific offense category in the code. Winans teachers told OCR that disruption could range from anything that interrupted instruction to tapping a pencil.

African American students were also referred for aggressive physical behavior, an offense subject to varied interpretations, at a rate 1.34 times greater than the rate at which white students were correspondingly referred. With respect to the offense category of theft—which the Code defined as the act or an instance of stealing; larceny; taking without permission—African American students were referred at a rate 9.83 times greater than the rate at which white students were referred. This disparity was statistically significant. Certain offense categories—“other,” and aggressive physical behavior, which were not defined or clearly defined in the Code—showed statistically significant disparities in the total number of incidents of referrals involving African American students compared to white students. Specifically, although African American students and white students had roughly equal enrollment numbers at Winans, African American students were involved in 69% of referrals (involving either African American or white students) for “other” and 68% of referrals for aggressive physical behavior. These disproportionalities were statistically significant.

In addition to examining referrals for the offenses, OCR examined the use of OSS and ISS for all offense categories at Winans. OCR determined that the incident counts⁴ for OSS (eight for African American students and zero for white students) and ISS (12 for African American students and four for white students) showed statistically significant disparities for African American students compared to white students. Although African American students and white students had roughly equal enrollment numbers at Winans, African American students were involved in 100% of the discipline referrals (involving either African American or white students) that resulted in OSS and 75% of the referrals resulting in ISS.

Waverly High School (Grades 9-12)

During the 2013-2014 school year, African American students comprised approximately 51% of the combined enrollment of African American and white students at the high school, while white students comprised the remaining 49% of the combined enrollment at high school. Although African American students and white students represented roughly equal proportions of student enrollment relative to each other at each school, the majority of the discipline referrals (involving either African American or white students) were for African American students (68% as compared to 32% for white students at the high school). OCR determined that this disproportionality was statistically significant.

⁴ Any time a student received OSS or ISS would be tallied for the incident count.

OCR further determined that, at the high school, African American students, as compared to white students, constituted approximately 68% of the students referred for discipline at least once during the 2013-2014 school year, and the disparity in the rate of referral for a first offense for African American students, which was 1.77 times the rate for white students, was statistically significant.

The evidence gathered to date shows that some of the discipline offense categories were particularly susceptible to the exercise of unguided discretion in the initial decision to refer a student as well as the decision regarding appropriate penalties at the high school. The information gathered suggests that the school permits the discipline of students in areas that its policy does not fully address and for which high school staff differed in explaining how the offense is defined. For example, OCR's review of the evidence gathered to date showed that students were disciplined for the offense categories of "other" and "m-Other." Although these offense categories were not listed in the Code, there were approximately 20 referrals resulting in students being suspended on one or more occasions for such misconduct during the 2013-2014 school year, and that, out of those 20 suspensions, 13 were assigned to African American students (accounting for 65% of those referrals, even though there were roughly equal numbers of African American and white students). Similarly, "disruption" and "m-Disrupt" were not specific offense categories listed or defined in the Code; yet, at the high school, 11 referrals resulted in students being suspended during the 2013-2014 school year, seven of which were African American students (accounting for 63% of those referrals). Some teachers defined "disruption" as any behavior that distracts, disturbs, or interferes with the learning environment or the learning of others. Two teachers likened the offense of "disruption" to that of "defiance." Examples that were given for "disruption" were "talking, walking out of the room, yelling or shouting, being noisy, tapping a pencil, using profanity, listening to loud music, swearing, and being late to class."

In addition, "defiance" and "m-Def" were not listed in the Code; however, during the 2013-2014 school year, there were approximately 43 referrals for these "offenses" that resulted in OSS, and 28 of those referrals were of African American students (accounting for 65% of those referrals). The teachers interviewed offered various definitions for this offense: some defined it as similar to insubordination (for example, refusing to comply with directions, not following the rules, etc.), while others defined it as a more serious offense or a "step up" from insubordination, and others identified it as a lesser offense than insubordination. OCR noted that insubordination was an offense category specifically listed in the Code as "Misconduct and Insubordination," and was defined as the failure to follow the directions of a staff member, or loud, disrespectful or disruptive behavior. One of the high school teachers provided an example of insubordination; specifically referencing an African American student, the teacher explained that she told the student who had spit a piece of gum out onto the hallway floor that he was going to "make this a ghetto school."

With respect to the offense categories of aggressive physical behavior, fighting, and assault, OCR's review of the information obtained found that the Code definitions did not clearly differentiate between the three offenses. Aggressive physical behavior was defined as "pushing, kicking, hitting, biting, spitting, scratching or other acts of unnecessary roughness"; assault was defined, in relative part, as "intentionally causing or attempting to cause physical harm to another

through force or violence”; and fighting was defined as “a physical or verbal confrontation between students.” The Code also did not provide guidance on which of these three offense categories was considered the most serious offense. Of the high school discipline files reviewed, OCR found there were 26 distinct incidents for which African American and white students were referred for conduct coded as aggressive physical behavior, the same offense for which Student A was punished. Out of the 26 incidents, 20 of the students referred were African American (for a total of 21 incidents) and five of the students referred were white. Of the 21 referral incidents involving African American students, 18 resulted in an assignment of OSS and 17 of the 18 OSS assignments were for three or more days. Of the five incidents involving white students, four resulted in an assignment of OSS: two of the four incidents resulted in OSS penalties of three or more days and two incidents resulted in OSS penalties of less than three days. OCR’s review of the files identified at least one white student who was given a lesser penalty, a two-day OSS for aggressive physical behavior after she punched another student, as compared to the three-day OSS given to Student A.

OCR compared the number of African American and white students referred for the first time for the selected offense categories listed in Table 5 below, and found that the rate at which African American students were referred relative to total African American enrollment exceeded the rate at which white students were correspondingly referred for all of the selected offense categories at the high school. Three of the five selected offense categories listed below were not at all listed or defined in the Code—“disruption,” “defiance,” and “other”—and African American students were referred at a rate of 2.86, 1.78, and 1.77 times more than white students for these undefined offenses, respectively. OCR determined that, with respect to the combined enrollment of African American and white students, the “defiance” offense category, an offense not defined in the Code, showed a statistically significant disparity between the number of African American students referred for a first offense and the corresponding number of white students.

**Table 5 – Waverly High School 2013-2014
Students Referred for First Offense (Selected Offense Categories)**

	African American		White		Ratio
	No. of Students	Rate	No. of Students	Rate	
Defiance	43	0.10	23	0.06	1.78
Aggressive Physical Behavior	9	0.02	4	0.01	2.14
Fighting	4	0.009	3	0.007	1.27
Other	13	0.03	7	0.02	1.77
Disruption	9	0.021	3	0.007	2.86

OCR also compared the number of African American and white students referred at least once for the same selected offense categories listed in Table 6, below. These were non-duplicated counts⁵ of students, unlike the first-offense counts just discussed above, and the data similarly showed that the rate at which African American students were referred relative to total African American enrollment exceeded the rate at which white students were correspondingly referred in all of the selected offense categories. Some of the highest racial disparities were identified in categories that were without definition or clear definition in the Code and/or appeared to be subject to discretion and varied interpretation, such as defiance and other.⁶

While OCR found that a statistically significant disparity existed for only one of the first-offense counts discussed above, OCR found that several offense categories reflected statistically significant disparities for non-duplicated counts. Specifically, OCR determined that, with respect to the combined enrollment of African American and white students, the offense categories of (1) aggressive physical behavior, (2) defiance, (3) disruption (aggregating the “m-disrup” and “disrup” referrals), and (4) other (aggregating the “m-Other” and “other” referrals) showed statistically significant disparities between the number of African American students referred at least once for the offense and the corresponding number of white students.

Table 6 – Waverly High School 2013-2014
Students with One or More Referral (Non-duplicated) – Selected Offense Categories

	African American		White		Ratio
	No. of Students	Rate	No. of Students	Rate	
Defiance	53	0.124	27	0.066	1.871
m-Defiance	24	0.056	5	0.012	4.576
Aggressive Physical Behavior	20	0.047	5	0.012	3.813
Fighting	15	0.035	6	0.015	2.383
Other	25	0.058	11	0.027	2.167
m-Other	8	0.019	3	0.007	2.542
Disrupt	12	0.028	8	0.020	1.430
m-Disrupt	9	0.021	0	0.000	N/A
Skip/Tardy/m-Tardy	10	0.023	5	0.012	1.907

OCR also determined that certain offense categories—fighting and skip/tardy in addition to aggressive physical behavior, disruption, and other, discussed above—showed statistically significant disparities in the total number of instances of referrals involving African American students compared to white students.

⁵ “Non-duplicated” figures count each student only once within a given school year for the kind of discipline at issue, even if a student has more than one instance of that kind of discipline.

⁶ Out of the five teachers interviewed with the highest referrals and the most disproportionate African American student referral ratios at the high school, four stated that disruption, insubordination, or defiance, which are categories not defined and/or clearly defined or described in the Code, were the behaviors they most often referred to the office.

OCR also examined whether disparities in the assignment of OSS and ISS as penalties at the high school were statistically significant, as captured in Table 7 below, and found that, with respect to the combined African American and white student enrollment at the high school, each count, except for first-offense⁷ OSS counts, showed statistically significant disparities (identified by an asterisk).

Table 7 – Waverly High School 2013-2014⁸
Use of OSS and ISS for All Offense Categories

Penalty	Count Method	African American		White		Ratio
		No. of Students	Rate	No. of Students	Rate	
OSS	First Offense	30	0.07	21	0.05	1.36
	* Non-duplicated	54	0.13	31	0.08	1.66
	* Incident	111	0.67	54	0.33	N/A
ISS	* First Offense	26	0.06	11	0.03	2.25
	* Non-duplicated	50	0.12	20	0.05	2.38
	* Incident	76	0.73	28	0.27	N/A

For instance, the OSS rate for African American students at the high school was 1.66 times the OSS rate for white students during the 2013-2014 school year.

District’s Disciplinary Recordkeeping System (2013-2014 and 2014-2015)

The District utilized “School Wide Information System (SWIS),” an information and records management system, designed to allow the District to electronically maintain student records, such as discipline records. According to the District administrator who oversaw the use of SWIS, the system should be used to record all disciplinary referrals and all suspension (ISS and OSS)⁹ information for each student. The District also maintained hard-copy discipline files. OCR’s file review, which primarily focused on approximately 60 high school student discipline files, revealed that some high school student discipline records, including hard-copy files and SWIS-maintained records, did not consistently contain due process records such as referral information or information about the incident that led to a referral, suspension worksheets completed by administrators, suspension notification letters completed by administrators, documentation from any appeal hearings, and the actual referral forms with teacher comments and statements. In addition, the hard-copy files and SWIS-maintained records contained sporadic documentation of written statements made by disciplined students or witnesses.

⁷ A student whose first reported instance of discipline in the school year resulted in OSS or ISS would be tallied for the corresponding first-offense count.

⁸ For the incident counts, OCR calculated the proportion of incidents involving African American students relative to the total number of incidents involving African American or white students; this proportion is showed in the “rate” column, although it is a proportion and not a rate.

⁹ The District also reported that expulsion information was recorded in SWIS.

Additionally, neither the District's SWIS database nor the hard-copy files reviewed included records of long-term suspensions. To date, OCR's review of high school files for the 2011-2012, 2012-2013, and 2013-2014 school years identified at least 13 students, all African American, who had been sent to a disciplinary hearing on a recommendation for a long-term suspension (a suspension of more than 10 days). However, the District's records did not show if the students were, in fact, assigned the long-term suspensions, and, if so, for how long. Despite OCR's requests for information, the District did not provide any other information with respect to long-term suspensions, including how long the suspensions lasted.

With respect to referrals to law enforcement, District administrators told OCR that such referrals had been made; however, neither the SWIS database nor the hard-copy files OCR reviewed consistently recorded this information. Of the hard-copy files reviewed, OCR found only one reference to law enforcement in the file, and it consisted of an unsigned written statement.

Staff Training on Discipline

The District asserted to OCR that on August 8, 2014, all principals attended training on the District's disciplinary practices and procedures. The District also reported to OCR that all of its principal and teachers have meetings at the beginning of the school year to discuss discipline issues, practices, and procedures. Most staff interviewed indicated that they did not recall specific training regarding how to interpret the various offense categories in the Code, but recalled general discussions of the Code during faculty meetings, professional development days, and staff in-services. Most staff interviewed also stated that they had discussions with the students in their classrooms about the Code at the beginning of the year and the high school teachers indicated that the provisions in the Code are reviewed for all students.

Many teachers OCR interviewed said they had received training on racial bias and cultural stereotypes within the last five years. There were a few teachers who indicated that the training was provided by the District but most of the teachers said they received training through their degree coursework.

Alternative Education Program

The District operates the Waverly Alternative Education Program (the program), an online seat-time waiver learning program where students earn credits by completing computer-based assignments and activities. The program, approved through the state of Michigan, allows students to attend school for a reduced number of hours per day as compared to students not enrolled in the program (4.5 hours per day rather than the traditional 6.5 hours). Students in the program have the opportunity to earn credits towards graduation and are eligible to receive a high school diploma at graduation. All of the students assigned to the program during the 2014-2015 school year were high school students; however, the program was located in the District's middle school.

According to the District's rosters there were 59 students in grades 9 through 12 assigned to the program. The racial demographics for the program for the 2014-2015 school year are listed below, which showed that African American students comprised over half (55.9%) of the

students in the program during the 2014-2015 school year. The District did not provide to OCR any written criteria for enrollment, eligibility, or completion for the program. OCR's investigation to date did not find any specific referral forms noting the bases for students' referral to or exit from the program. Rather, the high school principal told OCR that he made the decision about which students enter and exit the program.

Table 8 –Alternative Education Program Enrollment (2014-2015 School Year)

Race	Number of Students	% of Enrollment
African American	33	55.9%
White	20	34.0%
Asian	1	1.7%
Hispanic	5	8.4%
Total	59	

District staff denied that students were placed in the program as a result of disciplinary decisions, but did indicate that behavior could be a factor for placing a student in the program. However, OCR's review of records of students in the program indicated that at least 38 of the 59 students (or 64.4%) had at least one discipline referral in their student records and several students had more than one referral in their records or had been suspended for 10 days with a recommendation for a long-term suspension, pending a hearing.

OCR's review to date has suggested that the District has not maintained information regarding its use of the program; therefore, OCR is unable, to date, to determine whether the program is utilized as a form of exclusionary discipline and operated in compliance with Title VI.

Restorative Justice Program at Waverly Middle School

As of the 2014-2015 school year, Waverly Middle School had a restorative justice program. It was the only District school implementing such a program. Restorative justice is an approach to resolving conflict between students or between students and staff. Middle school employees were assigned to a "Restorative Thinking Center," and these staff members were available to help students problem-solve and identify ways to correct their own behavior. The middle school principal explained to OCR that students are referred to the Restorative Thinking Center in lieu of a traditional office referral. The principal reported that the restorative justice program has been very successful and has significantly cut down on office referrals for disciplinary reasons. For example, the middle school reported to OCR that the restorative justice program resulted in the avoidance of 327 OSS in the 2012-2013 school year and 203 OSS in the 2013-2014 school year. The disparity between African American students and white students receiving OSS at the middle school during the 2013-2014 school year was amongst the lowest in the District with the OSS rate for African American students only 1.03 times the OSS rate for white students.

Analysis and Conclusions to Date

Alleged Different Treatment of Student A Based on Race

Based on the allegation, OCR investigated whether Students A and B were disciplined differently for engaging in the same conduct. When determining whether offenses were comparable, OCR considered how the District categorizes the offenses with respect to severity and consequences. OCR also reviewed any mitigating or distinguishing facts as a part of its analysis. OCR concluded that the District determined that Student A and B, although involved in the same incident, were not engaged in the same conduct or degree of conduct. Nonetheless, the evidence obtained by OCR to date raised concerns regarding the disposition of discipline regarding this incident:

- According to the District, it opted to define XXXXXX XXXXXX XXXXXXXXXXX XXXX XXXXXX XX XX XXXXXX XXXXX XXX XXX XXXXXX XXX XXX XXX XXXXXXXXXXXXXXX. However, the District did not follow its Code or high school enforcement chart with respect to selecting a corresponding penalty for aggressive physical behavior. The XXXXXXX that Student A received was not listed or identified as an option for that offense in the Code or the high school's corresponding enforcement chart. Rather, the enforcement chart referenced a behavior contract, loss of privileges, ISS, lunch detention, and academic sanctions. Moreover, the administrator's statement to OCR that ISS was unavailable as an option for Student A is contradicted by the District's disciplinary records.
- There is potentially conflicting language listed in the Code and provided in the District's written notice of a 10-day-or-less suspension. The Code provides for a hearing with a building administrator and an opportunity to respond to notice of a 10-day-or-less OSS. The written suspension notice references an appeal process. It is unclear whether Student A's parent was provided a hearing and/or an opportunity to respond prior to the implementation of XX XXXXX XXXXXXX XXXX XXXXXXX and, consequently, may have been in the potentially more difficult procedural posture of requesting that the District overturn its decision through the appeal process.
- As evidenced from the HR director's investigation, the District did not initially review certain relevant information before reaching its conclusions and XXXXXXXX Student A, including a full interview of Student A and interviews of witnesses who identified XXXX XXX XXXXX XXXX XXXX.

To complete its investigation, OCR would need to conduct additional analysis of student discipline files and interview additional District administrators and staff.

Alleged Retaliation

Student A's parent alleged that the District abruptly ended the XXXX, appeal hearing and denied Student A's discipline appeal, in retaliation for Student A's parent's complaints about the discrepancy in treatment between Students A and B.

With respect to the XXXXX, appeal hearing with the school board, OCR finds that even if the District ended the meeting sooner than Student A's parent would have preferred, which the District denies, the District did not interfere with her right to complete her appeal on Student A's behalf. Student A's parent did not identify any specific information that she was not permitted to present to the school board in support of her appeal; rather, the information Student A's parent provided to OCR indicates that the school board allowed her to submit evidence during the hearing and to raise her concerns. Normally, petty slights, minor annoyances, and lack of good manners do not constitute adverse actions for purposes of retaliation prohibited by Title VI. Thus, OCR finds that, in this case, the school board's alleged action of ending the board hearing, even if found to have occurred, would not rise to the level of an adverse action taken against Student A and her parent; thus, it did not constitute retaliation.

OCR finds that the District's denial of the appeal constituted an adverse action because it could likely dissuade a reasonable person from engaging in protected activity. Here, Student A's parent and the school board president agreed that the complaint to the school board alleged that there was a disparity in discipline between Student A and Student B based on race; therefore, the District was aware that Student A's parent had engaged in protected activity.

However, OCR finds that the evidence is insufficient to establish a causal connection between Student A's parent's complaint and the school board's denial decision, as the school board president pointed to the weight of the evidence with respect to Student A's conduct as support for the discipline decision. Accordingly, OCR concludes that the evidence is insufficient to show that the District retaliated against Student A and her parent, as alleged.

The District's Administration of Discipline

OCR also identified potential compliance concerns with respect to the District's administration of discipline. For example, African American students were referred for discipline at higher rates than white students and, for some offense categories at the high school (aggressive physical behavior, defiance, disruption, and other), at a rate of two or more times that for white students. The evidence gathered to date showed there were higher rates of referrals for African American students for offense categories not included, defined, and/or clearly defined in the Code, and for which there was substantial varied staff interpretation and discretion.

With respect to the offense categories not defined by the Code, such as defiance or m-defiance, other, and disruption, African American students were referred for discipline at higher rates than white students and the disparities were found to be statistically significant. Specifically, African American students were referred at the high school for defiance, other, and disruption at rates that were respectively 2.29, 2.25, and 2.26 times greater than the rates at which white students were referred. In particular, OCR notes the significant disparity at Winans with regard to the category of theft, where African American students were referred at a rate 9.83 times greater

than the rate at which white students were referred. Although theft has certain objective components, the degree to which staff elect to refer for the offense has many subjective components, and the District's definition of this offense was broad and included taking something without permission. This may need to be addressed in staff training provided for in the resolution agreement.

Furthermore, the Code provides minimal guidance regarding how District administrators should determine appropriate penalties and makes fragmented references in different sections of the Code to penalty provisions. It states in one section that administrators have the ability to suspend students under a preponderance of the evidence standard. In another section it states that, with respect to any penalty that amounts to less than 10 days of suspension, administrators have discretion in the severity of the penalty. In one instance, the Code states that students face possible suspensions of up to three days, and in another instance it states five-day suspensions are appropriate for the commission of first and second offenses.

More generally, the District's policies may not provide sufficient information to students and families. While the District represented that it provides copies of its Code at the beginning of year, it is not clear whether the District provides students and their parents or guardians copies of its building-level enforcement charts. Moreover, even to the extent that the Code and charts are distributed, as noted above, certain provisions may be confusing or fail to provide enough information. Although some level of administrator discretion may be appropriate in some instances, the evidence obtained by OCR raised concern that the District's current Code and school enforcement charts may not provide enough direction to staff and notice to students and parents, which may lead to inconsistent application of disciplinary actions, some of which may have a disproportionate impact on African American students.

OCR's investigation also raised concerns regarding the District's recordkeeping. In many instances, the files from the 2013-2014 school year that the District provided were incomplete or lacked sufficient information to determine the reason for the referral, the outcome, and whether a hearing or appeal was sought on behalf of the students. In addition, OCR's review of the District's discipline records showed that the District did not maintain its records in a manner that accurately reflected the complete range of penalties to which students were subjected; the number of students who were subjected to long-term suspensions; the number of students who were referred to local law enforcement; the number of students who appealed their suspensions to the superintendent and/or the board of education; and the outcome of those appeals. The District also lacked any formal process for documenting the referral and assignment of students to the Alternative Education Program. Due to the lack of recordkeeping in the above identified areas, the District was prevented from self-monitoring or implementing other safeguards to ensure against differences in the application of the Code that may have resulted in a racial disparity. Likewise, the incomplete information limits OCR's capacity to determine the District's compliance with Title VI.

To make a compliance determination with respect to the District's administration of discipline and its recordkeeping, OCR would need to conduct further interviews with administrators, teachers at the high school and other District schools, and other staff involved in issuing specific consequences, and review additional individual discipline files of students, including hard-copy records which may contain law enforcement referrals.

OCR notes that one of its concerns was resolved by the District. Specifically, the District's 2013-2014 Code included a "Teacher Snap Suspension Policy" which allowed teachers to suspend a student with limited due process. However, the 2015-2016 and 2016-2017 versions of the Code no longer included this provision.

Resolution and Conclusion

On January 25, 2017, the District entered into the enclosed voluntary resolution agreement that is intended to, when fully implemented, resolve the issues raised in this complaint.

Through the agreement, the District commits to take specific actions to ensure that all students have an equal opportunity to learn in school. Provisions in the agreement are intended to ensure that the District implements fair and equitable discipline policies and practices and creates an environment where all students feel safe and welcome. In addition, the District commits to provide teachers and administrators with the tools and training to support positive student behavior, thereby providing a range of options to prevent and address misconduct and ensure that the District's disciplinary policies and practices are administered in a nondiscriminatory manner.

The agreement requires the District to take specific steps including, but not limited to, review and revision of the District's discipline policies, practices, and procedures, along with improvements to its data collection and review, and training its administrators and staff in order to ensure compliance with Title VI. The District has agreed to provide data and other information, demonstrating implementation of the Agreement, in a timely manner in accordance with the reporting requirements of the Agreement. OCR may conduct additional visits and request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title VI.

OCR will not close the monitoring of the Agreement until it has determined that the District has complied with the terms of the Agreement and is in compliance with Title VI. Should the District fail to fully implement the Agreement, OCR will take appropriate action to ensure the District's compliance with Title VI including possibly initiating administrative enforcement or judicial proceedings 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 to enforce the Agreement, OCR shall give the District written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District'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.

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

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

The complainant may file a private suit in federal court, whether or not OCR finds a violation.

We appreciate the courtesy and cooperation shown by the District during the course of this investigation. If you have any questions, please contact Mr. Jacob Oetama-Paul, who will be monitoring the District's compliance with the Agreement, by telephone at (216) 522-7624 or by e-mail at Jacob.Oetama-Paul@ed.gov.

Sincerely,

Meena Morey Chandra
Regional Director

Enclosure