



**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I**

5 POST OFFICE SQUARE, 8<sup>TH</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

AUG 02 2010

Ms. Maria Geryk  
Acting Superintendent of Schools  
Amherst Regional Public Schools  
170 Chestnut Street  
Amherst, Massachusetts 01002

Re: Complaint No. 01-10-1080  
Amherst Regional Public Schools

Dear Superintendent Geryk:

The United States Department of Education (Department), Office for Civil Rights, has completed its investigation of the above-referenced complaint in which the Complainant alleged that the Amherst Regional Public Schools (District) subjected [REDACTED] to different treatment based on race [REDACTED], subjected [REDACTED] to different treatment based on disability, and retaliated against the Complainant for her prior advocacy. After a thorough investigation of this complaint, OCR has concluded that there is insufficient evidence to establish that the District discriminated against [REDACTED] or retaliated against her, as alleged, and is closing the complaint as of the date of this letter. OCR's determination is discussed in detail below.

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In her complaint and conversations with OCR, the Complainant specifically alleged that during the 2009-2010 school year, [REDACTED] in the 8th grade at the Amherst Regional Middle School (Middle School) and [REDACTED] at the Amherst Regional High School (High School). The Complainant alleged that the District treated [REDACTED] differently based on race when it denied [REDACTED] the opportunity to enroll in Geometry and Algebra II courses because of [REDACTED] race. The Complainant also alleged that the District treated [REDACTED] differently on the basis of [REDACTED] disability and in retaliation for the Complainant's prior disability-related advocacy and her prior allegations of race discrimination when it required [REDACTED] to be taken to the hospital by ambulance after a choking incident.

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OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, as implemented by 34 C.F.R. Part 100 (Title VI), which prohibits discrimination on the basis of race, color, or national origin. OCR is also responsible for enforcing Section 504 of the Rehabilitation Act of 1973, as implemented by 34 C.F.R. Part 104 (Section 504) and Title II of the Americans with Disabilities Act of 1990, as implemented by 28 C.F.R. Part 35 (Title II), both of which prohibit discrimination on the basis of disability. Title VI, Section 504 and Title II each prohibit retaliation against individuals who assert rights that are protected by the laws OCR enforces. The District is subject to Title VI and Section 504 because it receives Federal financial assistance from the Department, and it is subject to Title II because it is a public entity that operates an elementary and secondary school system. Because the District is both a recipient and a public entity that operates an educational system, OCR considers it a "covered entity" under Title VI, Section 504 and Title II.

Based on the above allegations, OCR accepted the following issues for investigation:

- (b)(7)(C) 1. Whether the District discriminated against [REDACTED] on the basis of race by treating [REDACTED] differently in the placement process for math classes, in violation of 34 C.F.R. Section 100.3(a) and (b);
- (b)(7)(C) 2. Whether the District subjected [REDACTED] to different treatment on the basis of [REDACTED] disability when it required [REDACTED] to be transported to the hospital by ambulance after a choking incident, in violation of 34 C.F.R. Section 104.4(a) and (b) and 28 C.F.R. Section 35.130; and
- (b)(7)(C) 3. Whether the District retaliated against the Complainant and [REDACTED] when it required [REDACTED] to be transported to the hospital by ambulance after a choking incident because the Complainant had engaged in protected activities, in violation of 34 C.F.R. Section 100.7(e), 34 C.F.R. Section 104.61 which incorporates 34 C.F.R. Section 1007(e), and 28 C.F.R. Section 35.134. (b)(7)(C)

### Investigative Method

As part of OCR's investigation, we reviewed documents submitted by the Complainant and the District. We also conducted interviews on May 10 and 11, 2010, with administrators and teachers relevant to the complaint. We also met the Complainant and [REDACTED] on May 10, 2010, and interviewed the Complainant by telephone on multiple occasions. (b)(7)(C)

### Issue 1: Different Treatment Based on Race

#### *Background Information*

During the 2009-2010 school year, [REDACTED] attended 8th grade at the Middle School. The Middle School serves 7th and 8th grade students and has approximately 225 students in each grade. The District recommended that [REDACTED] attend the Math 8 course for the 2009-2010 school year; however, the District placed [REDACTED] in the 8th grade Algebra Honors course at the Complainant's request. The Complainant told OCR that the District never informed her that 8th grade students could take Geometry and Algebra II, and, as a consequence, the District denied [REDACTED] the opportunity to attend those classes.

#### *Legal Standard*

The regulation implementing Title VI at 34 C.F.R. Section 100.3(a) and (b)(1) and (2) provides that a covered entity may not treat a person differently, exclude a person, or deny the person any opportunity on the basis of race under any program operated by the covered entity. In analyzing different treatment on the basis of race under Title VI, OCR looks at whether there are other persons of a different race with whom to compare the alleged victims of discrimination. (For this complaint, OCR then considered whether [REDACTED] was treated differently – that is, less favorably – than similarly situated individuals of other racial groups at the Middle School.) OCR also looks at direct evidence of bias by the covered entity against persons of a particular race. If OCR cannot establish that the covered entity treated the individual differently than other persons of a different race, then it concludes its analysis at that point.

If, however, it appears that there was different treatment, OCR would then look at whether the covered entity is able to give a legitimate, non-discriminatory and non-pretextual reason for its different treatment of the protected individual.

*Factual Background*

According to documentation from the District as well as information obtained from OCR interviews with District staff, decisions on student assignments to math classes are overseen by the Middle School math department. OCR learned that, at the time the Complainant filed this complaint, the District had no written procedure regarding placement in math classes.

8th Grade Math Placement

OCR found that for the 2008-2009 and 2009-2010 school years, the educational program in math in the 8th grade had four groups: 1) Math 8; 2) Honors Algebra; 3) Geometry; and 4) Algebra II. According to the District, only students who successfully completed 8th grade Honors Algebra in 7th grade may take Geometry in their 8th grade year, and only students who successfully completed Geometry in 7th grade may take Algebra II in their 8th grade year.

Data provided by the District showed that during the 2009-2010 school year, out of the 235 total 8th grade students, 3% (8 students) took Geometry and 2% (4 students) took Algebra II. The data showed that each of the students placed in Geometry for 8th grade took Honors Algebra in 7th Grade and those 8th grade students placed in Algebra II had taken Geometry in 7th Grade. Data provided by the District for the 2008-2009 school year showed that each 8th grade student enrolled in Geometry that year had previously completed an Algebra I course, either at the Middle School or outside the District. During that year, there were no 8th grade students in Algebra II. The District reported that because [REDACTED] had taken Math 7 in 7th grade, [REDACTED] was not considered for placement in Geometry or Algebra II in 8th grade.

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The District informed OCR that during the 2008-2009 and 2009-2010 school years, it did not publicize the Geometry or Algebra II course options to students or parents. It stated that it made these options known only to students who had previously taken Algebra or Geometry in 7th grade and students whose parents made direct inquiries about those options.

7th Grade Math Placement

Since placement in upper level math courses in the 8th grade is determined on placement in the 7th grade math courses, OCR reviewed the placement of [REDACTED] in 7th grade as compared to [REDACTED] peers. OCR found that 7th grade students at the Middle School are placed in one of three classes: 1) Math 7; 2) 8th Grade Honors Algebra; or 3) Geometry. District staff informed OCR that beginning in the 2008-2009 school year, the District gave all students a pretest (7th Grade Placement Test), which consisted of 30 general math questions and 10 algebra questions. According to the District staff, students who perform well on both the 7th Grade Placement Test and the 10 algebraic questions are then given the opportunity to take a more comprehensive algebra test to see whether they can go directly to 8th grade Honors Algebra as 7th graders. According to the District, only those students who perform well enough on the 7th Grade Placement Test and algebra questions (approximately 20 students per year), are informed of the more comprehensive examination to place out of Math 7 into 8th grade Honors Algebra.

(b)(7)(C)

Data provided by the District showed that during the 2008-2009 school year, of the 217 total 7th grade students at the Middle School, approximately 95% (207 students) of all 7th grade students were placed in Math 7; 3% (7 students) were placed in 8th Grade Honors Algebra; and 2% (3 students) were placed in Geometry. The District provided OCR with test score data used to

determine math placement for over half of these students. The District, however, explained that because of the lack of a centralized maintenance of test scores and because of the retirement of one of the 7th grade math teachers, it was not able to provide test scores for approximately 100 students. As a result, OCR analyzed the existing data to identify evidence of discrimination.

OCR found that during the 2008-2009 school year, of the scores provided by the District, the average score on the non-algebraic portion of the 7th Grade Placement Test was 25.5/30. Of the 7 students whom the math department placed directly into 8th Grade Honors Algebra, the District provided test scores for four of these students. The average score for these 4 students on the non-algebraic questions was 26/30. The District provided OCR with a copy of [REDACTED]'s 7th Grade Placement Test, which showed that [REDACTED] scored 14/30 on the Placement Test and did not answer any of the ten algebra questions correctly. According to the available data, the students placed in 8th Grade Honors Algebra during their 7th grade year scored significantly higher than [REDACTED] on the 7th Grade Placement Test. (b)(7)(C) (b)(7)(C)

The District also informed OCR that in rare cases a 7th grade student could be placed in Geometry. If a student has previously taken an algebra course, the District allowed those 7th graders to take the 8th Grade Honors Algebra Final. If, based on the student's performance on the Final, the student demonstrated that he or she could already do the work covered in Honors Algebra, then the District placed the student in Geometry as a 7th grader.

#### *Different Treatment Analysis*

To establish different treatment on the basis of race, Title VI requires a showing that the District's class assignment practice treated [REDACTED] less favorably, on the basis of race, compared to similarly situated students of other races. (b)(7)(C)

OCR found that the District's practice in placing students for math classes, as outlined above, is not, in and of itself, suggestive of discrimination. OCR next reviewed documentation provided by the District, and interviewed relevant District teachers and administrators to determine whether the District applied the practice differently to [REDACTED] than it did to students of other races. The evidence indicated that [REDACTED] was recommended for math placement in 8th grade in a manner consistent with District practices. (b)(7)(C)

In interviews with OCR, the District staff members denied that [REDACTED] had been treated differently than other students because of [REDACTED] race when the math department did not recommend [REDACTED] for Geometry or Algebra II. In order to evaluate the claims of the District staff in this regard, OCR conducted interviews of math department staff. OCR also reviewed the District's race and ethnicity data for all Middle School math placements, as well as the 7th Grade Placement Test, and 8th Grade Placement Test for Middle School math classes. In terms of [REDACTED] [REDACTED]'s 8th grade placement, the data indicated that the math department's recommendation for [REDACTED] for Math 8 was consistent with the recommendation it made for other, non-[REDACTED] students with similar 8th Grade Placement Test scores. Correspondence between the Complainant and [REDACTED] s teacher demonstrated that despite the math department's recommendation, [REDACTED] like all students recommended for Math 8, was given the same opportunity to take 8th grade Honors Algebra, which [REDACTED] elected to do. OCR found that only students who successfully completed 8th Grade Honors Algebra in 7th grade may take Geometry in their 8th grade year, and only students who successfully completed Geometry in 7th grade may take Algebra II in their 8th grade year. Because [REDACTED] did not take 8th Grade Honors Algebra or (b)(7)(C) (b)(7)(C) (b)(7)(C) (b)(7)(C) (b)(7)(C) (b)(7)(C) (b)(7)(C) (b)(7)(C)

(b)(7)(C) Geometry in 7th grade, [REDACTED] was not eligible to take Geometry or Algebra II as an 8th grader. OCR also noted that the District's recommendation for [REDACTED] s placement in Math 7 was consistent with other students with similar 7th Grade Placement Test scores. Although the data indicated that there were no [REDACTED] students placed in either Geometry or Algebra II as 8th graders, OCR did not find any evidence to suggest that there were qualified [REDACTED] students who were denied those opportunities or that students less qualified than [REDACTED] students were placed in Geometry or Algebra II as 8th graders. Specifically, the data showed that 7th grade students who were recommended for more comprehensive exams to determine placement in either 8th grade Honors Algebra and Geometry scored significantly higher than [REDACTED] and other [REDACTED] students on this exam.

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In sum, the weight of the evidence gathered by OCR from the Complainant, the District staff interviews, and other documentation and data provided by the District, does not indicate that [REDACTED] was subjected to different treatment based on race. Consequently, OCR found insufficient evidence to establish a violation of Title VI.

(b)(7)(C)

The Complainant also raised a particular concern that the opportunity to attend Geometry and Algebra II courses was not publicized to minority students. OCR found that the District only informed parents of these opportunities if the students had previously taken Algebra or Geometry in 7th grade or in response to parent inquiry. While OCR did not find evidence of different treatment based on race in this regard, OCR notes that during this investigation the District published on the Middle School website, a "Guide for 7th Grade Honors Level Work" which details the math placement process, including placement in the honors level courses, for all students.

### Issues 2 and 3: Different Treatment Based on Disability and Retaliation

#### *Factual Background*

(b)(7)(C) [REDACTED] is a student at Amherst Regional High School (High School) in the District. (b)(7)(C) The Complainant informed OCR that as a result of [REDACTED] s disabilities [REDACTED] has low cognitive function and is [REDACTED]. The Complainant also informed OCR that [REDACTED] has difficulty swallowing food. District staff told OCR that the staff members who work with [REDACTED] are (b)(7)(C) trained to encourage [REDACTED] to swallow as [REDACTED] eats.

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(b)(7)(C) According to both the Complainant and the District, on December 4, 2009, during [REDACTED] s lunch period, [REDACTED] began choking on a sandwich. A paraprofessional in the classroom shouted to another staff member, who initiated the Heimlich maneuver for choking. Before the staff member completed the Heimlich, [REDACTED] vomited, expectorating the food. The staff member referred [REDACTED] to the School Nurse (Nurse) for assessment.

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(b)(7)(C) District records showed that the Nurse saw [REDACTED] at approximately 11:15 a.m. The Nurse's report provided by the District to OCR described [REDACTED] at the time of admittance as "alert, ambulatory, usual baseline drooling noted." In an interview with OCR, the Nurse stated that [REDACTED] behavior seemed slightly agitated but from her observations, [REDACTED] was not in immediate respiratory distress. The Nurse told OCR that she then called the School Nurse Leader (Nurse Coordinator) to ensure that she followed the correct choking protocol.

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The Nurse Coordinator told OCR that because of a fear that a choking victim may aspirate as a result of food entering his or her lungs, and because school nursing staff members are only a first aid

resource, she advised the Nurse that further medical evaluation was necessary. The Nurse Coordinator explained to OCR that because [REDACTED] is [REDACTED] and thus could not tell them whether or not [REDACTED] was in pain following the incident, they had difficulty evaluating whether or not [REDACTED] might be aspirating. (b)(7)(C)

The Nurse and Nurse Coordinator told OCR, and District records confirmed, that at 11:27 a.m. they called the Complainant on her home, work, and cellular phone numbers and left a message on each informing her of [REDACTED]'s condition and requesting that she pick [REDACTED] up from the High School. The Nurse Coordinator told OCR that she became uncomfortable waiting for a return call because of the concern that [REDACTED] may aspirate. The Nurse Coordinator told OCR, and District records confirmed that the staff then called the Complainant's husband at 11:30 a.m. The District health record for [REDACTED] states that the Complainant's husband was "informed of incident and protocol requiring medical evaluation post choking." According to the District, the Complainant's husband told the nurses that he was unable to pick up [REDACTED] and told the nurses to call the Complainant again. (b)(7)(C)

According to the records provided by the District, at 11:44 a.m., the nurses called the Complainant again and left a voicemail message. At this point, both nurses told OCR that they informed the High School Principal and Assistant Principal of the incident and the attempts to reach both the Complainant and her husband. At 11:52 a.m., the Nurse Coordinator called the District Physician's office to confirm that medical evaluation was necessary. The Nurse Coordinator told OCR that a staff member in the Physician's office confirmed that [REDACTED] needed an outside medical evaluation. (b)(7)(C)

District records indicate that at 12:10 p.m., the Complainant called the nurses and were informed of the incident, and that the Complainant requested to call [REDACTED]'s clinic before she agreed to transport [REDACTED] for medical evaluation. At 12:15 p.m., the Complainant called the nurses and stated that [REDACTED]'s clinic was closed for the lunch hour and would not reopen until 1:00 p.m., and she would pick [REDACTED] up from the High School then. Both the Nurse and Nurse Coordinator told OCR that the Complainant was offered a direct line to speak with the clinic during the lunch hour, but that she opted not to call them. The Complainant told OCR that based on the report of [REDACTED]'s condition from District staff, she did not believe [REDACTED] needed medical evaluation, and informed the District staff that she was reluctant to transport [REDACTED] to the hospital for that reason. (b)(7)(C)

Both the Complainant and District staff informed OCR that after she told the Nurse and Nurse Coordinator that she was unable to pick up [REDACTED] for medical evaluation, the High School Principal contacted the Complainant and informed her that if she was not able to pick up [REDACTED] immediately, they would call an ambulance to bring [REDACTED] to the hospital. After the Complainant informed the High School Principal that she was not able to pick up [REDACTED] at that time, the Principal, Nurse, and Nurse Coordinator stated that they decided to call the ambulance. District records indicate that the emergency call was made at 12:19 p.m., and that the ambulance arrived in the health room at 12:25 p.m. to transport [REDACTED] to the hospital. (b)(7)(C)

#### Issue 2: Different Treatment on the Basis of Disability

##### Legal Standard

Under the Section 504 implementing regulation, at 34 C.F.R. Section 104.4(a), no individual may be excluded from participation in, be denied the benefits of, or otherwise be subject to discrimination on

the basis of disability under any program or activity that receives Federal financial assistance. Title II, which applies to public entities operating elementary and secondary education programs, contains similar language at 28 C.F.R. Section 35.130(a). To establish that a student has been discriminated against on the basis of disability under Section 504 or Title II, OCR must prove that the covered entity's actions were taken against an individual "on the basis" or because of that individual's disability, rather than other legitimate considerations. To establish violations of Section 504 or Title II under circumstances such as those alleged in this case, OCR would typically conduct a different treatment analysis, in which we look at a variety of factors.

In analyzing different treatment on the basis of disability under Section 504 and Title II, OCR looks at whether there are persons not within the individual's protected class (i.e., non-disabled individuals) with whom to compare the alleged victim of discrimination. OCR considers whether the covered entity treated the individual differently (less favorably) than similarly situated, non-disabled students in the district. OCR also looks at direct evidence of bias by the district against individuals with disabilities. If OCR cannot establish that the covered entity treated the individual differently than non-disabled persons, then it concludes its analysis at that point.

If, however, it appears that there was different treatment, OCR would then look at whether the covered entity is able to give a legitimate, non-discriminatory and non-pretextual reason for its different treatment of the protected individual.

#### Analysis

As stated above, in a different treatment analysis, OCR determines whether the District treated similarly situated students outside [REDACTED] 's protected class (i.e., non-disabled students) differently – that is, more favorably – than it treated [REDACTED] under comparable circumstances. (b)(7)(C)

The District provided OCR with documentation of the five other "choking" incidents in the District during the 2008-2009 and 2009-2010 school years. In one of these reports, it was determined that the student had not actually choked and the Heimlich maneuver was not performed on that student. Therefore, OCR concluded that this student was not similarly situated to [REDACTED]. In the other four instances of "choking," the District staff performed the Heimlich on the student, as it was on [REDACTED]. (b)(7)(C)

Thus, OCR determined that there were four students similarly situated to [REDACTED] i.e., students who experienced choking and to whom the Heimlich maneuver was initiated and/or performed in response to that choking. Of the four students who were similarly situated to [REDACTED], two of them were outside [REDACTED] protected class, i.e., non-disabled. To determine whether the District treated [REDACTED] differently on the basis of disability, OCR compared the District's treatment of the two non-disabled students to the treatment of [REDACTED]. (b)(7)(C)

According to interviews with District staff and documentation provided by the District, the District staff called an ambulance for a similarly situated non-disabled student (Student C) on September 19, 2008. According to the accident report provided by the District to OCR, Student C arrived in the nurse's office after a staff member dislodged the food using the Heimlich maneuver. Though the student stated that [REDACTED] was "very scared but feeling better now," the District contacted the parent so that the parent could pick up the student and transport [REDACTED] for medical evaluation. The parent informed District staff that she was unable to get to the school to pick up Student C. Since Student (b)(7)(C)

) (7)(C) C's parents were not able to pick [REDACTED] up, the District staff called an ambulance to transport the student to the emergency room. According to the accident report, Student C's mother later met the student in the hospital emergency room. Based on this information, OCR could not establish that the District treated [REDACTED] differently than Student C.

) (7)(C) OCR learned that on November 3, 2009, District staff applied the Heimlich maneuver to another non-disabled student (Student D), but did not seek outside medical evaluation of the student in response to the choking concerns. Because the District did not seek medical evaluation for Student D after the student choked and the Heimlich maneuver was applied, OCR found that the District treated [REDACTED] (b)(7)(C) [REDACTED] differently than another similarly situated student outside [REDACTED] protected class, (b)(7)(C) Student D. For the purposes of this analysis, OCR assumed that the District's actions towards Student D were not only different, but more favorable than the treatment received by [REDACTED] (b)(7)(C)

) (7)(C) OCR then determined whether the District was able to give a legitimate, non-discriminatory explanation for its different treatment of [REDACTED] compared to Student D. The District asserted that it did not treat [REDACTED] differently because of discriminatory reasons, and provided several reasons for its treatment of [REDACTED].

First, the District informed OCR that requiring an outside medical evaluation after the Heimlich maneuver is performed on a student comports with accepted medical practice and previous District practice. District staff told OCR that in response to the District's failure to seek medical evaluation for Student D, on November 18, 2009, shortly before the incident with [REDACTED] the Nurse Coordinator reviewed the proper practice of required medical evaluation for choking incidents with all nursing staff at their monthly meeting. The District provided OCR with documentation of that meeting, including an agenda for participants which stated "Choking – should be transported to ER for evaluation."

Subsequent to this incident, the District published this choking protocol in its "School Health Services" policy on December 16, 2009. The protocol states that if the Heimlich maneuver is performed, "the person must be evaluated by a health care provider to rule out potential aspiration." The Nurse and Nursing Coordinator also told OCR that they called the District Physician's office to confirm the protocol shortly after [REDACTED] arrived in the health office and before they called the ambulance.

) (7)(C) Second, the District told OCR that the nature of [REDACTED] s disability heightened the need to obtain immediate medical attention for [REDACTED]. The Nurse and Nurse Coordinator told OCR that because [REDACTED] is [REDACTED] they were unable to ascertain through communication with [REDACTED] whether or not [REDACTED] was in pain, complicating their ability to determine whether or not [REDACTED] might be aspirating. The Principal also told OCR that the fact that an hour had already lapsed from the time that [REDACTED] arrived in the health room weighed heavily in the decision to call for an ambulance.

(7)(C) Third, the District told OCR that the Nurse, Nurse Coordinator, and Principal attempted to reach the Complainant and her husband multiple times to pick [REDACTED] up and transport [REDACTED] to immediate medical care (the timeline of these communications is described earlier in this letter). Documentation provided by the District and information provided by the Complainant supported these statements. District staff told OCR that when the Complainant and her husband communicated that they each would be unable to pick up [REDACTED] at that time, the Principal informed the (b)(7)(C)

) (7)(C) Complainant that [REDACTED] would have to be transported by ambulance. The Principal told OCR that this call was a last attempt to request that the Complainant pick up [REDACTED] and when she was unable to do so, he and the nursing staff decided that they would need to call an ambulance. Based on this information, OCR concluded that the District proffered legitimate, non-discriminatory reasons for transporting [REDACTED] by ambulance for medical evaluation.

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) (7)(C) OCR next analyzed whether there was sufficient evidence that the reasons proffered by the District's different treatment of Student D as compared to [REDACTED] were merely a pretext for retaliation. OCR examined the reasons for calling the ambulance to determine whether the District's actions appeared to be legitimate under the circumstances and whether these reasons were a pretext for discrimination.

) (7)(C) From OCR's investigation, there is no evidence to suggest that the reasons given by the District were a pretext for retaliation. OCR found that the District's actions concerning [REDACTED] comported with District practices, as reflected in its treatment of Student C, who, like [REDACTED]

(b)(7)(C)

) (7)(C) [REDACTED] was transported by ambulance to the hospital after application of the Heimlich maneuver. OCR also reviewed the three other incidents in which a student choked and the District staff applied the Heimlich maneuver during the past two academic years. Based on our review of this information, OCR found that, except the incident with Student D, the District consistently required medical evaluation of students to whom the Heimlich had been applied regardless of whether the student had a disability. Additionally, as noted above, OCR found that after the District failed to require medical evaluation of Student D and before the choking incident with [REDACTED]

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) (7)(C) [REDACTED] the District staff met and reviewed the proper protocol of requiring medical evaluation under such circumstances. After consideration of all the evidence gathered in the course of this investigation, OCR found that the failure to require medical evaluation of Student D was an unauthorized deviation from this established practice. Accordingly, OCR did not find any evidence to suggest that the reasons proffered by the District were a pretext for discrimination.

) (7)(C) After its investigation of this issue, OCR concluded that there was insufficient evidence to establish that the District treated [REDACTED] differently because of his disability. Specifically, the evidence demonstrated that the District's requirement that [REDACTED] get a medical evaluation was consistent with its prior practice. Furthermore, although the District deviated from that practice in regard to Student D, it provided legitimate, non-discriminatory reasons for requiring medical evaluation of [REDACTED]. Consequently, OCR found insufficient evidence to support a finding of a violation of Section 504 or Title II, as the Complainant alleged.

(b)(7)(C)

### Issue 3: Retaliation

#### Legal Standard

The Title VI regulation at 34 C.F.R. Section 100.7(e) and the Section 504 regulation at 34 C.F.R. Section 104.61 provide that a recipient, such as the District, shall not intimidate, threaten, coerce or discriminate against any individual because he/she has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the laws OCR enforces. A similar prohibition under the implementing regulation for Title II is found at 28 C.F.R. Section 35.134(b).

In investigating a retaliation complaint, OCR examines whether there is sufficient evidence to establish that: (1) the complainant engaged in a protected activity; (2) the covered entity was aware

of the protected activity; (3) the covered entity took adverse action against the complainant; and 4) there is sufficient evidence to infer a causal connection between the protected activity and the adverse action.

If one of the above elements cannot be established, then OCR ends its analysis and finds insufficient evidence of a violation. If, however, all of these elements are established, then OCR will determine: (5) whether the covered entity has identified a legitimate, non-retaliatory reason for taking the adverse action. OCR carefully scrutinizes any such reason provided by the covered entity in order to determine: (6) whether the reason is supported by the evidence, or whether it appears to be a pretext for retaliation (that is, a reason designed to conceal a retaliatory motive).

If OCR finds that the covered entity has not offered a legitimate, non-retaliatory reason, or if that reason is found to be a pretext for retaliation, then OCR will make a finding of retaliation.

Alternatively, if OCR concludes that the covered entity has offered a legitimate, non-retaliatory reason for its action and cannot show that the reasons provided are a pretext for retaliation, OCR will find insufficient evidence to prove retaliation.

To address this issue, OCR reviewed information and documentation obtained from the District, and conducted in-person interviews with the Complainant and with District staff, including the High School Principal, Nurse Coordinator, Nurse, and you.

#### Analysis

The first step in the retaliation analysis is to determine whether the Complainant engaged in a protected activity. In this case, a protected activity is the exercise of a right that is protected under Title VI, Section 504 or Title II. In an interview with OCR, the Complainant alleged that the District called an ambulance for [REDACTED] in retaliation for her advocacy regarding school discipline issues disproportionately affecting students of color in the District and her disability-related advocacy on behalf of [REDACTED]. Examining email correspondence between the Complainant and District staff, provided by the District, OCR found that the Complainant frequently advocated for students of color during the 2009-2010 school year, both as an individual and as a member of a minority student advocacy group in the District. Documentation provided by the District also demonstrated that the Complainant engaged in disability-related advocacy on behalf of [REDACTED] during this time. Since these actions exercise rights covered under Title VI, Section 504, and Title II, they are considered protected activities for the purpose of the retaliation analysis.

(b)(7)(C)

Next, OCR examined whether the District was aware that the Complainant engaged in these protected activities. The Nurse and Nurse Coordinator told OCR that, prior to the District's call for an ambulance for [REDACTED], they were not aware that she engaged in protected activity. Both the High School Principal and you, however, told OCR that, at the time of the choking incident, you were aware of the Complainant's advocacy on behalf of students of color and the Principal was aware of the Complainant's disability-related advocacy on behalf of [REDACTED]. You informed OCR that the Complainant often included you on correspondence related to racial justice issues in the District. Therefore, OCR found that the District had notice of the Complainant's protected activities. Accordingly, this fulfilled the first two elements of the retaliation analysis.

(b)(7)(C)

The third element of OCR's analysis is whether the District subjected [REDACTED] to an adverse action against her at the same time or sometime after she engaged in a protected activity. In order to establish this element, OCR must first determine that the conduct in question was

(b)(7)(C)

sufficiently serious to constitute adverse action. To be adverse, an action must cause tangible or lasting harm, or be likely to have a deterrent effect on a reasonable person's future protected activity. A transitory or merely unpleasant incident is not sufficiently serious to constitute an adverse action under a retaliation analysis. In this case, the Complainant alleged that the District retaliated against her by requiring [REDACTED] to be transported to the hospital by ambulance. On its face, without regard to specific context, the action of calling an ambulance in response to a choking incident, rather than waiting for parent transport to a Primary Care Physician, could possibly be considered an adverse action, considering the high expense and inconvenience potentially involved in emergency medical transport. District staff acknowledged that the Complainant's advocacy on behalf of students of color and disability-related advocacy for [REDACTED] was ongoing at the time the alleged adverse action occurred. Further, the event on December 4, 2009, occurred shortly after a documented act of advocacy, email correspondence dated November 23, 2009. Accordingly, for the purposes of this analysis, OCR assumed that the District's actions were sufficiently adverse and that they occurred at the same time or sometime after the Complainant's protected activities.

The fourth element of the retaliation analysis is whether there is sufficient evidence to infer a causal connection between the adverse action and the protected activity. In other words, we looked to whether a link can be inferred so as to show that the Complainant's engagement in protected activities caused the District to take the adverse actions against her. A causal connection may be inferred when the adverse action occurs in close proximity in time with the protected activity. Generally, the more time between the protected activity and the adverse action, the weaker the inference of causal connection. OCR may also consider other factors in determining whether there is sufficient evidence to support such an inference, including (for example) the alleged retaliator's awareness of the protected activity, a deviation from a district's policies and procedures, and different treatment of similarly situated individuals. These factors, as well as other case specific circumstances, are weighed together as a whole, and if the evidence suggests that the more likely cause of the adverse action is the protected activity, then OCR will infer a causal connection between the two.

As noted above in the different treatment analysis, OCR found that that the District's treatment of [REDACTED] was consistent with its general practice and its treatment of Student C, a non-disabled student. While OCR found that the District departed from its practice of requiring medical evaluation in regard to Student D, also a non-disabled student, as noted above, the District provided legitimate, non-discriminatory reasons for the unauthorized departure from its practice. Based on interviews with District staff, the documentation of prior choking incidents with other students, and the documentation of the November 18, 2009 nurses' meeting, OCR found that the District based its actions on prior practice, its concerns that [REDACTED] may suffer from aspiration as a result of choking, and because the Complainant told school staff that she was unable to transport [REDACTED] for medical evaluation herself.

In view of all the circumstances surrounding the District's request for an ambulance for [REDACTED] as a result of the choking incident, OCR did not find that it could infer, from the weight of the evidence, a causal link between the Complainant's advocacy and the District's request for an ambulance for [REDACTED]. OCR, therefore, found insufficient evidence to show that the District retaliated against the Complainant when it called an ambulance for [REDACTED].

### Conclusion

Based on the evidence above, OCR concluded that there is insufficient evidence that the District treated [REDACTED] differently in the math placement process based on race. OCR also found insufficient evidence to show that the District treated [REDACTED] differently than non-disabled students or retaliated against the Complainant when it called for an ambulance for [REDACTED] because the District provided legitimate, non-discriminatory, and non-pretextual reasons for its actions. Consequently, OCR is closing this complaint effective the date of this letter.

(b)(7)(C)

The information contained in this letter is not intended and should not be construed to cover any other issues regarding compliance with the regulations implementing Section 504, Title II, or Title VI that may exist but are not discussed therein. Please be advised that the Complainant may have the right to file a private suit in Federal court, whether or not OCR finds a violation.

This letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and disposition of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

We thank you and your staff for your cooperation during this investigation. Should you have any questions about this letter, or about our findings, please contact Michael Joyce, Civil Rights Attorney, at (617) 289-0059, or by email at [Michael.Joyce@ed.gov](mailto:Michael.Joyce@ed.gov). You may also feel free to contact me at (617) 289-0019.

Sincerely,



Donna L. Russell  
Team Leader/Civil Rights Attorney