

October 17, 2018

Dr. Henry C. Foley
President
New York Institute of Technology
Northern Boulevard
Tower House
Old Westbury, New York 11568

Re: Case No. 02-13-2323
New York Institute of Technology

Dear President Foley:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), regarding the above-referenced complaint filed against the New York Institute of Technology (the Institute). The complainant alleged that the Institute discriminates, on the basis of disability, because the student parking lot (Allegation 1), the route from the student parking lot to Salten Hall (Allegation 2), and the route from the Tower House parking lot to North House (Allegation 3) at the Institute's Old Westbury campus are not accessible to individuals with disabilities. The complainant also alleged that the Institute discriminates, on the basis of disability, by failing to monitor the use of accessible parking spaces throughout campus to ensure that such spaces are available for those with handicapped parking permits (Allegation 4). In addition, the complainant alleged that security guards at the Institute harassed him because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by (a) following him around campus and issuing him parking tickets during XXX XXXXX 2013 XXXXXXXXX; and, (b) calling the Institute's Director of Security (the Security director) and following him around when he tried to visit the Institute's president on XXXXXXXXXXXX, 2013 (Allegation 5). The complainant further alleged that the Institute discriminated against him, on the basis of his disability, by failing to respond appropriately to a complaint he made in or around XXXXX 2013, that security guards at the Institute had harassed him because of his disability (Allegation 6). The complainant also alleged that on or about XXXXXXXXX, 2013, the Dean of Campus Life (the dean) retaliated against him for his disability-related advocacy, by threatening to XXXXXXXXX XXX XXXXXXXXX XXXXXXXX XXXXXXXX XXX and telling him that "XXXXXXX XXXXX XX XXXXX" for him if he tried to contact the president again (Allegation 7).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The Institute is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with a complaint.

In its investigation, OCR reviewed information that the complainant and the Institute submitted. OCR also interviewed the complainant and Institute staff. Additionally, OCR conducted an on-site inspection of the Institute.

With respect to Allegation 1, the complainant alleged that the Institute discriminates, on the basis of disability, because the student parking lot is not accessible to individuals with disabilities. Specifically, the complainant alleged that the student parking lot consists of three separate but connected lots totaling over 1,000 parking spaces, but includes only two designated accessible spaces. The regulation implementing Section 504, at 34 C.F.R. § 104.21, provides that no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by disabled persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

OCR determined that the Institute has one student parking lot, which is divided into three sections referred to as Brookville I, II and III (collectively, the Student Lot). The Student Lot is located across the street (Campus Drive) and down a hill from the Academic Quad. OCR determined that the Student Lot was restriped in 2012. The U.S. Department of Justice's Americans with Disabilities Act (ADA) Design Guide states that when a lot is restriped, it must provide accessible parking spaces as required by the 2010 ADA Standards for Accessible Design (2010 ADA Standards).¹

OCR determined that the Student Lot contains a total of 706 parking spaces, four of which are designated accessible. Two of the designated accessible spaces are van accessible, but both lack appropriate signage, and one is not on the shortest route to an accessible entrance to the Academic Quad.

Section 208.2 of the 2010 ADA Standards requires that for parking lots containing more than 500 but fewer than 1000 parking spaces, two percent of the total (in this case, 14) spaces be designated accessible parking spaces. Section 208.2.4 requires that one of every six of the designated accessible spaces (in this case, 2) be van accessible. Section 208.3.1 requires that all

¹ See <http://www.ada.gov/restripe.pdf> (last visited May 29, 2018).

designated accessible spaces be located on the shortest accessible route to an accessible entrance.² On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve these compliance issues. OCR will monitor implementation of the resolution agreement.

With respect to Allegation 2, the complainant alleged that the Institute discriminates, on the basis of disability, because the route from the Student Lot to Salten Hall is not accessible to individuals with disabilities. Specifically, he stated that the Student Lot is across the street and down a hill from the Institute's Academic Quad, which contains Salten Hall, and that there are stairs and a steep ramp along the route from the Student Lot to Salten Hall.

OCR determined that the Academic Quad comprises Anna Rubin Hall, Harry Shure Hall, and Theobald Hall, which were constructed in 1966, and Salten Hall, which was constructed in 1975. OCR determined that construction was completed on Salten Hall in the Academic Quad in 1975, and it has not been altered since. The regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities constructed on or before June 3, 1977, as "existing facilities." Accordingly, OCR determined that Salten Hall is an existing facility under Section 504. The regulation implementing Section 504 requires a recipient to operate each program or activity conducted in existing facilities so that the program or activity, when viewed in its entirety, is readily accessible to individuals with disabilities. Accordingly, each program or activity operated in Salten Hall, when viewed in its entirety, must be readily accessible to individuals with disabilities. The regulation implementing Section 504 does not require a recipient to make structural changes to existing facilities. A recipient may comply through means such as redesign of equipment, or reassignment of classes or other services to accessible buildings or locations. Where programs or activities cannot or will not be made accessible using alternative methods, structural changes may be required in order for recipients to comply.

OCR determined that the route from the Student Lot to the entrance of the Academic Quad (which contains Salten Hall) has a ramp that is adjacent to a concrete stairway; accordingly, individuals with disabilities may use the ramp instead of the stairway. Using the 2010 ADA Standards (and earlier standards, such as the Uniform Federal Accessibility Standards (UFAS) and the Americans with Disabilities Act Accessibility Guidelines (ADAAG)), OCR determined

² OCR determined that there are two parking lots reserved for faculty and staff adjoining the Academic Quad: (1) the Harry Schure and East End 300 Road parking area (the Harry Schure Lot); and, (2) the Salten Hall and West End 300 Road parking area (the Salten Hall Lot). The Institute advised OCR that in addition to the four designated accessible spaces in the Student Lot, there are 13 designated accessible spaces in the Harry Schure Lot (of 33 total spaces) and 2 designated accessible spaces in the Salten Hall Lot (of 42 total spaces). Pursuant to Section 208.2 of the 2010 ADA Standards, where more than one parking lot is provided at a site, the number of accessible spaces is to be calculated according to the number of spaces required for each parking lot; however, pursuant to Exception 2 of Section 208.3.1, accessible parking spaces may be located in different parking lots if substantially equivalent or greater accessibility is provided in terms of distance from an accessible entrance. The total number of spaces in the Student Lot, Harry Schure Lot and Salten Hall Lot is 781 spaces. Accordingly, if Exception 2 of Section 208.3.1 is applied, a total of 16 accessible spaces would be required among the 3 lots, of which 3 would need to be van accessible. The Institute stated that disabled students and visitors may park in accessible spaces at the Harry Schure Lot and the Salten Hall Lot; however, OCR determined that prominent signage in front of the entrances to the Harry Schure and Salten Hall Lots states that parking therein is "[F]or Faculty and Staff only," and that there is "[n]o student parking in this area." In order to apply Exception 2 of Section 208.3.1, appropriate signage would need to be installed at all 3 parking lots advising disabled students and visitors of this option.

that the slope of the ramp was too steep; additionally, the ramp lacked railings.³ In order for the programs and activities operated in Salten Hall to be considered accessible from the Student Lot, the Institute would need to address these issues. On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve these compliance issues. OCR will monitor the implementation of the resolution agreement.

With respect to Allegation 3, the complainant alleged that the Institute discriminates, on the basis of disability, because the route from the Tower House parking lot to North House is not accessible to individuals with disabilities. Specifically, the complainant stated that the route is situated on hilly terrain.

OCR determined that North House contains the Institute's Human Resources (HR) department, and is located north of the Academic Quad. The Institute informed OCR that the HR department does not handle student employment; rather, student employment is handled by Career Services, which is located in Salten Hall. The Institute also informed OCR that the only reason a student would conceivably need to visit North House is to file a complaint against staff/faculty, which is typically done through Student Affairs/Campus Life Office in Salten Hall. OCR determined that North House was constructed in 1940. As stated above, the regulation implementing Section 504, at 34 C.F.R. § 104.22, categorizes facilities constructed on or before June 3, 1977, as "existing facilities." Accordingly, assuming that North House has not been altered since 1940, OCR determined that the North House is an existing facility under Section 504.

OCR determined that there is a parking lot directly in front and south of North House (North House lot). The North House lot is designated for faculty, staff and administration. While OCR also determined that there is a parking lot adjacent to the Tower House (Tower House Lot), which is located across Campus Drive and down a hill from North House, OCR determined that the Tower House Lot is not intended to serve the North House.⁴ Accordingly, the Institute is not required to maintain an accessible route between the Tower House Lot and the North House.

OCR determined that the Institute operates a shuttle bus that picks up and drops off students at locations around campus on school days, between 7:30 a.m. and 11:30 a.m., and 12:30 p.m. and midnight. OCR determined that the bus operates on a continuous loop of campus, with seven prescribed stops, three of which are in or outside of parking lots.⁵ While there is no stop at North House, OCR determined that students may call campus security at any time to request a pick up from any location on campus, or may contact the Office of Counseling and Wellness to arrange

³ The slope of the ramp ranged between 10.6% and 11.7%, whereas Section 405.2 of the 2010 ADA Standards requires that ramp runs have a running slope not steeper than 1:12, or 8.33%. Additionally, Section 405.8 of the 2010 ADA Standards requires that ramp runs with a rise greater than 6 inches shall have handrails complying with Section 505.

⁴ The Tower House Lot is also designated for faculty, staff and administration, and contains 10 visitor parking spaces. The Institute informed OCR that students visiting Tower House may park in the Tower House Lot visitor parking spaces.

⁵ Specifically, there is one stop in the Fine Arts parking lot; one stop directly across the street from the South parking lot; one stop adjacent to the tennis courts, which are west of the Student Activity Center; two stops on either side of Campus Drive, next to the Anna Rubin Hall; one stop at the Main Entrance to the campus; and, one stop outside of the NYIT de Seversky Mansion.

for a regular pick up at a non-prescribed stop.⁶ Accordingly, OCR determined that the Institute has a process in place for providing access to the programs and activities operated in the North House from parking areas, including from the Tower House Lot. Accordingly, OCR will take no further action with respect to Allegation 3.

With respect to Allegation 4, the complainant alleged that the Institute discriminates, on the basis of disability, by failing to monitor the use of accessible parking spaces throughout campus to ensure that such spaces are available to those with handicapped parking permits. In support of this allegation, the complainant asserted that on February 14, March 5, and April 23 and 25, 2013, vehicles without handicapped placards were parked in designated accessible parking spaces in the Harry Schure and Salten Hall Lots.⁷

The Institute provides a copy of its parking policy, entitled NYIT Traffic Rules & Regulations (the Parking Policy), to all students during orientation, and to each person who registers a vehicle with the Institute. The Parking Policy is also available in the Institute's Security Office and on its website.⁸ Pursuant to the Parking Policy, designated accessible parking spaces are reserved for individuals with handicapped license plates or permits. The Parking Policy states that anyone in violation of the Policy will be ticketed.

The Institute advised OCR that campus security guards monitor the Institute's parking lots periodically throughout the day, to ensure that only cars with the proper plates or permits are parked in designated accessible parking spaces. OCR determined that during academic year 2012-2013, the Institute's security guards issued 936 parking tickets. Of these, approximately 854 were for infractions such as "parking impermissibly in designated parking spaces," "parking without a permit," and "parking illegally." College staff further advised OCR that in each instance when the complainant reported a possible parking violation to them, including on the dates when the photographs were taken, security guards investigated and determined that there was no vehicle remaining in the space, or the individual person parked in the space was entitled to park in that space. The complainant did not provide, and OCR did not find, evidence that the College systematically ignored or failed to ticket non-disabled persons parked in designated accessible parking spaces.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the Institute discriminates, on the basis of disability, by failing to monitor the use of accessible parking spaces throughout campus to ensure that such parking spaces are available to those with handicapped parking permits. Accordingly, OCR will take no further action with respect to Allegation 4.

With respect to Allegation 5, the complainant alleged that security guards at the Institute harassed him because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by: (a) following him around campus and issuing him parking tickets

⁶ Such requests and arrangements can also be made for days and times that the shuttle bus does not usually operate.

⁷ The complainant provided photographs to OCR, which he claims were taken on the above-referenced dates. The photographs show vehicles without handicapped license plates or permits parked in designated accessible parking spaces in the Harry Schure and Salten Hall Lots.

⁸ See <https://www.nyit.edu/files/policies/ParkingRulesAndRegulations.pdf> (last visited Oct. 17, 2018).

during XXX XXXXXX 2013 XXXXXXXX; and, (b) calling the Security director and following him around when he tried to visit the president on XXXXXXXX, 2013.

Disability harassment that creates a hostile environment is a form of discrimination prohibited by Section 504 and its implementing regulation. Harassing conduct by an employee, a student, or by a third party can include verbal, written, graphic, physical or other conduct; or conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the institution's program. If OCR determines that harassing conduct occurred, OCR will examine additional factors to determine whether a hostile environment existed and whether the Institute took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

In analyzing whether retaliation occurred, OCR must first determine whether the three prima facie elements of retaliation can be established: (1) whether a recipient or other person subjected an individual to an adverse action; (2) whether the recipient or other person (a) knew that the individual engaged in a protected activity or (b) believed that the individual might engage in a protected activity in the future; and, (3) there is some evidence of a causal connection between the adverse action and protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

OCR determined that the complainant engaged in protected activity by complaining to the Security director and the dean XXXXXXXX, XXXXX, and XXXXXX XXX XXXXXX, that vehicles without handicapped parking permits were parked in designated accessible parking spaces. OCR determined that the complainant also engaged in protected activity on XXXXXX, 2013, when, while complaining to the Institute's Senior Director of XXXXXX XXX XXXXXX (the XXXXXXXXXXXX director) about a ticket he received that day, he stated that he wanted to file a complaint that security guards at the Institute were harassing him because of his disability. The security guard who ticketed the complainant on XXXXXXXX, XXXXXXXX, XXXXXXXX and XXXXXX, 2013, as set forth below, advised OCR that he was not aware of the complainant's protected activity; however, for the purpose of this analysis, OCR presumed that all Institute administrators and security guards had knowledge of the complainant's protected activity.

With respect to Allegation 5(a), the complainant alleged that security guards at the Institute harassed him because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by following him around campus and issuing him parking tickets during XXX XXXXXX 2013 XXXXXXXX. OCR determined that on XXXXXXXX, XXXXXXXX, and XXXXXXXX and XXXXXX, 2013, the complainant received parking tickets for parking in spaces reserved for faculty members. OCR determined that pursuant to the Parking Policy, persons who impermissibly park in reserved parking spaces will be ticketed.⁹

⁹ The Parking Policy provides that "[s]paces and parking lot sections reserved for . . . faculty and staff . . . are restricted at all times," and that handicapped license plates and/or permits "do not exempt the holder from other parking requirements."

The complainant did not dispute that he parked in spaces reserved for faculty members on the above-referenced dates.¹⁰

OCR determined that during academic year 2012-2013, the Institute's security guards issued 91 tickets for parking impermissibly in reserved parking spaces. OCR determined that more than 90% of such individuals ticketed were not disabled, and had not engaged in any protected activity prior to being ticketed.

Based on the foregoing, OCR determined that the Institute's security guards had a legitimate, nondiscriminatory, non-retaliatory reason for ticketing the complainant on the above-referenced dates; namely, the complainant violated the Parking Policy. OCR determined that the proffered reason was not a pretext for discrimination or retaliation, because it is undisputed that on the dates in question, the complainant had parked in spaces reserved for faculty members; the complainant violated the Parking Policy by doing so; and, security guards also ticketed nondisabled individuals who had not engaged in protected activity for parking in reserved parking spaces and violating the Parking Policy. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that Institute security guards harassed the complainant because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by issuing him parking tickets during XXX XXXXXX 2013 XXXXXXXX. Accordingly, OCR will take no further action with respect to Allegation 5(a).

With respect to Allegation 5(b), the complainant alleged that security guards at the Institute harassed him because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by calling the Security director and following him around when he tried to visit the president on XXXXX, 2013. OCR determined that on XXXXX, 2013, the complainant attempted to visit the president of the Institute, at Tower House, without an appointment. Institute staff advised OCR that the complainant was XXXXX, and refused to provide his name or any identification to the security guard stationed at Tower House (guard 1). Guard 1 then called the Security director, who dispatched an additional security guard (guard 2) to help handle the matter. OCR determined that guards 1 and 2 asked the complainant to conduct himself reasonably, make an appointment, and show some form of identification. OCR determined that the complainant instead left Tower House, while guards 1 and 2 observed him and noted his license plate number.

OCR determined that pursuant to Institute policy, as set forth in the Student Handbook, students are required to identify themselves and/or produce identification upon request by any Institute official. Guard 1 denied that XXX decision to call the Security director was because of or motivated by the complainant's disability or protected activity. Likewise, guard 2 denied that XXX act of coming to Tower House to interact with the complainant was because of or motivated by the complainant's disability or protected activity. OCR did not find any evidence to contradict the assertions of guards 1 and 2.

¹⁰ Additionally, OCR determined that on or about XXXXXXXX, 2013, the XXXXXXXX director told the complainant that pursuant to the Parking Policy, he was not allowed to park in faculty parking spaces. OCR determined that the XXXXX director nevertheless waived the complainant's tickets for XXXXXXX and XXXXX, 2013. OCR determined that the XXXXXXX director later offered to waive the complainant's tickets for XXXXXXX and XX, 2013, but the complainant refused the offer.

The Security director advised OCR that there have been other situations in which students have arrived without an appointment demanding to see the President, and were similarly asked to make an appointment and/or show identification. If the visitor refused to show identification, security have called the Security director, asked the visitor to leave, and monitored the situation.

Based on the foregoing, OCR determined that guards 1 and 2 had legitimate, nondiscriminatory, non-retaliatory reasons for interacting with the complainant as they did on XXXXXX, 2013; namely, the complainant engaged in inappropriate behavior and refused to provide his name or any identification. OCR determined that the proffered reasons were not a pretext for discrimination or retaliation, because the complainant's behavior was a violation of the Student Handbook, and Institute security guards have acted in a similar manner towards other students who refused to show identification. Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that Institute security guards harassed the complainant because of his disability, or in the alternative retaliated against him for his disability-related advocacy, by calling the Security director and following him around when he tried to visit the president on XXXXXXXX, 2013. Accordingly, OCR will take no further action with respect to Allegation 5(b).

With respect to Allegation 6, the complainant alleged that the Institute discriminated, on the basis of disability, by failing to respond appropriately to a complaint he made in or around XXXXX 2013, that security guards at the Institute had harassed him because of his disability. The regulation implementing Section 504, at 34 C.F.R § 104.7(b), requires that a recipient adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and its implementing regulation. In addition, the regulation implementing Section 504, at 34 C.F.R. §104.7(a), states that a recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with the requirements of Section 504 and its implementing regulation. The regulation, at 34 C.F.R. §104.8(a), also requires each such recipient to take appropriate steps to notify participants, beneficiaries, applicants and employees that it does not discriminate on the basis of disability; and, that this notice should also include the identity of its designated coordinator(s). The regulation, at 34 C.F.R. §104.8(b), requires recipients to publish this notice in any recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees.

Section 504 Coordinator

The Institute advised OCR that the Assistant Director of the Office of Disability Services (Assistant Director) is its "Section 504 Coordinator," and is the individual designated to coordinate its efforts to comply with Section 504. Accordingly, OCR determined that the Institute met the requirements of the regulation implementing Section 504 at 34 C.F.R. §104.7(a).

Notice of Non-Discrimination

OCR determined that the Institute’s Student Handbook, which is available on-line, includes a link to the Institute’s Statement of Non-Discrimination (the Statement), which states that the Institute “does not discriminate in admissions or access to, or operation of, its programs and activities on the basis of race, color, national origin, religion, creed, ethnicity, disability, age, marital status, sex, gender, sexual orientation, gender identity, veteran status, or any other legally protected status.” The Statement also provides the name, title, address and telephone number of the Institute’s designated Section 504 Coordinator. The Statement further states that inquiries concerning the statement may be directed to the Title IX Coordinator or to OCR.¹¹

OCR also determined that the Institute’s Non-Discrimination and Discriminatory Harassment Policy, which appears on the Faculty & Staff Resources webpage, directs visitors to the Statement. Additionally, the Institute’s on-line course catalog for undergraduate and graduate students contains a link to the Statement; however, the on-line catalog also includes a separate notice of nondiscrimination that does not provide the name, address or telephone number of the Institute’s designated Section 504 Coordinator.¹² On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve this compliance issue. OCR will monitor the implementation of the resolution agreement.

Grievance Procedures

OCR considers the following in determining if grievance procedures are prompt and equitable: whether the procedures (a) provide for notice to students and employees of the procedures, including where complaints can be filed, that is easily understood, easily located, and widely distributed; (b) apply to discrimination/harassment by employees, students, and third parties; (c) provide for adequate, reliable and impartial investigation, including an opportunity to present witnesses and evidence; (d) have reasonably prompt timeframes for major stages of the grievance process; (e) provide for notice to the parties of the outcome; and, (f) provide assurance that the institution will take steps to prevent further harassment and to correct its effects if appropriate.

OCR determined that during academic year 2012-2013, the Institute had a grievance procedure, entitled, “Americans with Disabilities Act – Grievance Procedure” (the Former Procedure), that covered complaints of discrimination in violation of Title III of the Americans with Disabilities Act. The Former Procedure indicated that complaints alleging disability-related discrimination should be filed in writing with the Assistant Director within ten (10) workdays after the complainant becomes aware of the discrimination. The Former Procedure provided that upon receipt of a complaint, the Assistant Director would conduct an “informal but thorough” investigation of the complaint and would afford all “interested persons and their representatives” an opportunity to submit relevant evidence. While the Assistant Director notified the complainant of the outcome of the investigation and any resolution in writing within 10 workdays of the filing of the complaint, the Former Procedure did not indicate that the respondent would be similarly notified. The Former Procedure afforded the complainant the opportunity to appeal the Assistant Director’s decision to the Institute’s Office of General Counsel within ten 10 workdays of the Assistant Director’s determination, but did not afford the

¹¹ See https://www.nyit.edu/about/statement_on_non_discrimination# (last visited on Oct. 17, 2018).

¹² See <https://catalog.nyit.edu/> (last visited on Oct. 17, 2018).

respondent a similar opportunity. The Former Procedure stated that the Office of General Counsel would notify the complainant of the determination regarding the appeal within 10 workdays of the filing of the appeal. The Former Procedure did not specifically indicate that it applied to discrimination or harassment carried out by employees, students and third parties; did not afford both parties the opportunity to present witnesses; did not provide for notice to both parties of the outcome of the investigation or appeal; and, did not include any assurance that the Institute would take steps to prevent further harassment and to correct its effects if appropriate.

OCR determined that the Institute revised the Former Procedure following academic year 2012-2013. The revised grievance procedure is entitled “Accommodation Policy for Students with Disabilities: U.S. Campuses – Formal Grievance Procedure” (the Current Procedure) and is easily located on the Institute’s website.¹³ OCR reviewed the Current Procedure, and determined that it is identical to the Former Procedure, except that it provides that appeals shall be filed with the Dean of Students. OCR determined that the Current Procedure contains the same deficiencies as those contained in the Former Procedure; namely, the Current Procedure does not specifically indicate that it applies to discrimination or harassment carried out by employees, students and third parties; does not afford both parties the opportunity to present witnesses; does not provide for notice to both parties of the outcome of the investigation or appeal; and, does not include any assurance that the Institute will take steps to prevent further harassment and to correct its effects if appropriate. On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve these compliance issues. OCR will monitor the implementation of the resolution agreement.

OCR determined that the Institute also had a grievance procedure that covered disability discrimination and harassment complaints filed by employees (the Employee Policy). OCR determined that the Employee Policy was distributed to all employees, who were required to sign and acknowledge their receipt and understanding of the policy. OCR determined that the Employee Policy provided notice to employees of grievance procedures, including where complaints could be filed. OCR determined, however, that while the Employee Policy indicated that it applied to discrimination or harassment carried out by other employees; it did not explicitly indicate whether it applied to discrimination or harassment carried out by students¹⁴ or third parties. OCR also determined that the Employee Policy did not provide for an opportunity for the parties to present witnesses and evidence; it did not have any timeframes for any stages of the grievance process; it did not provide for notice to the parties of the outcome; and, it did not include any assurance that the Institute will take steps to prevent further harassment and to correct its effects if appropriate. On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve these compliance issues. OCR will monitor the implementation of the resolution agreement.

The Complainant’s Allegation

¹³ See https://www.nyit.edu/policies/accommodation_policy_for_students_with_disabilities_us_campuses#grievance (last visited Oct. 17, 2018).

¹⁴ The Employee Policy stated that reports of “offensive conduct” carried out by students should be made to the Office of Student Affairs.

As set forth above, on XXXXXXXX, 2013, while complaining to the XXXXXXXXX director about a parking ticket he received on that date, the complainant informed the XXXXXXXX director that he wanted to file a complaint that the security guards at the Institute were harassing him based on his disability. The XXXXXXXX director acknowledged the complainant's complaint by electronic mail (email), dated XXXXXXXX, 2013. The complainant also met with the Assistant Dean of XXXXXXX XXXX (the assistant dean) on XXXXXXXX, 2013; and, filed a formal, written complaint of disability harassment at that time.

On or about XXXXXXXX, 2013, the complainant wrote to the assistant dean to inquire about the status of his complaint. The assistant dean did not respond. By email dated XXXXXX, 2013, the Institute's General Counsel informed the complainant that his complaint had been referred to her for response. General Counsel indicated that, as a preliminary matter, the complainant's "continued statements about being 'harassed' are baseless, fly in the face of continued attempts by [Institute] personnel to assist [him], and are not constructive to a solution." General Counsel continued, by informing the complainant that "New York law does not permit [him] to ignore parking regulations in the event that the handicapped spots are occupied. In fact, New York State Department of Motor Vehicles regulations explicitly provide that handicap permits 'do not allow you to disobey state or local parking regulations.'" General Counsel also informed the complainant that Section 504 and Title II do not contain parking regulations; indicated that the implementing regulations of both statutes prohibit discrimination against individuals with disabilities; and, invited the complainant to provide medical evidence of his disability, if he believed he was disabled and needed reasonable accommodations to address his concerns about parking. The General Counsel's email did not indicate that she had investigated the complainant's allegation that the security guards had subjected him to harassment because of his disability.

Based on the foregoing, OCR determined that there was sufficient evidence to substantiate Allegation 6; i.e., that Institute staff failed to respond appropriately to a complaint the complainant made in or around XXXXXX 2013, that security guards at the Institute had harassed him because of his disability. On October 10, 2018, the Institute signed the enclosed resolution agreement to resolve this compliance issue; specifically, regarding the Institute's failure to investigate the complaint of disability harassment. As set forth above with respect to Allegation 5, OCR otherwise investigated whether Institute security guards had harassed the complainant because of his disability, and determined that there was insufficient evidence to substantiate that allegation.

With respect to Allegation 7, the complainant alleged that on or about XXXXXXXXX, 2013, the dean retaliated against him for his disability-related advocacy, by threatening to XXXXXXXXX XXX XXXXXXXXX XXXXXXXX XXXXXXXX XXX and telling him that "XXXXXXX XXXXXX XX XXXXXX" for him if he tried to contact the president again. The dean informed OCR that following the complainant's receipt of parking tickets on XXXXXXXXX and XX, 2013, the complainant came to her office in XX XXXXXXXXX XXXXXX, told her that she and the XXXXXXXXXX director XXX XXX XXXX XXX XX XX XXXXXX XXXX, and informed her that he had a XXXXXXXXXX XXXX XXXXXXXXXX. The dean denied telling the complainant that she would XXXXXXXXXX XXX XXXXXXXXXX XXXXXXXXX if he attempted to contact the president again but acknowledged that she told the complainant that if he continued to engage in

behaviors contrary to the Institute’s policies, XXXX XX XXXXXXXX XX XXXXXXXX XXXXXXXX XXXXXXXX XX XXXXXXXX XX XXXXXXXX XXX XXXX XXXXXXXX XXXXXXXXXXXXXXXXXXXX XX XXXXXXXX XXXX XXXXXXXX, the Institute might need to conduct a judicial hearing.¹⁵ The dean also informed OCR that she told the complainant that he needed to make an appointment if he wanted to meet with the president, and that he would need to present his name and identification to Tower House security if requested. The dean also denied telling the complainant that XXXXXXX XXXXX XXX XXXXXXX for him if he tried to contact the president again. OCR did not find and the complainant did not provide any evidence to contradict the dean’s statements.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, the preponderance of the evidence did not substantiate the complainant’s allegation that the dean told the complainant that she would XXXXXXX XXX XXXXXXXX XXXXXXX if the complainant attempted to contact the president again or told him that XXXXXXX XXXXX XX XXXXX XXX XXX if he tried to contact the president again. Absent an adverse action, OCR does not proceed further with retaliation analysis. Further, OCR determined that the dean had a legitimate, non-retaliatory reason for telling the complainant that she might need to initiate the judicial process if the complainant continued to engage in behaviors contrary to the Institute’s policies, XXXX XX XXXXXXXX XX XXXXXXXX XXXXXXXX XXXXXXX XX XXXXXXXX XX XXXXXXXX XXX XXXX XXXXXXX XXXXXXXXXXXXXXXXXXXX XX XXXXXXXX XXXX XXXXXXXX; namely, the complainant XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXX XXXXXXXX XXXXXXXX XXX XXXXXXXX XX XXXXXXX XXX XXXX XXXXXXX XXXXXXXXXXXXXXXXXXXX XX XXXXXXXX XXXX XXXXXXXX, which violates Institute policies. OCR determined that the proffered reason was not a pretext to hide a retaliatory motivation, because the complainant acknowledged and documentation supported the complainant’s violation of these Institute policies. Accordingly, OCR will take no further action with respect to Allegation 7.

This letter should not be interpreted to address the Institute’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR’s determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR’s formal policy statements are approved by a duly authorized OCR official and made available to the public. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Institute 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 a 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, it will

¹⁵ The Dean informed OCR that she was also concerned because in XXXX 2013, she received a request for information regarding a XXXX for the complainant from the XXXXX.

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

If you have questions regarding OCR's determinations, please contact Eboné Woods, Compliance Team Attorney, at (646) 428-3898 or ebone.woods@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

cc: Catherine Flickinger, Esq.

Encl.