



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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August 9, 2022

Heidi Bauerle, Director
Leadership Learning Academy
100 W. 2675 N.
Layton, UT 84021

By email only to XXX@XXX

Re: OCR Complaint No. 08-22-1212
Leadership Learning Academy

Dear Ms. Bauerle:

This letter is to advise you of the outcome of the complaint filed with the United States Department of Education (Department), Office for Civil Rights (OCR), received on February 10, 2022, against the Leadership Learning Academy (the Academy). The complaint alleged that the Academy discriminates against students on the basis of their national origin and disabilities and retaliated against an employee (the Complainant).

Specifically, the complaint alleged that:

- The Academy denies special education referrals for English Learner (EL) students unless the students have three years of English language instruction.
- The Academy uses a different testing process when evaluating EL students for special education services: EL students are tested by an Academy staff member. Non-EL students are tested by a contract school psychologist who is trained to do cognitive testing.
- After the Complainant told the Academy that the Academy's special education practices discriminate against EL students, the Academy retaliated against him by removing him from his leadership positions, removing his ability to access student information, removing him from the teacher email list, and directing him not to communicate with anyone in the special education department.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 and its implementing regulation at 34 Code of Federal Regulations Part 100, which prohibit discrimination on the basis of race, color, or national origin in programs and activities that receive Federal financial assistance from the U.S. Department of Education; Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the

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

Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities.

Before opening the complaint for investigation, OCR interviewed the Complainant. On March 14, 2022, we notified the Academy that OCR was opening an investigation of the above allegations. We also sent the Academy a data request. The Academy provided the data requested by OCR. OCR also interviewed four Academy staff members and gave the Complainant an opportunity to respond to the information provided by the Academy. The Academy expressed an interest in voluntarily resolving OCR's concerns when discussing the information that OCR had learned to date. Pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), a complaint may be resolved when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and when OCR has determined that identified concerns can be addressed through a voluntary resolution agreement. OCR has determined that the concerns identified during the course of the investigation can be addressed through a voluntary resolution agreement and that a voluntary resolution agreement is also an efficient way to resolve those concerns. OCR has also determined that there is insufficient evidence to establish that the Academy retaliated as alleged. This letter explains OCR's findings.

Legal Standards

Non-discriminatory Treatment of Students

Title VI provides that recipients must provide equal educational opportunity to EL students. Recipients must ensure that EL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services.

Section 504 and the regulation at 34 CFR § 104.4(a) provide that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

Retaliation

Title VI, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity

in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

1. The individual or someone on behalf of the individual engaged in a protected activity or the recipient believed the individual or someone on behalf of the individual might engage in a protected activity in the future;
2. An individual experienced an adverse action caused by the recipient; and
3. There is some evidence of a causal connection between the protected activity and the adverse action.

A protected activity is any action taken to further a right guaranteed by the statutes and regulations enforced by OCR or to express opposition to any practice made unlawful by the statutes and regulations enforced by OCR.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR. Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.

In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly situated individuals, or the recipient's deviation from established policies or practices.

If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action. Pretext may be shown by evidence demonstrating that the explanation for the adverse action is not credible or believable or that treatment of the person was inconsistent with the treatment of similarly situated individuals or established policy or practice.

Investigation to Date

Following the interviews and review of the submitted documentation, OCR learned the following:

The Academy is a public charter K-6 institution. The Academy has two campuses: (1) the Layton Campus and (2) the Ogden Campus. The Complainant began working at the Academy in XXX as a Behavioral Specialist at the XXX Campus and as the 504 Coordinator for the XXX Campus. The Academy promoted the Complainant, and he began working as the Assistant Campus Director for the XXX Campus with the start of the 2021-2022 School Year (SY); the Complainant also continued serving as the XXX Campus 504 Coordinator while working as the Assistant Campus Director for the XXX Campus. The Layton Campus has approximately 500 students; of those 500 students, approximately 19 are EL students. The Ogden Campus has approximately 380 students; of those 380 students, approximately 28 are EL students.

On January 7, 2022, the Complainant and two other administrators (Administrator A and Administrator B) met to discuss referring students for special education evaluations. The discussion became heated.

On January 10, 2022, Administrator A submitted a complaint to the Academy's Lead Director, alleging that the Complainant's behavior was unprofessional and created a "hostile environment." The January 10, 2022 complaint stated that there were "other incidents similar to mine that have taken place this current school year." Later that day, on January 10, 2022, the Academy opened an investigation into the allegation that the Complainant's behavior created a hostile environment.

The Academy interviewed Administrator B the week the January 10, 2022 complaint was filed. Administrator B corroborated Administrator A's description of the January 7, 2022 meeting. Administrator B was also aware of similar incidents between other Academy employees and the Complainant during the 2021-22 SY. Administrator B stated that the Complainant's behavior toward Administrator A at the January 7, 2022 meeting and at a December 3, 2021 meeting was disrespectful, rude, and condescending. The Complainant did not talk to Administrator B in a disrespectful, rude, or condescending manner.

On January 19, 2022, Administrator B emailed the Lead Director a summary of the January 7, 2022 and December 3, 2021 meetings.

On January 19, 2022, the Complainant met with the Lead Director and an Assistant Campus Director regarding the January 10, 2022 complaint. The purpose of the January 19, 2022 meeting was to hear the Complainant's thoughts about his communication with Academy employees and how his communication could have created a hostile work environment. The Complainant expressed concerns that the Academy's special education practices discriminate against EL students at the January 19, 2022 meeting.

On January 21, 2022, the Lead Director emailed the Complainant, advising that he was no longer on the leadership team for the rest of the 2021-22 SY because "[a]fter multiple interviews it is clear that your communication with others causes uneasy feelings and issues of trust." The Lead Director said that she would reevaluate whether the Complainant should be on the leadership team after the 2021-22 SY. The January 21, 2022 email also stated, "Due to the complaint

regarding a special education employee I am asking you to not participate in any conversation with any employee in the Special Education Department unless [the Assistant Campus Director] or [Administrator B] are with you.” The January 21, 2022 email requested that the Complainant find professional development regarding communication and teamwork, with the Academy to pay for the trainings.

After the January 21, 2022 email, the Complainant stopped working as the Assistant Campus Director and 504 Coordinator of the XXX Campus and began working as a Behavioral Specialist for the XXX Campus. The Complainant alleged that the Academy also removed his ability to access student information, removed him from the teacher email list, and directed him not to communicate with anyone in the Special Education Department. The Academy alleged that the Complainant retained the level of access that is customary for a Behavioral Specialist. The Academy stated that the Complainant had the ability to get information about the students he was working with in his Behavioral Specialist capacity from the Academy’s secretaries, that the Complainant did not need to be on the teacher email list as a Behavioral Specialist, and that the Complainant retained the ability to communicate with the Special Education Department, but the communication needed to be in the presence of one of the XXX Campus’s two administrators. The Complainant’s pay remained the same.

The Academy stated that the Complainant did not express concerns that the Academy’s special education practices discriminate against EL students until the January 19, 2022 meeting about the January 10, 2022 complaint. During the rebuttal interview with OCR, the Complainant acknowledged that he did not express concerns that the Academy’s special education discriminate against EL students until the January 19, 2022 meeting because he believed that it made sense to wait until the already-scheduled January 19, 2022 meeting to raise the concerns.

The Academy’s written policies and procedures do not require that EL students have three years of English language instruction before proceeding with special education referrals for EL students. However, review of the documentation submitted by the Academy included emails referencing waiting on a special education referral for an EL student who did not have three years of English instruction. Interviews also indicated the possibility of confusion among Academy staff regarding whether the Academy has an informal policy that EL students should have three years of English language instruction before the Academy can determine whether the EL students need a special education evaluation referral.

The Academy makes individualized determinations when determining whether any student needs a special education evaluation referral. Factors considered when making the individualized determination include, but are not limited to, attendance, hearing screening, vision screening, Student Success Team input, and, for EL students, the number of years of English instruction.

The Academy uses the same process for all students to determine special education eligibility. Beginning with the 2021-22 SY, the Academy began using a contract school psychologist to administer the Woodcock-Johnson IV exam for cognitive and academic achievement assessment for special education eligibility purposes. The contract school psychologist provided testing for

the students referred for special education evaluation for all but two students who were referred for testing at the Academy since the beginning of the 2021-22 SY; the two students who were not tested by the contract school psychologist are not EL students. The Academy used Academy employees fluent in a student's native language to provide translation support to the contract school psychologist.

Retaliation Analysis

Based on careful review of the evidence, OCR has concluded that there is insufficient evidence to establish that the Academy retaliated against the Complainant as alleged. OCR's reasons for this conclusion are explained below.

The Complainant expressed his concerns that the Academy's special education practices discriminate against EL students at the January 19, 2022 meeting with the Lead Director and an Assistant Campus Director. Ordinarily, expressing such concerns would meet the definition of protected activity.

The Academy removed the Complainant from his leadership positions of Assistant Campus Director and 504 Coordinator of the XXX Campus and changed his level of access to information shortly after the January 19, 2022 meeting. Ordinarily, removing an employee from leadership positions and changing an employee's level of access to information would constitute adverse actions.

However, as previously noted, the parties agree that the Complainant did not express his concerns that the Academy's special education practices discriminate against EL students until the January 19, 2022 meeting about the January 10, 2022 complaint filed regarding the Complainant's conduct. By January 19, 2022, the Academy had already confirmed that other Academy employees were uncomfortable with the Complainant's conduct, specifically with how he talked to others, and the Academy was already in the process of taking corrective action in response to the Complainant's conduct. Accordingly, the preponderance of the evidence does not establish a causal connection between the protected activity and the adverse actions. The adverse actions were the result of complaints about the Complainant's conduct at work. The complaints about the Complainant's conduct at work pre-dated the Complainant's January 19, 2022 protected activity.

Even assuming a causal connection between the Complainant's January 19, 2022 protected activity and the adverse actions that followed on January 21, 2022, the Academy proffered legitimate, non-retaliatory reasons for the adverse actions: The Complainant was removed from leadership positions because the Academy determined that his conduct was not appropriate for someone in leadership positions. The Academy changed the Complainant's level of access to information to that of a Behavioral Specialist following the Complainant's removal from the Assistant Campus Director and 504 Coordinator positions for the XXX Campus. The Complainant's initial level of access to information was that of a Behavioral Specialist and a 504 Coordinator. A Behavioral Specialist does not need as much access to information as a 504

Coordinator. OCR's investigation did not reveal any evidence to suggest that the Academy's reasons were pretextual.

Resolution

Based on the information learned during the course of the investigation, OCR noted a concern that Academy staff may be under the impression that the Academy has an informal policy of requiring that EL students have three years of English language instruction before proceeding with special education referrals for EL students and a concern that translation and interpretation assistance is sometimes provided by Academy staff members who have not been trained to provide translation and interpretation assistance. During a meeting with OCR regarding OCR's investigation to date, the Academy expressed a willingness to voluntarily resolve the complaint.

On July 26, 2022, OCR sent the Academy a proposed Agreement. The Academy sent OCR the enclosed signed Agreement on August 8, 2022. When fully implemented, the Agreement will resolve the concerns raised. The provisions of the Agreement are aligned with the allegations, the issues raised by the complaint, and the information that was obtained during OCR's investigation. The provisions of the Agreement are consistent with the applicable statutes and regulations. OCR will monitor the Academy's implementation of the Agreement until the Academy is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint. OCR will promptly provide written notice of any deficiencies with respect to the implementation of the terms of the Agreement and will promptly require actions to address such deficiencies. If the Academy fails to implement the Agreement, we will take appropriate action, which may include enforcement actions.

OCR is closing the investigative phase of the case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of the case will be completed when OCR determines that the Academy has fulfilled all of the terms of the Agreement. When the monitoring phase of the case is complete, OCR will close case number 08-22-1212 and will send a letter to the Complainant and to the Academy stating that the case is closed.

The Complainant has a right to appeal OCR's determination regarding the retaliation allegation within 60 calendar days of the date indicated on this letter. In the appeal, the Complainant must explain why the factual information was incomplete or incorrect, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the Complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the Academy. The Academy has the option to submit to OCR a response to the appeal. The Academy must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the Academy.

This letter sets forth OCR's determination in an individual 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.

Recipients of Federal funds are prohibited from intimidation, harassment, or retaliation against individuals filing a complaint with OCR and those participating in a complaint investigation. complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

The Complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

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.

We thank the Academy for being willing to voluntarily address OCR's concerns. We appreciate the Academy's attention to this matter and look forward to working with the Academy to meet the terms of the Agreement.

If you have any questions, please contact XXX, the OCR attorney assigned to this complaint, at XXX-XXX-XXXX or XXX@XXX.

Sincerely,

/s/

Sandra J. Roesti
Supervisory Attorney

Enclosure: Resolution Agreement

cc: Brandon Fairbanks (by email only)

Sydnee Dickson, Utah State Superintendent of Public Instruction (by email only and without enclosure)