



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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May 30, 2014

Dr. James G. Merrill
Superintendent
Virginia Beach City Public Schools
2512 George Mason Drive
P.O. Box 6038
Virginia Beach, Virginia 23456-0038

Re: OCR Complaint No. 11-13-1249
Letter of Findings

Dear Dr.Merrill:

This letter is to notify you of the outcome of a complaint that was filed with the District of Columbia Office for Civil Rights (OCR), within the U.S. Department of Education (the Department), on June 3, 2013, against the Virginia Beach City Public Schools (Division). The Complainant, XXXX (School), alleged that Virginia Beach City Public Schools (Division) discriminated against her based on disability (XXXX) and retaliated against her when she advocated for her disability-related needs. The Complainant alleged that the Division discriminated against her based on disability when it declined to renew her teaching contract and recommended that her teaching license be revoked. <XXXX SENTENCE REDACTED XXXX> In addition, based on written information provided by the Complainant, OCR examined whether the Division discriminated against the Complainant based on disability when it failed to promptly and equitably resolve the internal grievance she filed alleging disability discrimination.

OCR initiated an investigation of the complaint under to its authority to enforce certain federal civil rights statutes and regulations, including Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in any program or activity receiving Federal financial assistance and the Americans with Disabilities Act of 1990 (Title II) and its implementing

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regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The Division is a public entity that receives Federal financial assistance and is subject to Section 504, Title II, and the implementing regulations.

The investigation included interviews with the Complainant, School personnel, and other witnesses identified by the Complainant. OCR reviewed documents provided by the Division and the Complainant. After careful consideration of the information, OCR determined the Division's decision not to renew the Complainant's teaching contract was motivated by legitimate, non-discriminatory factors and that the Division did not retaliate against the Complainant.

However, during the investigation, OCR identified initial concerns about the process the Division used to determine whether it would provide accommodations to the Complainant as an individual with a disability and, if so, what type of accommodations would be reasonable. In addition, OCR had preliminary concerns about the grievance procedure the Division uses to resolve complaints of disability discrimination filed by teachers. The Division expressed an interest in resolving these concerns prior to the completion of OCR's investigation. Pursuant to Section 302 of OCR's *Case Processing Manual*, OCR discussed resolution options with the Division. On May 23, 2014 the Division signed the enclosed agreement. The provisions of the agreement are aligned with information obtained during the course of OCR's investigation and are consistent with the applicable regulations. OCR will monitor implementation of the agreement.

Our findings of insufficient evidence with regard to the Complainant's allegations of different treatment based on disability and retaliation are explained more fully below.

Different Treatment Based on Disability

Legal Standard

In analyzing an allegation of different treatment based on disability, OCR ascertains whether a school district treated a complainant less favorably than a similarly situated individual without a disability. If so, OCR will assess the district's explanation for any difference in treatment to determine if the reasons are legitimate and non-discriminatory or whether they are merely a pretext for unlawful discrimination.

Analysis

The Complainant alleges that the Division discriminated against her based on disability when XXXX. The Complainant's argument is that she was treated differently from other teachers at the School based on her disability.

The Division denied that it XXXX, and the Complainant provided OCR with no evidence to support this claim. <XXXX SENTENCE REDACTED XXXX>. There is therefore insufficient evidence for OCR to find that this recommendation was made, and thus that Complainant was treated differently than any other teacher in this way.

The Division confirmed that it did not renew the Complainant's contract. According to information provided by the Division, there were XXXX teachers at the School during the 2012-2013 school year. Of these XXXX, two were hired on one-year contracts to fill a specific need and thus not renewed. Two others were hired on probationary contracts, like the Complainant, and were renewed. Therefore, the Complainant was treated less favorably than two other similarly situated, non-disabled XXXX teachers whose contracts were renewed.

However, the Division provided a legitimate, nondiscriminatory justification for the alleged different treatment: that the Complainant did not perform her job in a satisfactory manner. The Division stated that the Complainant: 1) made too many errors on Individual Education Programs (IEPs); 2) did not meet IEP time frames; and 3) had unsatisfactory teaching performance in the classroom.

OCR reviewed letters from the Principal to the Complainant about the Principal's concerns about the Complainant's performance, written observations of the Complainant teaching in the classroom, and formal performance evaluations of the Complainant. The Principal observed the Complainant teaching a XXXX. During both observations, the Principal noted the use of a full-length video, without appropriate supporting materials and very little, or the complete absence of, direct instruction. Both observations noted that inconsistent or incorrect substantive information was given by the teacher to the class, and the XXXX observation listed eight specific examples of these errors. Both observations noted that the teacher should have been farther along in the pacing of the curriculum. On XXXX, the Complainant received an interim evaluation rating of Developing/Needs Improvement on all seven performance standards. The Division provided and OCR reviewed a copy of the Teacher Evaluation Instrument completed for the Complainant. The Teacher Evaluation Instrument states "Teachers who receive Developing/Needs Improvement in 3 or more standards ... will be placed on a Performance Improvement Plan."

In a letter to the Complainant dated XXXX, the Principal summarized a XXXX, conference she had with the Complainant. This letter noted that the Complainant was "XXXX". The letter set forth the Principal's specific expectations for the Complainant's improvement. These expectations included the Complainant submitting "learning plans" for her upcoming XXXX classes to the Principal via email each Friday morning prior to the upcoming week. In e-mails to the Complainant dated XXXX the Principal reminded the Complainant that learning plans were to be submitted to her no later than the Friday prior to the week of instruction so that the Principal could provide feedback on the plans, and documented the fact that the Complainant was not adhering to this time frame.

On XXXX, the Complainant was placed on a Performance Improvement Plan (PIP) to address her performance deficiencies. The PIP required the Complainant, in part, to prepare learning plans, per School Board Regulation 4-58.1, to submit the learning plans for the upcoming XXXX classes to the Principal no later than Friday morning prior to the upcoming week, and to attend all scheduled classes, on time.

On XXXX, the Principal again observed the Complainant in the XXXX class. The observations noted that the teacher was reading multiple choice questions to the class on various topics and

that only one student appeared engaged, while the other two were not engaged. The observation again noted the absence of direct instruction by the Complainant and the lack of class objectives or a lesson plan. On the same date, the Complainant received a summative evaluation rating of Unacceptable. In a letter dated XXXX, the Principal notified the Complainant that she would recommend to the Superintendent that the Complainant's probationary teaching contract not be renewed. In a letter dated XXXX, the Principal summarized a meeting she had with the Complainant on XXXX, at which they discussed the Complainant's failure, for the second time since XXXX, to attend a scheduled class that day.

The evidence discussed above supports the Division's assertion that the Complainant had unsatisfactory classroom performance, which is one of the Division's stated legitimate, nondiscriminatory reasons for not renewing the Complainant's probationary contract. OCR's investigation also determined that the Division followed its policies governing decisions not to renew a probationary teacher's contract, which further supports the legitimacy of its stated reasons for not renewing the Complainant's contract.

The Complainant maintains that the Division's stated nondiscriminatory reason for not renewing her teaching contract, poor performance, is actually a pretext for discriminatory different treatment. She argues that her alleged performance problems were caused by the Principal treating her differently from special education teachers without disabilities, and in some cases resulted from the Principal holding her to higher standards than teachers without disabilities. She stated in her written response to the Principal's observation, dated XXXX, that she was assigned more IEPs and more complex IEPs than other similarly situated special education teachers without disabilities. Further, she stated that multiple IEPs were due in close proximity in time to one another and that she was assigned IEPs that were due during holidays and therefore had to be completed early. However, OCR's review of documentation provided by the Division shows that the Complainant was assigned the same number of IEPs as, or slightly fewer IEPs than, similarly situated special education teachers at the School without disabilities. In addition, information provided by the Division regarding due dates for the IEPs showed that the Complainant's due dates for IEPs were no closer together than those of special education teachers without disabilities, nor closer to holidays.

The Complainant further alleged that the Division treated her differently from special education teachers without disabilities by assigning her to teach more subjects on more grade levels during more periods, thus giving her less time to prepare lessons than special education teachers without disabilities. Further, the Complainant stated that the Principal assigned her a teaching schedule that did not allow her to plan with the other teachers who taught the same subject matter as she did. Information provided OCR by the Division shows that all special education teachers, including the Complainant, were assigned to teach during four periods of each day. It further shows that two special education teachers without disabilities were assigned to teach several subjects on multiple grade levels, similar to the Complainant. The information showed that the Complainant's planning period overlapped with the teacher assigned to teach XXXX and that her planning period overlapped with one of the special education teachers who taught XXXX.

In addition, the Complainant stated that teachers without disabilities were permitted to show full length movies in class, while this was used as a reason to give her an unsatisfactory evaluation.

In an interview with OCR, the Principal denied that other teachers at the School were permitted to show full-length videos in their classes and stated that if her teachers wanted to show a video that is more than fifteen minutes in length, they would ask her permission. She recalled two specific teachers who asked her for permission to show a lengthy video related to the class. In contrast, she observed the Complainant showing long movies, without permission, and the movies were unrelated to the curriculum.

Based on the above information, OCR finds that the Division noted legitimate performance concerns, including the fact that the Complainant did not attend assigned classes, inappropriately showed movies in class, and delivered classroom content with substantive errors.¹ Finally, none of the Complainant's concerns – that she had a higher caseload, that she was unable to plan with her colleagues, or that she had a more complex teaching schedule – were accurate, and thus they do not demonstrate that Division's legitimate reasons were a pretext for discrimination.

Based on the above, OCR finds insufficient evidence that the Division discriminated against the Complainant based on disability in violation of Section 504 and Title II of the ADA when it did decline to renew her teaching contract.

Retaliation

Legal Standard

When processing retaliation complaints, OCR establishes whether a prima facie, or initial case, of retaliation exists by determining whether all of the following elements are present: (1) engagement by the individual in a protected activity (opposition to discrimination or participation in an investigation of a civil rights law as enforced by OCR); (2) subsection by the recipient of the individual, or someone closely associated with the individual, to a materially adverse action, and (3) some evidence of a causal connection between the protected activity and the adverse action.

Analysis

On or about October 3, 2012, the Division was notified that the Complainant filed a complaint of disability discrimination with the EEOC. In September of 2012 the Complainant alleged to the School Principal that she was discriminated against based on disability at the School. In addition, on March 22, 2013, the Complainant filed a grievance with the Division alleging disability discrimination. OCR considers the filing of a complaint with the EEOC in opposition

¹ In addition to these reasons, the Division articulated concerns regarding the Complainant making errors and failing to meet time frames in IEPs. While OCR had initial concerns about the process the Division used to determine whether it would provide accommodations to the Complainant as an individual with a disability, and that accommodations may have assisted the Complainant with her IEP responsibilities, the Division voluntarily agreed to resolve OCR's concerns before the conclusion of the investigation. Further, the Division's concerns regarding the Complainant's classroom performance were sufficient to justify the non-renewal of the Complainant's contract. Thus, it was unnecessary for OCR to make a finding on this issue.

to disability discrimination to be a protected activity. The same is true for a complaint filed with a school district alleging disability discrimination.

In assessing whether an individual has been subjected to an adverse action, OCR considers whether the recipient's action significantly disadvantaged the individual and whether the challenged action reasonably might have deterred or precluded the individual from engaging in further protected activity. OCR finds that the Complainant was subject to a materially adverse action when the Division decided not to renew her teaching contract. The proximity in time between each of the Complainant's protected activities, which occurred on or around October 3, 2012 and on March 22, 2013, and the Division's decision to not renew the Complainant's teaching contract, initiated on May 9, 2013, provide some evidence of a causal connection. Therefore, there is an initial case of retaliation against the Complainant.

OCR next considered whether the Division had a legitimate, non-retaliatory justification for the adverse action. As OCR found above, the Division had a legitimate reason for not renewing the Complainant's teaching contract - the well-documented concerns it had about her classroom performance. Finally, OCR finds that the Division's classroom performance concerns were not a pretext or excuse for retaliation because the concerns were specific, based on carefully documented classroom observations, and the Complainant was given multiple opportunities to improve her performance. In addition, the Division followed its policies and procedures on providing employee feedback and nonrenewal of probationary teaching contracts.

Based on the above, OCR finds there is insufficient evidence that the Division retaliated against the Complainant when it decided not to renew her teaching contract.

Conclusion

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.

We have advised the Complainant that the Division may not harass, coerce, intimidate, or discriminate against her because she filed a complaint or participated in the complaint resolution process. If this happens, she may file another complaint alleging such treatment. Also, under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information that, if released, could constitute an unwarranted invasion of privacy.

We appreciate the Division's cooperation during the resolution of this complaint, especially that of Kamala Lannetti, Chief City Attorney. If you have any questions, feel free to contact Samantha Shofar at 202-453-5929 or Samantha.Shofar@ed.gov.

Sincerely,

/S/

Rachel Glickman
Team IV Leader
District of Columbia Office

Enclosure

cc: Kamala Lannetti, Deputy City Attorney