



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

March 12, 2019

Ellie Schollmeyer
Executive Director
The Exploris School
401 Hillsborough Street
Raleigh, North Carolina 27603

Re: OCR Complaint No. 11-18-1214
Resolution Letter

Dear Ms. Schollmeyer:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on March 8, 2018 against The Exploris School (the School). The Complainant alleged that in retaliation for her disability-related advocacy on behalf of her XXXXXX XXXXXXXX, the School:

1. Served the Complainant with a no trespass order on XXXXX; and,
2. The XXXXX XXXXXXXXX withdrew a professional reference from the Complainant on XXXXX.

OCR enforces 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 programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the Division receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

During its investigation, OCR reviewed documents provided by the Complainant and the School and interviewed School staff. The following is a summary of the evidence obtained by OCR during the investigation to date.

Facts

The Complainant was employed at the School as XXXXX beginning in XXXXX. While at the School, the Complainant served for a period of time as XXXXX, such that she was knowledgeable about the programs available for students XXXXXX at the School. On XXXXX, the School offered, and the Complainant accepted, a paid leave of absence from the Complainant’s position as XXXXX through XXXXX. On XXXXX, the School’s Board voted unanimously to a restructuring that resulted in the elimination of Complainant’s position, XXXXX, and the addition of XXXX new XXXXX positions, beginning XXXXX. The Complainant did not apply for the XXXXX positions and instead applied to, but was not selected for, the XXXXX position. As a result, the Complainant was no longer employed by the School beginning XXXXX.

In addition, the Complainant has XXXX XXXXXX who enrolled at the School in the Fall of XXXXX, both of whom have disabilities. On XXXXX, the Complainant filed a complaint on behalf of one of her XXXXXX alleging discrimination on the basis of disability with the North Carolina Department of Public Instruction, Exceptional Children Division (the NCDPI), which the School acknowledged. The Complainant informed OCR that the NCDPI issued corrective actions for the School on XXXXX. The NCDPI issued its final report on XXXXX, finding that the Complainant’s allegations of noncompliance were substantiated by its investigation and directing the School to take corrective action in order to remedy the identified violations. The School also acknowledged that the Complainant otherwise engaged in disability-related advocacy on behalf of the XXXXX, including filing complaints alleging disability discrimination that constituted a denial of a free appropriate public education (FAPE).

With respect to the alleged issuance of a no trespass order, as stated in Allegation 1, although the Complainant was no longer employed by the School, her presence on campus was nonetheless frequent. The Executive Director recorded nearly weekly interactions with the Complainant, wherein the Complainant approached, questioned, directed, and challenged staff in what the Executive Director described as “an XXXXXX XXXXXX XXXXXXXX XXXXX manner.” On or around XXXXX, the Complainant was asked to direct all questions to either the Executive Director or Associate Director, rather than to teaching staff. The Executive Director reported that staff continued to feel XXXXXX and XXXXXX by the Complainant’s behavior. As a result, on XXXXX, the Complainant was served with a no trespass letter from the School, forbidding the Complainant from being present on campus for any reason without prior approval from the Executive Director or Board Chair, and limiting responses to Complainant’s communications from the School to once per week.

With respect to the alleged withdrawal of a professional reference, as stated in Allegation 2, the School asserted that the Complainant “possessed great skill and experience in the performance of her job as XXXXXXXX XXXXXXXX and was an asset to the [School] community in many ways.” On XXXXX, the School’s XXXXX XXXXXXXX (the XXXXXXXX XXXXXXXX), sent to the Complainant a copy of a letter of recommendation “To Whom It May Concern” recommending

the Complainant “for a position at your institution.” The letter’s signature block included reference to the XXXXXX XXXXXXXX professional role XXXXX as well as the School’s “Board Member.” On XXXXX, after receiving calls from another school district requesting that the XXXXXX XXXXXXXX serve as the Complainant’s reference, the XXXXXX XXXXXXXX wrote an email to the Complainant explaining that “[d]ue to recent events, I no longer feel comfortable serving as a reference for you.”

The Complainant alleges that in retaliation for her disability-based advocacy on behalf of her XXXXX XXXX XXXXXXXX, the School: (1) served her with the no trespass letter on XXXXX; and (2) the XXXXXX XXXXXXXX withdrew her professional reference on XXXXX.

Legal Standards

The Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation. A claim of retaliation requires an adverse action. An adverse action is something that could deter a reasonable person from engaging in further protected activity. OCR then determines whether the recipient has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the recipient’s reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

OCR determined that the Complainant engaged in disability-related protected activities including but not limited to, filing her NCDPI complaint and advocacy on behalf of her XXXXX XXXXXXXX XXXXXXXX. There is also no dispute that the School served the Complainant with the no trespass letter on XXXXX, and that the XXXXXX XXXXXXXX withdrew her professional reference on XXXXX. OCR finds these actions to be sufficiently adverse.

The School proffered a number of legitimate, non-retaliatory reasons for its actions. The School cited the Complainant’s failure to follow the handbook and school policy; the administrative burden of responding to all of the Complainant’s requests; ensuring that employees were safe and protected from XXXXXXXX; and that the XXXXXX XXXXXXXX withdrew or otherwise would not provide further reference from the Complainant in her individual, as opposed to her professional, capacity.

Before OCR completed its investigation of this complaint, and with respect to the no trespass order described in Allegation 1, the School provided OCR with documentation indicating that the Complainant and the School entered into a Consent Order and Settlement Agreement, filed on XXXXX, through an Individuals with Disabilities Education Act (IDEA) due process proceeding regarding one of the XXXXXXXX, conducted by the Office of Administrative Hearing of the State

of North Carolina, Wake County. Pursuant to the Consent Order and Settlement Agreement, the School withdrew the no trespass letter regarding the Complainant, by letter dated XXXXX. As such, OCR determined that the Allegation 1 has been resolved and is therefore no longer appropriate for investigation, pursuant to Section 108(j) of OCR's *Case Processing Manual*. Accordingly, OCR will take no further action regarding Allegation 1.

Further, with respect to the withdrawal of the Complainant's professional reference, as described in Allegation 2, before OCR completed its investigation and determined whether the School's legitimate non-retaliatory reasons were a pretext for retaliation, the School expressed a willingness to resolve the allegation pursuant to Section 302 of OCR's *Case Processing Manual*, which OCR determined was appropriate.

Conclusion

On March 11, 2019, the School signed the enclosed Resolution Agreement (the Agreement) pursuant to Section 302 of OCR's *Case Processing Manual* which, when fully implemented, will address Allegation 2. The provisions of the Agreement are aligned with the allegation and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the School to send a reference letter to the Complainant for employment, providing information necessary for a potential employer; and to provide training to School personnel on the prohibition against disability-related retaliation. Please review the enclosed Agreement for further details. OCR will monitor the School's implementation of the Agreement until the School has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the School'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 School must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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

We appreciate the School's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Dwayne J. Bensing, the OCR attorney assigned to this complaint, at 215-656-8539 or Dwayne.Bensing@ed.gov.

Sincerely,

Letisha Morgan-Cosic
Team Leader, Team II
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Erin McNeil Young
Hall Booth Smith, P.C.
13024 Ballantyne Corporate Place
Suite 625
Charlotte, North Carolina 28277
T: 980.859.0383
eyoung@hallboothsmith.com