No. 18-_____

In the Supreme Court of the United States

DAYO ADETU, ET AL.,

Petitioners,

v.

SIDWELL FRIENDS SCHOOL,

Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

42 U.S.C. § 1981(b) and the D.C. Human Rights Act, § 2-1402.61 protect individuals who engage in protected activity from retaliation. This case concerns retaliation claims by Petitioners against Respondent, the former educational institution where the minor Petitioner matriculated, for various actions and inactions taken before, during and after the Petitioners engaged in protected activity. The questions presented for review by this Court are:

1. Whether the D.C. Court of Appeals erred in affirming the trial court's grant of summary judgment on the grounds that non-pecuniary damages were not permitted for breach of an Office of Human Rights mediated settlement agreement?

2. Whether the D.C. Court of Appeals erred in assessing the claims of retaliation by misapplying the material adversity legal standard applicable to claims of discrimination, rather than claims of retaliation established by this Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)?

3. Whether the D.C. Court of Appeals erred in determining whether there were genuine issues of material fact?

4. Whether the D.C. Court of Appeals erred in its application of the "academic deference rule?"

PARTIES TO THE PROCEEDING

PETITIONERS

- Dayo Adetu and Dayo Adetu by her next friend and parents, Titilayo Adetu and Nike Adetu. Dayo Adetu is today over the age of majority.

RESPONDENT

- Sidwell Friends School.

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The opinion of the District of Columbia Court of Appeals ("DCCA") (App.1a) was entered on January 23, 2019, Dkt. No. 17-CV-888, *Dayo Adetu, et al. v. Sidwell Friends School*.

The unreported order of the D.C. Superior Court (App.19a) was entered on July 14, 2017.

JURISDICTION

The judgment of the DCCA was entered on January 23, 2019 (App.1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

- 42 U.S.C. § 1981

  (a) Statement of equal rights: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined: For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

- **District of Columbia Human Rights Act, D.C. Code § 2-1402.61**

(a) It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter.

(b) It shall be an unlawful discriminatory practice for any person to require, request, or suggest that a person retaliate against, interfere with, intimidate or discriminate against a person, because that person has opposed any practice made unlawful by this chapter, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing authorized under this chapter.

(c) It shall be an unlawful discriminatory practice for any person to cause or coerce, or attempt to cause or coerce, directly or indirectly, any person to prevent any person from complying with the provisions of this chapter.

STATEMENT

A. Background

This matter was first filed in the Superior Court of the District of Columbia, and docketed as 2015 CA 009948 B, pursuant to D.C. Code § 11-921, *et seq.*, as amended, and then appealed to the D.C. Court of Appeals pursuant to D.C. Code § 11-721. The Supreme Court should consider this Petition for Writ of Certiorari reviewing the lower Court's decision because the lower Court has entered a decision that is in conflict with the current law of this land, namely this Court's decision in *Burlington N. & S.F. Ry. Co. v. White*, 548 U.S. 53 (2006) ("White").

This case concerns the retaliatory scheme Respondent Sidwell Friends School ("Respondent," or "Sidwell") orchestrated and successfully executed against Dayo Adetu ("Petitioners," or "Dayo")[1] to compromise, falsify and disparage her academic record, and to interfere with and ultimately impede her post-secondary matriculation efforts to an "Ivy League" university, all in response to various protected EEO activities she or her parents engaged in while she was a student at Sidwell. App 54a.

As background, Sidwell is a co-educational Quaker (Religious Society of Friends) day school in Upper Northwest, Washington, D.C. App.57. It has a repu-

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[1] Suit was brought by Dayo and her parents, Dr. Titilayo Adetu and Mrs. Nike Adetu (the "Parents") (Dayo and her Parents are collectively the "Petitioners").

tation for having a highly competitive student selection process, and in fact proudly professes that it is "the Harvard of Washington's private schools." *Id.* Indeed, many of Washington D.C.'s most powerful and elite figures have sent their children to Sidwell, including children and grandchildren of U.S. Presidents, Congressmen and Senators. *Id.* Sidwell has long been perceived as a "feeder-school" to Ivy League institutions and other top universities all over the world. *Id.*

Dayo is African-American, but her parents are Nigerian nationals. *Id.* at 56a.

Dayo met the discerning standards and qualifications for admission to Sidwell and began matriculation at the lower school in 2000 at the age of four (4). *Id.* at 55a. Dayo thereafter continuously matriculated to the middle school, and then in the fall of 2010 to high school or "Upper School" (9th-12th grades). *Id.* During the course of her matriculation, and until her graduation from Sidwell on June 6, 2014, Dayo proved to be a gifted mathematician,[2] as well as a nationally recognized merit scholar and student-athlete. As a nationally recognized college bound student athlete and a high academic achiever, Dayo entertained interest from track coaches at Princeton, Columbia and Brown. *Id.* at 55a, 72a-74a.

Dayo had a strong interest in attending an Ivy League institution, actively applying to thirteen (13) universities, including: Yale, Harvard, Columbia, Cornell, Penn, Duke, Johns Hopkins, CalTech, MIT, UVA, McGill and Princeton University. *Id.* at 76a.,

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[2] In the 10th grade, Dayo was the only Black girl in the School's accelerated mathematics course, Math II.

77a. She also applied to Spelman College, a historically black college in Atlanta, Georgia. Despite the fact that Sidwell touts a 100% college matriculation rate for its graduating high school seniors, Dayo did not receive unconditional acceptance to any of the thirteen (13) universities to which she applied and desired admission. In fact, Dayo was the only student in her graduating class of 126 students who did not receive unconditional acceptance from any educational institution to which she applied.[3] *Id.* at 80a.

Petitioners first suspected discrimination and retaliation against Dayo and had evidence of this long before her senior year, and before she was rejected by every school to which she applied. *Id.* at 59a. Dayo first began to notice that she was not being treated equally to her student-peers beginning in 2011, a year after her older sister Lola had filed a discrimination complaint against Respondent with the D.C. Office of Human Rights. *Id.* at 58a-59a. As the Parents advocated against discriminatory or retaliatory treatment of Dayo, the retaliation intensified. *Id.* at 59a-84a.

On October 28, 2011, the Parents took steps to address perceived racially discriminatory grading practices of Ms. Kozibrodzka, Dayo's Math II instructor during her 2011-2012 school year. *Id.* at 59a-62a. Although Dayo typically excelled at Math and had been recognized nationally as a Math Scholar (*Id.* at 55a), Ms. Kozibrodzka had given Dayo a recurrent 68% on four (4) Math tests, recurrent scores of 89% on quizzes, and recurrent scores of 70% on extra-credit assign-

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[3] Dayo reapplied to colleges a year after she graduated from Sidwell, and gained admission and eventually matriculated at the University of Pennsylvania in August 2015. *Id.* at 56a.

ments. *Id.* Kozibrodzka continued to manipulate Dayo's grades to her detriment. *Id.* On one occasion Kozibrodzka conceded that her grading was incorrect and was forced, by Dayo's protest before the entire class, to change her grade from an 81% to an 89%. *Id.* Ms. Kozibrodzka also made academic achievement difficult for Dayo in various other ways, but most significantly by failing to make the same allowances for Dayo's hectic schedule as an out of state track competitor, as she did for Dayo's white peers in the same predicament. *Id.* By the end of the 2011-2012 scholastic year, Kozibrodzka's manipulative and retaliatory grading practices resulted in Dayo receiving a "C+/C," which successfully prevented Dayo's matriculation to Math III—which entrance into required a minimum grade of "B." *Id.*

Dayo's parents persisted. From June 2012 through December 6, 2012, the Parents continued to appeal to the Headmaster, Thomas Farquhar, regarding the repeated erroneous scoring of Dayo's work, and the oppressive effect it was having upon her educational achievement in Math and her personal morale. *Id.* During a meeting on December 6, 2012, Mr. Farquhar, having clearly grown frustrated by the Parents' advocacy on behalf of Dayo, angrily blurted out during a meeting "all of the teachers want the Adetus gone, gone, gone from the School," and that "non-retaliation [against Dayo] is now off the table." *Id.* at 65a.

Mr. Markey, Dayo's Calculus teacher during her 2012-2013 scholastic year, followed Ms. Kozibrodzka's example and began manipulating Dayo's math grades as well. For the fall calculus course, Mr. Markey graded Dayo as an "A-" instead of an "A," although Dayo had

earned a final score of 93.112%, which according to Sidwell's own policy constitutes an "A". *Id.* at 65a-66a. Mr. Markey would not review his grading error. *Id.* He also refused to advance Dayo to BC Calculus claiming that she had not earned the requisite "A" grade to enter the class. *Id.* For the second time, Dayo was being held back.

Petitioners filed a Complaint of Discrimination and Reprisal on Dayo's behalf with the D.C. Office of Human Rights on April 22, 2013[4] (OHR Case No.: 13-246-EI) against Sidwell (the "First OHR Complaint"). *Id.* They alleged, *inter alia*, discrimination and retaliation based upon: false and inaccurate grading and assignment of work in Math II (2011-2012) and Calculus (2012-2013); Math course placement in Calculus vice Math III (2012-2013); and wrongful Math course placement in AB Calculus vice BC Calculus (2013-2014). *Id.*

On June 14, 2013, only seven (7) days' after Sidwell had been served with the First OHR Complaint, Sidwell radically changed its position regarding Dayo's placement in Calculus BC. *Id.* at 67a-68a. Mamadou Gueye, the Academic Dean, issued the Parents an email stating that Dayo "is in Calculus BC" despite Sidwell's former contentions that Dayo's grades were too low to be placed in that class. *Id.* This about face by Sidwell was no solution at all, however. Dayo's instructors continued to, *inter alia*, retaliate against her. *Id.* at 68a-84a.

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[4] The first charge of discrimination was served on Sidwell on June 7, 2013.

On July 17, 2013, the parties participated in mediation at OHR, which resulted in the entry of a Settlement Agreement, pursuant to which Respondent agreed, in part, to: (1) pay Petitioners $50,000; (2) not retaliate against Dayo; (3) to recalculate "in good faith" "with explanation" Dayo's "Fall and Spring Semesters-Calculus 2012-2013" and "Math II 2011-2012" grades by September 30, 2013; (4) record any grade "increases" in "Dayo's official record and transcript with [Sidwell]" by September 30, 2013; and (5) not make any "disparaging or negative statements or comments" about Dayo to "any business, organization, individuals or other persons regarding matters relevant to this Agreement." *Id.* at 68a-69a.

On November 6, 2013, the Parents, on Dayo's behalf, filed their petition for Breach of Settlement Agreement (the "Petition"). *Id.* at 69a-70a. That Petition was premised upon, *inter alia*, Sidwell's failure to in good faith accurately and timely recompute Dayo's Math II and Calculus grades and failure to timely provide the mandated written explanations. *Id.* at 69a-76a. The Petition was actively litigated, or pending, during Dayo's entire Senior scholastic year (Fall 2013-Spring 2014). *Id.* Petitioner due to ongoing retaliation, they also filed their Second OHR Complaint of Discrimination (the "Second OHR Complaint") on or about May 7, 2014. *Id.* at 81.

The original civil Complaint filed in the D.C. Superior Court set forth three (3) causes of action, namely: Declaratory Judgment (Count I), Breach of Settlement Agreement (Count II), and Fraudulent Inducement to

Contract (Count III).[5] Sup. Ct. Dkt. #1. With leave of Court, Petitioners filed an Amended Verified Complaint ("Am. Ver. Compl.") on November 8, 2016, adding three (3) additional causes of action: Count III-Violation of 42 U.S.C. § 1981(b); Count IV-Violation of the District of Columbia Human Rights Act; and, Count V-Breach of the Implied Obligation of Good Faith and Fair Dealing. *Id.* at 54a-101a.

REASONS FOR GRANTING THE PETITION

The DCCA committed harmful and clear error. It concluded that Counts I, II and V failed because Dayo was not permitted to seek non-pecuniary damages. *Id.* at 7a-8a. Petitioners contend that Sidwell materially breached the Settlement Agreement in the particulars set forth in Counts I, II and V, and the Court should have permitted Dayo to request non-pecuniary and pecuniary damages at trial. *Id.*

The DCCA imposed an incorrect legal standard when analyzing Petitioners' retaliation claims, Counts III and IV. *Id.* at 9a-14a. The DCCA improperly applied the legal standard used in a substantive discrimination case regarding material adverse action, rather than the standard governing retaliation cases. *Id.* It is improper for the Court to assess whether an objectively tangible harm that affects an individual's "terms, conditions, or privilege of education of future educational

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[5] The Fraud Count was dismissed pursuant to Respondent's Motion to Dismiss.

opportunities" has occurred in a retaliation case.[6] *Id.* In 2006, this Supreme Court ruled in *White* that Title VII's "anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64-67.

A moving party therefore may recover for retaliation by "show[ing] that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, at 68-69. Here, the DCCA contravened the law of this land, set forth in *White*, and *Reeves*, 530 U.S. at 150. The Petition for Writ of Certiorari should be granted to correct this manifest injustice.[7] If the DCCA's opinion here is allowed to stand, District of Columbia law will directly conflict with the well-settled law of this land.

The DCCA, after disregarding *White*, misconstrued the "academic deference" rule. App.11a. Most importantly, if a complainant can prove that their substantive

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[6] The DCCA mistakenly relied upon *D.C. Dep't of Pub. Works v. D.C. Office of Human Rights*, 195 A.3d 483, 491 (D.C. 2018). *Id.*

[7] Sidwell's designated college admissions expert witness is William "Rick" Singer. Sidwell's Exh. S to MSJ, Excerpts of Singer's Deposition (10/14/16). Mr. Singer opined that Dayo would not have been admitted to the Ivy League schools to which she applied "because her grades and . . . scores and . . . overall essay . . . was [sic] not strong." *Id.* at 207:14-21; 208. Singer was indicted and plead guilty to spearheading a massive college admissions fraud scheme involving Yale, which is one of the colleges to which Dayo applied. *See Indictment, U.S. v. Singer*, 19 CR 10078, U.S. Dist. Ct. D. Mass. (3/5/19). The lower courts had Mr. Singer's testimony at their disposal, as it was filed by Sidwell.

due process or civil rights were violated or that the educational institution did not fulfill its contractual obligations, courts do not defer to the institution.

I. THE DCCA ERRED IN FAILING TO PERMIT DAYO TO SEEK NON-PECUNIARY DAMAGES FOR SIDWELL'S CONTRACTUAL BREACHES

To prove liability for breach of contract, Plaintiff must establish: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). "[I]t is well established that settlement agreements are entitled to enforcement under general principles of contract law." *Goozh v. Capitol Souvenir Co.*, 462 A.2d 1140, 1142 (D.C. 1983) (quotations omitted).

Sidwell breach the Settlement Agreement in several particulars. *See* Count II, V. *Id.* at 88a-93a. Most critically, and without waiving any other grounds stated, Sidwell breached the contract by, *inter alia*, failing in good faith to recompute Dayo's Math II and Second Semester Calculus grades and in permitting her official record and transcript to remain inaccurate to this day. The DCCA did not analyze the case from a material breach perspective, yet the trial court did. For the sake of brevity, Petitioners set forth said material breach as a pivot for their contention that non-pecuniary damages should be available in these cases.

The issue of emotional distress damages within a breach of settlement case involving the release of discrimination claims under the District of Columbia

Human Right Act or provisions of the federal Civil Rights statutes is believed to be a case of first impression in this Court. The DCCA and trial court relied upon the general rule regarding emotional damages in breach of contract cases, *Howard University v. Baten*, 632 A.2d 389, 392-393 (D.C. 1983), concluding that such damages were unavailable without further analysis. App.6a-9a. However, not one of the cases relied upon by the DCCA or the trial court addressed the issue of emotional distress damages within the context of a breach of an OHR or Title VII mediated Settlement Agreement. *Id.*

Restatement (Second) Contracts Section 353 states: "[r]ecovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Courts have held that "the requisite emotional disturbance may come where the contract's express intent is either to enhance or to protect a plaintiff's mental state." *Pedroza v. Lomas Auto Mall, Inc.*, 625 F.Supp.2d 1156 (D.N.M. 2009); *Dobyns v. United States*, 118 Fed. Cl. 289, 322-326 (2014); *Munday v. Waste Mgmt. of N. Am., Inc.*, 997 F. Supp. 681, 687 (D. Md. 1998) (awarding non-pecuniary damages where breach of settlement agreement to resolve claims of discrimination and mental anguish was of the kind likely to induce severe emotional distress); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1200 (11th Cir. 2007); *Smith v. NBC Universal*, 524 F.Supp.2d 315, 327 (S.D.N.Y. 2007).

Here, the DCCA erred in affirming the grant of Summary Judgment and thus not permitting Dayo to

seek non-pecuniary damages for, *inter alia*, emotional distress, and pecuniary damages as a direct and proximate result of Sidwell's breach of contract and bad faith.

II. THE DCCA APPLIED AN INCORRECT LEGAL STANDARD IN DECIDING PETITIONER'S RETALIATION CLAIM RESPECTING THE "MATERIALLY ADVERSE ACTION" ELEMENT OF THE CAUSE OF ACTION

In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451-452 (2008), this Court held that Section 1981(b) forbids retaliation as well as "retaliation against a person who has complained about a violation of another person's contract-related 'right.'" [8]

Section 2-1402.61 of the D.C. Human Rights Act forbids retaliation stemming from exercising any right granted or protected under the Act. D.C. Code Ann. § 2-1402.61 (a) and (b) (the "DCHRA").

To state a claim of retaliation under § 1981(b) and the DCHRA, a plaintiff must show (1) that she engaged in statutorily protected activity; (2) that the [academic institution] took materially adverse action; and (3) that a causal connection existed between the two. *Jones v. Dist. of Columbia. Water & Sewer Auth.*, 922 F.Supp. 2d 37, 41 (D.D.C. 2013); *see also Vogel v. District of Columbia Office of Planning*, 944 A.2d 456, 463 (D.C. 2008) ("Such a *prima facie* showing [under the DCHRA] gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by artic-

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[8] Uncapped emotional distress damages are recoverable under the post-Civil War Civil Rights Acts, 42 U.S.C. § 1981(b). *Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989).

ulating a legitimate reason for the employment action at issue. If the employer offers a legitimate reason, the presumption of illegality drops out of the case, and the employee has the burden of proving by a preponderance of the evidence that the stated reason is pretextual and that the adverse personnel action was indeed retaliatory.")

In determining whether a materially "adverse action" has taken place in the context of a retaliation claim, under either § 1981(b) or the DCHRA, the Court is required to determine if the Respondent's actions would be "harmful to the point that they could well dissuade a reasonable [student] from making or supporting a charge of discrimination." *White*, 548 U.S. at 57; *Thompson v. North American Stainless*, 562 U.S. 170, 173 (2011) ([i]n *White*, "we held that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct."); *Blair Davis-Garett v. Urban Outfitters, Inc., et al.*, Doc. No. 17-3371-CV (2d Cir. April 8, 2019).

Although *White* is a Title VII case, the courts have held that "the same standards apply in evaluating claims of . . . retaliation under . . . § 1981." *Kidane v. Northwest Airlines, Inc.*, 41 F.Supp.2d 12, 17 (D.D.C. 1999). The same is true for retaliation claims under the DCHRA. *See Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C. 1994) (stating that the standard for retaliation claims under the DCHRA mirrors the standard under Title VII." *Browne v. Potomac Elec. Power Co.*, No. CIV.A. 05-1177 (RWR), 2006 WL 1825796, at *2, FN 3 (D.D.C. July 3, 2006)).

Although in this case, the DCCA interpreted a "materially adverse action" as a tangible harm that

has affected Dayo's educational opportunity and advancement (akin to a tangible harm that affects an employee's terms and conditions under Title VII) (App.10a) that narrow interpretation is at war with *White*, 548 U.S. at 62–63.

The DCCA, like the trial court, committed reversible error because it did not analyze Plaintiffs' allegations set forth in Counts III and IV of the Am. Ver. Compl, against the *White* standard. App.10a-14a. (*See* discussion *Infra*.).

Sidwell Retaliated in Failing to Comport with the Terms of the Settlement Agreement

While the DCCA acknowledged that the Petitioners' "alleged breach of the settlement agreement could properly be part of the retaliation analysis," the Court went on to apply the wrong standard for "material adversity." App.10a The trial court did not address Petitioners' claims of retaliatory non-compliance with the Settlement Agreement (App.34a-53a). *See also* Super. Ct Dkt. # 191-192, Ps' SODF, para. 10, pg. 10-11, and para. 16, pg. 13-14.

Petitioners may demonstrate through direct or circumstantial evidence that retaliation "motivated the [school's] adverse . . . actions." *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 284 (4th Cir. 2004). Direct evidence is "evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment action." *Warch v. Ohio Cas. In. Co.*, 435 F.3d 510, 520 (4th Cir. 2006). *Sennello v. Reserve Life Ins. Co.*, 872 F.2d 393, 394 (11th Cir. 1989) (finding direct evidence as "we can't have women in management

because women are like Jews and Niggers . . . "); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1191 (11th Cir. 1997) (reversing grant of summary judgment to employer where plaintiff had presented direct evidence and noting that because plaintiff had "presented sufficient direct evidence to survive summary judgment, [the court would] not address his *McDonnell Douglas* argument and whether he ha[d] presented evidence of pretext").

The record reflects direct evidence of retaliatory animus. As alleged in para. 30 of the Am. Ver. Compl. (App.65a), on December 6, 2012, Dr. Adetu, Mrs. Adetu and their representative, Lennox Abrigo met with Head of School Thomas Farquhar in his office. *Id.* The substance of the meeting related to the Parents ongoing concerns about racially discriminatory and retaliatory treatment of Dayo related to her math course placement and treatment by the Math Department. *Id.* at 64a-65a. Mr. Farquhar physically charged at Dr. Adetu saying: (a) "all of the teachers want the Adetus gone, gone, gone from the School;" and (b) that "non-retaliation [against Dayo] is now off the table." *Id.*; *see* Ps' Exh. 1 to their Oppo. to Def.'s MFSJ, Depo. Tr. (6/20/16) Dr. Adetu 169:15-22; 170:1-22 ("He [Farquhar] charged at me"). This direct evidence of retaliatory animus is not disputed by Sidwell. The Headmaster's animus as reflected was held not only by Sidwell's key decision maker, but by "all" the teachers at Sidwell. *Id.* at 64a-65a. A retaliatory animus towards Dayo prevailed about and infected all of her teachers. *Id.* at 54a-101a.

Because Petitioners have established that Sidwell's actions/omissions were tainted by illegal retaliatory

animus, Sidwell can only rebut this case by proving by a "preponderance of the evidence" that the same actions would have been undertaken even in the absence of the presence of the illegal factor. *Merritt*, 120 F.3d at 1191; *Sennello* 872 F.2d at 395 ("With Ebert's statements in the record, along with the facts surrounding her demotion and termination, no further inference would be required to conclude that Reserve discriminated against [plaintiff]") (emphasis added).

The failure of Sidwell to comport with provision 1(C)(1)-(3) of the Settlement Agreement was retaliatory. Petitioners engaged in protected activity in negotiating the Settlement Agreement on July 17, 2013, when Mrs. Adetu inquired on October 1, 2013 of Mr. Farquhar as to Sidwell's compliance with the Settlement Agreement and in filing the Petition for Breach of Settlement Agreement on November 6, 2013. *Id.* at 68a, 70a, 71a; *see Singletary v. District of Columbia*, 351 F.3d. 519, 525-526 (2003) (filing of an appeal in the D.C. Court of Appeals and issuance of various letters by plaintiff's attorney to his employer constituted protected activity, not merely the filing of the original complaints); *Hamilton v. Geithner*, 666 F.3d 1344, 1357-1358 (D.C. Cir. 2012) (informal EEO activity constituted protected activity; summary judgment reversed and case remanded for trial). Mr. Markey knew of the First Charge of Discrimination as of July 7, 2013. *See* Super. Ct. Dkt. #200-204, Ps' Exh. 16 to their Oppo. to Def.'s MFSJ. *Id.* Ms. Kozibrodzka knew of the First Charge of Discrimination as of July 6, 2013; Mr. Heigis knew of the First Charge of Discrimination as of July 5, 2013; Mr. Farquhar knew of the First Charge of Discrimin-

ation as of June 10, 2013. *Id.* Mr. Farquhar[9] and Mr. Markey (*see infra*.) all knew of the Settlement Agreement on July 17, 2013.

Sidwell's non-compliance with the Settlement Agreement is materially adverse. A reasonable jury could find that a reasonable student would be dissuaded from complaining of retaliation or discrimination by, *inter alia*, having their Math II and Second Semester Calculus grades inaccurately recorded permanently in the official record and transcript at their high school. Sidwell has offered no legitimate non-discriminatory reasons for its non-compliance with the Settlement Agreement, that have not been sufficiently rebutted.

The Written Recomputations Were Tendered Late

Sidwell maintains no legally cognizable excuse for its failure to timely provide the recomputation explanations. Atty. Christopher Davies, Sidwell's 30(b)(6) designee, admitted the recomputation explanations were provided 45 days late, and over eleven (11) days' after Plaintiffs' filed their Petition with OHR. *See* Ps' SODF, paras. 46-50, pg. 27-31. The failure to timely provide the recomputations was retaliatory because Dayo suffered actual and prospective harm as she was precluded from taking any action to correct her Second Semester Calculus and Math II grades before these false grades were sent to colleges and universities in 2013, and that harm is ongoing as those grades remain inaccurate. *Rattigan v. Holder*, 604 F.Supp.2d 33, 52-53 (D.D.C. 2009) ("Taken together, *Burlington* and *Rochon* indicate that whether an action is 'mate-

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[9] Farquhar signed the Settlement Agreement for Sidwell.

rially adverse' is determined by whether it holds a deterrent prospect of harm, and not by whether the harm comes to pass or whether any effects are felt in the present."). *See also Velikonja v. Gonzales*, 466 F.3d 122, 124 (D.C. Cir. 2006); *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1087-91 (10th Cir. 2007).

Second Semester Calculus Grade Remains Incorrect

Mr. Markey did not recompute Dayo's Second Semester Calculus grade in good faith. Note, Markey testified at deposition that he was contacted by Sidwell Atty. Davies on July 17, 2013, who told him "that as part of the Settlement Agreement, [he] needed to go through and thoroughly recalculate [Dayo's Calculus grades]." *See* Markey Depo. Ps' Exh. 6 (Markey Depo., p. 72:12-18) to Oppo. to D's MFSJ; *see also* Def.'s Exh. K (Markey's Depo. Tr. 74:1-20 Def.'s MFSJ (Super. Ct. Dkt. #177). Markey therefore actually knew of Petitioners' protected activity. Markey testified that he "turned around" the inaccurate Second Semester re-computation "within 24 hours" of Atty. Davies' request. *Id.* A closer temporal proximity could hardly be imagined. *See Rochon*, 438 F.3d at 1220 (D.C. Cir. 2006) (" . . . we have long held a 'causal connection . . . may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse . . . action took place shortly after that activity.'").

Sidwell's Math Department Chair, Justin Heiges, confirmed that Dayo's Second Semester Calculus grade is false. At his deposition, Mr. Heigis was examined about his subordinate's recomputation of Dayo's Second Semester Calculus grade. *See* Ps' SODF, para. 7, pg. 7-8; Ps' Exh. 5 (Heigis Depo., p. 63:15-21; 64-66) to

Oppo. to D's MFSJ. He was asked about the function and purpose of the written calculus course policy/ syllabus. *Id.* (Heigis Depo., p. 63:15-22; 64-66). Heigis admitted that the substance of the course policies for all calculus teachers "should be substantially similar." *Id.* (Heigis Depo., p. 65:1-22; 66:1-15). Heigis explained the course policy is designed to ensure consistency when comparing grades issued by different teachers of the same subject matter. *Id.* "Q: So that when you look at an A in Markey's class for calculus and an A in Kozibrodzka's class for calculus [for example], you ought to have the confidence as the math department head, that you are looking at apples and apples, agreed? A: Yes." (Heigis Depo., p. 66:9-15). Thereafter, on the record, Mr. Heigis re-computed Dayo's Second Semester grade, and in compliance with the written Calculus course policy issued by Mr. Markey (Heigis Depo., p.73-78), Mr. Heigis concluded that Dayo earned an overall grade of 89.96 (A-), but was erroneously given a grade of 88.96 (B+) by Mr. Markey. *Id.*[10]

The written course policy was binding upon Markey because, as Heigis testified, calculus teachers' adherence to the course policies ensure consistency when comparing grades issued by different teachers of the same subject matter. *See Steele v. Mattis*, 899 F.3d 943, 946 (D.C. 2018) (noting admonishment of plaintiff-educator by supervisors for his failure to follow the "required syllabus" and use of an "unapproved concept" in teaching one of his subjects in an ADEA termination case). Mr. Markey' alleged justification for violating the written course policy in the

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[10] Heigis admitted that Markey maintains a "practice" of rounding up. (Heigis Depo., p. 81:11-19).

Second Semester by counting the senior exam twice was to help students increase their grades is pretextual because his approach actually caused Dayo's grade to decrease from an A- to a B+, which strains credulity if a teacher is trying to "help" his *entire* class improve their grades.[11] Dayo proved pretext. *See Rochon*, 438 F.3d at 1220; *Alvarado v. Board of Trustees of Montgomery Community College*, 928 F.2d 118, 122 (4th Cir. 1991) (the College's violation of its internal policies supported the 4th Circuit's finding that the refusal to promote plaintiff was pretextural); *Porter v. California Dept. of Corrections*, 383 F.3d 1018, 1031 (9th Cir. 2004); *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 322 (3d Cir. 2000) (a violation of company policy can constitute a pretext for unlawful discrimination under Title VII).[12]

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[11] Sidwell's corporate designee, Patrick Gallagher, admitted in deposition that Dayo was the only Sidwell student in Sidwell's Class of 2014, who filed a discrimination or retaliation complaint against Sidwell. *See* Ps' SODF, para. 94, pg. 50; Ps' Exh. 18 (SFS 30(b)(6) Dep. Tr. (Gallagher) (12/14/16, p. 285:10-22; 286: 1) to Oppo. to D's MFSJ.

[12] Evidence of the facts and circumstances arising prior to execution of the Settlement Agreement is admissible under either Rules 403 or 404(b) of the Federal Rules of Evidence to demonstrate motive, intent, opportunity, and/or the absence of mistake. Sidwell's actions also violated Nat. Ass. College Admission Counseling's policy. App.79a. It is relevant to note that regarding the First Semester Calculus grade, Dayo was the only student whose grade required changing as a result of Mr. Markey's "mistake;" and it took an OHR Settlement Agreement to force Mr. Markey to correct that grade.

Dayo's Math II Grades Were Recomputed with Retaliatory Animus

Similarly, the DCCA failed to address in its Opinion Kozibrodzka's retaliatory actions or omissions. (App.9a-14a). Ms. Kozibrodzka knew of the First Charge of Discrimination as of July 6, 2013, constituting protective activity. *See* Ps' Exh. 16 to their Oppo. to Def.'s MFSJ. She was also the subject of the Parents' allegations of discrimination during 2011-2012. The Parents had complained that Kozibrodzka pegged Dayo with recurrent scores of 68% on four Math II tests, recurrent scores of 89% on quizzes and recurrent scores of 70% on extra credit assignments. (App.59a) In her belated recomputation explanation, Kozibrodzka ascribed to Dayo a first quarter 2011 test/quest score of 79%; however, the actual test was never produced in this litigation—though requested—and Dayo never took such test. *See* Ps' SODF, para. 7, pg. 8-9; Ps' Exh. 8 (Nike Adetu Depo., p. 182-187) to Oppo. to D's MFSJ; *see also* (Super. Ct. Dkt. No. #177) Def.'s Exh. P-Dayo Adetu's Suppl. Responses to Interr. No. 9 of Def.'s First Set of Interr., p. 1-2. Indeed, in her Answer to Def.'s Interrogatory No. 9, Dayo characterized the purported test score of 79% as "non-existent and a complete fabrication." *Id.*

Defendant does not deny said allegations of fabrication. *See* Def.'s Memo., p. 11-12, 21. The trial court concluded that the issue related to the purported 79% test score created a "genuine factual dispute," however, found "there [is] no evidence that Ms. Kozibrodzka intentionally falsified her grading records or intentionally used inaccurate information." However, questions of intent are "notoriously inappropriate" for

summary judgment. *Leberman v. John Blair & Co.*, 880 F.2d 1555, 1559–60 (2d Cir. 1989). Dayo stated under oath, as corroborated by Mrs. Adetu under oath, that she never received a test score of 79% in Math II during the first quarter of 2011. (App.31a). No such purported test has ever been produced in this litigation. Reasonable minds may conclude that Ms. Kozibordzka intentionally and maliciously falsified the 79% test score for purposes of breaking the specious recurring test score pattern opposed by Plaintiffs on several occasions and which in part led to the filing of the First Charge of Discrimination. App.59a-68a.

Additionally, Kozibrodzka's bad faith recomputation with explanation is undergirded by her admitted destruction of her original grade book, *etc.*, after being told by Farquhar to preserve Dayo's Math II work product. *See* Ps' SODF, para. 7, pg. 8-9; Ps' Exh. 7 (Kozibrodzka Depo., p. 178-184). Kozibrodzka was instructed by Mr. Farquhar to maintain all Dayo's work product for Math II "after school ended in 2012." *See* Ps' Exh. 7 (Kozibrodzka Depo., p. 183-184). However, she "shredded" the Math II work product of Dayo's 2011-2012 peers, including the original of her grade book. *Id.* She allegedly kept a photocopy of "the pages—some pages" of her grade book for the relevant time. *See Ps' Exh. 7* (*Kozibrodzka Depo.,* p.179:4-13). When asked about her recomputation of Dayo's scores for class participation, extra credit, and homework individually, Kozibrodzka was simply unable to testify at deposition respecting the actual scores given Dayo regarding each such category. *See* Ps' Exh. 7 (Kozibrodzka Depo., p.176:19-22; 177:1-2). *See Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012) (reversing summary judg-

ment for Agency where there was no contemporaneous documentation of Agency's rationale for promotion).

Kozibrodzka's variance from the written course policy constitutes additional evidence of a retaliatory motive. *See Goosby*, 228 F.3d at 322. The concept of the "quest" is suspect. The quest is not mentioned in the course policy. *See* Ps' Exh. 9. *See Steele*, 899 F.3d at 946. Koziebrodzka's decision to afford herself the "discretion" to convert a quest to a quiz or test removes objectivity from the grading process and introduces a level of subjectivity not stated in the mandatory course policy.

Moreover, Koziebrodzka's decision to further change her grading methodology for the Second Semester of Math II is evidence of pretext. Koziebrodzka admitted that she employed a new grading methodology for third quarter where she multiplied the "test average by three, the quest average by two and the quiz average by one." *See* Ps' Exh. 7 (Kozibrodzka Depo., p. 210-211). This grading methodology violated the written course policy. *Id.* at 185-188; see Ps' Exh. 9 (Koziebrodzka Depo. Exh. 3). Koziebrodzka admitted that she did not notify the parents of her Math II students of this change in the course policy, and on the interim grade reports she admitted she did not assign a point value to tests, quests and quizzes. (Kozibrodzka Depo., p. 210-211.) Based upon the totality of the circumstances a reasonable jury may therefore find that Koziebrodzka actions were materially adverse under *White* and with Kozibrodzka's actual knowledge of Petitioners' engagement in protected activity.

Dayo's Incorrect Transcript as of Fall 2013 Were Sent to Colleges/Universities

The DCCA and trial court improperly weighed the evidence and/or the credibility of the witnesses when it concluded the incorrect transcript was not issued to any colleges or universities prior to November 1, 2013. (App.9a-14a; 29a). It is disputed that Dayo's transcript was not sent to any college or university prior to November 1, 2013. *See* Ps' Statement of Disputed Facts ("SODF"), para. 62, pg. 38. Sidwell's Registrar Lenherr was actually aware of Plaintiffs' First Charge of Discrimination as of July 8, 2013. *See* Ps' Exh. 16 to their Oppo. to Def.'s MSJ. While the trial court ruled that Dayo's First Semester Calculus grade was not corrected on her transcript until after October 4, 2013, and before November 1, 2013, Sidwell's Registrar (Ms. Lenherr) sent an email to Sidwell's Atty. Christopher Davies dated July 2, 2014, stating that Dayo's "initial transcript" was sent to colleges and universities during the time period of September 2013-January 2014. *See* Ps' Exh. 3 (Lenherr Depo., p. 130:6-17) to Oppo. to D's MFSJ; a true copy of Lenherr's email to Davies is attached as Ps' Exh. 15 (Lenherr Depo. Exh. 8) to Oppo. to D's MFSJ. While Ms. Lenherr attempts to contend that her email to the School's Attorney was erroneous, when pressed at deposition as to whether she sent a copy of the "incorrect" transcript to Brown, or any other university, her repeated answer was "I don't know." *Id.* (Lenherr Depo., p. 133-135); *see* Ps' SODF, para.59, pg. 36. Then, Lenherr testified that "maybe" she sent Dayo's [inaccurate] transcript to Coach Riese of Brown in September, 2013. *See* Ps' SODF, para. 117, pg. 57-58 (Lenherr Depo., p. 173-175:1-8). Note, Brown's Track Coach John Reise

was recruiting Dayo in August-September 2013, and with Plaintiffs' authorization, contacted Sidwell requesting academic information about Dayo. *See* Am. Ver. Compl., para. 58, p. 22. Neither Sidwell nor Ms. Lenherr produced any real or Electronically Stored Information ("ESI") establishing the exact date the First Semester Calculus grade was changed on Dayo's transcript, or in the PCR system. *See* Ps' SODF, para. 47, pg. 28-29, and para. 58, pg. 35.

Dayo's First Semester Calculus Grade Has Not Been Officially Corrected

In violation of the Settlement Agreement, Dayo's "official [academic] record" with Sidwell has not been corrected regarding the First Semester Calculus grade. In response to Plaintiff's Second Charge of Discrimination, Sidwell on or about August 29, 2014, filed its scathing response to the Second Charge. (App.82a-83a). In so doing, Sidwell responded by producing a copy of Dayo's 2012 Fall Semester Report Card, which contained the wrongful "A-," rather than the "A." *Id.* Thus, in the face of Sidwell's claim that it comported with the Settlement Agreement on October 4, 2013, as late as August 2014, Dayo's official record with Respondent remains erroneous. *Id.* Thus, this record reflects significant evidence of harm or potential harm to Dayo stemming from Sidwell's failure to timely correct or actually correct Dayo's First Semester Calculus grade on her "transcript and official record." Obviously, this condition would dissuade a reasonable student from complaining of discrimination or retaliation.

The Secondary School Reports

Negative references made with retaliatory motives may be deemed retaliatory. *Harris v. Prince George's County Pub. Sch.*, Case No. 96-2785, 1998 U.S. App. LEXIS 7703 at *7 (4th Cir. April 20, 1998) (citing *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997) ("Dissemination of negative employment references for retaliatory motives can constitute a violation of Title VII"); *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 754 (3rd Cir. 1997) ("[E]mployer who retaliates cannot escape liability merely because the retaliation falls short of its intended result"); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) (same).

Sidwell retaliated against Dayo respecting its completion of her SSRs. Sidwell's completion of the SSRs, tantamount to a reference letter, failed to accurately "rate" Dayo against her Sidwell peers. The SSRs were completed in large part on or about January 10, 2014, save Scattergood's completion of Dayo's SSR supporting her application to HBCU Spelman College. Petitioners participated in protected activity on December 12, 2013 (App.72a), when they filed her Reply to Sidwell's Surreply respecting her Petition less than thirty (30) days' prior to Scattergood's completion of the SSRs dated January 10, 2014. Scattergood also knew of Plaintiffs' protected activity because the Parents told Scattergood on October 24, 2013 (App.74a) that they believed Dayo was suffering disparate treatment because Sidwell was not providing her the same level of support as her white college bound student athletes in violation of Sidwell's "College Counseling Policy." (App.74a-75a). Scattergood testified that she knew there was "bad blood there with college counseling and the

[Adetu] family." Scattergood claims that it was because of "the prior daughter's counseling experience that has [sic] my alarm bells going off." Ps' Exh. 17 Scattergood Depo., p. 84-85.

Sidwell again violated its own policy. *See Alvarado*, 928 F.2d at 122; *Porter*, 383 F.3d at 1031. For rating purposes, the plain language of the SSR form (itself reflecting the internal policy) only compares Dayo with other students in her graduating Class of 2014. The SSR states: "in comparing the other Sidwell Friends School students in the applicant's course selection is: [] less demanding; [] average; [] demanding; [] very demanding; [] most demanding." (emphasis added). Regarding each SSR completed by Scattergood, she designated Dayo's course selection as "most demanding." *See* Ps' composite Exhibit 28. However, the SSR then reads: "Compared to other students in his or her class, I rate this student in terms of . . . ." (emphasis added). The person completing the form must then "rate" the student for "academic achievement," "extracurricular achievements," and etc., using the designation of: "below average"; "average"; "good"; "very good"; "excellent"; and "outstanding." *Id.* For each non-HBCU applied to which Dayo applied such as Dartmouth, Yale, Cornell, Columbia, Duke, Pennsylvania, MIT and Hopkins. Scattergood "rated" Dayo's "academic achievement" as either "good" or "very good." However, with respect to Dayo's SSR for Spelman, Ms. Scattergood marked Dayo's academic achievement as "excellent." *Id.*

Petitioners assert that Dayo's academic achievement rating respecting her Spelman application was "excellent"; therefore, her academic achievement rating

should have been "excellent" with respect to the non-HBCUS to which she applied. The DCCA accepted Sidwell's contention (which was disputed by Petitioners) that the SSRs were comparing students with their peers applying to the same college. (App.12a). A reasonable jury could find Sidwell's manner of completing Dayo's SSR was materially adverse under *White*.

Letter of Recommendation

Scattergood's letter of recommendation submitted on Dayo's behalf was retaliatory. The letters were prepared during the fall of 2013, when Dayo was engaging in protected activity or opposing Sidwell's breach of the Settlement Agreement. Of course, Scattergood testified of the "bad blood." Scattergood knew on October 24, 2013, the Parents had complained of Sidwell discriminating against Dayo. (App.74a-76a). She knew of Dayo's ongoing case against Sidwell based on her communications with Mr. Davies on January 14, 2014. *Id.*

Scattergood's "bad blood" testimony constitutes direct evidence of retaliatory animus. She had no business making reference to Dayo's parents' nationality in Dayo's letter of recommendation to the colleges and universities to which Dayo applied. *Id.* at 77a. The DCCA and the trial judge, adopted Respondent's position, misapprehended the issue, conflating Nigerian "heritage" with Nigerian Nationalism. *Id.* at 13a. Scattergood did not refer to Dayo's "heritage," which is significantly different from one's nationality which has legal ramifications for purposes of immigration, etc. The DCCA concluded Petitioners offered no "non-speculative evidence of harm." *Id.* While Dayo's parents

are Nigerian nationals, Dayo and Lola are Americans. (App.56a). As Dayo explained, Scattergood's reference to Dayo's parents as "Nigerian" created the false impression that Dayo was a Nigerian national. Ps' Exh. 27, Dayo's Depo. p. 344:15-22; 345:1-17. As a Nigerian National, Dayo testified she would not receive the benefit of "affirmative action." *Id. Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997) (negative employment reference about former employee given in retaliation actionable). Therefore, Scattergood not only made a false statement about Dayo's nationality, but actually hurt Dayo's college prospects for the Fall 2014. Note, Farquhar, collaborated with Ms. Scattergood in devising the letter of recommendation. (App.65a, 76a-77a).

Test Record

Dayo's Test Record as maintained by Sidwell omitted her SAT II Chemistry score. Ps' Exhibit 29 to Oppo. to MSJ. Sidwell's omission of Dayo's chemistry score disqualified her for admission to several engineering programs to which she applied, including McGill University. (App.41a-44a). The trial court adopted Sidwell's contention that the "Test Record" is merely an "internal record" that is not submitted to colleges and universities. *Id.* The DCCA mistakenly concluded that Petitioners' tendered "no" evidence of the defective Test Record being sent to "McGill or any other college." (App.12a-14a). However, Sidwell's position is pretextual because Sidwell's Rule 30(b)(6) witness Patrick Gallagher actually admitted that Ms. Carter submitted the defective Test Record to Spelman College after March 20, 2014. *See* Ps' SODF, para. 122, pp. 59, see Ps' Exh. 18 (Gallagher Depo., p. 130-131). "Q: Do you know the colleges and universities

to which Sidwell . . . submitted Dayo's SAT scores? That is, the SAT as well as the SAT subject test scores? . . . A: As I was saying, by the documents that were provided to me to review, there is only record that it was sent to Spelman." (emphasis added). Mr. Gallagher is unable to dismiss the fact that the Test Record was sent to colleges and universities in addition to Spelman. *Id.* During this time period, Dayo's last protected activity was December 16, 2013, *i.e.*, three (3) months prior, and her Petition was pending. A reasonable jury may therefore conclude that Sidwell lied because it actually sent the false Test Record to Spelman.

McGill

Regarding Dayo's application to McGill, Sidwell retaliated against Dayo. While the trial court adopted Defendant's position, Petitioners amply disputed the fact that Sidwell timely submitted Dayo's mid-year transcript in February 2014. *See* Ps' SODF, para. 118, pp. 58, see Ps' Exh. 3 (Lenherr Depo., p. 181-185). On December 16, 2013, less than two (2) months prior to that time, Dayo submitted her Response to Sidwell's Sur-reply relevant to the Petition. Lenherr does not know if Dayo's transcript was even mailed or dispatched to McGill. *Id.* Lenherr did not send Dayo's transcript via certified mail or overnight mail to McGill. *Id.* She did not send Dayo's transcript under any cover letter. *Id.* At bottom, Lenherr has no record of ever sending Dayo's mid-year transcript to McGill. *Id.* While Lenherr claims she mailed Dayo's transcript along with the other Sidwell students who applied to McGill, she has no proof that she actually sent *Dayo's* mid-year transcript to McGill. *Id.* The trial court erred on this

point as well; the DCCA erred in failing to address the issue at all.

Dayo's Application to Spelman was not late.

The DCCA did not address this issue. (App.9a-14a). Trial court erred in determining that Dayo's application to Spelman was "after Spelman's deadline." (App.50a). Plaintiffs disputed the Defendant's contention that Dayo's application to Spelman was late. *See* Ps' SODF, para. 112, p. 56, *see* Ps' Exh. 18 (Gallagher Depo., p. 66:6-10). Defendant's 30(b)(6) witness Mr. Gallagher testified that "Dayo's [Spelman application] was not late." *Id.* Then, when asked for Spelman's deadline for submission of applications for the 2013/2014 scholastic year, Mr. Gallagher replied: "[t]hat, I do not know." *See* Ps' Exh. 18 (Gallagher Depo., p. 68:6-9) to their Opp. to Def.'s MSJ. Furthermore, in Ms. Carter's numerous email communications with Spelman's Admissions Officers, none of the Spelman Officials reported that Dayo's application was belated. *See* Ps' Exh. 24. A reasonable jury may therefore conclude that Dayo's application to Spelman was timely and Ms. Carter's advocacy regarding Dayo's application to Spelman was extreme and contained false statements (App. 77a-78a) against her non-advocacy respecting Dayo to non HBCUs, and that Ms. Carter attempted to steer Dayo to Spelman.

Disparate Advocacy

The trial court weighed the credibility of the witnesses and impermissibly made factual determinations regarding Dayo's claims of retaliation in the form of disparate advocacy. (App.50a-51a). The DCCA did not address the issue, except to say cryptically that

Petitioners failed to demonstrate adverse action. (App. 9a-14a). Scattergood was actually aware of Petitioners' protected activity during October 2013, and before. On January 14, 2014, Ms. Scattergood communicated with Atty. Davies regarding Dayo's college applications. (App. 75a-76a). While Ms. Carter admitted that Sidwell's College Counseling Department engaged in no advocacy regarding Dayo's applications to Ivy league schools (*see* Ps' Exh. 25), Ms. Carter's zealousness in support of Dayo's application to Spelman involved making false statements to get Spelman officials' to focus upon Dayo's application. *See* Ps' Exh. 19, 23-24; *see* Ps' SODF, para. 107-110, 113-115, pp. 54-57; App.76a. For instance, Ms. Carter wrote Spelman March 28, 2014 stating that she had submitted Dayo's school material on Thursday, March 13, 2014 to Spelman via fax and electronically. *See* Ps' Exh. 23. However, neither Ms. Carter nor any representative of Sidwell was aware of Dayo's application to Spelman until March 20, 2014. *See* Ps' Exh. 19. Ms. Carter made an explicit false statement to Spelman. *See* Ps' Exh. 23. In her email to Lee Palmer dated March 22, 2014, regarding Dayo's application to Spelman, Ms. Carter noted "we need to get this one." *Id.* (emphasis added).

Contrastingly, Sidwell's support for Dayo's non-HBCU applications was non-existent. Respecting Dayo's non-HBCUs applications, Sidwell and Ms. Carter remained mute or offered negative assistance. *Compare* Ps' Exh. 19 with 23-24; *see* Ps' SODF, para. 107-110, 113-115, pp. 54-57; *see* the SSRs. The trial court appears to contend that Ms. Carter's overture in her email of April 14, 2014, reflected Sidwell's continued "willingness" to assist Dayo regarding her UVA waitlist and the submission of late applications. However,

when read closely, any purported offers of "support" in the April 14, 2014 email chain are prophylactic and spineless. Ms. Carter continues to steer Dayo to Spelman, stating; "[a]t this point, we therefore believe the emphasis should be on . . . Spelman . . . ." *Id.* Unlike Dayo's Spelman pursuit, Ms. Carter never agreed to write letters or emails, or place telephone calls to senior admissions officers in support of Dayo's UVA application. Sidwell's suggestion that Dayo personally "reach out" to UVA is not support, but a self-help directive. Finally, regarding Dayo's application to Spelman, Ms. Carter's zealous advocacy was unsolicited; why is it that respecting Dayo's UVA application Dayo must actively enlist Ms. Carter's aid. A reasonable jury could find Ms. Carter's explanation pretextual, and that she was an integral part of Sidwell's systematic retaliatory effort to thwart Dayo's non-HBCU college prospects for the Fall of 2014.[13]

III. THE COURT OF APPEALS FAILED TO APPLY THE PROPER LEGAL STANDARDS WITH REGARD TO DECIDING SUMMARY JUDGMENT

The DCCA claims that it drew all justifiable inferences in Dayo's favor; yet, it apparently did not.

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[13] The trial court dismissed several of Petitioners' allegations of retaliation as "immaterial." App.52a. The DCCA does not address Petitioners' remaining claims of retaliation, though well-pled. Petitioners beg to differ with the trial court's handling of those claims. While individually the disputed facts maybe immaterial, upon this entire record such facts speak volumes and demonstrate the extensive nature of the retaliation experienced by Dayo. On that basis alone, this case should be remanded for trial because the "whole record" was not considered by either the trial court or the DCCA.

In actuality, the DCCA discredited Dayo's account of the events in this matter, claiming that she only cited to her "own beliefs or dissatisfaction as support" for her claims. For instance, the lower Court asserted that Petitioners' citations to the Am. Ver. Compl. she filed and her own affidavit as support for her claims were insufficient. Yet, this is contrary to legal precedent in the District of Columbia and the overwhelming majority of federal and state courts across this nation, which allow parties to refer to verified complaints in a party's statement of disputed facts to oppose Rule 56 motions. *See, e.g.*, *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) ("Every circuit that has faced this issue has treated verified complaints as acceptable opposition to a motion under Rule 56 for summary judgment").

With regard to many matters, the DCCA and trial court chose to accept Respondent's version of events over Petitioners'. However, the role of the Court is not to make credibility determinations when there are material facts in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Second, when reviewing the factual record as a whole, the Court seemed to consider each piece of evidence presented in a piecemeal fashion, rather than as part of a larger inter-connected scheme. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (at summary judgement, the court must "review the record 'taken as a whole'"). Of course, the record contains direct evidence of retaliatory intent based upon Farquhar's promise to retaliate against Dayo, which the DCCA ignored.

IV. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE "ACADEMIC DEFERENCE RULE"

To be clear, the "academic deference rule" has no place here.

The Court is not required to give deference to academic decisions, as to eliminate the need for judicial scrutiny of discriminatory or retaliatory acts. *Steele*, 899 F.3d at 948–49. In *Steele*, the D.C. Circuit disregarded the academic deference rule thereby overruling the trial court's grant of summary judgment in an ADEA case. The Court noted:

> But even if we were to give some degree of deference to the College's decision about who was best qualified to teach the courses it had determined best fit its "mission needs," Government Br. at 10, Dr. Steele has produced enough evidence to create a triable issue of fact that age played a role in his termination.

(emphasis added).

Here, Petitioners have set forth sufficient evidence in support of their retaliation case. They are not merely challenging the academic judgment of Sidwell, and that of their agents. Dayo's academic future was compromised, at best, because of Respondent's retaliatory actions, of which Dayo has direct evidence. Sidwell's actions should not enjoy any degree of deference. The ruling in *Hajjar-Nejad v. George Washington Univ.*, 37 F.Supp.3d 90 (D.D.C. 2014) is inapposite.

CONCLUSION

Applying the *White* standard to the present case, Petitioner Dayo Adetu presented evidence sufficient to create a genuine triable issue as to whether she suffered retaliation. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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