



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION XV

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MICHIGAN  
OHIO

OCT 22 2013

Gwen M. Mattison, Esq.  
General Counsel  
Wright State University  
356 University Hall  
3640 Colonel Glenn Highway  
Dayton, Ohio 45435

Re: OCR Docket #15-13-2011

Dear Ms. Mattison:

This letter is to notify you of the disposition of the complaint filed against Wright State University (the University) with the U.S. Department of Education's Office for Civil Rights (OCR) on November 15, 2012, alleging discrimination against a student (the Student) on the basis of disability. Specifically, the complaint alleged that the University:

1. refused the Student's participation in water activities for a scuba course during the spring 2012 semester because of his disability; and
2. eliminated an academic adjustment – the Student's use of a list of mathematic identifiers during testing – for a math class in the fall 2012 semester, although the University had previously approved it as a disability-related service.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104. Section 504 prohibits discrimination based on disability by recipients of federal financial assistance from the U.S. Department of Education. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Title II prohibits discrimination on the

basis of disability by public entities. The University is a public institution that receives Federal financial assistance from the U.S. Department of Education. It is, therefore, subject to the requirements of Section 504 and Title II, and OCR had jurisdiction to investigate this complaint.

Based on the allegations, OCR investigated the following legal issues:

- whether the University, on the basis of disability, excluded a qualified student with a disability from participation in, denied the student the benefits of, or otherwise subjected the student to discrimination regarding any postsecondary education aid, benefits, or services in violation of the Section 504 implementing regulation at 34 C.F.R. §§ 104.4 and 104.43; and
- whether the University failed to make modifications to its academic requirements as necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against a qualified student with a disability in violation of the Section 504 implementing regulation at 34 C.F.R.

§ 104.44.

To investigate this complaint, OCR interviewed the Student and reviewed documentation submitted by the Student and the University. OCR also interviewed pertinent University witnesses. In addition, OCR provided the Student with the opportunity to respond to information submitted by the University and to provide additional support for the complaint allegations.

Based on a careful consideration of the information obtained, OCR has determined that the University violated the Section 504 and Title II implementing regulations when it refused the Student's participation in water activities for the scuba course in spring 2012 and denied the Student the use of his previously approved academic adjustment of a list of math identifiers for a xxxxxxxxxxxx course in fall 2012. However, the University signed the enclosed agreement that, once implemented, will fully address these compliance issues in accordance with Section 504 and Title II. The agreement also resolves compliance issues related to a separate complaint, OCR Docket #15-12-2118; however, this letter addresses only OCR Docket #15-13-2011. OCR's findings related to OCR Docket #15-12-2118 are explained in a separate letter. A summary of OCR's investigation of the instant complaint, the applicable legal standards, the bases for OCR's determinations, and the terms of the agreement related to this complaint are presented below.

### **Summary of OCR's Investigation**

- **Background**

The Student stated that he has epilepsy, which causes him to have seizures and memory difficulties. He enrolled at the University in the fall of xxxx. In xxxxxx of 2009, he informed the University's Office for Disability Services (ODS) about his disability. ODS

approved the Student at that time for several academic adjustments and auxiliary aids and services (collectively, “academic adjustments”), including extended time and a quiet area to take exams.

ODS staff told OCR that they typically do not provide written notice to students of the specific academic adjustments and auxiliary aids and services for which they have been approved or denied. The student’s ODS representative typically discusses what the student has been approved for with the student during a meeting.

No current, comprehensive documentation was available from either party regarding the Student’s approved academic adjustments in effect during the time periods at issue in this complaint. The University submitted a copy of a Pre-Service Interview Form, which was filed out by the ODS associate director during the Student’s initial request for disability services. The form indicated several services, although it is not clear whether these were just discussed or actually approved. The services listed on the form are: “Academic Copy Notes; Test Proctoring Extended Time; Test Proctoring Private Room; Technology Center Scanned Books; Technology Center Audio; Academics Note Taking; Test Proctoring Other.”

The ODS associate director told OCR that she had conducted the Student’s initial pre-service interview, and that at that interview she approved the Student for academic adjustments, including books on CDs, copies of notes from a classmate, and extra time in a quiet room to take exams. The associate director said that she had orally informed the Student of his approved academic adjustments during the pre-service interview.

The University also provided OCR with e-mails from the ODS associate director regarding an additional academic adjustment that would allow the Student to show no or shortened work for mathematics problems. The Student provided OCR with a copy of an e-mail from the ODS associate director stating that the Student had been approved for use of an “identity sheet that lists out all of the identities he needs for exams for” xxxxxxxxxxxxxx. The ODS director told OCR that the Student had not been approved for any academic adjustments based on his seizures.

- **Alleged Exclusion from Scuba Course**

The Student reported that he enrolled in a scuba course at the University in the spring 2012 quarter. The Student says that at the first class session the scuba instructor asked all students, including the Student, to fill out a form that called for each student’s medical information. Suspecting that his epilepsy could be an issue, the Student said that he approached the instructor after the first class. The Student stated that the instructor confirmed that having epilepsy would be problematic for participating in the course. Based on this conversation, the Student said that he spoke to his neurologist and obtained a letter that stated it was the doctor’s opinion that the Student could scuba dive in shallow water, “although it was best to be cautious.” The Student said that he took this note to the second scuba class session.

The Student stated that at the third scuba class the instructor asked him to stay after the class ended. The instructor then told the Student that, because of the Student's epilepsy, he would not be allowed in the pool or to participate in the course. The Student said that he then spoke to the chair of the University's department of kinesiology and health, through which the scuba course was being offered. The Student stated that the chair told him that he had spoken to the Student's doctor and that the doctor had revoked the scuba clearance that the doctor had previously given. The Student told OCR that he then called his doctor's office and spoke to a member of the doctor's staff. The staff member, according to the Student, informed him that the doctor's file notes indicated that the doctor had spoken to the department chair, but there was no notation that the doctor had revoked the previously given clearance. The Student stated that he concluded that the department chair had lied to him about his doctor's alleged revocation of the clearance.

The Student went to a number of administrators at the University to complain about being excluded from scuba, as discussed in more detail below. He said that at some point the instructor and the department chair suggested he just watch the class and not participate in the pool activities. He said the associate dean of the college of education and human services, within which the department is housed, concurred that he should observe the class rather than participate. The Student stated that this was like a "slap in the face," because the purpose of the course was for physical education and to learn to scuba dive; participating in the water was the whole point of the course. The Student said that he eventually withdrew from the scuba course and received a full refund from the University. He said that he was concerned that the University would deny him full participation in other courses. This was based on a comment the assistant provost had made to him when he went to talk to him about being denied the ability to participate in the scuba course. He said the assistant provost had told him that he had spoken with you as the University's attorney and that you had told the assistant provost that there were laws in place that allowed the University to exclude him from any course.

The Student's scuba instructor told OCR that she has taught scuba at the University for xx years. She said she is a certified scuba instructor, holding the highest rating from the National Association of Underwater Instructors (NAUI).

The instructor explained that the section of the spring 2012 scuba course in which the Student enrolled met for xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxx of each session were in the classroom and then two hours were in the University's swimming pool. The class uses the whole pool, with depths ranging from 4 to 14 feet. During the first pool session, students have to show their swimming and survival skills in the water. During the second week, the students use skin diving equipment (mask, snorkel, fins, etc.), and then by about the fourth week of class they are using full scuba equipment in the pool, including compressed air. The course is offered as a general elective in the department of kinesiology and health, although the class works toward basic open water scuba diving certification. Students can successfully complete the course without becoming certified, however, and the certification is separate from the required coursework. For students who are interested in becoming certified, the instructor offers an optional two days of instruction in a lake, quarry, ocean, or other deep-water locations in Ohio or Florida.

To take the scuba course, the instructor explained, all students must complete a medical history form and waiver. The instructor said that she uses the medical history form to ascertain if a student is physiologically capable of taking the course.

The instructor said that she then compares the completed form to an accepted list of scuba “contraindicators,” which she explained are attributes that cause a person and his or her diving partner to be at risk of injury and death. She said that the list of scuba contraindicators was developed in the 1950s. She uses the NAUI version, but said that the list is recognized by all of the diving agencies. The instructor gave examples of contraindicators, including congestive heart failure, seizures, and spinal-cord injuries. The instructor explained that the risk of physical injury applies not only to the person possessing the contraindicator, but also to his or her diving partner because scuba divers always dive in pairs, and each is responsible for the other’s wellbeing. For example, the instructor stated, if a person is 60-100 feet underwater when the person has an asthma attack or a seizure, they would have to surface immediately, which is not possible on compressed air because of the risk of embolism. A person in that situation is likely to panic and cling to and claw at their partner, which would lead the partner to drown too. She said that, because of this risk, there would no way to accommodate a person with one of these contraindicators for the person to be able to participate in scuba diving. She acknowledged that some of the impairments on the list of contraindicators vary widely in severity and type, such as asthma, and that developments have been made in the air used for diving since the list was developed that might allow a person for example with some forms of asthma to dive. She asserted, however, that a person with epilepsy with active seizures would never be allowed to dive.

The instructor said that she recalled the Student. She said that on the first day of the scuba class she showed the class a video about the medical risks involved with scuba diving and passed out the medical forms. The instructor stated that at the end of class the Student told her that he had epilepsy. The instructor told OCR that, because under at least one theory a person might be able to safely scuba dive if he or she had been seizure-free for more than five years, the instructor inquired as to when the Student had last suffered from a seizure. The instructor said that the Student responded that he has seizures once a day, if he is current with his medications; if not, he has three or four seizures a day. The instructor also said that the medications the Student was taking were themselves also contraindicators because of how they can counteract with the nitrogen and underwater pressure associated with scuba diving. The instructor asserted that, although in the class the students only go to a maximum depth of 14 feet, most diving accidents happen in the first atmospheric level of pressure, i.e., the first few feet, and that even at that depth the Student would drown if he were to have a seizure. The instructor said that she then told the Student that he could not take the scuba class because she was not willing to risk students’ lives.

The instructor said that the Student showed up for the next class with a letter from his doctor, but without the medical form that was to have been filled out. The instructor stated that she told the Student that he needed to submit a completed medical form. The instructor said that the Student then stormed out of class. According to the instructor, she

then provided a copy of the doctor's letter to her supervisor, the chair of the department of kinesiology and health, who was also a certified diving instructor. The instructor said that the department chair told her that he would look into it. The instructor said that the Student showed up for the next class, took the in-class quiz, and then left, not waiting for that class's lecture. The instructor said that she had not seen the Student since then. The instructor said that she has not received training during her employment with the University concerning students with disabilities.

OCR also spoke to the department chair, who noted that he was previously a certified master scuba instructor and trainer, has a Ph.D. in Exercise Physiology, and worked with a different university's recreational dive management program, performing the program's hyperbaric physiology. The department chair stated that he found out about the Student's scuba course issues early in the spring 2012 semester. He said that the course instructor had contacted him and told him that she was considering keeping the Student from the water portion of the class because of the Student's epilepsy. The department chair said that he felt that this was reasonable. The department chair said that the Student then contacted him, asking if a note from his physician would allow him to participate in the entire class. At that point, not knowing the severity of the Student's condition, the department chair said that they would consider it.

The department chair said that he then received a letter from the Student's personal physician that released the Student to participate in pool activities, provided the Student could be checked constantly. This proposal, the department chair said, was a "nonstarter." He stated that the University could not provide that service because it would place the safety of the Student's diving partner at risk. His concerns were similar to those described by the instructor -- specifically, if the Student and the partner were underwater and the Student suffered a seizure, the Student would likely thrash around while wearing 45 pounds of equipment, putting not only himself but also his companion at risk. The risk involved is compounded, the department chair said, because of the change of pressure that a person experiences when rising to the surface after a scuba dive; if not done properly, an embolism could occur. Therefore, the department chair stated, if the Student started to have a seizure the diving companion could not rise quickly to the surface to get additional help. The department chair also said there is no way to predict how a person who suffers a seizure while scuba diving would react. He said he had dealt with this topic extensively, and knew of no data available on what happens to a seizing brain underwater while under elevated pressure with increased oxygen. The department chair said that these risks to the partner exist regardless of the partner's scuba skill level. Based on these issues, the department chair said that he and the instructor decided that the Student's doctor's request was unworkable, and the instructor so informed the Student.

The department chair told OCR that he also spoke to all of the local scuba instruction programs, four local dive shops, and the three major national scuba certifying agencies to see whether any accommodation could be made for the Student; he said they uniformly said that they would not teach scuba diving to the Student. The department chair stated that he also called the Divers Alert Network, an association that is involved in crafting medical standards and position papers regarding scuba. That association also said that it

would not take the Student as a scuba student. OCR notes it was not clear whether the department chair made these contacts at the time the Student was seeking to take the scuba course or after OCR had already started its investigation into this complaint.

The department chair said that he spoke with the Student's doctor shortly after receiving the doctor's letter from the Student. The doctor, the department chair said, did not realize there were 15 other students in the class; he thought it was more of a one-on-one setting. The department chair said that when he told the doctor that the University was not going to be able to have a person in the water at all times with the Student the doctor seemed content with the decision. The department chair did not recall receiving a second letter, dated xxxxxxx, 2012, from the doctor.

The documents the University submitted to OCR included an e-mail dated xxxxxxx, 2012, from the department chair to the associate dean of the University's college of education and human services stating that the department chair had talked to you as the University's general counsel, and that you had told him that the University was unable to provide the Student's accommodation for the scuba course because it was "unrealistic."

The department chair said that he was familiar with dealing with students with disabilities. He stated that he attended a program taught by ODS about accommodating students with disabilities and that he trains members of his staff on the topic using ODS handouts. He also said that his department has an accommodation process separate from ODS's process. The department chair said that his department's standard for "determining reasonable accommodations" is not written down anywhere; there is, however, a boilerplate statement on the syllabus for each course in the department about how to obtain accommodations through the department.

The University submitted a copy of the syllabus for the scuba course in which the Student had enrolled. It stated:

Students with Disabilities: Students who feel they cannot meet the stated competencies in any of the BIPE [Basic Instruction in Physical Education] classes may inform the instructor that they desire medical competencies. The instructor and the student will then work with a specialist in adapted physical education in order to assess the student's abilities in the specific sport. The modified competencies then become the standard for the course. All requests for modifications must be made during the first week of class. Students who feel they need an individual exercise program before they can take the BIPE courses are encouraged to sign up for HPR100 – Physical Education for the Disable Student.

This statement also appears on the University's webpage for the BIPE program.

The department chair said that the department typically uses ODS's accommodation recommendations for a student, unless providing the academic adjustment would "vary from licensure or other standards." The department chair stated that these licensure or

other applied standards are not written down anywhere, but are, instead, determined on a course-by-course basis. For example, he said the scuba course would follow the standards under which the particular instructor is licensed. He said that, as the department chair, he is the ultimate decision maker regarding accommodations for students with disabilities for department courses. The department chair said that the department does not document modifications to be made for students with disabilities because there is no need to since the department's classes are all graded pass/fail. Departmental accommodation decisions are made and passed on orally.

The ODS director from the time period in question told OCR that the department chair approached him at some point in the spring 2012 semester concerning the Student's desire to take the scuba course, about two to three weeks after the course had started. The ODS director described the Student as having requested an academic adjustment of an additional diver who would accompany the Student on dives and that this was denied by the department chair. The ODS director said he thought the department chair had denied the request based on the department's budget. The ODS director recalled that the issue of cost and safety to the Student had also been discussed at higher levels of the University's administration.

The ODS director said he met with the Student and told the Student he should research whether there were any scuba programs that worked with people with epilepsy, information from which might help the University devise a program for the Student. The director also tried unsuccessfully to locate such a program. By the time they met again a couple of weeks later, the University had already decided the Student could not take the course. The director said that he had tried to locate another location where the Student could learn how scuba dive, separate from the University, but could not find any.

The University's vice president for curriculum and instruction, who was the University's interim provost during the spring 2012 term, confirmed to OCR that he had granted the Student a withdrawal and full refund from the scuba course.

OCR provided the Student with the opportunity to respond to information submitted by the University. He said that no one from the University had ever inquired about the frequency of his seizures or about the types of medications he was taking. He also said that his seizures do not occur without any warning. Instead, he said that he feels an "aura" of an upcoming seizure about 45 seconds to a minute before one occurs. He said that is why he is not restricted in life activities such as being able to drive a car. The Student said that if he had no warning prior to seizures he would not have attempted to take the scuba class. The Student also said that he filled out the requested medical form when it was handed out and turned it in to the scuba instructor after the class. He said his turning in of the completed form was what led to the initial conversation about his ability to take the course. He said that he had not requested any academic adjustments from the University to take the scuba course and did not feel he needed any. The Student did not recall there being a form or portions of a form that required a doctor's signature. He said he had asked his doctor if it was okay to take a scuba course, and the doctor had said yes. The Student asserted that the doctor was aware of all of the medications he was on and



the meeting was also attended by the chair of the University's mathematics department and maybe another member of the mathematics department. The director said the mathematics chair opined that the use of a formula sheet would give the Student an unfair advantage, and denied the request unilaterally. The director explained that he was not a mathematics expert and that the chair of a department has the authority to reject an accommodation request. The director said he was not aware of any written policy or procedure regarding when a department chair can deny an accommodation request. The director said that the idea of the use of a formula sheet had first arisen during a meeting attended by the ODS associate director and a psychologist from the University's counseling services. The director said that alternatives to the use of a formula sheet were not considered; the accommodation was just denied.

OCR interviewed the psychologist, who is an associate faculty member for the University's school of professional psychology. The psychologist's records indicated that during a meeting xxxxxxxx, 2011, the Student had asked her about using a formula sheet as a manner of compensating for academic difficulties. The psychologist recalled that she said that she agreed it would be helpful, but that allowing him the use of a sheet was not her decision to make.

The ODS associate director recalled that it was the psychologist who had come up with the idea of a formula sheet for the Student to use in math classes. She said she decided to approve the use of the formula sheet, provided it did not alter a core part of a course. How the formula sheet would be used was to be decided by the Student and his instructor. The associate director said that she later received a call from the Student asking her to verify to Instructor B that a formula sheet was one of his accommodations, because Instructor B's xxxxxxxxxxxx course featured a lot of formulas that were difficult for the Student to memorize. The associate director stated that Instructor B called her and explained that memorizing the formulas was a core element of his course, so the associate director agreed the Student could not have this accommodation for Instructor B's course. The associate director said there was no documentation in the Student's ODS file regarding the request for the formula sheet as an accommodation, the decision process, or the decision to deny the use of a formula sheet. She also said that the decision on whether a course element is essential or not is a decision made by faculty, not ODS. She clarified that such a decision was in the sole discretion of the faculty member; sometimes ODS is involved in the discussion, but it is not required. She said this decision is part of the faculty member's "academic freedom." She also said that if the student is not satisfied with the faculty member's decision the student can talk to the University's office of affirmative action programs about the University's "Wright Way" policy 4001. The associate director said this process is in the University Student Handbook and that she had told the Student about it a number of times.

The ODS associate director said the Student was also approved to not show, or show in a different way, his work when answering mathematics questions as an accommodation. The associate director said that the ODS database is usually updated when accommodations are added for a student. The dates of the approvals, however, are not entered in the database. The person who approves the accommodation is supposed to

enter the new accommodation. She was not sure whether the Student's ODS entries were updated in the database. She also said that denials of accommodations are not entered into the database, unless someone types them into the comments section. She said that denials of accommodation requests are made either face-to-face, over the phone, or by letter.

OCR spoke with Instructor A, who the Student had told OCR had allowed him to use his formula sheet accommodation for her xxxxxxxxxxxx class, xxxxxxxx, which he took during the winter 2012 term. Instructor A said that she allows all students to use a "cheat sheet" for their final xxxxxxxxxxxx exam. Instructor A stated that students can put anything they want on their sheet, including formulas. She said that she only extended this courtesy for the course's final exam, and not for other tests or exams during the course. Instructor A said that she did not recall the Student or ODS asking her if the Student would be able to use a cheat sheet on the course's midterm. She said that she remembered the Student asking her about a particular formula, and that she had replied that he could write it on the cheat sheet for the final, but that the sheet could not be used for any other exams. She said that this conversation may have occurred after the course's midterm examination. Instructor A said that she does not believe that the Student ever used the cheat sheet because, although she provided ODS with a copy of the exam for the Student to take at ODS per his approved testing accommodations, it was returned blank. The Student did not finish the course that term. Her records for that term showed that he scored 15 out of 100 on the midterm exam and only turned in one out of nine homework assignments. She recalled him not coming to class often and not participating when he did attend.

Instructor A said she allows her students to use a cheat sheet because xxxxxxxxxxxx involves a lot of formulas. She said that she did not know if other University xxxxxxxxxxxx professors allowed their students to use cheat sheets. She said she also did not know if the xxxxxxxxxxxx course coordinator, who decides what is to be taught in the University's xxxxxxxxxxxx classes, had a position on the use of cheat sheets in the xxxxxxxx course.

The chair of the University's mathematics department said he could not recall anything specific to the Student, but recalled the issue of the use of formula-identifier sheets being raised at some point for some student. He did not recall ODS being involved. The department chair stated that the use or nonuse of a cheat sheet is at the prerogative of the course instructor. He clarified that, while ODS decides what accommodations a student should receive, and the mathematics department works closely with ODS, the department does not necessarily provide the accommodation. It is the faculty member's sole decision as to what should be provided. The faculty member's decision is then communicated with ODS, who informs the student. He said that ODS and the department will also discuss whether there are any alternatives available, but that no alternatives would have been discussed in a case such as the requested use of a cheat sheet, since there would be no alternatives; either the student can or cannot use the sheet. Faculty members' decisions involving the same accommodation can vary, even when involving the same

course. The department chair did not recall being personally involved in the consideration of the Student's accommodation request, and believed it could have been delegated to one of his associates. He noted that Instructor B is an adjunct instructor who is hired on an as-needed basis.

OCR attempted to interview Instructor B through the University. The University indicated that Instructor B did not respond to requests made after the end of the spring 2013 semester to schedule an interview. Instructor B also did not respond to OCR's attempts to contact him directly.

When provided the opportunity to respond to the information submitted by the University, the Student in his follow-up interview said that he had originally asked a different instructor during a summer 2011 math course (Instructor C) if he could use a list of formulas/identifiers for an exam in that course. Instructor C had told him he would allow it if ODS approved it as an accommodation. The Student said that he went to ODS and it was approved. However, by then it was too late for him for that summer 2011 class, so he took an incomplete. He then said it was Instructor A who would not allow him to use the approved sheet when he took her class in winter 2012. Then he said that Instructor A did not allow the sheet for the midterm exam but that she had allowed him to retake the midterm with the formula sheet after he went to ODS about her initial refusal. He insisted that he took the midterm in Instructor A's course twice, regardless of what the course records show. When asked why the records show he did not take the final at all, despite his description that by then he was allowed to use the formula sheet, he said that unrelated personal circumstances had caused him to fail Instructor A's course that term.

- **The University's Disability Grievance Procedure**

Although the University's disability grievance procedure was not the focus of a specific allegation in this complaint, during the investigation the Student described having brought his exclusion from the scuba course to the attention of various University officials. He said that he approached the ODS associate director, who recommended that he approach the University provost. He also said that he spoke to an assistant dean, the associate provost, and the provost. He said that he also attempted to speak to the University's president, but was never able to talk to him. The Student said that he felt these were the proper people to speak to because he was following a grievance procedure he had found in a University manual. He recalled the grievance procedure called for him to go in order first to the instructor with whom the issue arose, then the department chair, the college dean, the provost, and ultimately the president. The assistant dean had given him another grievance process to follow, but he decided to instead approach the provost, because the assistant dean had suggested that the Student just accept the instructor's and department chair's idea that he take the scuba class but not get in the water. This suggestion, the Student said, was an insult.

The Student said he then went to the provost's office, and spoke to the assistant provost. According to the Student, the assistant provost and he discussed the University's willingness to refund money to the Student for the scuba course. The Student stated that the assistant provost also said that the University was within its rights to deny him from the scuba diving class and any other class the University chose. The Student attempted to then contact the University's provost, but the provost ignored his contacts, except to say that he had already formally responded to the Student. The Student said that he told the provost that he had not in fact received a response, and the provost's office promised to look up the response and forward it to the Student. The Student said that he never received the promised response.

The Student reported that the last step of the grievance procedure called for him to meet with the University's president. The Student's attempts to meet with the president were unsuccessful. The Student reported that the president's administrative assistant would not arrange a meeting, instead informing him that there was nothing the president could do for the Student at that time.

The ODS associate director told OCR that the Student had asked her who he could talk to about his issue with the scuba course. She said that she told him he could talk to the dean of the college over the department offering the course or to the University's office for affirmative action.

OCR was not able to speak to the associate dean of the college because she was no longer employed by the University at the time of OCR's investigation. Documents provided by both the Student and the University show that the associate dean had contact with the Student on the scuba issue. In an e-mail to the Student written after the associate dean had met with the Student, the associate dean referred the Student to the college's general grievance process. Nowhere in the e-mail did she mention a grievance process for disability discrimination complaints. The University's documents also included an e-mail dated xxxxxxxx, 2012, from the associate dean to you stating that the department chair was "no longer interested in speaking with [the Student] after [the Student] commented to [the associate dean] that he may file a Civil Rights complaint." In addition, another e-mail dated xxxxxxxx, 2012, from the department chair to the associate dean, described above in the discussion of OCR's investigation of the scuba course allegation, stated that you had told the department chair that if the Student wanted to file a complaint the Student should talk to you about it.

The then-interim provost explained that the Student ended up coming to him because the University's "chain of petitions" for academic issues calls for the eventual involvement of the provost's office. The then-interim provost said, however, he believed that the Student did not come to him through a formal process, but rather because of the Student's informal request for a withdrawal from the scuba class and a full refund. The then-interim provost said that during their discussion the Student expressed his displeasure about the lack of accommodation for the course. The then-interim provost told OCR that, although to his understanding there was a University process for students to appeal accommodation requests called "Affirmative Action," he did not specifically recall

referring the Student to it, although he said he would have. He also believes that he referred the Student to the University's affirmative action office because the Student had said that he had been discriminated against due to his epilepsy, and the affirmative action office handled disability complaints.

The Student told OCR that no one at the University, including those he had spoken to during his various grievance meetings and those at the ODS, had ever told him about an "affirmative action" grievance procedure at the University.

A review of the University's Student Handbook reveals two different grievance procedures that are to be used regarding actions "for which no special grievance procedure is established." One is titled the "Administrative Grievance Process" and the other is titled the "Academic Grievance Process." Under the Administrative Grievance Process section, the Handbook lists those areas where other grievance processes may be involved. Disability-related concerns are not listed. Following this process, students who wish to appeal a University administrative office action are instructed to:

- (1) Discuss the concern in a timely manner with the administrator involved.
- (2) If no resolution, discuss the matter with the director or supervisor of the administrator.
- (3) If no resolution, discuss the concern with the appropriate vice president.
- (4) If no resolution, discuss the issues with the provost or the designee.
- (5) If no resolution, discuss with the president or the designee, if necessary.

The University's director of student support services is listed as available to provide assistance and to answer questions about this process.

For the Academic Grievance Process, the Handbook states that specific colleges and schools within the University may have their own academic grievance policies or processes that supersede this process. There is no mention of disability concerns. Students who wish to initiate an academic grievance through this process are told to:

- (1) Discuss their concern with the involved faculty member.
- (2) If no resolution, discuss the concern with the chair of the department.
- (3) If no resolution, discuss the issue with the dean or the designee.
- (4) If no resolution, discuss the concern with the provost or designee.

The director of student support services is also listed as available to assist students in identifying the applicable grievance process and to address concerns.

While investigating this complaint, OCR also received from the University for OCR Docket #15-12-2118 a copy of the University's disability policies and procedures. These are published in the University's Student Handbook and are found at "policy 4001" in the University's policies. OCR attempted to independently find these policies and procedures on the University's website and noted that it was very difficult. For example, a search for "discrimination" in the University's website search box did not bring up these policies and procedures. It appeared that the only way to find these policies and procedures was to know the University's specific terms for them and to search for those – "Affirmative Action" or "Wright Way."

The University's grievance process, which the University calls its "Affirmative Action Complaint Procedure," states that it applies to "any person claiming to be aggrieved by an unlawful employment practice or any other alleged discriminatory practice at Wright State." University policy 4001.18(a). This includes any person in the "university community" and a person outside the community if the alleged offense occurred with regard to an admission application, an application for employment, or "with regard to any other alleged discriminatory action by a university staff member acting in an official capacity." 4001.18(a)(1) & (2).

The procedures call for the matter to first to be considered informally through mediation. 4001.18(f). There is no mention in the procedures as to when events in this informal process must be completed by nor is there any mention of a person's ability to opt out of the informal process. The procedures state that, if this informal process is not successful, the same mediator will then conduct an impartial investigation, "upon written request by the complainant." 4001.18(f)(7). There is no indication as to whom this request is made or when it should be made.

The grievance procedures do not provide prompt timeframes for all stages of the investigation for all complaints, such as the informal mediation process. Moreover, while a subsequent investigation must be completed with "ten working days" (4001.18(g)(5)), the procedures do not indicate what triggers this ten-day clock. Finally, certain events later in the process are linked to the respondent's receipt of a complaint. There is no indication, however, as to (1) which complaint the procedures refer to or (2) how that date is determined or communicated.

The grievance procedures do not provide that complainants will be provided with written notice of the outcome of the investigation. The University's "investigation" is described as being completed so that the mediator may better mediate the issue. There is no University investigation that is presented at the formal hearing on the matter. Instead, it appears that each side is required to present its own case to the panel. 4001.18(j). As such, there is no investigative "outcome" that can be provided to the complainant. Moreover, the final outcome of the hearing apparently may or may not be shared with the complainant. Section 4001.18(k) states that complainants receive the recommendation of

the panel, but also leaves ambiguous whether complainants will receive the final determination: “Final directives will be issued by the provost or relevant vice president (or designee) to the complaint **and/or** the respondent for resolution of the grievance.” 4001.18(k) (emphasis added).

The procedures do not explain that complaints that may be filed include allegations of disability discrimination carried out by employees, other students, or third parties. The procedures do not include the address and telephone number of the University employee with whom complaints should be filed and do not provide for an alternate person if the person with whom the complaint is filed is alleged to have been involved in the discrimination/ harassment. Instead, the policies simply note that a complaint may be filed with “the Office of Affirmative Action Programs.” 4001.18(a).

The procedures do not include an assurance that the University will take steps to prevent recurrence of any discrimination found to have occurred and to correct discriminatory effects on the complainant and others, if appropriate.

### **Applicable Regulatory and Legal Standards**

The Section 504 implementing regulation at 34 C.F.R. §104.4(b)(1)(ii) and the Title II implementing regulation at 28 C.F.R. § 35.130(b)(1)(ii) prohibit a recipient or public entity from affording a qualified person with a disability an opportunity to participate in or benefit from the entity’s aid, benefit, or service that is not equal to that afforded to others. In addition, the Section 504 regulation provides, at 34 C.F.R. § 104.44(a), that a recipient shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability. Title II requires that public entities such as the University make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7).

The Section 504 regulation provides, at 34 C.F.R. § 104.44(d)(1), that a recipient shall take such steps as are necessary to ensure that no person with a disability is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

Institutions do not have a duty to identify students with disabilities. Students in institutions of postsecondary education are responsible for notifying institution staff of their disability should they need academic adjustments. The student must inform the school that he has a disability and needs an academic adjustment. Postsecondary schools may require students with disabilities to follow reasonable procedures to request an academic adjustment. Students are responsible for knowing and following those procedures. Schools may set reasonable standards for documentation. Schools may require students to provide documentation prepared by an appropriate professional, such

as a medical doctor, psychologist, or other qualified diagnostician. The documentation should provide enough information for the student and the school to decide what is an appropriate academic adjustment. If the documentation that the student provides does not meet the postsecondary school's requirements, a school official should tell the student in a timely manner what additional documentation the student needs to provide.

If an auxiliary aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not limit what it spends for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Under both Section 504 and Title II, recipients are not required to make modifications that would fundamentally alter the nature of the service, program or activity. While a university must accommodate course or other academic requirements to the needs of an individual student with a disability, academic requirements that can be demonstrated by the institution to be essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory and need not be changed. 34 C.F.R. § 104.44(a); 28 C.F.R. § 130(b)(7). With regard to whether a requested academic adjustment or auxiliary aid would fundamentally alter an essential program requirement, courts and OCR give great deference to an institution's academic decision-making. However, in order to receive such deference, relevant officials within the institution are required to have engaged in a reasoned deliberation, including a diligent assessment of available options.

An appropriate deliberative process should include a group of people making the decision who are trained, knowledgeable, and experienced in the relevant areas. While it reasonably might be expected that a course instructor would be included in the process of determining what requirements are essential to participation, allowing an individual professor to have ultimate decision-making authority or to unilaterally deny an accommodation is not in keeping with the diligent, well-reasoned collaborative process that warrants the accordance of deference by OCR to the judgments of academic institutions. The decision makers must consider a series of alternatives, and the decision should be a careful, thoughtful and rational review of the academic program and its requirements.

A person with a disability is "qualified" with respect to postsecondary education services if the person meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity. 34 C.F.R. § 104.3(1)(3). Nothing in Section 504 prevents educational institutions from addressing the dangers

posed by an individual who represents a “direct threat” to the health and safety of others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity under 34 C.F.R.

§ 104.3(l)(3).

The Title II regulation, at 28 C.F.R. § 35.130(h), states that a public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. The regulation, at 28 C.F.R. § 35.139, further states that a public entity is not required to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety **of others**. [emphasis added]. However, in determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), states, in part, that a recipient shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. The Title II regulation contains a similar requirement at 28 C.F.R. § 35.107(b). When evaluating whether a recipient’s grievance procedures meet the prompt and equitable standard, OCR considers a number of factors, including whether the procedures provide for:

- (1) notice of the procedures, including where complaints may be filed;
- (2) application of the procedure to complaints alleging discrimination carried out by employees, other students, or third parties;
- (3) adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- (4) designated and reasonably prompt timeframes for the major stages of the complaint process;
- (5) notice to the parties of the outcome of the complaint; and
- (6) an assurance that the school will take steps to prevent recurrence of any discrimination and to correct discriminatory effects on the complainant and others, if appropriate.

A grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. The school must make sure that all designated employees have adequate training as to what conduct constitutes disability discrimination and are able to explain how the grievance procedure operates.

Grievance procedures may include informal mechanisms for resolving disability discrimination complaints to be used if the parties agree to do so. In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, mediation will not be appropriate even on a voluntary basis.

Although not required under Section 504, many institutions provide an opportunity to appeal the findings or remedies in a grievance. In such cases, OCR evaluates the grievance process, inclusive of the appeal level, to determine whether, as a whole, the process is both prompt and equitable. Finally, OCR recommends, and many institutions include, a provision advising that retaliation against any individual who files a complaint or participates in the grievance process is prohibited.

### **Analysis and Conclusions**

- **Scuba Course**

The University did not dispute that the Student is a student with a disability as defined under Section 504 and Title II. There also was no dispute that the Student was excluded from the water portions of a scuba course in the spring 2012 term because of his epilepsy.

Under Section 504 and Title II, the University would have been permitted to exclude the Student from the scuba course if it determined that his participation posed a significant risk to the health or safety of others. OCR would have also given deference to a University determination that a requested academic adjustment to the course would be a fundamental alteration had the University followed an appropriate deliberative process and applied the correct legal standards.

In the instant case, the evidence supports that the Student did not request any academic adjustment to participate in the scuba course. The instructor, however, shortly after the course began, raised the issue of the Student's disability and unilaterally excluded the Student from participating in the course, relying on a list of medical conditions that has remained unchanged since the 1950s. Neither she nor anyone at the University made an appropriate individualized assessment of the situation, ascertaining: the nature, duration, and severity of the risk caused by permitting the Student to participate; the probability that the potential injury would actually occur; and whether reasonable modifications of policies, practices, or procedures would sufficiently mitigate the risk. Nor was the instructor's judgment based on current medical knowledge or on the best available objective evidence.

After the University required a statement from the Student’s doctor, the University considered whether to provide the Student with the academic adjustment of providing a person in the water one-on-one with the Student and determined that this did not fit within the University’s already-designed format for the course or was “unrealistic.” Although the department chair asserted that NAUI licensing standards applied to the course, the evidence showed that students were not required to obtain NAUI certification to complete the course. The chair stated that the University applies whatever standards a particular instructor was certified under, but this is not stated in any program materials. It appears that several University officials considered the potential accommodation but did not engage in a collaborative, reasoned process or consider any alternatives prior to denying the Student’s participation in the water portion of the scuba course.

Although there was some evidence suggesting that the Student’s participation underwater on compressed air might pose a direct threat to the health and safety of other students in the course and the instructor, the University did not follow any process or appropriate legal standard in its decision-making that would allow OCR to give deference to its exclusion of the Student from all water portions of the course. OCR finds therefore that the University violated the Section 504 and Title II regulations at 34 C.F.R. §§ 104.4 and 104.44 and 28 C.F.R. § 35.130.

- **Formula Sheet for Math Courses**

The Student’s version of events regarding this allegation varied over the course of the investigation and did not comport with the evidence obtained. However, the weight of the evidence is sufficient to show that ODS approved the Student to use a xxxxxxxxxxxxxx formula sheet as an academic adjustment for the xxxxxxxxxxxxxx course he took in the fall of 2012.

When the Student’s instructor for the course, Instructor B, objected to the sheet, the University allowed the instructor to unilaterally deny the Student the accommodation. The University did not engage in a reasoned, collaborative, deliberative process, and no alternatives were considered. Instructor B unilaterally decided that a “core element” of the xxxxxxxxxxxxxxxxxxxxxxxx course involved the memorization of formulas. However, at least one other University xxxxxxxxxxxxxx professor, Instructor A, allowed all of her students to use such a sheet for final exams in the same course. And, despite having a course coordinator, who is to assure uniform application of course material over all University xxxxxxxxxxxxxx classes, the University has not taken steps to eliminate the use of these formula sheets. The evidence does not therefore support that the University’s mathematics department considers the memorization of these formulas to be an essential element of the course.

Moreover, the University witnesses described a systemic practice at the University whereby faculty is regularly permitted to unilaterally deny students with disabilities approved accommodations as part of “academic freedom,” in violation of the Section 504 regulation.

- **The University’s Disability Grievance Procedure**

Although not a specific allegation in this complaint, the evidence obtained by OCR in this investigation showed that the Student attempted to make an internal complaint of disability discrimination regarding his exclusion from the scuba course. However, no person at the University was able to direct him to a disability grievance procedure. In addition, documents provided by the University suggest that the department chair refused to talk with the Student after he indicated he wished to file a complaint and that there was discussion of having the Student to come to you with any complaint although that was not the appropriate avenue for disability grievances under the University’s written policies and procedures. Most University witnesses did not seem to be aware of the University’s disability grievance process, other than a few individuals who believed it fell within the purview of the University’s affirmative action office.

OCR also determined that the University’s disability grievance process does not provide a prompt and equitable resolution process as required by the Section 504 and Title II regulations at 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b). For example, the grievance procedures do not provide prompt timeframes for all stages of the investigation for all complaints nor do they clearly require that complainants will be provided with written notice of the outcome of the investigation. The procedures also do not include the address and telephone number of the University employee with whom complaints should be filed, nor an assurance that the University will take steps to prevent recurrence of any discrimination found to have occurred and to correct discriminatory effects on the complainant and others, if appropriate. The procedures do not state that a complainant’s participation in any informal resolution process is voluntary and that the complainant may elect to pursue the formal process at any time.

### **Resolution**

To resolve these compliance findings, the University submitted the enclosed agreement on October 20, 2013. The agreement requires the University to notify the Student in writing of his opportunity to reenroll in the scuba course the next term the University offers the course, if he reenrolls at the University. If the Student reenrolls at the University and notifies ODS that he is reenrolling in the scuba course, then the agreement requires the University to promptly engage in an interactive process with him, to include ODS at all stages, to determine what academic adjustments are necessary.

The agreement also requires the University to notify the Student in writing of his opportunity to reenroll in the xxxxxxxx course. The notice will include a complete, written list of the academic adjustments for which he has been approved by the University and any requests for academic adjustments that have been denied, and written notice of how he can request additional academic adjustments if he reenrolls.

The University will not be required to provide devices or services of a personal nature, nor to provide an academic adjustment or modification that would result in a fundamental alteration to the University's program or an undue financial or administrative burden. The University is also not required to permit an individual to participate in a program when the individual poses a direct threat to the health and safety of others. The agreement sets forth the processes and standards under which the University may make these determinations.

The agreement further requires the University to draft new policies and procedures for its Student Handbook regarding the provision of academic adjustments and auxiliary aids and services for students with disabilities and to revise or rewrite its disability grievance procedures. Once the policies and procedures are approved, the University will publish them and provide training on them for faculty and relevant staff. The University will notify its College of Education and Human Services that it is to immediately cease its separate process for determining accommodations for its BIPE courses. Finally, the agreement requires the University notify participants, beneficiaries, and employees that it does not discriminate on the basis of disability and of the name and/or title and contact information for the employee designated to coordinate the University's compliance with Section 504 and Title II.

OCR will monitor the implementation of the agreement. If the University does not fully implement the agreement, OCR will reopen the investigation and take appropriate action.

This concludes OCR's investigation of the complaint and should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those address in this letter. OCR will monitor the University's implementation of the agreement. Should the University fail to fully implement the agreement, OCR will take appropriate action to ensure the University's full compliance with Section 504 and Title II.

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.

Please be advised that the University may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, 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.

