



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

1350 EUCLID AVENUE, SUITE 325
CLEVELAND, OH 44115

REGION XV
MICHIGAN
OHIO

June 25, 2015

Elizabeth Rae-O'Donnell, Esq.
Cummings, McClorey, Davis & Acho, P.L.C.
33900 Schoolcraft Road
Livonia, Michigan 48150

Re: OCR Docket #15-14-2134

Dear Ms. Rae-O'Donnell:

This is to notify you of the disposition of the above-referenced complaint filed on February 28, 2014, with the U.S. Department of Education (the Department), Office for Civil Rights (OCR), against Henry Ford Community College (the College). The complaint alleged that the College discriminated against a student (the Student) on the basis of disability on XXXXXXXX XX, 2014, by issuing him an interim suspension notice and not allowing him to return to the College. The complaint also alleged that the College's actions constituted retaliation against the Student because he complained that the automatic door openers for some accessible entrances on campus were not working.

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, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance from the Department. 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, which prohibit discrimination on the basis of disability by public entities. Section 504 and Title II also prohibit retaliation against persons who make complaints or assert rights under those laws. As a recipient of such financial assistance and as a public entity, the College is subject to these laws; accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR opened an investigation of the following issues:

- whether the College excluded a student from participation in, denied him the benefits of, or otherwise subjected him to discrimination in its programs and activities based on disability, in violation of the regulation implementing Section 504 at 34 C.F.R. §§ 104.4 and 104.43, and the regulation implementing Title II at 28 C.F.R. § 35.130;
- whether the College is utilizing criteria or methods of administration that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability, in violation of the Section 504 regulation at 34 C.F.R. § 104.4(b)(4) and the Title II regulation at 28 C.F.R. § 35.130(b)(4); and
- whether the College intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because the individual made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under those laws in noncompliance with the regulations implementing Section 504 at 34 C.F.R. § 104.61 and Title II at 28 C.F.R. § 35.134.

During the course of OCR's investigation, OCR staff interviewed the Student and College staff. OCR also reviewed documentation provided by the parties. After a careful review of the relevant information, OCR determined that the evidence is sufficient to support a finding that the College violated Section 504 and Title II when, on XXXXXXXX XX, 2014, it issued the Student an interim suspension notice and did not allow him to return to the College. However, OCR determined that the evidence is not sufficient to support a finding that the College retaliated against the Student because he complained that the automatic door openers for some accessible entrances on campus were not working. The College has signed a Resolution Agreement, a copy of which is enclosed, that, once implemented, will address the compliance issues OCR identified. OCR discusses the bases for its determinations below.

Alleged Disability Discrimination - Suspension

- **Summary of OCR's Investigation**

“XXX-Entire Summary of 16 paragraphs redacted-XXX”

- **The College's “Student Conduct Policy and Due Process Procedure”**

OCR reviewed the College's “Student Conduct Policy and Due Process Procedure,” which states in section III, Sanctions:

B. Interim Suspension

1. The Vice President/Designee may, at his/her discretion, remove a student from a class or suspend him or her from the College for an interim period pending an investigation or disciplinary proceedings.

The Vice President/Designee may also, with the approval of the President or his/her designee, remove a student from a class or suspend him or her for an interim period, for purposes of obtaining a medical, psychiatric or psychological evaluation, whenever the Vice President/Designee determines that there is reasonable cause to believe that the continued presence of a student in class or on the College campus poses a threat to him/herself or to others or to the stability of normal College classes or functions.

If practical, a student will be given an opportunity to appear personally before the Vice President/Designee before he or she is suspended on an interim basis. Such an appearance is solely for the purpose of considering:

- a. The reliability of the information concerning the student's alleged conduct;
- b. Whether the alleged conduct and surrounding circumstances reasonably indicate that the continued presence of the student in class or on the College campus poses a threat to him/herself or to others or to the stability of normal College classes or functions.

If circumstances are such that the Vice President/Designee does not believe it is practical to give the student an opportunity to appear personally before an interim suspension is imposed, then the opportunity for such an appearance shall be given as soon after the imposition of an interim suspension as is practical.

The Student Conduct Policy, under the “Due Process Procedure” heading, states:

II. Disciplinary Process

A. Disciplinary proceedings are subject to the following guidelines:

1. Charges of violations of College rules/regulations may be made by any College employee, faculty member or student;
2. Charges shall be in writing and shall be filed with the Vice President/Designee;
3. If the charges and evidence are determined by the Vice President/Designee to warrant proceeding further:
 - a. The Vice President/Designee shall notify the student in writing that he/she is accused of a violation of one or more regulations, and shall specify each alleged violation;

b. This notification shall include a statement of possible consequences, including potential penalties, and a statement of the student's right to hearing and other due process rights;

c. This notice shall be sent within seven (7) calendar days after charges were first filed with the Vice President/Designee. Such letter shall also specify the course of action available to the student, as indicated below.

4. Within seven (7) calendar days after the Vice President/Designee mails the letter set forth above, the student shall have the right to elect, in writing, one of the following three courses of action:

a. The student may voluntarily admit the alleged violation (with or without an explanation) and waive, in writing, his/her rights to a judicial hearing and other such due process protection and request that the Vice President/Designee take whatever action he/she deems appropriate. If the student elects this option, the decision of the Vice President/Designee is final, and no appeal is available.

b. The student may voluntarily admit the alleged violation and request a hearing before the Vice President/Designee.

c. The student may deny the alleged violation, in which case the Vice President/Designee shall either:

i) Dismiss the charge;

ii) Hear the case;

iii) Assign the case to another administrator for hearing.

5. The student has the right not to respond. If no response is received from the student within seven (7) calendar days after the Vice President/Designee mails the letter set forth in 4 above, the Vice President/Designee has the right to take whatever measures he/she, in his/her discretion, deems appropriate, including holding a hearing or issuing discipline without a hearing.

6. No hearing will be conducted by an administrator who initiated the charges or who determined that the charges warranted further proceeding, unless the student agrees in writing to a hearing before such administrator.

7. The student shall be notified at least seven (7) calendar days prior to the hearing as to the time and place of such hearing, and the name of the individual who will be hearing the matter. The written notice shall contain a statement of the charges with sufficient particularity so that the student may prepare his/her defense.

8. If the student objects to the administrator who will be hearing the matter, he/she must notify the Vice President/Designee of the objection, in writing, not less than three (3) calendar days prior to the hearing. Upon receipt of a timely objection, the Vice President/Designee shall assign another administrator to hear the matter. The Vice President shall maintain a list of administrators for this purpose. When a timely objection is made, the Vice President shall take the names of five administrators from the list, and assign a neutral individual to select one name at random, who shall hear the matter.

- **Applicable Regulatory Requirements**

The regulation implementing Section 504, at 34 C.F.R. § 104.3(j)(1), defines an individual with a disability as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.

With regard to postsecondary education, a “qualified” individual with a disability is one who meets the institution’s academic and technical standards for admission or participation in the academic program. See 34 C.F.R. § 104.3(l)(3).

Under Section 504 and Title II, schools must afford a qualified student with a disability an opportunity to benefit from an aid, benefit, or service that is equal to that afforded others and are prohibited from providing different or separate aids, benefits, or services to a qualified student with a disability when that action is not necessary to provide aids, benefits, or services as effective as those provided to others. 34 C.F.R. § 104.4(b) and 28 C.F.R. § 35.130(b).

To determine whether an individual has been subjected to disability-based discrimination in discipline, OCR generally considers whether the individual is a qualified individual with a disability, whether the individual was subjected to discipline, and whether the discipline was based on the individual’s disability. Absent overtly discriminatory policies, OCR considers whether there are other circumstances that may raise an inference of discrimination. OCR may examine whether the institution failed to follow established procedures or practices, whether the institution treated the student with a disability differently than similarly-situated students without disabilities, or whether there is other evidence of discrimination. If different treatment can be inferred from any such circumstances, OCR considers whether the recipient has provided a legitimate, non-discriminatory reason for its action. If such a reason is presented, OCR considers whether the reason is merely a pretext for discrimination.

The Title II regulation, at 28 C.F.R. § 35.139, does not require a public entity to permit an individual to participate in or benefit from its services, programs, or activities when that individual poses a direct threat to the health or safety **of others**. (emphasis added). “Direct threat” is defined as a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision

of auxiliary aids or services. 28 C.F.R. § 35.104. In determining whether an individual poses a direct threat, the 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 will mitigate the risk. 28 C.F.R. § 35.139(b).

In addition, 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). Following a proper determination that a student poses a direct threat, an educational institution may require as a precondition to a student’s return that the student provide documentation that the student has taken steps to reduce the previous threat (e.g., followed a treatment plan, submitted periodic reports, granted permission for the institution to talk to the treating professional). However, educational institutions cannot require that a student’s disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications. Moreover, the student must not be subject to adverse action on the basis of unfounded fear, prejudice, or stereotypes.

- **Analysis**

In this instance, there is no dispute that the Student had a disability and identified himself as such with the College. The evidence also shows that on XXXXXXXX XX, 2014, the College suspended the Student on a short-term basis because of his encounters with and behavior toward a staff member at the College on XXXXXXXX XX, 2014, and the XXXX XXXXXXXXXXXX on XXXXXXXX XX, 2014. The College then placed him on an interim suspension indefinitely on XXXXXXXX XX, 2014, without notifying the Student of the specific bases for his suspension.

The preponderance of the evidence supports that the interim suspension was based, at least in part, on the Student’s disability and the College’s fear because of his diagnosis as a person with a mental illness. Requiring the Student to meet with someone in the College’s counseling department prior to obtaining a clearance to return suggests that the College was concerned about the Student’s mental health and removed the Student because of this concern.

In addition, the College did not follow its policies and procedures for interim suspension and its actions appear to be outside of its discipline process. Moreover, the vice president, who made the decision to suspend the Student, initially suspended the Student without having seen the campus security report detailing the events triggering the interim suspension, which led to an inaccurate understanding of what had occurred. She made her final decision regarding the interim suspension without speaking with the staff member in the XXXXXXXXXXXX office who had the telephone encounter with the

Student or the instructor whose e-mails served as another basis for the suspension. She had never met with the Student in person. Additionally, the College did not provide the Student with information regarding actions available to him to respond to the suspension, or, as noted, even the reason for his suspension. The College offered the Student no procedural protections.

Although Section 504 and Title II permit colleges to take immediate action against an individual when that individual poses a direct threat to the health or safety of others, none of the documents the College produced indicated that the College properly assessed whether the Student posed any type of threat of harm to others. College officials told OCR that based on a review of the Student's file, the campus safety reports, an e-mail from the instructor regarding the Student's reaction to being told during class that he had to leave, and the behavioral counselor's assessment, the College believed the Student was a potential threat to others and that he was a threat to the normal functioning of College activity. However, during interviews, College officials also stated that they believed, at most, that the Student had been "indirectly threatening," either because of his aggressive and demeaning comments or because he seemed volatile and did not directly answer questions. The vice president also cited to his diagnosis to support that he posed a threat. There is also no indication that the College made an individualized assessment to ascertain: the nature, duration, and severity of any risk; the probability that potential injury would actually occur; and whether reasonable modifications of policies, practices, or procedures would sufficiently mitigate the risk. The XXXXXXXX XX assessment that the College mandated before the Student could return to the College stated that it did not have sufficient details to assess the severity of the Student's condition and recommended further assessment.

Thus, OCR finds that the College discriminated against the Student based on his disability, in violation of Title II and Section 504, when it suspended him from the College.

In addition, OCR's review of the College's policy shows that it allows the vice president to impose requirements and take actions against individuals, up to and including suspension, with very broad discretion that can result in discrimination in its application, as the evidence supports happened in this instance.

Alleged Retaliation

- **Summary of OCR's Investigation**

The Student stated that the suspension was also in retaliation for complaints he made to various College staff members that the automatic door openers on some buildings did not work. While the Student stated that he had made this complaint to many College staff including security guards, the Student specifically identified only three staff in the College's disability services office to whom he made this complaint. OCR interviewed two of the three identified staff members; both denied that the Student had ever complained to them that automatic door openers on some buildings did not work. They

also both said that no one else had told them that the Student had complained that automatic door openers on some buildings did not work. College staff told OCR that the disability services office has an electronic record-keeping system into which substantive phone calls and meetings with students are entered. Staff stated that they reviewed the Student's electronic record for such notes, but that the review revealed no mention of accessibility concerns; one staff member had a record of 17 communications with the Student, none of which included discussion of automatic door openers. In addition, one of the identified staff stated that she contacted the facilities department and asked if they had any record of any work orders regarding automatic door openers; the facilities department had no such records. The College did not have any records of any complaints by the Student to any College department regarding automatic door openers.

- **Applicable Regulatory Requirements**

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates the prohibition against retaliation contained in the implementing regulation for Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e). Section 100.7(e) prohibits recipients from engaging in intimidating or retaliatory acts against any person for the purpose of interfering with any right or privilege secured under the regulation, or because the person has made a complaint or participated in any manner in an investigation or proceeding brought pursuant to the regulation. The regulation implementing Title II includes a similar provision at 28 C.F.R. § 35.134.

To establish a prima facie case of retaliation under Section 504 or Title II, OCR must find: (1) the individual engaged in protected activity; (2) the individual experienced a materially adverse action by the recipient; and (3) there is a causal connection between the protected activity and the materially adverse action. To determine whether a “materially adverse action” has occurred, OCR considers whether the alleged adverse action could well dissuade a reasonable person in the individual's position from making or supporting a charge of discrimination. If any of the elements of a prima facie case cannot be established, OCR will find insufficient evidence of a violation.

- **Analysis and Conclusion**

OCR spoke with individuals the Student identified as persons to whom he complained that the automatic door openers for some accessible entrances on campus were not working. Both of these individuals denied receiving complaints from the Student or being alerted by others that the Student had raised such concerns. Additionally, there is no record with disability services, facilities, or any other College department of the Student having made any complaint to the College regarding automatic door openers not working. Thus, OCR was unable to obtain evidence to support that the Student engaged in protected activity under Section 504 or Title II by complaining to College staff regarding the automatic door openers for some accessible entrances on campus not working. Therefore, OCR finds the evidence insufficient to support a finding that the College suspended the Student in retaliation for complaining to staff about some

accessible entrances on campus not working, in violation of Title II and Section 504, as alleged.

Resolution

To resolve the above-described compliance findings, the College submitted the enclosed Resolution Agreement (the Agreement) to OCR on June 18, 2015. Under the terms of the Agreement, the College will:

- revise its student conduct policy and due process procedure to ensure that they fully comply with Section 504 and Title II; adopt and publish the revised policy and procedure; and provide training on its revised policy and procedure to relevant College staff; and
- invite the Student to reenroll, remove the suspension and the classes from which he was suspended from his transcript and records, and reimburse him for tuition, books, and supplies purchased for the classes from which he was suspended.

Conclusion

Based on the foregoing, OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the College's implementation of the Agreement. Should the College fail to fully implement the Agreement, OCR will take appropriate action to ensure the College's full compliance with Section 504 and Title II.

This concludes OCR's investigation of the complaint and should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in Federal court, whether or not OCR finds a violation.

Please be advised that the College 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.

We look forward to receiving the College's first monitoring report by July 1, 2015. For questions about implementation of the Agreement, please contact Ms. Kimberly Kilby, who will be monitoring the College's implementation, by e-mail at Kimberly.Kilby@ed.gov or by telephone at (216) 522-2574. For questions about this letter, please contact Supervisory Attorney/Team Leader Donald S. Yarab at (216) 522-7634.

Sincerely,

/s/

Meena Morey Chandra
Director

Enclosure