



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

32 OLD SLIP, 26th FLOOR
NEW YORK, NY 10005-2500

REGION II
NEW JERSEY
NEW YORK
PUERTO RICO
VIRGIN ISLANDS

September 26, 2014

Dr. Robert A. Scott
President
Adelphi University
Office of the President
Levermore Hall, Room 100
1 South Avenue
P.O. Box 701
Garden City, New York 11530-0701

Re: Case No. 02-14-2291
Adelphi University

Dear Dr. Scott:

This letter is to notify you of the determination made by the U. S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against Adelphi University (the University). The complainant alleged that the University and the XXXXXX XX XXXXXX XXXX personnel at the Hudson Valley Campus discriminated against her on the basis of her disability, when on or about XXXXXXXX XX, XXXX, the University approved the complainant to tape record class lectures, subject to permission from her professors and classmates, as an auxiliary aid (Allegation 1). The complainant further alleged that her XXXXX XXXXXXXXXX XX course instructor discriminated against her on the basis of disability, by failing to respond to her request to use a computer, as an approved auxiliary aid, for the essay portions of her midterm exam during XXXXXXX XXXX (Allegation 2). Finally, the complainant alleged that in retaliation for her continuing to tape record class lectures, as an auxiliary aid, the Director of the University's Counseling and Accommodations Center (CAC Director) engaged in intimidation and threatened her with ethics violations and expulsion on or about XXXXXXXXXX XX, XXXX (Allegation 3).

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs or activities receiving financial assistance from the U.S. Department of Education (the Department). The University is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504.

In its investigation, OCR interviewed the complainant and University personnel. OCR also reviewed documentation the complainant and the University submitted.

The regulation implementing Section 504, at 34 C.F.R. § 104.44, requires recipients to modify academic requirements when necessary to ensure that the requirements are not discriminatory on the basis of disability,

and to take steps to ensure that no qualified individual with a disability is subjected to discrimination because of the absence of educational auxiliary aids. At the postsecondary level, it is the student's responsibility to disclose a disabling condition and to request academic adjustments or auxiliary aids. In reviewing allegations regarding the provisions of academic adjustments or auxiliary aids, OCR considers whether: (1) the student provided adequate notice to the recipient that the academic adjustments or auxiliary aids were required; (2) the academic adjustments or auxiliary aids were necessary; (3) the appropriate auxiliary aids or academic adjustments were provided; and (4) the academic adjustments or auxiliary aids were of adequate quality and effectiveness.

The complainant alleged that the University discriminated against her on the basis of her disability, when on or about XXXXXXXX XX, XXXX, the University approved the complainant to tape record class lectures, subject to permission from her professors and classmates, as an auxiliary aid. The complainant asserted that on XXXXXXXX XX, XXXX, the University approved her use of a tape recorder to record class lectures; however, on XXXXXXXX XX, XXXX, Director of the Office of Disability Support Services (ODSS) informed her that her prior approval for this auxiliary aid would be subject to the permission of instructor/class and revoked without such consent.

OCR determined that upon the complainant's enrollment in the University's XXXXXXXX XX XXXXXXXX XXXX (XXX) prior to the start of the fall XXXX semester, the University's ODSS approved the complainant's request to receive academic adjustments and auxiliary aids.¹ By letter dated XXXXXXXX XX, XXXX, the ODSS Director approved the complainant for the following: (1) extended time testing (one and one-half times the standard amount); (2) use of computer for essay exams; (3) a distraction reduced environment for exams; (4) note taking services; (5) books in alternative format; and (6) tape recording of class lectures, when appropriate and with instructors' permission.

OCR determined that prior to XXXXXXXX XXXX, according to the University's tape/digital recording policy (the Policy)², students who the ODSS approved to record class lectures, as an auxiliary aid, were expected to seek instructors' permission prior to audio recording. OCR determined that on XXXXXXXX XX, XXXX, the University revised the Policy to provide that: (a) students notify the instructor and the ODSS of a request to record a class lecture at least two weeks prior to the start of class; (b) audio recording of class lectures will only be permitted when appropriate and with instructors' and/or class participants' permission; (c) decisions regarding recording of classes will be determined on a case-by-case basis; and (d) in cases where recording class lectures is **NOT** considered appropriate, a note taker will be provided for students.

OCR determined that the complainant's classes for the spring XXXX semester, XXXXX XXXXXXXXXXXX XX (Course 1) and XXXXXXXX XX (Course 2), began on or about XXXXXXXX XX, XXXX. OCR determined that in a letter dated XXXXXXXX XX, XXXX, the ODSS Director advised the complainant that pursuant to the revised Policy, the complainant's accommodation plan for the spring XXXX semester had been updated to reflect that tape recording of class lectures would be permitted "*when appropriate and with instructor[s]' and/or class participant[s]' permission.*" (emphasis added). According to the complainant's accommodation plan, the complainant was also entitled to note taking services in addition to tape recording. The complainant's accommodation plan did not specifically state that note taking services would be provided in lieu of tape recording, if tape recording was not permitted.

¹ The complainant is diagnosed with XXXXXXXXXXXX XXXXXXXX XXXXXXXXXXXXXXXXXXXX XXXXXXXX, XXXXXXXX XXXX, with XXXXXXXXXXXX XX XXXXXXXXXXXX XXXX XXXXXXX and XXXXXXXX XXXXXXXX.

² University data provided to OCR indicated that prior to XXXXXXXX XX, XXXX, there was no express subsection on tape or digital recording of class lectures contained within the University's Policy and Procedure Manual of XXXX. However, the Petition for Reasonable Accommodations & Academic Adjustments form used prior to XXXXXXXX XX, XXXX included, as an academic accommodation, a student's ability to "[T]ape record class lectures when appropriate and with instructors permission."

OCR determined that in an email sent on XXXXXXXX XX, XXXX, the complainant requested permission from the professor for Course 1 (Professor 1) to record her lectures. OCR further determined that in email responses sent on XXXXXXXX XX and XX, XXXX, Professor 1 advised the complainant that she consented to recording, but the complainant would have to also seek permission from the other students to record the class; Professor 1 stated she would make the request to the class as a general announcement without referring to the complainant. OCR determined that on XXXXXXXX XX, XXXX, Professor 1 surveyed the class and told the complainant that she could not record. OCR determined that in email sent to the professor for Course 2 (Professor 2) on XXXXXXXX XX, XXXX, the complainant similarly requested permission to record the class. OCR learned that at the next class meeting, Professor 2 surveyed the class and the students objected to the complainant's recording classes.

The ODSS Director stated that in or around the last week of XXXXXXXX XXXX, Professor 1 informed her that students in Course 1 were not comfortable with the complainant's recording the class sessions. The ODSS Director explained to OCR that this class was taught in a group interactive format where students may share personal experiences, and students were reluctant to speak if they were being recorded. During that same period, last week of XXXXXXXX XXXX, Professor 2 similarly informed the ODSS Director that some students in Course 2 also opposed the complainant's recording the class.³ Consequently, Professors 1 and 2 and other University personnel directed the complainant to stop recording in both classes.⁴ The ODSS Director and University staff advised the complainant that note taker services were provided to her as an alternative for tape recording Courses 1 and 2. OCR determined that the University arranged note takers for the complainant spring XXXX semesters for Courses 1 and 2.

OCR determined that on or about XXXXXXXX XX, XXXX, pursuant to the revised Policy, the ODSS approved the complainant to tape record classes as an auxiliary aid, subject to the permission of her instructors and/or classmates. However, OCR determined that the University's Policy, and the corresponding amendment to the complainant's approved accommodations, effectively made the complainant's use of tape recording, as an auxiliary aid, subject to the discretion of instructors and/or other students, rather than within the purview of the ODSS, which is responsible for determining whether a student with a disability requires a specific academic adjustment or auxiliary aid.

The University asserted that the denial of the complainant's use of a tape recorder was not discriminatory because the assignment of a note taker eliminated the complainant's need to tape record the courses. However, the evidence indicated that the ODSS determined that the complainant required and approved the complainant to receive both tape recording and note taking as auxiliary aids; therefore, it was the responsibility of the ODSS to request further documentation to assess whether in the complainant's specific case, the note taker was effective without the tape recording. OCR found no evidence indicating that the ODSS requested additional documentation from the complainant to support her request for both a note taker and the ability to tape record classes due to her disability; or made an individualized determination that a note taker alone was effective to address the complainant's disability.

Based on the above, OCR determined that the University discriminated against the complainant on the basis of her disability, when on or about XXXXXXXX XX, XXXX, University approved the complainant to tape record

³ The complainant asserted that during the fall XXXX semester, Professor 2 had permitted her to tape record the course she took with him.

⁴ Professor 2 stated that after he directed the complainant to not record the class; however, he noticed in XXXXXXXX XXXX that she was still doing so. Professor 2 acknowledged that early in the fall XXXX semester for his XXXXXXX X course, the complainant showed him a letter of accommodations, and spoke to him about extended time for examinations and use of a quiet area to take examinations; however, Professor 2 denied having any knowledge that the complainant was recording his class at that time. Professor 2 stated that he would not have allowed the complainant to record the class because that course was a process class in which there were group discussions and students may have felt inhibited to participate if they knew they were being recorded.

class lectures, subject to permission from her professors and classmates, as an auxiliary aid. Further, OCR determined that the Policy's requirement of instructor/classmate permission to tape record prohibited students with disabilities who were determined to have required tape recording of classes as a necessary auxiliary aid from effectively receiving the accommodation, and raised a compliance concern under Section 504. Moreover, the Policy provides that in the event tape recording is not permitted, note taking services are substituted without an individualized determination as to whether note taking is an effective alternative for the student with a disability.

Accordingly, OCR will negotiate a resolution agreement (attached) with the University, which will address OCR's concern.

The complainant alleged that Professor 1 discriminated against her, on the basis of disability, by failing to respond to her request to use a computer, as an approved auxiliary aid, for the essay portions of her spring XXXX Course 1 midterm exam. The complainant stated that although she emailed Professor 1 to request the use of a computer prior to the midterm exam, Professor 1 never responded and she had to handwrite her essay during the midterm exam.

As stated above, OCR determined that in a letter dated XXXXXXXX XX, XXXX, the ODSS approved the complainant for the following academic adjustments/auxiliary aids during testing: extended time testing (1.5x the allotted amount); use of computer for essay exams; and a distraction-reduced environment for exams. On XXXXXXXX XX, XXXX, the complainant sent an email to Professor 1, Professor 2, the XXXXXXXXXX XXXXXXXXXX XXX XXXXXXXXXX XXXXXXXXXX (the XXXXXXXXXX),⁵ and the SSW Program Director (the XXX Director), in which she stated that she was approved to receive testing accommodations, including the use of a laptop computer to write essay questions. On XXXXX X, XXXX, Professor 1 confirmed via email that the complainant would take the midterm exam on the same day (XXXXXX XX, XXXX) as the rest of the class, at a time arranged between the complainant and the XXXXXXXXXX.

The University stated that for the midterm exam administered on XXXXX XX, XXXX, the complainant was assigned to a private office furnished with a functional desktop computer that the complainant could access by using her University account password. The University stated that the complainant's accommodations plan specified that the complainant required the use of a computer (not specifically a laptop) for essay exams, and that a desktop computer was available to the complainant as an appropriate testing accommodation during the midterm exam. The XXXXXXXXXX, whose office was next door to the private office, stated that she told the Student that she would be available if, at any point, the complainant had questions. The XXXXXXXXXX stated that during the exam, she looked in on the complainant, asked the complainant if she needed anything, but the complainant responded in the negative. The XXXXXXXXXX stated that at some point, she observed that the complainant was not using the computer but rather, was hand writing her answers; however, at no time during the midterm exam did the complainant mention or complain to her that she did not have access to the desktop computer, or required the use of a different computer. The XXXXXXXXXX stated that she did not know or inquire at the time, whether the complainant used the computer to respond to any portion of the exam. The complainant asserted that she did not use the desktop because it belonged to a faculty member, however, she did not mention to the XXXXXXXXXX that she was not using the desktop computer. OCR did not find sufficient evidence to substantiate the complainant's allegation that the University failed to provide her with a computer as an auxiliary aid on the midterm exam.

Therefore, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the University discriminated against her, on the basis of her disability, by failing to provide her with the use of a

⁵ OCR determined that the ODSS worked with the XXXXXXXXXX to arrange testing accommodations for all students at the University.
*The Department of Education's mission is to promote student achievement and preparation for global competitiveness
by fostering educational excellence and ensuring equal access.*
www.ed.gov

computer, as an auxiliary aid, for the essay portions of the Course 1 midterm exam administered on XXXXX XX, XXXX. Accordingly, OCR will take no further action regarding Allegation 2.

The complainant alleged that in retaliation for continuing to tape record class lectures, as an auxiliary aid, the CAC Director engaged in intimidation and threatened her with ethics violations and expulsion on or about XXXXXXXX XX, XXXX. In support of her allegation, the complainant asserted that when she attempted to explain why she needed to tape record her classes during a meeting held on XXXXXXXX XX, XXXX, the CAC Director told the complainant that she was violating the XXXXXX XXXX Code of Ethics and would be expelled if she continued to record her classes. The complainant further asserted that she was intimidated by the CAC Director who yelled and told the complainant that she could file a complaint with the U.S. Department of Education, Office for Civil Rights, if she disagreed.

In analyzing whether retaliation occurred, OCR must first determine: (1) whether the complainant engaged in a protected activity; (2) whether the recipient was aware of the complainant's protected activity; (3) whether the complainant suffered an adverse action contemporaneous with, or subsequent to, the recipient's learning of the complainant's involvement in the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action from which a retaliatory motivation reasonably may be inferred. When there is evidence of all four elements, OCR then determines whether the recipient has a legitimate, non-retaliatory reason for the challenged action or whether the reason adduced by the recipient is a pretext to hide its retaliatory motivation.

OCR determined that the complainant engaged in a protected activity by advocating for her right to tape record classes, as an auxiliary aid, from in or around XXXXXXXX XXXX and throughout the spring XXXX semester. OCR determined that the University was aware of the complainant's protected activity.

The University stated that during a meeting with the complainant, Professor 2, and the SSW Director, held on XXXXXXXX XX, XXXX, the complainant raised issues about students' negative reactions to her recording classes as an accommodation for Courses 1 and 2; and the SSW Director invited the CAC Director to join the meeting to address the complainant's concerns. The SSW Director, Professor 2, and CAC Director stated that the complainant then acknowledged that she had continued to record her classes despite the University's directive not to do so absent the consent of Professors 1 and 2 and her classmates. The CAC Director, the SSW Director, and Professor 2, confirmed that in response to the complainant's admitting to recording without consent, she was in conflict with the XXXXXX XXXX Code of Ethics as a "violation of trust" but denied that anyone present threatened to file an ethics complaint, or expel the complainant from either the XXXXXX XXXX program or the University during the XXXXXXXX XX, XXXX meeting. The CAC Director further acknowledged that both she and the complainant raised their voices during the exchange, but that the complainant escalated the tone of the meeting by insisting that her rights were being violated. The CAC Director stated that she and SSW Director attempted to explain to the complainant that she should file a complaint with ODSS or the University if she was dissatisfied with the Professor 1's and Professor 2's decisions regarding recording of classes.

OCR determined that during the meeting, the CAC Director engaged in a verbal exchange with the complainant; however, the University witnesses denied that the CAC Director engaged in intimidation and threatened the complainant with ethics violations and expulsion. OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find sufficient evidence that the alleged conduct rose to the level of an adverse action sufficient to sustain a claim of retaliation. An adverse action is one that affects a person's education, work or well-being in an unwarranted, serious, lasting, and usually tangible manner (i.e., something that is more than a transient, unpleasant incident). OCR has determined that the alleged conduct was not sufficiently substantiated to be considered an adverse action, in that it did not affect the complainant in an

unwarranted, serious, lasting or tangible manner. Absent an adverse action and a causal connection, OCR does not proceed further with retaliation analysis.⁶ Accordingly, OCR will take no further action with regard to Allegation 3.

OCR will monitor the implementation of the enclosed resolution agreement, which the University signed in order to resolve Allegation 1. If the University fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

This letter should not be interpreted to address the University'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 file a private suit in federal court whether or not OCR finds a violation.

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 complainant may file another 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.

If you have any questions regarding OCR's determination, please contact Anthony Spinelli, Compliance Team Investigator, at (646) 428-3789 or anthony.spinelli@ed.gov; Tracey R. Beers, Senior Compliance Team Attorney, at (646) 428-3804 or tracey.beers@ed.gov; or Felice Bowen, Compliance Team Leader at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXXXXX XXXXXXXX, Esq.

⁶ The University stated that the complainant continued her studies in the Program and completed the spring 2014 semester, and that she is currently enrolled in the fall 2014 term. The complainant remains in satisfactory standing in the program.