

November 9, 2015

Harvey G. Stenger
President
Binghamton University
State University of New York
P.O. Box 6000
Binghamton, New York 13902-6000

Re: Case No. 02-15-2331
SUNY Binghamton University

Dear President Stenger:

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 SUNY Binghamton University (the University). The complainant alleged that the University discriminated against her, on the basis of her disability, by denying her the opportunity to use accessible seating in the lecture hall for her XXXXXXXXXXXX XX XXX XXX course (Course A), taken during the spring 2015 semester, on or about February 12, 2015, and May 14, 2015 (Allegation 1). The complainant also alleged that University personnel subjected her to harassment because of her disability, during the spring 2015 semester, as follows: (a) a Course A teaching assistant made facial expressions and hand gestures to another teaching assistant, after the complainant requested to sit in the lecture hall's accessible seating on or about February 17, 2015; and, (b) after she disclosed her disability to her XXXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX XXXX course (Course B) professor, the professor made an inappropriate comment about her in or around March 2015 (Allegation 2).

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). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The University is a recipient of financial assistance from the Department and is a public postsecondary education system. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

In its investigation, OCR reviewed information and documentation that the complainant and the University submitted. OCR also interviewed the complainant and University personnel. OCR made the following determinations.

During academic year 2014-2015, the complainant was enrolled in the University's Harpur College of Arts and Sciences; and, she majored in XXXXXXXXXXXX, XXXXXXXXXXX, XXX XXX. During the spring 2015 semester, the complainant was enrolled in several courses affiliated with her major, including Course A and Course B; and, she registered with the University's Services for Students with Disabilities Office (SSD) as a student with a disability. The SSD provided the complainant with an Accommodation Plan, which outlined the complainant's approved academic adjustments, auxiliary aids and other accommodations for her courses, including: extended time (time and one-half) to complete in-class assignments, quizzes, and exams; and, access to "disability-accessible" desks in the classrooms where her courses were held. The University stated that the Accommodation Plan was effective as of February 23, 2015.¹ OCR determined that the SSD provided the complainant with three copies of the Accommodation Plan, specifically addressed to each of her professors.

Allegation 1:

With respect to Allegation 1, the complainant alleged that the University discriminated against her, on the basis of her disability, by denying her the opportunity to use the lecture hall's accessible seating for Course A, on or about February 12, 2015 (Incident A) and May 14, 2015 (Incident B). The complainant stated that the University provided a "disability desk" as accessible seating for students with disabilities in the lecture hall; and, acknowledged that she used the accessible seating in the lecture hall for Course A on all other dates.

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 University informed OCR that the Course A professor (Professor 1) held biweekly lectures in a large lecture hall with tiered seating for approximately 150 students. In addition to Professor 1's biweekly lecture, Course A included a weekly seminar taught by the three teaching assistants assigned to the course. Each teaching assistant (TA) was assigned two sections of 25 students, and taught two section seminars each week. The University explained that it provided accessible

¹ The University informed OCR that the Accommodation Plan did not contain a specific date of authorization; however it was effective as of February 23, 2015, when the complainant picked the plan up from the SSD office.

seating to individuals with disabilities in the form of a long desk, referred to as the “disability desk,”² which was located near the auditorium entrance at the top of the tiered seating, along with an independent stand-alone chair.³ The University stated that the disability desk contained the universal access symbol for individuals with disabilities.⁴ Professor 1 lectured from a desk at the bottom of the lecture hall; and, generally, at least one of his three TAs sat at the disability desk at the top of the tiered seating, because from that vantage point they could take student attendance without leaving their seats.⁵

The complainant stated that sometime after receiving her Accommodation Plan on February 25, 2015, she visited Professor 1 during his office hours on an unspecified date at the end of February 2015. During this meeting, the complainant asserted that she informed Professor 1 that she had a disability; gave him a copy of her Accommodation Plan; and, asked him to review the lecture material with her on a weekly basis. The complainant further asserted that the Director of the SSD (SSD Director) notified Professor 1 via telephone regarding the complainant’s need to access the disability desk in the Course A lecture hall, on or about February 25, 2015.

Professor 1 advised OCR that he did not know where the complainant sat during class, as he relied on his TAs to create the seating chart and to take attendance. Professor 1 also denied that the complainant had provided him with a copy of her Accommodation Plan or informed him that she had a disability.⁶ Professor 1 further denied ever being contacted by any staff members of the SSD regarding the complainant’s access to the disability desk on or about February 25, 2015; or, on any other date. In addition, all three TAs denied receiving a copy of the complainant’s Accommodation Plan or otherwise being informed that the complainant had a disability that required access to accessible seating. Two TAs noted that the complainant generally sat at the disability desk and one TA would sit next to her.

Although Professor 1 denied that he had received the complainant’s Accommodation Plan or other notice from the SSD Director, OCR determined that Professor 1’s account was not credible. Specifically, the University provided OCR with documentation indicating that on or about February 25, 2015, the SSD Director personally contacted Professor 1 regarding the difficulty the complainant experienced accessing the disability desk. In a handwritten note signed by the SSD Director, she documented that she left a message for Professor 1 asking him to speak with his TAs regarding the “purpose of the [disability] desk and their need to make it comfortable [sic] available for students with disabilities.” In an email to the complainant the same day, the SSD Director notified her of her actions and also stated that she informed

² The disability desk was approximately 42 inches long, 30 inches deep, and 28 inches high.

³ The University stated that often, several additional chairs were also located near the disability desk; these chairs were removed from other classrooms and brought into the lecture hall.

⁴ The disability desk contained a placard provided by the SSD stating, “This desk provides access for a student with a disability (Desk #XX). It must remain in this classroom for the semester.”

⁵ The TAs informed OCR that they generally sat at the disability desk for most classes they taught in XXXXXXXX XXXXXXXX XXX, where Course A was held.

⁶ Professor 1 recalled that the complainant attended his office hours in or around February 2015. According to Professor 1, the complainant requested that he provide her with weekly “individual tutoring” which Professor 1 declined to do.

Professor 1 that the complainant would drop off her Accommodation Plan in the near future.⁷ Consequently, OCR determined that as of February 25, 2015, Professor 1 had received notice that the complainant was a student with a disability, and that she required access to the disability desk in his classroom pursuant to her Accommodation Plan.

Regarding Incident A, the complainant stated that when she arrived to class and attempted to sit at one of the chairs at the desk on or about February 12, 2015, one of the TAs (TA 1) told her that she could not sit there.⁸ The complainant stated that she responded to TA 1 that she could not use general seating and required access to the accessible seating. The complainant stated that TA 1 again informed her that she could not use the accessible seating; and as a result, she was forced to find a stand-alone chair and sit with her notebook in her lap.

OCR determined that Incident A allegedly occurred on February 12, 2015, prior to the time that University approved the accessible desk as an accommodation for the complainant on February 23, 2015; and, prior to the date that Professor 1 or any of the TAs would have been aware of the complainant's approved accommodation. 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, with respect to Incident A.

With respect to Incident B, the complainant asserted that TA 2 denied her access to the disability desk during the final examination (the Exam) for Course A, on or about May 14, 2015. The complainant explained that she arrived late for the Exam, and when she entered the lecture hall another student was already seated at the disability desk; therefore, she approached TA 2 to obtain a copy of the Exam and asked where she should sit because the disability desk was already occupied. The complainant did not know whether the other student had a disability. The complainant asserted that TA 2 directed her to sit in the general lecture hall seating, but the complainant responded that she could not XXX in general seating because the lap desk did not fold over her lap. The complainant stated that because she was denied accessible seating, she was forced to complete the Exam without a desk while seated on the floor; and, she suffered humiliation in front of her peers.⁹

TA 2 informed OCR that he recalled that the complainant arrived late for the Exam. He stated that the complainant came to him to request an Exam, generally stated that she could not sit at the disability desk but did not mention another student, and then left once she obtained the Exam. TA 2 acknowledged that he saw the complainant sitting on the floor, but stated that he gestured to either TA 1 or TA 3 to bring a chair for the complainant to sit in, and that they brought her a chair. TAs 1 and 3 informed OCR that they did not recall Incident B at all; and, they denied

⁷ Further, the complainant asserted that she hand-delivered a copy of her Accommodation Plan to Professor 1 on or about February 26, 2015, during his office hours. Professor 1 recalls that the complainant came to his office hours around the same date, although he denies receiving a copy of her Accommodation Plan. Nevertheless, even assuming that the complainant had not hand-delivered her Accommodation Plan to Professor 1, OCR determined that the SSD Director otherwise notified him of the complainant's right to use the disability desk as an auxiliary aid.

⁸ The complainant also alleged that her TA (TA 3) was seated at the disability desk when this interaction occurred.

⁹ The complainant stated that she used her book bag as a makeshift desk.

seeing the complainant sitting on the lecture hall floor for the Exam or bringing a chair to her.¹⁰ Professor 1 also denied seeing the complainant seated on the floor during the Exam.

Based on the foregoing, OCR determined that the University had notice of the complainant's disability in February 2015, and that she was entitled to receive the required academic adjustments and auxiliary aids, as stated in her Accommodation Plan, as of February 23, 2015. OCR determined that the University failed to ensure that the complainant had access to the disability desk on May 14, 2015, when she arrived late to the Exam and another student, whose disability status was unknown, was seated in the complainant's assigned seat at the disability desk. Further, when the complainant informed TA 2 that she was unable to sit at the disability desk because it was occupied, neither TA 2 nor anyone else obtained alternative accessible seating for the complainant; consequently, the complainant took the Exam on the floor without a desk.

Therefore, OCR determined that the evidence was sufficient to support that the University discriminated against the complainant, on the basis of her disability, by failing to ensure that the complainant had access to her approved accommodation, accessible seating, on May 14, 2015; in violation of the regulation implementing Section 504, at 34 C.F.R. § 104.44. OCR has obtained a Resolution Agreement (attached) to remedy this compliance issue.

Allegation 2(a):

Regarding Allegation 2(a), the complainant alleged that TA 1 subjected her to harassment because of her disability on or about February 17, 2015, by making facial expressions and hand gestures to TA 2 after the complainant requested to sit in the lecture hall's accessible seating on that date. In support of her allegation, the complainant asserted that after looking at her, TA 1 pointed to another student, who had a XXXXXXXX XXXXX and XXXX to her (Student 1), and was seated in the back row of general seating. The complainant asserted that TA 1's facial expressions and gestures implied that he believed that she should be able to sit in general seating like Student 1. The complainant did not identify any witnesses to this alleged encounter.

Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or, conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the recipient's program. If OCR determines that harassing conduct occurred, OCR will examine additional factors to determine whether a hostile environment existed and whether the recipient took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

TA 1 and TA 2 denied making any facial expressions or gestures comparing the complainant to any other students seated in general seating. TA 2 recalled an incident in which he and TA 1 might have made gestures toward the complainant after TA 1 informed the complainant that she

¹⁰ TA 3 stated that because he had listed the complainant's assigned seat as the disability desk after creating the seating chart, he assumed that she was seated at the disability desk for the Exam.

could not sit at the disability desk because another student had already occupied what appeared to be a vacant seat; however, TA 2 denied making any facial expressions or hand gestures comparing the complainant to any other students in the course. Rather, TA 2 asserted that because class had already started, they were attempting to communicate without causing a disruption; and as a result, they may have pointed or used other hand gestures towards the complainant rather than conversing orally.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case to determine whether the preponderance of the evidence substantiates an allegation. Here, OCR determined that the preponderance of the evidence did not substantiate that the TAs subjected the complainant to the conduct that she felt was harassing.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that University personnel subjected her to harassment because of her disability by making inappropriate facial expressions and hand gestures on or about February 17, 2015. Further, TA 2 provided a legitimate, non-discriminatory explanation for any facial expressions or hand gestures made towards the complainant; specifically, they were trying to direct her to seating in a non-verbal manner so as not to disrupt class. Accordingly, OCR will take no further action regarding Allegation 2(a).

Allegation 2(b):

With respect to Allegation 2(b), the complainant alleged that after disclosing her disability to her Course B professor (Professor 2) in or around March 2015, Professor 2 subjected her to harassment because of her disability, by making inappropriate comments about her. Specifically, the complainant alleged that Professor 2 stated “depending on the XXXXXXXXXXXXXXXX test results [you] may not be able to graduate” from the University and “[you] would have to graduate from another school.” The complainant stated that in or around March 2015, she contacted Professor 2 on several occasions for assistance with her coursework. The complainant asserted that during one of these conversations, she disclosed her disability; and, she also informed Professor 2 that she was undergoing further XXXXXXXXXXXXXXXX testing to determine what accommodations she might require at the University.¹¹ The complainant asserted that during a meeting after class on March 30, 2015, Professor 2 made the harassing comment, as described above. The complainant did not identify any individuals who witnessed the alleged harassment.

Professor 2 informed OCR that she recalled that the complainant notified her that she had a disability at the beginning of the spring 2015 semester¹²; that she met with the complainant on several occasions during the semester; and, that during one meeting, the complainant told her that she was undergoing XXXXXXXXXXXXXXXX testing. Professor 2 also recalled meeting with the complainant on or about March 30, 2015, which was immediately prior to the withdrawal deadline for the spring 2015 semester; and, they discussed that the complainant was failing

¹¹ The complainant informed OCR that she previously placed a copy of the Accommodation Plan in Professor 2's University mailbox.

¹² Professor 2 also recalled receiving a copy of the Accommodation Plan.

Course B.¹³ Professor 2 denied that they discussed the complainant’s disability during this meeting; or, that she told the complainant that she would “not be able to graduate” or that she would “need to graduate from another school.” Rather, Professor 2 stated that she encouraged the complainant to consider withdrawing from rather than failing Course B. Professor 2 asserted that she attempted to comfort the complainant by stating, “it was not the end of the world if she graduated from another university,” and that “she could always graduate from another university.”

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 to corroborate the complainant’s version of events, or to otherwise refute Professor 2’s account.

Based on the foregoing, OCR determined that there was insufficient evidence to substantiate the complainant’s allegation that Professor 2 subjected her to harassment because of her disability, by stating “depending on the XXXXXXXXXXXXXXXX test results [you] may not be able to graduate” from the University and that she “would have to graduate from another school,” on or about March 30, 2015. Accordingly, OCR will take no further action regarding Allegation 2(b).

However, as discussed previously, OCR has obtained a resolution agreement to address the compliance issue identified in Allegation 1. OCR will monitor the implementation of the enclosed resolution agreement. 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, it 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.

¹³ Professor 2 stated that the complainant appeared very emotional and overwhelmed.

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; Joy M. Purcell, Compliance Team Attorney, at (646) 428-3766 or joy.purcell@ed.gov; or, Félice Bowen, Compliance Team Leader at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX, Esq.