

January 12, 2016

Mark Lubell  
Executive Director  
International Center of Photography  
1114 Avenue of the Americas  
New York, New York 11143

Re: Case No. 02-15-4026  
International Center of Photography

Dear Mr. Lubell:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against the International Center of Photography (the School). The complainant alleged that the School discriminated against him on the basis of his disability, or in the alternative retaliated against him because of his disability-related advocacy, by dismissing him from his work-study position in September 2014.

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 and activities receiving financial assistance from the U.S. Department of Education (the Department). The School is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Section 504.

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which provides that:

No recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceedings or hearing held in connection with a complaint.

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/alleged injured party was

subjected to 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.

The regulation implementing Section 504, at 34 C.F.R. § 104.4(a), provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance. The regulation, at 34 C.F.R. § 104.4(b)(1), specifies that in providing any aid, benefit, or service, a recipient may not, on the basis of disability, deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service.

The regulation implementing Section 504, at 34 C.F.R. § 104.11, states that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which the regulation applies. The regulation, at 34 C.F.R. §104.12(a), requires recipients to make such reasonable accommodations to the known physical or mental limitations of otherwise qualified applicants or employees with a disability. Reasonable accommodations may include making facilities accessible, job restructuring, or modified work schedules. Recipients are not required to make reasonable accommodations that would impose an undue hardship on the operation of its program or activity. In addition, the regulation, at 34 C.F.R. §104.12(d), prohibits a recipient from denying an employment opportunity to a qualified applicant or employee with a disability if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

Recipients may require an employee to follow reasonable procedures to request and document the need for reasonable accommodations. If the employee with a disability believes that he or she needs a reasonable accommodation, the employee has the obligation to identify him- or herself as having a disability and to request the provision of reasonable accommodations. An employee's request for a reasonable accommodation must be sufficiently direct and specific, identifying the type of reasonable accommodation needed. If the request for a reasonable accommodation is not initially granted, the employee and the recipient should engage in an interactive process to determine what, if any, reasonable accommodation will be made, and the appropriate scope of the reasonable accommodation. The interactive process may be brief, with an employee requesting a reasonable accommodation and a recipient granting it with minimal documentation requirements; or it may be more protracted, with various exchanges between the employee or applicant and the recipient about the nature of the reasonable accommodations. If the reasonable accommodations provided are not effective in meeting the employee or applicant's needs, it is the employee's responsibility to notify the recipient as soon as possible. The employee and the recipient should work together to resolve the problem, including as appropriate by modifying the reasonable accommodations being provided or identifying other effective reasonable accommodations to be provided.

In its investigation, OCR interviewed the complainant and four witnesses who are employees of the School (the XXXXXXXX XXXXX XXX XXXXXXXX, the XXXXXXXX XXXXX XXX XXXXXXXXXXXX, the School’s Legal Counsel (Counsel), and the Human Resources (HR) Director). OCR also reviewed documentation that the School submitted. OCR made the following determinations.

The School is a private institution dedicated to photography. It runs a museum through which it presents exhibitions, bringing the work of photographers and other artists to the public in one-person and group exhibitions; and through its school, it provides classes and workshops. The School also has a teaching assistant program. Teaching assistants (TAs) do not receive a salary, but for each hour worked, TAs receive a tuition reduction or may use the School’s darkroom or digital media labs on an hour per hour basis. The School does not permit a TA to assist in teaching a class until after he or she has worked for one semester in one of four office positions: Photo Lab, Digital Media Lab, Equipment Office, and Library. The TA program at the School is not a part of any government sponsored work-study program.

The complainant alleged that the School discriminated against him on the basis of his disability, or in the alternative retaliated against him for his disability-related advocacy, by denying his request for a reasonable accommodation to complete his work as a TA and effectively terminating him from the TA position in September 2014. OCR determined that the complainant applied for a position as a TA at the School in June 2014, participated in an interview for the position in August 2014, and was assigned to a position in the School’s Digital Media Lab (DML) on or about September 9, 2014. The complainant’s position entailed working from 2:00–6:00 p.m. on Fridays, providing customer service to students, faculty, other TAs, and staff in the DML. His duties included handling phone calls; making reservations; signing students in and out of the labs; lending equipment; turning printers, scanners, and projectors on and off; replacing ink; keeping labs tidy; noting problems with machines; and replenishing supplies.

The School advised OCR that after the complainant’s first shift on September 12, 2014, he advised the School’s TA Liaison<sup>1</sup> that he was concerned about performing the duties required of him as a TA in the DML. Following this conversation, the TA Liaison sent an electronic mail (email) message to the complainant on September 18, 2014, suggesting that he work one more shift to see if he still had concerns, at which time she would remove him from the schedule and see if she could find him another opportunity within the School. After working a second shift on September 26, 2014, the complainant emailed the TA Liaison on September 29, 2014, stating that he would need to request a reasonable accommodation for his disability. The TA responded on the same day, asking for the specific accommodations he was requesting.

On September 30, 2014, the complainant sent an email the TA Liaison, stating that he was requesting the following: XXXXXXXXXXXX XX X XXXXXXXXXXX XXXX XXX XXX XXXXXXXXXXX XXXXXXX XXX XXXX XXXXXXXXXXX XX XXXX, XXXXXXXXXXX XXXX XXXX XXX XXXXXXXXXXX XXX XXX; XXXXX XXXXXXX XX XXXXXXXXXXX XXX XXXXXXX XXX XXXXXXXXXXX; XXXXXXX XX XXX XXXXX XX XXXXX; XXXXXXXXXXX XX XXXXXXXXXXX XXXXXXX XXXXXXXXXXXXXXXXXXX XXXXX

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<sup>1</sup> The TA Liaison is no longer employed by the School, and OCR was unable to reach her for an interview.

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The TA Liaison responded to the complainant later that day on September 30, 2014, that the School was unable to accommodate all of his needs, given the TA position requirements and the structure of the program. She further stated that she would remove the complainant from the DML schedule effective that day.<sup>2</sup>

On October 2, 2014, the complainant responded by email, asking how the structure of the program precluded his participation and who had made the decision. The TA Liaison responded later the same day. She advised the complainant that all of the TA positions require sitting for periods of time to complete required tasks. She further stated that short breaks are permitted and advised the complainant to speak to the shift supervisor about the request to make sure the desk is covered while the complainant took a break. The TA Liaison stated that the School does not assign special supervisors or mentors to TAs, and that each department has a shift supervisor to whom the TAs report. She also stated that the complainant could bring a water bottle with him or avail himself of the water in the vending area. The TA Liaison advised the complainant to contact her if he had further questions. The complainant replied about ten minutes later, referring to the ADA and asserting that “people with disabilities have rights”; and asking whether the TA Liaison was agreeing to “accommodate [his] needs.” The TA Liaison replied almost immediately that she would contact the School’s Human Resources (HR) Department and would contact the complainant soon regarding his requests.

OCR reviewed the School’s Non-Discrimination Policy, which is outlined in the School’s employee handbook and distributed to employees upon hiring. Reasonable accommodation requests are addressed under section 3.1, Equal Employment Opportunity:

[The School] will provide reasonable accommodation consistent with the law to otherwise qualified employees and prospective employees with a disability and to employees and prospective employees with needs related to their religious observance or practices. What constitutes a reasonable accommodation depends on the circumstances and thus will be addressed by [the School] on a case-by-case basis. Employees or applicants for employment who believe they may require such accommodation are encouraged to speak with the Director of Human Resources. In some cases medical verification will be required.

OCR interviewed Counsel, who was serving as the School’s HR Director in September and October 2014. She stated that the TA Liaison contacted her at that time to discuss the

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<sup>2</sup> The TA liaison further stated “I would encourage you to attend events at [the School], visit our museum and attend classes as a student if you would like to stay involved in some capacity which I hope you will...you can hand in your timesheet with the hours you have worked as a TA to me so you can use the credit hours towards printing time in the DML or Darkroom if you would like.

complainant's request for reasonable accommodations, but the issue "slipped through the cracks", as Counsel and the TA Liaison were on back-to-back vacations. Counsel further asserted that the complainant did not contact the School after October 2, 2014; and Counsel assumed that the complainant was no longer interested in working as a TA at the School.

Based on the foregoing, OCR determined that in its initial response to the complainant's request for reasonable accommodations, and thereafter, the School did not engage in an interactive process to determine what accommodations would have been reasonable to assist the complainant in performing the duties of his position. Instead, the School effectively terminated the complainant's position as a TA by removing him from the TA schedule. Accordingly, OCR determined that the School violated the regulation implementing Section 504, at 34 C.F.R. §104.12(a).<sup>3</sup>

On January 12, 2016, the School agreed to implement the enclosed resolution agreement, which addresses the compliance concerns identified in this letter. OCR will monitor the implementation of the resolution agreement.

This letter should not be interpreted to address the School'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 School 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.

If you have any questions about OCR's determination, please contact Lauren Numeroff, Compliance Team Attorney, at (646) 428-3895 or [lauren.numeroff@ed.gov](mailto:lauren.numeroff@ed.gov); or James Moser, Compliance Team Attorney, at (646) 428-3792 or [james.moser@ed.gov](mailto:james.moser@ed.gov).

Sincerely,

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<sup>3</sup> The preponderance of the evidence did not support a retaliatory motive for failing to accommodate the complainant and effectively terminating him; rather, as stated above, the preponderance of the evidence supported that School personnel failed to follow the interactive process to determine whether the School could provide the accommodations that the complainant was requesting.

Timothy C. J. Blanchard

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