



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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July 27, 2017

Dr. Jerome A. Gilbert
President
Marshall University
One John Marshall Drive
Huntington, WV 25755

Re: OCR Complaint No. 03-16-2243

Dear Dr. Gilbert:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received against Marshall University (the University). The Complainant alleged that the University discriminated against her on the basis of XXXXXX.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving Federal financial assistance from the Department. Because the University receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction pursuant to Section 504, Title II, and Title IX.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

In reaching a determination, OCR reviewed documents provided by the Complainant and the University, interviewed the Complainant, and interviewed University faculty and staff. After carefully considering all of the information obtained during the investigation, OCR identified a compliance concern regarding the Complainant's allegation related to disability discrimination. The University agreed to resolve the concern through the enclosed resolution agreement.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

OCR did not find sufficient evidence to support the Complainant’s allegation concerning sex discrimination. OCR’s findings and conclusions are discussed below.

Legal Standards

Under the Section 504 regulation, at 34 C.F.R. § 104.3(j)(1), an individual with a disability is any person who has a physical or mental impairment, which substantially limits one or more major life activities. Title II similarly defines an individual with a disability at 28 C.F.R. § 35.108. With regard to post-secondary students, 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. 34 C.F.R. § 104.3(l)(3).

The Section 504 regulation, at 34 C.F.R. § 104.43(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 be otherwise subjected to discrimination under any postsecondary education program of a recipient. The Title II regulation, at 28 C.F.R. § 35.130(a), contains a similar prohibition applicable to public postsecondary educational institutions.

The Section 504 regulation, at 34 C.F.R. § 104.44(d)(1), requires recipient colleges and universities to take steps to ensure that no disabled student 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. Section 104.44(d)(2) provides that auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipient colleges and universities, however, need not provide attendants, individually prescribed devices, readers or personal use or study, or other devices of services of a personal nature.

Under the Title II regulation, at 28 C.F.R. § 35.130(b)(1)(ii) and (iii), public colleges and universities may not afford a qualified individual with a disability opportunities that are not equal to those afforded others, and may not provide aids, benefits or services that are not effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. Under 28 C.F.R. § 35.130(b)(7), public colleges and universities must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program or activity. Under 28 C.F.R. § 35.135, public colleges and universities are not required to provide disabled individuals with personal devices, individually prescribed devices, readers for personal use or study, or services of a personal nature. Section 35.103(a) provides that the Title II regulation shall not be construed to permit a lesser standard than is established by the Section 504 regulation. Therefore, OCR interprets the Title II regulation to require public colleges and universities to provide necessary auxiliary aids to the same extent as is required under the Section 504 regulation.

The Title II regulation, at 28 C.F.R. § 35.160(a), requires a public college or university to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. Communication is construed broadly to mean the transfer of information. In determining whether communication is as effective as that provided to non-disabled persons, OCR looks at the timeliness of the delivery, the accuracy of the communication, and whether the manner and medium used are appropriate to the significance of the message and the abilities of the disabled individual.

The regulation at 28 C.F.R. § 35.160(b)(1) further requires a public college or university to furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity. In determining what type of auxiliary aid and service is necessary, 28 C.F.R. § 35.160(b)(2) requires that the college or university give primary consideration to the requests of the individual with disabilities.

In determining whether a particular aid or service would result in undue financial and administrative burdens, a Title II entity should take into consideration the cost of the particular aid or service in light of all resources available to fund the program, service or activity and the effect on other expenses or operations. The decision that a particular aid or service would result in an undue burden must be made by a high level official, no lower than a Department head, and must include a written statement of the reasons for reaching that conclusion.

To determine whether a recipient met its obligations as described above, OCR considers whether a complainant is a qualified individual with a disability and identified herself to the recipient as such an individual in need of an academic adjustment or auxiliary aid or service. OCR next considers whether the complainant provided documentation of her disability and whether the recipient engaged in interactive discussions with the complainant to identify the appropriate adjustment, aid, or service. OCR then considers whether the recipient offered or provided the adjustment, aid, or service as identified; whether the complainant notified the recipient of any problems with the adjustment, aid, or service meeting her disability-related needs; and whether the recipient responded to any such concerns.

The Title IX regulation, at 34 C.F.R. § 106.31(a), states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. In addition, the regulation at 34 C.F.R. § 106.31(b)(1) states that recipient shall not, on the basis of sex treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service.

To determine whether an individual was treated differently on the basis of sex, OCR considers whether a complainant was treated differently than similarly-situated individuals of a different sex; whether the recipient can articulate a legitimate, non-discriminatory reason for the

difference in treatment; and whether the reason offered by the University is pretext for discrimination.

Background

The Complainant is a student with a disability who registered for courses at the University XXXXXX.

The University's Office of Disability Services requires that students who need an academic accommodation provide documentation to the Office of Disability Services, the College Program for Students with Autism Spectrum Disorders, the HELP Program, and/or the Student Athlete Program Offices, and that office will then notify a professor of the recommended accommodation. The Office of Disability Services website states, and the Interim Director of Disability Services (Interim Director) confirmed, that a student is required to provide documentation of his or her disability. In the case of a medical disability, the Office requires that the student provide documentation from a treating physician identifying the student's disability and what accommodations he or she needs. The student may receive the accommodation recommended by a physician, depending on the documentation, and the University generally follows what the physician states. The Interim Director explained that there are situations where a request may not be reasonable or the request cannot be accomplished right away. In those situations, the University works with the student to help make the affected academic class a success. Regarding "alternative format textbooks," the Office of Disability Services website notes that students are encouraged to use digital/ebooks and recommends that students contact the University's bookstore or online outlets to obtain these materials. The website also states that if the books are not available, students will want to meet with staff of the Office of Disability Services to discuss alternatives.

The Complainant notified the Office of Disability Services in person and by email XXXXXX.

xxx—paragraphs redacted--xxx

Analysis

Issue 1 – Disability Discrimination

OCR found that the Complainant is a qualified individual with a disability, as she has a documented disability which impacts one or more major life activities, and she was accepted into the University for purposes of obtaining one or more academic degrees and/or certificates. The Complainant notified the University of her disability, provided medical confirmation, and requested the assistance of the University's Office of Disability Services in order to obtain a XXXXXX.

OCR found that the University had extensive interactions with the Complainant in order to understand her needs and to find out what was needed for her to have success in the XXXXXX program. OCR also found that the University did not communicate adequately with the Complainant concerning her goals XXXXXX.

The University should have continued communicating with the Complainant about possible course substitutions, or other auxiliary aids or accommodations, including the Complainant's preferred method XXXXXX, in order to identify the appropriate auxiliary aid or accommodation it would provide to the Complainant. It is evident that the University did not attempt to provide the Complainant with her preferred method of communication. When the Complainant XXXXXX that XXXXXX.

XXX—paragraph redacted-- XXX

The University's decision to deny the Complainant's XXXXXX and instead provide a course substitution did not align with its obligation to ensure effective communication with students, which is construed broadly to mean the transfer of information, and can include written communication XXXXXX. Instead of ensuring effective communication for the Complainant, the University made it impossible for her to take a course of her choice because of her disability. This is unacceptable, particularly when an auxiliary aid was available that could have permitted the Complainant to participate in the course with her non-disabled peers. Therefore, based on a preponderance of the evidence, OCR finds sufficient evidence of disability discrimination as alleged by the Complainant.

XXX—paragraphS redacted—XXX

Conclusion

To resolve the compliance concern identified above, the University entered into the attached Resolution Agreement, signed on July 13, 2017. Once the Resolution Agreement is fully implemented, the University will be in compliance with Section 504 and Title II with respect to the issues addressed in this letter. OCR will monitor the University's implementation of the Resolution Agreement until the University is in compliance with the statutes and regulations at issue in the case.

This concludes OCR's investigation of the complaint. 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 have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the University's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Andrea DelMonte, the OCR attorney assigned to this complaint, at 215-656-8554 or andrea.delmonte@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader
Philadelphia Office

Enclosure

cc: Jendonnae Houdyschell, Associate General Counsel (via email)
Dawn George, Assistant Attorney General (via email)