



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV**

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

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TENNESSEE

June 24, 2016

Dr. Ken Atwater

President

Hillsborough Community College

1206 N Park Road

Plant City, Florida 33563

Re: Complaint #04-16-2076

Dear Dr. Atwater:

On December 30, 2015, the U. S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint filed against the Hillsborough Community College (HCC), alleging discrimination on the basis of disability (Testing Anxiety Disorder) and retaliation. Specifically, she alleged the following:

Beginning with the fall 2014 semester in the Earth Science class, the College did not allow the Complainant to test in the testing center.

The College subjected the Complainant to retaliation when the Earth Science Professor gave her a lower grade, based on an average of students, which placed her two points away from passing the class.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of Federal financial assistance, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Because the College is a recipient of Federal financial assistance from the Department and is a public entity, it is subject to the above statutes. Accordingly, OCR has jurisdiction over this complaint. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR initiated an investigation of the following legal issues:

Whether the College failed to provide the Complainant with approved academic adjustments in her Earth Science class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44 and Title II and its implementing regulation at 28 C.F.R. § 35.130(b)(7).

Whether the College retaliated against the Complainant by giving her a failing grade in her Earth Science class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.61, which incorporates by reference the Title VI implementing regulation, at 34 C.F.R. §100.7(e).

Legal Standards

I. Academic Adjustments and Auxiliary Aids

The Section 504 implementing regulation at 34 C.F.R. § 104.44 requires that a recipient make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified applicant or student with a disability. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements and adaptation of the manner in which specific courses are conducted. The Title II implementing regulation at 28 C.F.R. § 35.130(a) is interpreted as offering no greater or lesser protection than the Section 504 regulation.

Academic requirements that the recipient can demonstrate are essential to the instruction being pursued, or to any directly related licensing requirement, will not be regarded as discriminatory. A recipient's determination as to what constitutes an essential requirement of its program should be based upon a deliberative process that involves a group of trained, knowledgeable, and experienced people who engage in a rational review of the program and its requirements and consider whether effective alternatives to the requirement exist which could allow the student with a disability to participate without waiving or lowering essential requirements or fundamentally altering the nature of the program.

Thus, recipients must provide academic adjustments and aids that are effective and that are appropriate to the individual needs of the student with a disability. To ensure that a student with a disability is not denied academic adjustments based on their individualized needs, a postsecondary institution should engage in an interactive process, and the student and the institution should work collaboratively to enable the student to have an equal opportunity to participate in the recipient's programs and activities. Students with disabilities possess unique knowledge of their individual disabilities and should be prepared to discuss the functional challenges they face and, if applicable, what has or has not worked for them in the past.

The interactive process begins when a student notifies the institution that he/she has a disability and that he/she needs an academic adjustment or aid because of that disability. If the student has received proper notice of an institution's process for providing adjustments, they are expected to follow the process in seeking an adjustment. This includes the obligation to inform the institution of their disability, provide supporting documentation, and ask the institution for assistance related to their disability. Once a student takes these steps consistent with the institution's established process, it is then the institution's responsibility to ensure that any necessary and agreed upon academic adjustments are provided to the student. If an aid and adjustment is not meeting a student's needs then it is the student's responsibility to contact the institution as soon as possible so they can work together to resolve the issue.

II. Retaliation:

Retaliation is prohibited under the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulation at 34 C.F.R. § 100.7(e). The Title VI regulation 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 a law enforced by OCR, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504. The Title II implementing regulation at 28 C.F.R. § 35.134, similarly prohibits retaliation by public entities.

To establish a *prima facie* case of retaliation, OCR uses a four step analysis: (1) whether the complainant engaged in an activity protected by the laws OCR enforces; (2) whether the University was aware of the protected activity; (3) whether the University took adverse action against the Complainant contemporaneous with or subsequent to the participation in a protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If one of the elements cannot be established, OCR finds insufficient evidence of a violation. If all of the above elements are established, OCR then determines whether the recipient has a legitimate, non-discriminatory explanation for the adverse action. If such an

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explanation is proffered, OCR examines whether the reason given is merely a pretext for retaliation.

Summary of Investigation

Upon the receipt of this complaint, the College provided OCR with its Section 504 policies and procedures, the Complainant's records from the College's Disability services, and correspondence showing the Complainant's request for academic adjustments and auxiliary aids and the College's response. Prior to the conclusion of the investigation, the College requested to voluntarily resolve Issue #1 and Issue # 2 of this complaint under Section 302 of OCR's *Case Processing Manual*. Pursuant to these procedures, a complaint may be resolved at any time when, before the conclusion of an OCR investigation, the recipient expresses an interest in resolving the complaint and signs a resolution agreement that addresses the complaint allegations. In such circumstances, the provisions of the resolution agreement will be aligned with the complaint allegations or the information obtained during the investigation and will be consistent with applicable regulations.

Issue#1: Whether the College failed to provide the Complainant with approved academic adjustments in her Earth Science class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44 and Title II and its implementing regulation at 28 C.F.R. § 35.130(b)(7).

Based upon information provided by the College, OCR learned that the Complainant had a documented testing Anxiety Disorder, which impacted her ability to take test. OCR also learned that based on this disability, the College approved the following academic adjustments and auxiliary aids for the Complainant on August 20, 2014 and January 12, 2015: 1) use of a tape recorder in class; 2) tests and quizzes given in the College's testing center or in a quiet monitored environment; 3) extended time for all tests and quizzes, including exit exams (double time); and 4) extended time for in-class assignments-double-arranged with Instructor.

The evidence obtained thus far also showed that the Earth Science Instructor (Instructor) received notices of these approved academic adjustments and auxiliary aids on August 20, 2014 and January 12, 2015, respectively. Finally, OCR learned that despite the approved academic adjustment which allowed for testing in the College's "testing center or in a quiet monitored environment", the Complainant took her first Earth Science exam in the classroom instead of the testing center on October 1, 2014. The evidence also showed that she failed this test.

Prior to the conclusion of the investigation, the College offered to resolve Issue # 1 and pursuant to OCR CPM § 302, OCR accepted the College's request¹ OCR also reviewed the College's procedures regarding the ability of students to self-identify and request academic adjustments and auxiliary aids and determined that the policy and procedures were in compliance with Section 504 and Title II.

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II. Whether the College retaliated against the Complainant by giving her a failing grade in her Earth Science class, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. §104.61, which incorporates by reference the Title VI implementing regulation, at 34 C.F.R. §100.7(e).

Based on information provided by the College, OCR learned that on November, 11, 2014 the Complainant complained to the Learning Disability Specialist, that she did not receive her testing academic adjustment from her Earth Science Instructor (Instructor) on October 1, 2014. The evidence obtained thus far also showed that the Complainant received a failing final grade for the Earth Science Course in December, 2014 and again in February, 2015 after her grade was recalculated pursuant to a petition she filed to change her final grade in the Earth Science Course.

The evidence thus far also shows that in consideration of the Complainant's petition, in February, 2015, the Dean of Arts requested that the Instructor use a different grading matrix to re-calculate the Complainant's grade to determine if the grade would be higher. Finally, the evidence shows that based on the Instructor's re-calculations in February, 2015, the Complainant still received a 60.3% (higher than her actual score on her first exam), thus giving her a final course average of 67.8% even with the Dean's adjusted grading matrix.

Prior to the conclusion of the investigation, the College offered to resolve Issue# 2 as well. Pursuant to OCR CPM § 302, OCR accepted the College's request to resolve this complaint and the College entered into the enclosed Resolution Agreement.

Resolution Agreement

On June 23, 2016, the College signed the attached Resolution Agreement (Agreement), which once implemented, will fully address the complaint allegation in accordance with the requirements of Section 504 and Title II. The Agreement requires the College to 1) give the Complainant three options she can choose from to replace the grade she received in the Earth Science Course, and 2) conduct training to all relevant staff regarding the Section 504 requirement to provide academic adjustments or auxiliary aids in the manner approved by the College and to not retaliate against students

OCR will monitor the College's implementation of the attached Agreement to ensure that it is fully implemented and that the College is in compliance with the statutes and regulations at issue in this complaint.

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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, you 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, please contact Ms. Cassandra Williams, Investigator, at (404) 974-9393 or me at 404-974-9408.

Sincerely,

April England-Albright, Esq.
Supervisor General Attorney

Enclosure

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