



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

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REGION IV
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February 6, 2017

VIA ELECTRONIC AND REGULAR MAIL

Dr. Jack Hawkins, Jr.
Chancellor
Troy University
600 University Ave.
Troy, AL 36082

Re: Complaint #04-16-2153

Dear Dr. Hawkins:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Troy University (University) received by OCR on March 21, 2016, in which the Complainant alleged that the University discriminated against her on the basis of disability and engaged in retaliation.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability and retaliation by recipients of Federal financial assistance (FFA); and Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 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 and retaliation by public entities. As a recipient of FFA from the Department and a public entity, the University is subject to these laws. Accordingly, OCR has jurisdiction over this complaint.

OCR investigated the following legal issues:

1. Whether the University retaliated against the Complainant, after she filed a grievance in January/February 2016, when in February and March 2016 her XXXXXXXX XXXX professor assigned increased class work, deducted 30 points from her final exam and paper, and gave her failing grades ("D" and "F"), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.
2. Whether, from August 2015 to March 2016, the University discriminated against the Complainant on the basis of disability when it failed to provide an academic adjustment (transcripts for class videos), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44, and the Title II implementing regulation at 28 C.F.R. § 35.130.

During its investigation, OCR reviewed evidence submitted by the Recipient and the Complainant, including educational records and communications. OCR evaluates evidence obtained during an investigation under a preponderance of the evidence standard to determine whether the greater weight of the evidence is sufficient to support a conclusion that a recipient failed to comply with a law or regulation enforced by OCR or whether the evidence is insufficient to support such a conclusion. For Issue 1, OCR

determined that there was insufficient evidence to establish a violation of Section 504 or Title II, as alleged. Further, prior to the conclusion of the investigation, the University requested to voluntarily resolve Issue 2 listed above pursuant to Section 302 of OCR's *Case Processing Manual*. Provided below is a discussion of the evidence reviewed.

Legal Standards

Retaliation

Retaliation is prohibited under the regulation implementing Section 504 at 34 C.F.R. § 104.61, which incorporates by reference the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d, *et seq.*, 34 C.F.R. Part 100. The regulation implementing Title VI at 34 C.F.R. § 100.7(e) provides that a recipient shall not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws enforced by OCR, or because he or she has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing. The regulation implementing Title II at 28 C.F.R. § 35.134 similarly prohibits retaliation by public entities.

To establish whether retaliation occurred, OCR examines (1) whether the complainant engaged in a protected activity; (2) whether the recipient had knowledge of the protected activity; (3) whether the recipient took an adverse action contemporaneous with or subsequent to the protected activity; and (4) whether there is a causal connection between the protected activity and the adverse action. If any one of the foregoing cannot be established, a retaliation allegation fails. If, however, a *prima facie* case of retaliation is established, OCR would investigate to determine whether the recipient has a legitimate, nondiscriminatory reason for its actions, which is sufficient to rebut the inference of discrimination created by the taking of an adverse action after the complainant engaged in a protected activity. OCR would also determine whether any reason presented by the recipient is merely a pretext for discrimination in the form of retaliation.

Academic Adjustments

The Section 504 implementing regulation at 34 C.F.R. § 104.44(a) states that a recipient to which this subpart applies shall 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 student with a disability. Section 504, at 34 C.F.R. § 104.44(d), states that postsecondary recipients shall take such steps as are necessary to ensure that qualified individuals with disabilities are not denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the program or activity because of the absence of educational auxiliary aids and services for students with impaired sensory, manual or speaking skills. Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments.

Under the requirements of Section 504, a complainant with a disability is obligated to notify the University of the nature of the disability and the need for a modification, adjustment, aid or service. Once a university receives such notice, it has an obligation to engage the complainant in an interactive process concerning the complainant's disability and related needs. The student is responsible for providing evidence of a condition that requires academic adjustments. In some cases, this will require that the student provide the results of medical, psychological, or educational diagnostic tests and professional prescriptions for academic adjustments.

In making each of these determinations, it is necessary to decide on a case-by-case basis whether the student carried out his or her responsibility for cooperating in the provision of aids and adjustments, and

whether the student and the educational institution acted in a reasonable manner consistent with effective delivery of services. Institutions of postsecondary education must provide appropriate accommodations based on students' disabilities and individual needs when necessary to avoid discrimination. 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.

Although the Title II regulation does not contain provisions specifically pertaining to the provision of academic adjustments, as in the case of the Section 504 regulation, OCR interprets the Title II regulation's general prohibition against discrimination (at 28 C.F.R. § 35.130) to incorporate the relevant provisions of the Section 504 regulation.

Background

OCR's review of the evidence obtained in its investigation indicated that the Complainant enrolled in the University's online XXXXXXXX XXXXXXXX program in August 2013. In October 2013, she identified herself as a student with a disability ("severely hearing impaired") using the University's *Application for Disability Services* form, on which she requested transcription for classes using video and audio lectures without closed caption or written materials. The University submitted documentation to OCR reflecting the Complainant's approved accommodations as transcription of all online videos and lectures; the approved accommodations were communicated to the Complainant's professors for the 2013-2014, 2014-2015 and 2015-2016 academic years by the University's Disability Services Coordinator (Disability Coordinator).

Summary of Investigation

Issue 1: Whether the University retaliated against the Complainant, after she filed a grievance in January/February 2016, when in February and March 2016 her XXXXXXXX XXXX professor assigned increased class work, deducted 30 points from her final exam and paper, and gave her failing grades ("D" and "F"), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, and the Title II implementing regulation at 28 C.F.R. § 35.134.

The Complainant alleged that after she filed a complaint with the University's XXXXXXXXXXXX XXXXXXXXXXXX, the Chair of the XXXXXXXX department, and her XXXXXXXX XXXX professor in January 2016 about the use of videos without transcription in the course, her XXXXXXXX professor then retaliated against her in February and March 2016 by increasing the reading assignments for the course, giving her a "D" on her final paper, from which he also deducted 30 points for late submission, and giving her an "F" on her final exam.

Protected Activity and Knowledge of Protected Activity

A protected activity is one in which a person either opposes an act, policy, or practice that is unlawful under any of the laws OCR enforces; files a complaint, testifies, assists, or participates in an investigation, proceeding, or hearing conducted under the laws that OCR enforces; or otherwise asserts rights protected by the laws enforced by OCR. The Complainant alleged that she engaged in a protected activity in the third week in January 2016 when she filed an internal grievance with the University's Chair of XXXXXXXX regarding her professor's failure to provide an academic adjustment. OCR's review of documentation submitted by the University dated XXXXXXXX XX-XX, 2016, confirmed that the Complainant filed a complaint on or about XXXXXXXX XX, 2016, with the University's Disability Services office and the University's Chair of the XXXXXXXX department regarding the professor's posting of videos without transcription. Accordingly, OCR determined that the Complainant engaged in a protected activity of which the University had knowledge.

Alleged Adverse Actions

OCR investigated to determine whether the University took adverse actions against the Complainant contemporaneous with or subsequent to her protected activity. To be an “adverse action,” the District’s action must significantly disadvantage the Complainant, or her ability to gain the benefits of the District’s program. In the alternative, even if the challenged action did not meet this standard, the action could be considered retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the Complainant was, because of the challenged action, precluded from pursuing her discrimination claims. To make this determination, OCR considers (on a case-by-case basis, in light of all the facts and circumstances) whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse.

Increased Workload

OCR determined that that there was no increased class work for the Complainant in the XXXXXXXX class. The Complainant alleged that she looked at the course readings in early January 2016, prior to the first day of the course on January 5, 2016, and stated that only two chapters per week were posted. However, when she looked at the course readings posted by the professor the week of January 25, 2016, five days after she filed an internal complaint with the University on XXXXXXXX XX, 2016, she saw that eight additional chapters were posted for the next two weeks. The Complainant acknowledged that she did not know the exact date the additional materials were posted nor did she recall if the written materials had always been a part of the intended class readings. However, the professor notified OCR that he did not increase the workload at any time; rather, the professor provided written materials that could be reviewed by any of the students in the XXXXXXXX class in lieu of the videos. The professor also stated that week 5 contained a large number of written materials, but those materials had been part of the course since the beginning. The University submitted screenshots of the course reading requirements for the semester, which included week 5 (XXXXXXXX X, 2016), the two-week period following the Complainant’s initial complaint, which showed that the course reading requirements were not altered since initial posting to the course’s electronic assignment board on August 2014. Thus, OCR determined that the workload was not increased; therefore, OCR found no adverse action with regard to increase workload, as alleged.

30-Point Deduction and Failing Grades

OCR determined that the 30-point deduction from the Complainant’s final paper, which constituted 30% of her grade, and the failing grade on her final exam, which also constituted 30% of her grade, were adverse actions.

Causal Connection

A causal connection can be inferred by establishing, among other things, closeness in time between the date of the protected activities and the adverse actions, change in treatment of the individual after the recipient had knowledge of the protected activity, or different treatment of the individual compared to other similarly-situated persons. OCR determined that the adverse actions of receiving the 30-point deduction on the final paper and failing grade on the final exam occurred on March 3 and 4, 2016, which was approximately two months after the Complainant’s protected activity on or about XXXXXXXX XX, 2016.

Accordingly, OCR concludes that the proximity between the protected activity and the adverse action supports a finding of a causal connection between the protected activity and the adverse action. Based on the above, the Complainant has established a *prima facie* case of retaliation. Accordingly, OCR next

analyzed whether the University had legitimate, nondiscriminatory and non-pretextual reasons for its actions.

Legitimate, Non-discriminatory Reasons

The University stated that the Complainant's grades were based on the content and the late submission of her work, and were not in retaliation for complaining about the lack of transcription.

Regarding the 30-point deduction on the Complainant's final paper, the course syllabus for XXXXXXXX XXXX XXXXXXXX XX XXX XXXXXXX XXXXXXX XXXX, XX, 2016, stated that "your term paper will be submitted via Turnitin (a link provided on the course Blackboard site." Further, the *Course Schedule* contained in the syllabus states that "TERM PAPER DUE 3/3[2016] (half grade off per day late)." Thus, all students that submitted the final paper past the due date on the course syllabus (March 3, 2016) were assessed a ½ letter grade deduction in accordance with the grading procedures on the course syllabus. The evidence indicated that ½ letter grade deduction is equivalent to a 30-point deduction. The Complainant submitted her term paper on XXXXXX XX, 2016 at XX:XX XX. OCR's review of the University's printout of the electronic assignment board indicated that the due date for the final paper was listed as March 4, 2016, 11:59 pm. The professor explained that the due date for the paper was March 3, 2016, as listed on the syllabus provided to the students at the beginning of the course. He clarified that the date of March 4, 2016, listed on the assignment board was the last date that the paper would be accepted. Based on this information, OCR determined that the University proffered a legitimate, nondiscriminatory reason for the 30-point deduction of the Complainant's term paper grade.

Regarding the Complainant's failing grade on the final exam, the University stated that the Complainant's grades were based on the content of her work. OCR determined that the Complainant obtained a grade of XXX/600 on the final exam, and per OCR's review of her final exam, the University provided her with a detailed explanation for each of her final exam answers, as well as justification for the scoring of each answer. The professor also stated that the failing grade was a result of the content of the Complainant's exam responses, which included (1) misunderstanding of the issue, (2) timeline format rather than argument and analysis format, (3) references to outdated entities, and (4) inadequate bibliography sources. Based on this information, OCR determined that the University had a legitimate, nondiscriminatory reason for provision of a failing grade on the Complainant's final exam.

Pretext

Pretext is evaluated by examining the University's adherence to policies and procedures, the University's past practices, and the consistency or lack thereof in the testimony of the University's witnesses.

Regarding the 30-point deduction, OCR reviewed term paper grades for a classmate, who turned in the final paper on the same day as the Complainant and also received a ½ letter grade penalty (30-point deduction) for lateness. In addition, another classmate requested to turn the term paper in on March 5, 2016, and was denied by the professor and, as a result, received a zero on the term paper due to lateness. The University confirmed that neither of these students engaged in a protected activity. OCR determined that the professor's actions with regards to the Complainant's term paper were consistent with his syllabus and the treatment of other students in the class. Accordingly, OCR determined that there is insufficient evidence that the 30-point deduction was pretext for unlawful discrimination.

Regarding the failing grade on the final exam, OCR determined that seven other students scored lower than the Complainant on the exam. Further, OCR was unable to find any evidence that the Complainant's grade assessment was based on anything other than the content of the Complainant's submitted work, based upon the professor's comments contained in her exam. Based on the credibility of the University's

statements in conjunction with its grading of the entire class, OCR determined that there is insufficient evidence that the 30-point deduction was pretext for unlawful discrimination.

In conclusion, OCR determined that there is insufficient evidence to support a finding that the University retaliated against the Complainant as alleged in violation of Section 504 or Title II.

Issue 2: Whether, from August 2015 to March 2016, the University discriminated against the Complainant on the basis of disability when it failed to provide an academic adjustment (transcripts for class videos), in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44, and the Title II implementing regulation at 28 C.F.R. § 35.130.

The Complainant alleged that during the 2015-2016 academic year the University failed to provide her with the academic adjustment of transcripts for videos, which should have been provided in accordance with her accommodations.

OCR determined that the Complainant appropriately identified herself as a student with a disability in need of academic adjustments, which stated “some of my classes use video and audio lectures. Since there is no closed caption or written material, I need someone to write it out for me.” Further, on December 21, 2015, the University’s XXXXXXXXXXXX XXXXXXXXXXXX emailed the XXXXXXXX XXXX professor a copy of the Complainant’s *Accommodation Letter*, which stated that the “approved accommodations” included “transcription of all online videos and lectures.” The letter also stated that “faculty members did not have the option to (1) refuse to provide the accommodations, (2) select the accommodations they will provide, or (3) modify the accommodations in any way.”

During the Complainant’s XXXXXXXX XXXX course, at least two of the five videos the professor posted on the online blackboard for the class did not have transcription available. In particular, in an email dated January 19, 2015 to the Complainant’s XXXXXXXX professor, the XXXXXXXX XXXXXXXXXXXX confirmed that based on the Complainant’s approved accommodations, there would need to be transcripts for any videos shown in the course. On January 20, 2016, the professor acknowledged to the Complainant in an email that there was no transcript available for a movie he posted that was only to be used as “background information.” The professor indicated that the Complainant could possibly get the movie from the library or read a suggested book to get the information. Further, the professor attempted to locate transcription for a second video posted in the course that also did not have transcription, but was only able to locate a closed caption version on YouTube. The XXXXXXXXXXXX XXXXXXXXXXXX acknowledged to the professor that YouTube’s captioning feature was “inadequate” and “very difficult to impossible to get accurate information.” The professor offered to excuse the Complainant from participation in the module and provide her an alternate version of the final exam with those questions removed.

OCR also reviewed email communication from the University’s XXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX XXXXXXXXXXXX (Director) to the Complainant dated January 20, 2016, upon which the Director conducted an internal inventory of video usage by the University’s XXXXXXXX professors. The Director identified to the Complainant those XXXXXXXX courses which contained transcribed videos and those that did not, and suggested that if the Complainant wished to take any of those courses identified in which videos did not have transcription, she could work with a University staff member to obtain the transcripts.

Prior to the completion of OCR’s investigation, the University requested to voluntarily resolve this issue. In order to complete the investigation of this issue, OCR would need to interview University staff and review additional documentation to determine whether the University effectively provided the

Complainant with her academic adjustment and/or engaged in the interactive process to provide a sufficient alternative.

Proposed Agreement

Pursuant to Section 302 of OCR's *Case Processing Manual*, a complaint may be resolved when, before the conclusion of an investigation the recipient or public entity expresses an interest in resolving the complaint. The attached Agreement will require the University to take actions to remedy any compliance concerns regarding disability discrimination and retaliation, and includes the following provisions: (1) revise its process for the provision of academic adjustments to its students who are deaf or hard of hearing to include the creation of a plan to ensure either effective transcription for all audio visual materials in all courses or alternative educational materials and (2) provide annual Section 504/Title II training for all faculty, administrators and staff, including individuals, such as professors, involved in implementing or approving the procedures for requesting academic adjustments, auxiliary aids and other modifications. The provisions of the Agreement are aligned with the complaint allegation and the information obtained during the investigation is consistent with applicable regulations.

On November 28, 2016, OCR received the enclosed signed Agreement that, when fully implemented, will resolve the issue. OCR will monitor the University's implementation of this Agreement to ensure that it is fully implemented. If the University fails to fully implement the Agreement, OCR will reopen the case and take appropriate action to ensure compliance with Section 504 and Title II.

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 College may not harass, coerce, 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. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact Zandra Hall at (404) 974-9290, or me at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer, Esq.
Compliance Team Leader

Enclosure

cc: XXXX XXXXXX, XXX