



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

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

REGION IV
ALABAMA
FLORIDA
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December 5, 2017

Dr. Tony G. Waldrop
President
University of South Alabama
307 N. University Blvd
Mobile, AL 36688

Re: Complaint #04-16-2275

Dear Dr. Waldrop:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its case resolution process regarding the above-referenced complaint filed against the University of South Alabama (University), on July 14, 2016. Specifically, the Complainant alleged:

1. The University engaged in discrimination on the basis of disability (XXXX XXXXXXXXXXXX) when on XXX XX, XXXX, the university dismissed the Complainant from its XXXXX XXXXXXXX XXXXXXXX (XXX) program for failing oral exams after the University failed to provide an academic adjustment (written exam); and
2. During the 2015-2016 school year, the University discriminated against the Complainant and similarly situated students with disabilities when it implemented a policy of requiring oral examinations for all Ph.D. candidates regardless of oral disability status.

OCR investigated this complaint pursuant to Section 504 of the Rehabilitation Act of 1973 (Section 504), 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 (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 by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the University is subject to these laws. Additional information about the laws OCR enforces is available on our website, at <http://www.ed.gov/ocr>.

OCR proceeded with an investigation of the following legal issues:

1. Whether the University engaged in discrimination on the basis of disability (XXXX XXXXXXXXXXXX) when on XXX XX, XXXX, the University dismissed the Complainant from its XXXXX XXXXXXXX XXXXXXXX (XXX) program for failing oral exams after the University failed to provide an academic adjustment (written exam), 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.

2. Whether during the 2015-2016 school year, the University discriminated against the Complainant and similarly situated students with disabilities when it implemented a policy of requiring oral examinations for all PhD candidates regardless of oral disability status, in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.43 and the Title II implementing regulation at 28 C.F.R. § 35.130.

During its complaint resolution process, OCR interviewed the Complainant and witnesses from the University and also reviewed evidence submitted by the Complainant and the University. A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). 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 pursuant to Section 302 of OCR's *Case Processing Manual*. Provided below is an analysis of OCR's investigation thus far of the legal issues.

Regulatory Requirements

Issue 1:

The Section 504 implementing regulation at 34 C.F.R. § 104.44(a) requires 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. 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.

Further, in accordance with the Section 504 implementing regulation at 34 C.F.R. § 104.44(c) recipients, in their course examinations or other procedures for evaluating students' academic achievement, shall provide such methods for evaluating the achievement of students who have a disability that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

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.

Issue 2:

The Section 504 implementing regulation at 34 C.F.R. § 104.43(a) requires that no student with a disability shall, on the basis of disability, be excluded from participation in, be denied the

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benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits or services. Further, the Section 504 implementing regulation at 34 C.F.R. § 104.43(c) states that a recipient to which this subpart applies may not, on the basis of disability, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity. As stated above, Title II's general prohibitions against discrimination incorporate the relevant provisions of the Section 504 regulation.

Under Section 504, recipients may not implement a neutral qualification standard or selection criterion that screens out individuals on the basis disability and those individuals are able to satisfy other requirements. A recipient may rebut an allegation of discriminatory qualification standards if the recipient proves that the challenged standard is educationally necessary and there are no alternatives with lesser impact and/or the recipient proves that the Complainant could not meet the standard with reasonable accommodation/academic adjustment or modification.

Background

The Complainant was enrolled at the University from August 2010 - May 2016 in its College of Medicine, XXXXX XXXXXXXX XXXXXXXX (XXX) Graduate program where he was pursuing a Ph.D. degree. The XXX *Interdisciplinary Graduate Program Handbook* indicates a requirement for students obtaining entry to its Ph.D. program to pass both portions of a Ph.D. Qualifying Exam (Qualifying Exam) consisting of both written and oral components. The policy allows for students that do not pass the exam to retake it a second time and grounds for dismissal from the program include two unsuccessful attempts to pass the exam. The Complainant failed to pass both the written and oral portions of the Qualifying Exam on XXXXXXXX XX and XXXX XX, 2015. The Complainant asserts that after failing the exam for the second time in XXXX 2015, he notified the University that his approved accommodations were not working due to an XXXX XXXXXXXXXXXX and requested an academic adjustment (written exam) for the oral portion of the exam. The Complainant contends that the University allowed him a third attempt to pass the exam but discriminated against him on the basis of disability when it failed to provide the academic adjustment of a written exam due to an XXXX XXXXXXXXXXXX XXXXXXXXXXXX and dismissed him from its program in XXX XXXX after he failed the oral portion of the exam a third time.

Policies

The University's Student Disability Services Handbook (SDS Handbook) includes a copy of OCR's guidance document, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, which notifies students that a specific academic adjustment may be requested and the school may offer that academic adjustment or offer an effective alternative. The SDS Handbook also informs students that: (1) the University is not obligated to provide services for students with disabilities until they register with the SDS office and request accommodations; (2) students are responsible for requesting accommodation letters from SDS at the beginning of each semester and delivering accommodation letters to instructors; (3) instructors are not obliged to provide accommodations until they receive official

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accommodation letters from students; and, (4) students are responsible for reporting any concerns about accommodations to SDS as soon as possible. The University's *Student Handbook: Interdisciplinary Graduate Program in XXXXX XXXXXXXX XXXXXXXX* (Graduate Handbook) informs students that with disabilities requesting services must submit documentation to the SDS office¹ and documentation must be on file before the student is eligible to receive reasonable accommodations.

Summary of Investigation

Issue #1:

Whether the University engaged in discrimination on the basis of disability (oral expression) when on XXX XX, XXXX, the University dismissed the Complainant from its Basic Medical Science (BMS) program for failing oral exams after the University failed to provide an academic adjustment (written exam), in noncompliance with the 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.

When determining whether a student was discriminated against because of a Recipient's failure to provide an academic adjustment or modification, OCR looks to determine whether: (1) the Complainant is a qualified individual with a disability, (2) notified the Recipient of the disability and need for academic adjustment/modification, (3) there is an adjustment or modification that would allow the Complainant to participate in the educational program, and (4) the Recipient failed to engage in the interactive process and/or provide an effective adjustment/modification.

Whether the Complainant Is A Qualified Individual With A Disability & Notified the Recipient of A Need For Academic Adjustment/Modification

The evidence reviewed thus far established that the Complainant self-identified and registered with the University's Student Disability Services (SDS) office in October 2010 as a qualified individual with a disability (XXXX), needing a tape recorder in the classroom and extended testing time. The Complainant submitted supporting medical documentation and the University provided the following approved accommodations: (1) double time for essay exams, (2) double time for math exams, (3) time and a half for objective exams, (4) testing in a distraction-reduced environment, (5) use of priority seating in class, and (6) use of a tape recorder in class. The University submitted documentation indicating that on February 11, 2015, it provided the Complainant an accommodation letter containing these same accommodations to forward to his Graduate department prior to his first oral exam scheduled for February 13, 2015. Additional medical documentation the Complainant submitted to the University in May 2014 in order to receive extended time on the Medical College Admission Test (MCAT), confirmed the Complainant's qualified disability status (XXXX and XXXXX XXXXXXXX [XXXXXX-XXXXX XXXXXXXXXXXX XXXXX and XXXXXX (XXXXXXXXXX and XXXXXX) XXXXXXXXXXXXXXXX] with the following recommended adjustments: (1) extended time on all tests and standardized assessments in a distraction free environment, (2) continue

¹ The Student Disability Services Office is referenced by its former name (Office of Special Student Services) in the Graduate Handbook. The current name for the office is used throughout this document.

accommodations of taping all lectures, (3) front row seating, and (4) use of a dictation program or a computer to type test questions and complete homework assignments. There was no reference to an XXXX XXXXXXXXXXXX XXXXXXXXXXXX for which the Complainant needed accommodation of a written or multiple-choice test.

OCR reviewed evidence showing that on March 23, 2016, the Complainant submitted medical documentation to the University confirming his status as an individual with a qualified disability needing exams in “a standardized multiple-choice or other selected-response format” rather than short answer, essay or oral format. The evidence established the Complainant as a qualified individual with a disability and need for academic adjustment. Additionally in the March 23, 2016, letter, the Complainant stated that he can compensate for his expression difficulties by scripting his presentation beforehand, rehearsing multiple times, and using notes to help maintain focus while speaking.

Based on the evidence reviewed, OCR determined that the Complainant is a qualified individual with a disability who on XXXXXXXX XX, 2015, after his second attempt to pass the Qualifying Exam, notified the University of the need for an additional academic adjustment of time to write down questions and organize his thoughts on paper before giving an answer and on XXXXX XX, 2016, after a third unsuccessful attempt to pass the oral portion of the Qualifying Exam, he notified the University of the need for an academic adjustment of a written multiple choice exam in place of the oral exam.

Whether there is an Adjustment or Modification that Would Allow the Complainant to Participate in the Educational Program

Evidence OCR obtained thus far indicates that on October 27, 2010, the University approved the following academic adjustments to help the Complainant participate in the educational program: (1) double time for essay exams, (2) double time for math exams, (3) time and a half for objective exams, (4) testing in a distraction-reduced environment, (5) use of priority seating in class, and (6) use of a tape recorder in class. Further, the Complainant appealed to the University on XXXXXX XX, 2015, to allow him a third attempt to pass the Qualifying Exam (both written and oral portions) due to his XXXXXXXX disability, and he requested an alternative format in the form of time to write down questions and organize his thoughts on paper before giving an answer. The University submitted evidence showing that on XXXXXX XX, 2015, it provided the Complainant his requested alternative format. OCR also reviewed documentation showing the University provided the following additional modifications for the Complainant’s third oral exam on XXXXXXXX XX, 2016: (1) provided the topic areas covered in the oral exam two weeks in advance as a preparation guide; (2) provided a list of primary questions to be asked by the Qualifying Committee during the oral exam the day before the exam; (3) allowed him to bring in a single page of paper with notes/key points that he felt would be helpful; (4) provided pen and paper for any scratch work; (5) allowed him the opportunity to bring slides/PowerPoint to the exam in case he needed material to help address any questions; and (6) provided him use of a dry-erase board. Based on the information submitted, there were academic adjustments or modifications that would have allowed the Complainant to participate in the University’s educational program.

Whether the Recipient Failed to Engage in the Interactive Process and/or Provide an Effective Adjustment/Modification

If there was a denial of academic adjustments, OCR considers whether the University engaged in a deliberative process upon its denial of the Complainant's academic adjustments. A recipient is not required to provide the specific accommodation/adjustment requested, but must provide an effective adjustment. Information obtained during interviews indicated that students are informed to go to the SDS office for accommodations but could request assistance directly from professors or within the graduate office without going through the SDS office.

A review of the evidence showed that on XXXXXX XX, 2015, after his second unsuccessful attempt to pass the both the written and oral portions of the Qualifying Exam, the Complainant requested that SDS provide an academic adjustment (write down his thoughts before providing answers) for his oral exams and on XXXXXX XX, 2015, SDS denied the request. However, also on XXXXXX XX, 2015, the Complainant notified the Appeals Committee in writing that his current accommodation of double time was not working due to his learning disability and they met with him on XXXXXX XX, 2015, and granted his requested academic adjustment of an alternative format for the oral exam.

The University provided documentation indicating it also offered the Complainant additional modifications for the third oral exam so that he would have time to prepare written materials, including notes and exam responses, prior to the exam and bring those written items with him to the exam. During a telephone call with OCR staff on XXXXXXXX XX, 2017, the Complainant confirmed that the University gave him an opportunity to write down answers to the exam questions and bring them to the exam so that he could read the answers if needed, but that he did not write down the answers because "he didn't read that far into the email" and never saw where the Qualifying Exam Committee gave him permission to do so.

Additional documentation reviewed by OCR showed that on XXXXX XX, 2016, after failing the oral portion of the Qualifying Exam a third time, the Complainant appealed to the University and submitted medical documentation, specifically identifying him as having an oral expression disability needing an academic adjustment of a standardized, multiple choice or other selected-response format. The University's SDS staff contacted the Complainant, the Complainant's Qualifying Exam moderator and the graduate department director to discuss the new documentation and accommodation request, before denying the Complainant's request for academic adjustment of a written, multiple choice format. SDS staff referenced the timing of the Complainant's request (after he had already taken the exam on more than one occasion) and cited the oral exam as an essential component of the program requirement as stated in the graduate handbook.

The Complainant appealed the denial of format change to a written exam and the University met with him on XXXXX XX, 2016 to discuss the appeal and contacted his medical provider on XXXXX XX, 2016, to gain additional information related to his oral disability. The SDS Director also wrote a letter to the Appeals Committee on XXX X, 2016, on behalf of the Complainant indicating that SDS engaged the Complainant's medical provider, advocated for his entrance into the Ph.D. program and offered to assist in any deliberative process for

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modifications of the oral exam for individuals with speech disabilities. The SDS Director also inquired to the Appeals Committee as to the subjectivity of the assessments as one committee member felt the Complainant demonstrated sufficient basic medical science knowledge and there was no written rubric or published expectations for the oral exam other than pass/fail.

The evidence submitted reflects that after the Complainant notified the University in writing in XXXXXX 2015 that his previously approved academic adjustments were not working, the University engaged in the interactive process and provided the Complainant with effective adjustments/modifications which included allowing the Complainant a third opportunity to take the Qualifying Exam (with no time limit), providing him exam topics and questions prior to the exam, allowing him to bring written notes and a presentation into the exam, and giving him time to write down questions and organize his thoughts on paper prior to responding during the exam, per the Complainant's request. The University engaged the Complainant, pertinent University staff as well as the Complainant's medical provider before denying his SDS appeal.

Based on the information submitted, OCR determined that there was insufficient evidence to find the University 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, as alleged in the complaint.

Issue 2:

Whether during the 2015-2016 school year, the University discriminated against the Complainant and similarly situated students with disabilities when it implemented a policy requiring oral examinations for all PhD candidates regardless of oral disability status in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.43 and the Title II implementing regulation at 28 C.F.R. § 35.130.

A prima facie case for discriminatory qualification standards requires that the standard or selection criterion screens out individuals with disabilities on the basis of disability and the complainant satisfies other requirements. A recipient may rebut an allegation of discriminatory qualification standards if the recipient proves that the challenged standard is educationally necessary and there are no alternatives with lesser impact and/or the recipient proves that the Complainant could not meet the standard with reasonable accommodation/academic adjustment or modification.

The University maintained that the Complainant failed to pass either the written or the oral portions of the Qualifying Exams in XXXXXXXX and XXXX 2015, and for the third exam, the University provided the Complainant his requested academic adjustment of an alternative format in addition to providing other academic adjustments which would allow him to write responses prior to taking the exam; however, the Complainant did not satisfy the knowledge requirements of its program even with the Complainant's requested alternative format.

Information obtained during interviews with University staff members was conflicting with regards to whether the University's oral portion of the exam was educationally necessary. In interviews with University faculty familiar with the Complainant and the program, one staff

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member said that the oral component has always been oral because students are going outside the school to do research, would be challenged to prove their work, and “have to be able to do that in a verbal manner if they’re going to be in research and academia.” Two other staff members stated that the oral exam did not have to be oral, could be conducted in other formats (i.e. via computer, sign language, or an interpreter) and that the purpose of the qualifying exam was for students to demonstrate overall knowledge of biomedical science, defend their research, demonstrate understanding of the research, and allow for interactive questioning. However, OCR also reviewed communication between the Graduate office and the SDS office in XXXXX 2016 that indicated that there was some discussion that changing the oral component to solely written and/or multiple choice would not be appropriate as students are informed upon acceptance that there are both written and oral components. Further, in denying the Complainant’s appeal after his third unsuccessful attempt at the oral portion of the exam, an SDS staff member communicated to the Complainant that the oral portion of the exam was an essential component of the program as stated in the Graduate Handbook.

The University’s *Student Handbook: Interdisciplinary Graduate Program in XXXXX XXXXXXXX XXXXXXXX* (Graduate Handbook) states that the Ph.D. candidacy Qualifying Exam consists of both written and oral components and that both parts must be passed in order for entry into its Ph.D. candidacy program. The Graduate Handbook also informs students that they can request accommodations through the SDS office. In its response to OCR, the University indicated that six of its Ph.D. programs require oral examinations but that students with documented disabilities that register with the University and request alternatives to the oral exam would be engaged in an interactive process to find reasonable accommodations. The University’s response also reflected that for the 2014-2015, 2015-2016 and 2016-2017 academic years, no students other than the Complainant requested an alternative to the oral exams.

During interviews, University staff stated that only two or three students over the past eight years have not passed the exam; although students with XXXX have been accommodated and passed the qualifying exam. Three of four staff members confirmed they had no recent formal training, if any, regarding disability-related services and no one referred the Complainant back to SDS prior to advocating on his behalf or providing academic adjustments. Prior to OCR completing its investigation to determine if the University conducted reasoned deliberations to demonstrate that a requirement is essential to its program, the University voluntarily requested to resolve Issue #2.

Actions Required to Complete Investigation and Justification for Complaint Processing Manual (CPM) Section 302 Resolution

Prior to the completion of OCR’s investigation of this allegation, the University expressed interest in resolving Issue #2 in accordance with Section 302 of OCR’s CPM. To complete its investigation, OCR would need to conduct additional interviews with University staff members to determine the training, knowledge, and experience level of those involved in the decision-making process for modification requests to its oral exam component in addition to reviewing the disability status of any students that did not pass the oral portion of the Qualifying exam. OCR has some concern that the Graduate Handbook and staff perception imply that the oral portion of the exam may not be subject to modification, even though the University did provide an

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alternative format to the Complainant. OCR would also need to view the University's process for determining essential components of its Ph.D. programs, as there are six other programs that require oral examination.

Resolution Agreement

Based on the totality of evidence available to OCR at this time, OCR determined that entering into a 302 voluntary resolution agreement addressing legal issue #2 is appropriate. On December 1, 2017, the University signed the enclosed Resolution Agreement (Agreement) which, when fully implemented, will resolve the complaint.

The enclosed Agreement requires the University to: (1) convene a committee to engage in a deliberative process and draft academic adjustment processes and procedures used to determine what academic requirements are essential to its programs requiring oral examinations as well as what modifications would fundamentally alter a course or academic program; (2) revise its XXX *Interdisciplinary Graduate Program Handbook* and any other handbooks/publications for its programs requiring oral exams to clearly reflect that the oral portions of its examinations are available for modification for students approved for academic adjustments; (3) conduct annual Section 504/Title II training for all faculty/staff and administrators in its XXX program and other programs requiring oral examinations, all SDS staff members, the Section 504 Coordinator and any others involved in decisions concerning requests for academic adjustments, auxiliary aids and other modifications.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and is consistent with applicable regulations. OCR will monitor the implementation of the Agreement until the recipient is in compliance with the statutes and regulations at issue in the case.

Conclusion

This letter sets forth OCR's determination in an individual OCR case and 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 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.

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.

Please be advised that intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the

laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's investigation 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: XXXXXXXX XXXXXXX XXXXXX, Esq.