



**UNITED STATES DEPARTMENT OF EDUCATION**  
**OFFICE FOR CIVIL RIGHTS REGION IV**  
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ATLANTA, GEORGIA 30303-8927

**Region IV**  
Alabama, Florida  
Georgia, Tennessee

July X, 2018

Sister Linda Bevilacqua  
President  
**BARRY UNIVERSITY**  
11300 NE 2<sup>nd</sup> Avenue  
Miami Shores, Florida 33161

Re: Complaint #04-17-2056

Dear Sister Bevilacqua:

On November 9, 2016, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint that the Complainant and her legal counsel filed against Barry University (University) alleging discrimination on the basis of disability and retaliation during the Complainant's enrollment in the University's Nursing program (Program). Specifically, the Complainant alleged that the University failed to provide the Complainant with accommodations required to enable her to access the Program and retaliated against her after she complained about the University's failure to accommodate her.

OCR is responsible for enforcing 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 prohibits 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), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35, which prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department, the University is subject to the provisions of Section 504. As a public entity, the University is also subject to the provisions of Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

OCR investigated the following legal issues:

1. Whether the University discriminated against the Complainant on the basis of disability by failing to provide necessary academic adjustments for the Complainant in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44.
2. Whether the University retaliated against the Complainant in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq., at 34 C.F.R. § 100.7(e).

OCR reviews evidence under the preponderance of the evidence standard. Under a preponderance of the evidence standard, OCR evaluates evidence obtained during an investigation to determine

whether the greater weight of the evidence is sufficient to support a particular conclusion or whether the evidence is insufficient to support such a conclusion. OCR's findings and conclusions are discussed below. In reaching a determination in this case, OCR reviewed documents provided by the Complainant and the University and interviewed the Complainant and University staff.

After carefully considering all of the information obtained during the investigation, OCR found insufficient evidence to support Issue 1 of the complaint. Prior to the completion of OCR's investigation, the University requested to voluntarily resolve Issue 2 of this complaint. Pursuant to Section 302 of OCR's Case Processing Manual, a complaint may be resolved, before the conclusion of an investigation, when the recipient or public entity expresses an interest in resolving the complaint. The attached Resolution Agreement (Agreement) will require the University to take actions to remedy any potential compliance concerns.

### **Legal Standards**

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. Because the University receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Pursuant to 34 C.F.R. Section 104.43 (a) no qualified disabled student shall, on the basis of disability, be excluded from participation in, be denied the 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. (c) A recipient may not, on the basis of disability, exclude any qualified disabled student from any course, course of study or other part of its education program or activity.

Pursuant to 34 C.F.R. Section 104.44 (d) a recipient shall take such steps as are necessary 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. Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairment, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.

Retaliation is prohibited under 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), 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 the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation or other matter in connection with a complaint.

**Factual Findings**

The Complainant enrolled in the Program in September 2014. The evidence shows that the Complainant notified the University of her Type I diabetes, during her undergraduate enrollment at the University through a Disability Services Intake Form. Review of the Complainant's Office of Disability Services (ODS) file shows that the Complainant reached out to the University requesting additional accommodations in January 2016 during her enrollment in the Program. During this period the ODS office was operated by the Director. The University utilized a former director of the ODS (Former Director) to assess students' requests for accommodations and medical documentation. The Complainant's ODS file includes a January 2016 email from the Former Director to the Director stating that she met with the Complainant by phone, reviewed her medical documentation and concluded that in order to accommodate the Complainant's disability she should be permitted to eat snacks and drink beverages during testing to help regulate her blood sugar and that, if the Complainant required a break to visit the restroom, she was approved an additional 15 minutes of time to complete her testing.

The documentation shows that when the Complainant took the High Acuity course in May 18, 2016, she was approved for the following accommodations: eat a snack during class, testing in ODS, ability to have snacks and/or drinks during her exams as medically needed. OCR notes that although the Complainant alleged that she was permitted time and a half for testing as an accommodation the accommodations memo shows no record of this.

The University reported to OCR that the Complainant's High Acuity Professor (Professor) made a decision to offer the Complainant time and a half on testing in order to avoid the question of whether an additional 15 minutes was needed. However, in an interview with OCR, the Professor described the extended time for the Complainant as an accident. The Professor reported that the Complainant submitted her accommodations memo at the same time as another student (who had been approved for extended time) and the Professor mistakenly input the Complainant for extended time on testing as a result.

During rebuttal the Complainant reported that she had been approved for extended time in every test in all of her other classes in the Bachelors of Science in Nursing program after January 2016. The Complainant stated that she had to enter her approved accommodations in a computerized system for each test and that she entered DRE for distraction reduced environment and EXT for extended time for each. Review of the Complainant's ODS file shows entry of those codes for testing in the High Acuity class as well as the Complainant's other courses.

Based on the foregoing, although the evidence is inconclusive as to how the Complainant was approved for time and a half extended time. The University has conceded that the Complainant was "approved" time and a half at least for purposes of the High Acuity course and the evidence supports the Complainant's contention that she had been provided the same in other exams in the Program, OCR examined whether the Complainant was denied time and a half in the final exam in High Acuity, as alleged.

**Issue One: Whether the University discriminated against the Complainant on the basis of disability by failing to provide necessary academic adjustments for the Complainant in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.44.**

Facts & Analysis

On July 7, 2016 the Complainant took the final exam for High Acuity. The exam was conducted in two parts; the substantive final exam and a separate online Kaplan test. The Complainant has conceded that she received extended time for the substantive final exam, and alleged that the University failed to implement the accommodation for extended time for the online Kaplan portion of the test. Specifically, the Complainant alleged that the timer on the screen for the Kaplan exam counted down the standard amount of time and did not contain the additional time approved for the Complainant. The Complainant stated that she rushed through the online Kaplan exam because of the timer. The Complainant said that the ODS Administrative Assistant told her when she was on question 75 that the timer was not accurate for her and she could have more time if she needed, however, she was unable to go back to earlier questions.

When interviewed by OCR, the ODS Administrative Assistant denied the Complainant's contention and stated that she did not interact with the Complainant during the Kaplan final exam for High Acuity. The Professor stated that the Kaplan exam has a countdown clock and when the time reaches zero a box pops up which asks a student if they want additional time, if the student has been approved for additional time. If they click yes, the additional time is provided. When interviewed by OCR, the Complainant stated that she had never let the Kaplan time clock run down to zero so she did not know if the Professor's statement was correct, but stated that because she was unable to go back in the test to look at the exam questions she had already completed any potential additional time was useless. The Complainant alleged, and an email record verifies, that the Complainant notified the Professor about the lack of accommodation on the day of testing. In her email to the Professor, the Complainant asked if she could retake the Kaplan exam again without the rush since her grade was far below her average for the Kaplan portion of tests.

The evidence shows that the Complainant's failed the substantive portion of the High Acuity final making her success or failure on the Kaplan portion of the exam. Review of the High Acuity syllabus shows that the Kaplan portion of the exam is not included in calculation of the final score unless the student had achieved an unrounded, weighted average of 76% on the four exams in the course. The evidence shows that the Professor reminded the Complainant of this fact via email on the July 7, 2016 after receiving the Complainant's final exam score of 59.18% and noted in the email that the Complainant's overall score on the four exams was 70.27%. Review of the Complainant's grades shows that the Complainant failed the last two exams in the High Acuity course and did not meet the 76% requirement. During a rebuttal conversation with the Complainant and the Complainant's attorney, the Complainant conceded that the syllabus terms, and her failure of the 3<sup>rd</sup> and 4<sup>th</sup> (final) exam of the course meant that the result in the Kaplan portion of the exam would not be included in calculation of her final score.

The Complainant, through negotiation with legal counsel, was able to obtain an opportunity to retake the *undisputed* substantive portion of the High Acuity final exam in September 2016 with extended time and reduced distraction. The Complainant confirmed that she failed the exam again and as a result she did not retake the Kaplan portion of the exam.

Conclusion

OCR finds that the evidence is disputed as to whether the Complainant was denied extended time on the Kaplan portion of the exam. OCR finds, however, that the issue of whether the University provided the Complainant with extended time on the Kaplan is moot due to the failure of the substantive portion of the final exam for which there is no dispute regarding extended time. Based on the foregoing, OCR is administratively closing this complaint allegation as moot pursuant to Section 110(o) of OCR's Case Processing Manual. OCR cautions the University that it should endeavor to maintain accurate recording of approved accommodations for students as well as record of the provision thereof and that failure to do so could result in failure to provide appropriate access to students with disabilities.

**Issue Two: Whether the University retaliated against the Complainant in noncompliance with the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d et seq., at 34 C.F.R. § 100.7(e).**

Prior to the completion of OCR's investigation, the University requested to voluntarily resolve Issue 2 of this complaint. On July 12, 2018, OCR received the enclosed signed Resolution Agreement (Agreement) that, when fully implemented, will resolve the complaint. 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. The Complainant may file a private suit in federal court whether or not OCR finds a violation.

This concludes OCR's investigation of the complaint 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 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.

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 provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please be advised that the University 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.

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 matter, please contact Colleen Grogan at (404) 974-9395.

Sincerely,

Andrea de Vries  
Compliance Team Leader

Enclosure