



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

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March 14, 2019

Dr. Randy K. Avent
President
Florida Polytechnic University
4700 Research Way
Lakeland, Florida 33805-8531

OCR Docket # 04-19-2022

Dear Dr. Avent:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed on October 10, 2018, against Florida Polytechnic University (University) alleging discrimination based on disability. The complaint alleged that the University failed to provide the Student with approved academic adjustments during the fall 2018 semester. The complaint also alleges that the University retaliated against the Student by instructing him not to discuss his academic adjustments with his instructors.

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 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), 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, 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 opened an investigation of the following legal issues:

1. Whether the University discriminated against the Student, when it failed to provide academic adjustments during the fallⁱ 2018 semester, 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 the University retaliated against the Student, when it instructed him not to discuss his academic adjustments with his instructors, 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.

During the investigation of this complaint, OCR reviewed documents provided by the Complainant and the University, including the Student's disability services file and communications between the Complainant, Student and the University staff. After submission of the documentation above, but before OCR completed review of the documentation or conducted interviews; on December 19, 2018, the University requested to resolve this complaint pursuant § 302 of OCR's *Case Processing Manual*. Section 302 states that allegations under investigation may be resolved at any time when, prior to the point when the Regional Office issues a final determination, the recipient expresses an interest in resolving the allegations and OCR determines that is appropriate to resolve them because OCR's investigation has identified issues that can be addressed through a resolution agreement. OCR has determined that it is appropriate to resolve Issue #1 of the complaint with a § 302 resolution agreement because OCR's investigation has identified issues that can be addressed through a resolution agreement.

On Mach 8, 2019, the District submitted the enclosed signed Resolution Agreement, which, when fully implemented, will address Issue #1.

OCR reviewed the 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 has concluded there is insufficient evidence of a violation of Section 504 and Title II, with regard to Issue #2. The basis for OCR's determination is discussed below.

Legal Standards

The Section 504 implementing regulation 34 C.F.R. § 104.44(a) requires recipient colleges and universities to make modifications to their academic requirements that 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. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. 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 Section 504 implementing regulation 34 C.F.R. § 104.61 incorporates the Title VI implementing regulation 34 C.F.R. § 100.7(e), which states, "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 section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part." The regulation implementing Title II is interpreted consistent with the regulation implementing Section 504.

OCR interprets the regulations it enforces, consistent with case law regarding analogous provisions, to require satisfaction of the following three elements to find a prima facie case of

retaliation: (1) an individual experienced an adverse action caused by the recipient; and (2) the recipient knew that the individual engaged in a protected activity or believed the individual might engage in a protected activity in the future; and (3) there is some evidence of a causal connection between the adverse action and the protected activity.

After OCR has been able to infer a causal connection between the protected activity and the adverse action, an inference of unlawful retaliation is raised. OCR will then determine if the recipient has identified a facially legitimate, non-retaliatory reason for the adverse action. If the recipient identifies a facially legitimate, non-retaliatory reason for the adverse action, OCR next conducts a pretext inquiry to determine whether this reason is genuine or is a cover for retaliation.

Background

The Student enrolled and began classes at the University in fall 2016 with a major in mechanical engineering. On July 4, 2016, the Student submitted a formal request to the University's Office of Disability Services (ODS) for academic adjustments. The Student's request included supporting documentation, including his high school IEP and documentation of his diagnoses of ADHD, dyslexia, and associated learning/processing deficits. On July 6, 2016, the University notified him that he was determined eligible for academic adjustments. The Student and the University engaged in an interactive process, including meetings and an appeal process in response to the denial of some of his requested academic adjustments. On November 28, 2016, the Student received his final list of approved academic adjustments from ODS; on January 31, 2017, ODS reinstated the list for the spring 2017 semester. On March 3, 2017, ODS revised the list of academic adjustments to include the following: Permission to use notes, procedures, study guides, and graphic organizers, but not limited to formulae on all class assessments and assignments, identified by the University as "accommodation #5".

In fall 2018, when the Student was in his third year at the University, the Complainant filed this complaint on behalf of the Student alleging discrimination based on disability. Currently, the Student is on a medical withdrawal from the University.

Issue 1: Whether the University discriminated against the Student when it failed to provide academic adjustments during the fall 2018 semester, in noncompliance with 34 C.F.R. § 104.44, and 28 C.F.R. § 35.130.

In an email dated September 6, 2018, the Student's Calculus Professor notified him that he may not include solutions sheets from homework assignments in the materials he brings to quizzes and exams. The Calculus Professor's email stated, in part, "It's part of the effort to make sure that you learn all the course objectives and course learning outcomes at a proper level." On September 13, 2018, the Student took a Calculus quiz without the use of the solutions sheets from homework assignments.

On September 20, 2018, the Vice Provost of Academic Support Services (Vice Provost)ⁱⁱ, sent an email to the Student regarding "[t]he University's application of your accommodation #5." The Vice Provost's email states, in part, "As you know, accommodation #5 on your Florida Poly

accommodation letter contains broad language. In order to ensure that your professors can adequately evaluate your ability to meet the learning objectives of the course, reasonable boundaries need to be established so that professors can effectively assess that you are meeting the course learning objectives. If the materials used by you during an exam are overly broad such as text books with example problems that are very similar to the exam itself or copies of worked homework or past exam problems, the professor is unable to determine whether or not you can meet the learning objective.” The Complainant was verbally notified by his Physics Professor that he could not bring the following to take a quiz, text or exam: completed homework problems or assignment solutions. The Student took a Physics test on September 21, 2018, without certain items of the academic adjustments referenced in accommodation #5.

The Student notified the University that he objected to the Physics and Calculus instructors’ determination of how accommodation #5 would be implemented in their respective courses, asserting that their determinations rendered his academic adjustments inadequate and ineffective in meeting his disability-related needs. Without any further deliberative or interactive process, the Student took the Physics test and Calculus quiz in September 2018 without all of the items that may have been encompassed in accommodation #5.

On December 19, 2018, before OCR completed its investigation of this complaint, including conducting witness interviews or reviewing all of the evidence in order to establish whether the University provided the Student with appropriate academic adjustments in compliance with 34 C.F.R. § 104.44 and 28 C.F.R 35.130, the University requested to resolve this complaint issue pursuant to CPM § 302.

The Resolution Agreement signed by the University offers the Student an opportunity to engage in an interactive process to determine whether the academic adjustments that the University provided for the Student’s Calculus and Physics exams in September 2018, were of adequate quality and effectiveness. If the University determines that it did not provide the Student with appropriate academic adjustments for either or both of the Student’s September 2018 Calculus and Physics exams, the University will offer the Student an opportunity to retake, as appropriate, the Calculus and/or Physics assessments, dated September 13, 2018 and September 21, 2018, respectively, with the appropriate academic adjustments and at no cost to the Student. The University will also re-calculate the Student’s final grade(s) for the his Calculus and Physics courses to reflect the updated exam result(s) and will update his transcript to reflect the revised Calculus and/or Physics grade(s) for the fall 2018 semester.

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

Issue 2: Whether the University retaliated against the Student when it instructed him not to discuss his academic adjustments with his instructors, in noncompliance with 34 C.F.R. § 104.61, and 28 C.F.R § 35.134.

The Complainant alleged that the University retaliated against the Student by instructing him not to contact his professors regarding his disability-related needs; rather, the Student was required

to exclusively contact the Vice Provost because the Complainant spoke at the State of Florida Universities Board of Governors meeting on September 13, 2018, about the challenges the Student had faced at the University in meeting his disability-related needs.

On September 20, 2018, the Vice Provost sent an email to the Student that addressed the implementation of accommodation #5 (referenced above). Specifically, the Vice Provost explained, “To address the issue and provide a reasonable interpretation of ‘Permission to use notes, procedures, study guides, and graphic organizers, but not limited to formulae on all class assessments and assignments’ your professors will indicate on their ASC Testing Ticket materials that you are allowed to use in the exam”. In addition, the email referenced the conversation(s) that the Student had with his Physics Professor about *accommodations #5* for the Physics exam. The Vice Provost concluded the email by stating, “All questions or concerns with the University’s application of your accommodation #5 must be addressed to [Vice Provost] Vice Provost of Academic Support Services. [Vice Provost] will function as a single point of contact for any and all communications regarding your accommodations at Florida Polytechnic University.”

OCR considered whether this act by the University constituted an *adverse action*. To make this determination, OCR considered whether the alleged adverse action caused lasting and tangible harm, or had or could reasonably have a deterrent effect. The complaint does not allege and the evidence does not support that the Student suffered lasting or tangible harm from being directed to communicate with the Vice Provost regarding his disability-related needs. Additionally, the University did not prohibit the Student from directly communicating with his instructors regarding others matters, only his academic adjustments, thus, it does not appear that his education opportunities were been limited or restricted as a result of the act. Additionally, the Student was not deterred from pursuing his disability-related claims either with the University or outside agencies as evidenced by his filing this complaint with OCR on October 23, 2018, after the alleged retaliation. The preponderance of the evidence does not indicate that the Student suffered an adverse action as a result of the University’s act. Thus, OCR will not proceed further with the retaliation analysis.

Based on the above, OCR has determined that there is insufficient evidence to support a finding that the University retaliated against the Student on the basis of disability, in violation of Section 504 and Title II, as alleged.

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. The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

The complainant has a right to appeal OCR's determination within 60 calendar days of the date indicated on this letter. In the appeal, the complainant must explain why the factual information was incomplete or inaccurate, the legal analysis was incorrect or the appropriate legal standard was not applied, and how correction of any error(s) would change the outcome of the case; failure to do so may result in dismissal of the appeal. If the complainant appeals OCR's determination, OCR will forward a copy of the appeal form or written statement to the recipient. The recipient has the option to submit to OCR a response to the appeal. The recipient must submit any response within 14 calendar days of the date that OCR forwarded a copy of the appeal to the recipient.

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.

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, to the extent provided by law, personally identifiable information that, if released, could constitute an unwarranted invasion of privacy.

Thank you and your staff for the cooperation shown to OCR. OCR looks forward to the University's first monitoring report by May 1, 2019. If you have any questions or concerns about this letter or seek further information, please contact General Attorney Edget Betru at 404-974-9351 or by email at Edget.Betru@ed.gov, or the undersigned at (404) 974-9356.

Sincerely,

Wendy Gatlin
Compliance Team Leader

ⁱ In its notification of investigation, OCR inadvertently stated that the allegations pertained to the spring 2018 semester rather than the fall 2018 semester, as alleged. The correction has been made to reflect the fall 2018 semester.

ⁱⁱ The University's Disability Services Coordinator left his position in October 2016 and the Vice Provost for Academic Affairs has served in an interim capacity following his departure.