



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

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REGION IV

ALABAMA
FLORIDA
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October 3, 2022

Via email only at: lawrence.barrett@fgc.edu

Dr. Lawrence Barrett
President
Florida Gateway College
149 SE College Place
Lake City, Florida 32026

Re: Complaint #04-21-2159

Dear Dr. Barrett:

The U.S. Department of Education, Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint filed against Florida Gateway College on September 7, 2021, alleging discrimination based on disability, and 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 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 certain public entities. As a recipient of Federal financial assistance from the Department of Education and a public entity, the College is subject to these laws and to OCR's jurisdiction.

OCR investigated whether the College discriminated against the Student based on disability, by failing to provide him with academic adjustments to course quizzes and examinations using the "Honorlock" computer system from September 4, 2020, through April 1, 2021, in violation of Section 504 and its implementing regulation at 34 C.F.R. §104.44(a); and Title II and its implementing regulation at 28 C.F.R. § 35.130.

During the investigation, OCR reviewed the Student's disability services file, including all requested and/or granted accommodations, for the 2020-2021 academic year; all internal and external email correspondence between the Student and the College pertaining to the Student's requests for accommodations; a copy of the College's policy on requesting and granting accommodations to students with disabilities for the 2020-2021 academic year; a copy of the College's academic testing policies and procedures regarding the use of the "Honorlock" computer system, for the 2020-2021 academic year; a copy of the College's academic integrity policy, and

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a copy of the “Honorlock” computer system video of the Student taking a remote learning quiz on or around September 1, 2020. OCR also interviewed the Complainant¹, the College’s Current Accessibility Services Director, and the College’s Executive Director of Technology Programs and Public Service Programs. After carefully considering all the information obtained during the investigation, OCR has found sufficient evidence of a violation of Section 504 and Title II.

Legal Standards

The Section 504 regulation, at 34 C.F.R. §104.43(a), provides that a qualified person with a disability may not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any postsecondary aids, benefits, or services on the basis of disability. The Title II regulation, at 28 C.F.R. §35.130(a), provides that no qualified individual with a disability shall, on the basis disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

The regulation at §104.44(a) requires a university to modify its academic requirements as 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. The Title II regulation, at 28 C.F.R. §35.130(b)(7)(i), provides that a public entity shall make reasonable accommodations in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Universities may establish reasonable requirements and procedures for students to provide documentation of their disability and request academic adjustments and auxiliary aids and services. Students are responsible for obtaining disability documentation and for knowing and following the procedures established by the university. Once the student has provided adequate notice and documentation of his/her disability and the need for modifications due to the disability, the university must provide the student with appropriate academic adjustments and auxiliary aids and services that are necessary to afford the student an equal opportunity to participate in a school’s program. However, the university is not required to make adjustments or provide aids or services that would result in a fundamental alteration of the university’s program or would result in a financial and administrative burden.

In determining what modifications are appropriate for a student with a disability, the university should familiarize itself with the student’s disability and documentation, explore potential modifications, and exercise professional judgment. The question of whether a university must make modifications to its academic requirements or provide auxiliary aids is determined on a case-by-case basis. OCR generally does not substitute its judgment for that of qualified educators and

¹ The Student is represented by legal counsel in this matter through “Disability Rights Florida” (DRF), Florida’s state protection and advocacy agency for individuals with disabilities, designated by the Governor of the State of Florida pursuant to federal laws 42 U.S.C. § 15001 *et seq.*, and the State of Florida, Governor’s Executive Orders 08-240 and 87-151. DRF filed this complaint on behalf of the Student with his consent. OCR interviewed the attorney on behalf of the Student in this investigation.

professionals regarding modifications. Instead, OCR reviews relevant factual evidence to determine whether a university acted in a reasonable manner and whether it took appropriate steps consistent with Section 504 in making decisions regarding a student's eligibility for academic adjustments. Section 504 envisions a meaningful and informed process with respect to the provision of modifications, *e.g.*, through an interactive and collaborative process between the university and the student. If a university denies a request for a modification, it should clearly communicate the reasons for its decision to the student so that the student has a reasonable opportunity to respond and provide additional documentation that would address the university's objections.

Factual Findings

The Student first enrolled at the College as a dual enrollment student while in high school and then as a full-time college student. During the 2020-2021 academic year, the Student was working on his Bachelor of Applied Science degree in Water Resources Management. The Student has XXXXXXXXXXXXXXXXXXXXXXXX and these disabilities are documented with the College. The Student has always received accommodations or academic adjustments for his disabilities throughout his entire attendance at the College.

Beginning the fall 2020 semester, the College required that all students use "Honorlock" to take all quizzes and exams. Honorlock is an online proctoring system that uses artificial intelligence to detect behavior that appears to be cheating through facial recognition and detection, and eye tracking. If the software deems any behavior suspicious, it will alert the professor by sending the professor a message in the system.

During the fall 2020 semester, the Student was enrolled in four online classes. On September 1, 2020, the Student was granted the following accommodations for testing: time and a half extended time, distraction free environment, administration of testing in sections, grammar/spellchecker, use of 4 function calculator, and administration of paper and pencil tests.

On or around September 1, 2020, the Student took a quiz in his Public Administration and Public Policy (PAD XXXX)² class using the Honorlock system for the first time. During the administration of the quiz, Honorlock flagged the Student's recorded behavior and sent a message to the PAD XXXX Professor to review the video of the Student testing. The PAD XXXX Professor reviewed the video and determined that the Student was cheating on the quiz.³ Specifically, the PAD XXXX Professor stated in an email to the Student later that same day that she had concerns after reviewing the Honorlock video because the Student did not complete a full room scan that showed the entire room or the surface of the desk on which he was working prior to the exam, and that there were several times where the Student's full face was not in view of the camera and he was looking down or away from the computer screen. Immediately thereafter, the Professor gave the Student a failing grade for the quiz and warned him that if the behavior should occur again, he would be expelled from the College.

² Course specific name and designation in class syllabus.

³ The PAD XXXX Professor was XXXXXX and unavailable for interview during the OCR investigation.

The Complainant told OCR that the Student immediately attempted to appeal the cheating allegations and the failing grade, and to discuss his disability-related concerns pertaining to Honorlock with the Professor. The Student contended that he did not cheat on the quiz, and that Honorlock monitors eye movement for cheating and that he has disability-related eye movement which was wrongly interpreted by Honorlock as cheating. The Complainant told OCR that the Student is easily distracted and has difficulty keeping his eyes focused on the screen because of his disabilities.

On September 3, 2020, the Student sent the PAD XXXX Professor, the Accessibility Services Director (Former Director), and his other instructors an email requesting an accommodation based on his XXXX disability to not use Honorlock, or in the alternative, to take his exams and quizzes at the Student Testing Center. He stated his concern about using Honorlock going forward and did not want to face additional cheating allegations and possible failure and/or expulsion if the system flagged his disability-related behaviors again.

On September 3, 2020, the PAD XXXX Professor verbally agreed to meet with the Student via an online platform along with the Executive Director, Technology Programs and Public Service Programs (Executive Director) under the condition that the meeting would be recorded. The Student objected to the meeting being recorded. Later that evening, the PAD XXXX Professor sent the Student an email, copying the Former Director and the Student's other instructors, that stated his request for accommodations had been reviewed by the appropriate college personnel, that Honorlock is an anti-cheating software that was instituted that fall throughout the entire college for all students, and that he would be required to utilize it to take his quizzes and exams online in her course.

On September 4, 2020, the Student's Environmental Law (EVR XXXX) Professor sent an email to the Student that stated that the same information in the PAD XXXX Professor's email to the Student also would apply for his course as well [referring to the September 3, 2020, email from the PAD XXXX Professor to the Student]. The Student immediately responded to the EVR XXXX Professor and asked if he was allowed to take exams at the Student Testing Center, to which the EVR XXXX Professor replied that the Student's request to take exams at the Student Testing Center was denied.

On September 8, 2020, the Student sent the Former Director an email inquiring about the status of his request for accommodations to not use Honorlock, and stated that the College's insistence on him using Honorlock was a violation of his rights.⁴

On September 8, 2020, the Former Director replied to the Student by email and offered to meet with him at 3:00 p.m. that day. That meeting did not occur, but the Former Director sent the Student an email at 4:06 p.m. that same day offering to meet with him the next day at 11:00 a.m. There is no evidence in the record that the meeting ever took place.

⁴ The Accessibility Services Director that the Student contacted at that time now is retired from Florida Gateway College and was unavailable for interview during the OCR investigation.

On September 8, 2020, the Student's Environmental Policy and Management (PAD XXXX) Professor responded to the Student's request for accommodations and asked him what specific accommodations the Student was requesting for his course. On September 17, 2020, the Student sent an email reply to the PAD XXXX Professor, including his EVR XXXX and PAD XXXX Professors, and again asked for accommodations to Honorlock and stated that if he did not receive any accommodations to the Honorlock requirement he would be forced to withdraw from his courses. The Student also stated in that email to his Professors that not providing him with the requested accommodations to Honorlock was a violation of his rights.

On September 17, 2020, both the PAD XXXX Professor and the EVR XXXX Professor sent the Student an email in response stating that he had spoken with college administration and that all reasonable, requested accommodations had been afforded to him, and that the Honorlock requirement in his course would not be removed.

On October 6, 2020, the Student sent the Former Director an email requesting accommodations for Honorlock, and explained that he would have to withdraw from all of his classes if he did not receive his requested accommodations because Honorlock does not work with his disability.

On October 8, 2020, the Executive Director sent the Student an email in response to his email to the Former Director stating he and the Former Director had reviewed his request for an accommodation to Honorlock, and that his current accommodations in place of 1.5 times the normal testing time requirements and testing in a non-distracting environment were met by testing at home, via use of the Honorlock system. That same day, in response to the Executive Director's email, the Student emailed the Former Director and asked if she were going to help him with his request for an accommodation for Honorlock.

On October 20, 2020, the Student sent an email to his PAD XXXX, PAD XXXX and EVR XXXX Professors stating that he was withdrawing from his Fall 2020 semester courses. In his email, he alleged that the College failed to engage him in the interactive process to provide reasonable alternatives to Honorlock due to his disability. The Student withdrew from his courses that same day.

On October 26, 2020, the Complainant contacted the College to resolve the Student's concerns and negotiate a reasonable alternative to Honorlock. The Complainant spoke to the College's Director of Human Resources and Equity Officer via telephone and email several times to discuss alternatives for the Student such as using the testing center and/or using a live proctor via an online platform. The College denied these requests.

In January 2021, the Student reenrolled in the College for the Spring 2021 semester and took two online courses – Wetland Resources (EVR XXXX), and Environmental Regulation and Compliance (EVR XXXX).

On February 2, 2021, the Complainant spoke with the College's President via telephone who reiterated the College's position that the Student's only option was to use Honorlock for tests and quizzes. The Complainant told OCR that the College did not articulate how providing an alternative to Honorlock was a fundamental alteration or undue burden to the College.

During an interview with the College’s current Accessibility Services Director (Current Director), she explained the step-by-step process for a student to request an accommodation and have that accommodation request reviewed, evaluated and responded to in the appropriate manner. The Current Director stated that a student places a request for an accommodation with the Disability Services Office, or DSO.⁵ The director reviews the request, then meets with the student to discuss the request. They then discuss the appropriateness of the request, or that it is warranted, reasonable, permissible within the federal disability laws and guidance, and that the school can actually provide the requested accommodation. Based on the foregoing process, a determination is made by the director whether to approve the requested accommodation or deny. There are no set criteria, and it is decided on a case-by-case basis. If it is a change or addition to a previously approved accommodation plan, the DSO will re-issue the accommodation letter with the current date to include the change. Finally, the DSO distributes the final draft accommodation letter to each of the student’s instructors so that they will be aware of and provide the specific accommodations to the student. The Current Director explained that the Student’s accommodation request concerning Honorlock did not go through the process at the DSO as described, and that she has no documentation that the Student had an Honorlock accommodation request on file with the office.

During an interview with the College’s Executive Director, he stated that he vaguely recalled sending the Student an email on October 8, 2020, in response to the Student’s October 6, 2020, email to the Former Director requesting an accommodation to not use Honorlock. The Executive Director stated that both the Student and his mother have complained about a multitude of issues during the Student’s time with the College. The Executive Director stated that the College administration designated him as the “college portal” to respond to the Student and his mother. The Executive Director stated that he does not believe, however, that he ever actually spoke to the Student about his accommodation request to not use the Honorlock online proctoring system. The Executive Director stated that he reviewed the emails to, and replies from, all of the Student’s Professors, and determined that the Student’s request to not use Honorlock was without merit. The Executive Director also stated that no formal documentation is in the record at the DSO concerning the Student’s accommodation request to not use Honorlock because an academic adjustment discussion at the DSO was not warranted based on the evidence from the PAD XXXX Professor’s course. The Executive Director stated that it was very obvious that the Student was cheating on his quiz. The Executive Director also stated that he does not know if the Former Director ever spoke with the Student about his Honorlock accommodation request.

The Student’s record shows that he completed two intensive certificate programs at the College, receiving “high honor” in both programs. The Student graduated from the College on May 22, 2022.

Analysis

The Student was granted testing accommodations on September 1, 2020. The Student contacted the College’s Former Accessibility Services Director and his four individual course professors on

⁵ The Current Director referred to her office as the Disability Services Office during her interview with OCR.

numerous occasions during the Fall 2020 semester via email correspondence requesting an accommodation to not use the Honorlock online proctoring system based on his XXXX disability.

The College's Executive Director, Technology Programs and Public Service Programs, was designated as the point of contact to coordinate any issues between the Student and the College. In this role, the Executive Director unilaterally determined that an interactive process between the Student and the Disability Services Office regarding the use of Honorlock was not warranted. The Executive Director unilaterally determined that the Student's request for an exception to Honorlock was not reasonable and did not offer the Student reasonable alternatives to Honorlock. There is no evidence that the Disability Services Office, which is the designated office to respond to requests for accommodations, was involved in the decision.

The evidence is sufficient to show that the College failed to engage in the interactive process to determine reasonable academic adjustments for the Student concerning the use of Honorlock. Based on the foregoing, OCR has determined that there is sufficient evidence to support the finding that the College violated Section 504 and Title II with regard to the issue investigated in this complaint.

On September 27, 2022, the College entered into the attached resolution agreement (Agreement) to resolve the violation of Section 504 and Title II. The Agreement requires the College to provide Section 504 and Title II training to College faculty, staff, and administrators who have responsibility for evaluating students for disability-related requests for academic adjustments and/or auxiliary aids and services. The training will emphasize the prohibition of discrimination based on disability, the timely review of student requests for academic adjustments and/or auxiliary aids and services, including engaging in the interactive process and the requirement to give primary consideration to a student's request for academic adjustments and/or auxiliary aids and services, consistent with Section 504 and Title II.

Conclusion

This concludes OCR's consideration of this complaint, which we are closing effective the date of 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 a right to file a lawsuit in federal court whether or not OCR finds a violation.

Please be advised that the College must not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding this letter, please contact Mark Sperry, General Attorney, at (202) 987-1881, or me, at (404) 974-9356.

Sincerely,

/s/

Wendy Gatlin
Compliance Team Leader

Enclosure