



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

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**REGION V
ILLINOIS
INDIANA
IOWA
MINNESOTA
NORTH DAKOTA
WISCONSIN**

April 28, 2015

XXXXXXXXXX
XXXXXXXXXXXX
North Dakota State University
PO Box 6050, Dept 1000
Fargo, ND 58108

Re: OCR # 05-15-2025

Dear XXXXXXXXXXXX:

This is to notify you of the disposition of the referenced complaint filed on October 30, 2014 with the U.S. Department of Education, Office for Civil Rights (OCR), against North Dakota State University (University) alleging discrimination on the basis of disability. Specifically, the complaint alleged that the University discriminated against the Complainant on the basis of disability when:

1. It terminated the Complainant's employment on XXXXXXXXXXXX because it regarded XXX as having a disability.
2. It denied the Complainant a prompt and equitable grievance procedure to redress her claim that the University terminated her employment because it regarded XXX as having a disability.

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. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. Since the University receives Federal financial assistance from the Department and is a public entity, the University is subject to Section 504 and Title II, and OCR has jurisdiction over this complaint.

By letter dated November 19, 2014, OCR informed the Complainant that it was dismissing Allegation #1 XXXXXXXXXXXX, and that it was opening Allegation #2 for an investigation.

During the complaint investigation, OCR reviewed documentation provided by the Complainant and the University, including relevant University policies and procedures, and interviewed the Complainant. OCR determined that the evidence is sufficient to establish that the University fails to provide a grievance procedure for the prompt and equitable

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

resolution of complaints alleging discrimination on the basis of disability filed by former students and employees, in violation of Section 504 and Title II. OCR also has determined that the evidence is sufficient to establish that the University discriminated against the Complainant in violation of Section 504 and Title II, as alleged in Allegation # 2. The reasons for these determinations are set forth below.

Background

University Policies and Procedures

Non-Discrimination policy

The University's Equal Opportunity and Non-discrimination Policy states that:

the University is fully committed to equal opportunity in employment decisions and educational programs and activities, in compliance with all applicable federal and state laws..., for *all individuals* without regard to age, color, disability . . . national origin. . . race. . . [and] sex. . . .

NDSU Policy 100.¹

Notice of Non-Discrimination

The University's Non-Discrimination Notice² states, in its entirety:

The following notice must be included in all departmental publications such as bulletins, announcements, manuals, publications, guidebooks, brochures, pamphlets, catalogs, application forms or recruitment materials describing or inviting participation in programs at North Dakota State University.³ (This notice is not required on departmental homepages.):

"North Dakota State University does not discriminate on the basis of age, color, disability, gender expression/identity, genetic information, marital status, national origin, public assistance status, sex, sexual orientation, status as a U.S. veteran, race or religion. Direct inquiries to the Vice President for Equity, Diversity and Global Outreach, 205 Old Main, (701) 231-7708."

¹ <http://www.ndsu.edu/fileadmin/policy/100.pdf>.

² http://www.ndsu.edu/diversity/equity/non_discrimination_statement/

³ OCR confirmed that this statement is included in the University's 2014-15 Undergraduate and Graduate Student Bulletins, which are available on-line at: <http://bulletin.ndsu.edu/bulletin-information/>, and is included in written applications for employment and admission to the University. OCR was unable to confirm that this statement is included in the University's on-line applications for employment and admission.

Section 504 Coordinator

The University's website provides the name and contact information for the University's designated Section 504 Coordinator.⁴

Grievance Procedures

The University has enacted and implemented policies and procedures to ensure the rights of its students and employees are protected. NDSU Policy 156 establishes grievance procedures and states its purpose is to “provide a fair and orderly system for review at [NDSU] of alleged violations of equal opportunity laws, regulations and policies that prohibit discrimination against all protected classes as defined in NDSU Policy 100.”⁵ Paragraph 2.1 of Policy 156 provides that “[a]ny student, employee of the University, or any group of such persons who is affected by an apparent violation of equal opportunity laws, regulations or policies shall be entitled to an administrative review of the grievance.” Policy 156 does not specify that it covers complaints alleging discrimination or harassment carried out by employees, other students, or third parties. Sub-paragraph 2.1.1 of NDSU Policy 156 clearly explains where and within what time period complaints may be filed, stating: “This review is initiated by completing the NDSU Formal Equal Opportunity Grievance...and filing it with the Diversity Officer. Unless the Diversity Officer stipulates otherwise, the grievance form must be submitted *within six months* of the alleged violation.”

NDSU Policy 156, which is readily available to students and employees, provides adequate notice of the University's grievance procedure, including specifying where complaints may be filed. The Policy does not specify its applicability to third parties, or, as discussed below, to former students and former employees. According to NDSU Policy 156, grievances raised under the policy must be submitted within six months of the alleged violation, the administrative review of a grievance will be completed within 30 calendar days, absent extenuating circumstances, and an appeal by either party must be submitted within 10 working days after the conclusion of the administrative review process. In the event a grievance is not resolved to the satisfaction of the parties through the administrative review process or voluntary mediation, Policy 156 allows either party to request a Grievance Hearing, and contains provisions governing pre-hearing meetings and the discovery of information related to the grievance. The Policy does not specify timeframes for the conclusion of a Grievance Hearing.

With respect to individual complaints that proceed to a Grievance Hearing, Policy 156 further specifies that both parties may present opening statements, and explains that the Grievance Hearing committee relies “upon the opposing parties to call the necessary witnesses and present relevant evidence.” Witnesses presenting testimony at a Grievance Hearing are subject to questioning by either party or members of the hearing committee. The Grievance

⁴ http://www.ndsu.edu/diversity/equity/ada_coordinator/

⁵ <http://www.ndsu.edu/fileadmin/policy/156.pdf>.

Hearing committee, at the conclusion of the hearing, determines by a preponderance of the evidence whether a violation of the University's equal opportunity policy has occurred. Pursuant to Policy 156, "The President shall be responsible for determining an appropriate administrative response to the findings, conclusions and recommendations. The decision of the President is final." The Policy does not provide for written notification of the outcome to both parties. Although Policy 156 clarifies that retaliation against individuals who assert their rights under the policy is prohibited, it does not include assurances that the University will prevent the recurrence of discrimination or correct the effects of discrimination on the aggrieved party.

Although the language in Policy 156 does not differentiate between current and former students and employees, the University interprets the policy to afford a grievance procedure only to current students and employees. The University explained to OCR that "so long as the affected individual falls under any of these categories [current student or employee], they are entitled to an administrative review of the allegation under Policy 156." According to the University, if a former employee files a grievance challenging her/his termination, that person will be entitled to a review under Policy 156 if she/he initiates the grievance prior to the termination, but will not be entitled to such review if she/he files the grievance after the termination since by then the individual is no longer an "employee of the University."

Notwithstanding this interpretation of its policy, the University informed OCR that in the event that the grievance procedure described in Policy 156 is not available to an individual, the University has the "obligation to follow-up on any allegation of discrimination and to take remedial action when appropriate/necessary." If such an event occurs, the University represented to OCR that it conducts a preliminary investigation to determine whether the conduct rises to the level of discrimination, and that if it does not, the University will not pursue the allegation any further. The University acknowledged that its written policies and procedures do not provide notice to former students and employees that the University will follow up on allegations of discrimination against them and take remedial action as warranted. The University asserted that it is extremely rare for a former employee or student to assert a claim of discrimination, and stated that the instant complaint "appears to be the first instance of a former employee making such a complaint." According to the University, a former employee or student whose claim will be preliminarily investigated to determine whether the conduct rises to the level of discrimination is informed of the results of such an investigation at the discretion of the University's Vice President for Equity, Diversity, and Global Outreach. The University further asserted that the handling of such cases occurs on a case-by-case basis.

Facts

The Complainant XXXXXXXXXXXX from XXX position as XXXXXXXXXXXXXXXX on XXXXXXXXXXXX, a few weeks before the end of XXX XXXXXXXX probationary period. She alleges that the University discriminated against her on the basis of a perceived disability because her supervisor commented that she was an "XXXXXXX" and she filed a complaint to

redress her claim under the University's internal grievance policy on XXXXXXXX. On October 7, 2014, the University's XXXXXXXXXXXXXXXX sent the Complainant an e-mail explaining that there was no applicable policy under which she could file her grievance because she was a probationary employee at the time of her termination. The XXXXXXXX referred the Complainant to the XXXXXXXX if she had additional questions. The Complainant responded to the XXXXXXXX via e-mail on October 10, 2014, stating that she disagreed that University grievance policy did not apply to her by explaining that on the date of the alleged discrimination she was an employee of the University, that the alleged discrimination is the reason she no longer is an employee, and that she filed her grievance within 6 months of the discrimination. Eventually, the Complainant contacted the XXXXXXXXXXXX, who similarly told her "at this point there are no internal processes available to you for pursuing a grievance." Neither the XXXXXXXX nor the XXXXXXXX informed the Complainant that the University conducted a preliminary investigation into her grievance and determined that the conduct about which she complained did not rise to the level of discrimination.

While the University initially informed the Complainant that its grievance procedure was not available to her because of her probationary status, during OCR's investigation the University stated only that the grievance procedure was not available to the Complainant because she filed her complaint approximately one month after she was terminated and the grievance procedure is available only to current employees and students. According to the University, the Complainant, who was terminated on XXXXXXXX, did not submit her grievance until XXXXXXXXXXXX, by which time she was no longer an employee. Although the Complainant filed her grievance within the 6-month time limit established by NDSU Policy 156, the University maintains that the grievance procedure was no longer available to her because by the time she filed her grievance she was no longer an "employee of the University." Nevertheless, the University informed OCR that the Office of Equity, Diversity, and Global Outreach conducted a preliminary investigation into the merits of the Complainant's disability discrimination grievance and determined that it had no basis because her supervisor terminated the Complainant based on her work performance and not based on a perceived disability. The Complainant was not notified that the University conducted the preliminary investigation into her grievance nor was she informed of the results of the preliminary investigation.

Applicable Regulations and Legal Standards

Discrimination Generally

The Section 504 regulations, at 34 C.F.R. §§ 103.4(a) and 104.11(a), generally provide that no qualified person with a disability shall, on the basis of disability, "be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance," or "be subjected to discrimination in employment under any program or activity to which this part applies." The Title II regulations, at 28 C.F.R. §§ 35.130 and 35.140, similarly provide that no qualified

individual with a disability shall, on the basis of 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,” or “be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.”

Grievance Procedures

The Section 504 and Title II regulations, at 34 C.F.R. § 104.7(b) and 28 C.F.R. § 35.107(b), respectively, require that recipients and public entities of a certain size adopt and publish grievance procedures “for the prompt and equitable resolution of complaints alleging any action prohibited by this part.”

In an educational setting, Section 504 and its implementing regulation generally provide the same or greater protection than Title II and its implementing regulation. Where, as in this case, Title II does not offer greater protection than Section 504, OCR applies the Section 504 standards.

In evaluating whether a recipient’s grievance procedures satisfy this requirement, OCR will review all aspects of its policies and practices, including the following elements that are critical to achieve compliance with Section 504.

- notice to students and employees of the procedure, including where complaints may be filed;
- application of the grievance procedures to complaints filed by students or on their behalf alleging discrimination or harassment carried out by employees, other students, or third parties;
- provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and individual(s) accused of discrimination to present witnesses and other evidence;
- designated and reasonably prompt timeframes for the major stages of the complaint process;⁶
- written notice to the parties, complainant and individual(s) accused of discrimination, of the outcome of the complaint; and
- an assurance that the recipient will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Notice of Non-Discrimination

The Section 504 regulation, at 34 C.F.R. § 104.8, requires recipients to notify participants, beneficiaries, applicants, employees and unions or professional organizations holding

⁶ OCR evaluates on a case-by-case basis whether the resolution of disability discrimination complaints is prompt and equitable. OCR has noted that, based on its experience in typical cases, there is a 60-calendar day timeframe for investigations.

collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of disability in violation of Section 504. If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the nondiscrimination policy. The regulation implementing Title II, at 28 C.F.R. § 35.106, requires a public entity to make available to applicants, participants, beneficiaries, and other interested parties information regarding the provisions of Title II and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such a manner as the head of the entity finds is necessary to apprise such persons of the protections against discrimination assured them by Title II.

Analysis

The Complainant alleges that the University discriminated against her when it denied her a prompt and equitable grievance procedure to redress her claim that the University terminated her employment because it regarded her as having a disability.

The evidence confirmed that the University in fact denied the Complainant access to its grievance procedure to redress her claim of disability discrimination. Although the University initially informed the Complainant that its grievance procedure was not available to her because of her probationary status, the University stated to OCR only that the grievance procedure was not available to the Complainant because she filed her complaint on XXXXXXXXXXXXX, by which time she was no longer an employee because she had been terminated on XXXXXXXXXXXXX.

OCR determined that the University's lack of a grievance procedure to resolve complaints of discrimination filed by former students and employees pertaining to conduct related to employment with or participation in the University's services, programs, or activities violates Section 504 and Title II.

The Section 504 and Title II regulations at 34 C.F.R. §104.7(b) and 28 C.F.R. § 35.107(b) prohibit certain conduct and do not preclude former employees or former students from raising complaints of discrimination regarding "*any action* prohibited by this part." Accordingly, the University's lack of a grievance procedure to resolve complaints of discrimination filed by former students and employees pertaining to conduct related to employment with or participation in the University's services, programs, or activities and that is prohibited by the regulations within the timeframe established by the University's policy violates Section 504 and Title II. Although the University asserts that it reviews claims from former employees and students to determine whether the complained of conduct rises to the level of discrimination, and that in cases where discrimination is found the University takes appropriate remedial action, the University's written policies do not inform former employees and students of this procedure nor does the University's practice – which relies on the discretion of the NDSU Vice President for Equity, Diversity, and Global Outreach – ensure

that grievance procedures as required by the Section 504 and Title II regulations are available in all cases.

With respect to the existing grievance procedures, OCR further finds that Policy 156 does not provide for a prompt and equitable resolution of complaints of discrimination in that it does not specify its applicability to third parties, or, as noted above, to former students and former employees; specify timeframes for the conclusion of a Grievance Hearing, provide for written notification of the outcome of a Grievance Hearing to both parties, and does not include an assurance that the University will correct the effects of discrimination on the aggrieved party and prevent its recurrence.

Finally, although the University's non-discrimination policy properly prohibits discrimination on the basis of disability and is available on the University's website, OCR found that the University did not notify applicants for admission and employment of its obligation not to discriminate on the basis of disability in its on-line applications. Thus, OCR determined that the University failed to comply with Section 504, at 34 C.F.R. § 104.8, and Title II, at 28 C.F.R. § 35.106.

After carefully considering all the evidence, OCR concludes that the University's lack of a grievance procedure to resolve complaints of discrimination filed by former students and employees pertaining to conduct related to employment with or participation in the University's services, programs, or activities constituted discrimination on the basis of disability. Accordingly, OCR determined that the University discriminated against the Complainant in violation of Section 504 and Title II, as alleged in Allegation #2.

On April 28, 2015, the University executed the enclosed Resolution Agreement. The Resolution Agreement is consistent with applicable regulations and is aligned with the complaint allegation and the information obtained during the investigation by requiring the University to review and revise, with OCR approval, its written policies and procedures to resolve complaints of discrimination based on disability by current and former students and employees pertaining to conduct related to their employment or participation in the University's services and programs; adopt, implement and publish the revised policies and procedures; maintain documents relating to complaints or other reports of disability discrimination; provide effective training to relevant employees on the revised policies and procedures including reporting discrimination and/or investigating reports of discrimination; and provide the Complainant written notice of the outcome of her internal complaint and her right to appeal the determination. OCR will monitor the University's implementation of the Resolution Agreement until the University is in compliance with the statutes and regulations at issue in this case. The proper implementation of the Resolution Agreement will address all of OCR's findings of Section 504 and Title II violations.

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.

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. The Complainant may 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. In the event that 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.

We wish to thank you and your staff, including the University's Office of the General Counsel, for the cooperation extended to OCR during our investigation. If you have any questions, please do not hesitate to contact Alonzo Rivas by phone at 312-730-1684, or by e-mail at Alonzo.Rivas@ed.gov.

Sincerely,

Aleeza Strubel
Supervisory Attorney