



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620
DALLAS, TX 75201-6810

REGION VI
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TEXAS

May 20, 2014

Dr. G. David Gearhart, Chancellor
Office of the Chancellor
University of Arkansas
425 Administration Building
Fayetteville, Arkansas 72701

OCR Reference: 06-13-2348

Dear Dr. G. David Gearhart:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed the investigation of a complaint, which was received in our office on August 12, 2013, and filed against the University of Arkansas (UA), Fayetteville, Arkansas. The complainant alleged that the UA discriminated and retaliated against her (the Student) on the basis of her disability, in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (amended 1992), and its implementing regulation at 34 C.F.R. Part 104 and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132, and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability. The complaint alleged that during the 2011-2014 academic school years, the UA repeatedly failed to assign the Student XXX XXX XXX XXX as previously approved as an accommodation from the Center for Educational Access. The complaint also alleged that the UA retaliated against her when she attempted to assert her rights to receive the aforementioned accommodation.

OCR determined that the UA is a recipient of Federal financial assistance from the Department and is also a public entity. Therefore, OCR has jurisdiction to investigate this complaint under Section 504 and Title II.

Based on the complaint letter and information received from the complainant during the evaluation stage, OCR investigated the following issues to determine:

1. Whether from October 2011 through the 2014 academic school years the UA failed to take such steps necessary to ensure that the student was not denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of the educational auxiliary aid (i.e., **XXX XXX XXX XXX**) the Center for Educational Access (CEA) had approved for her to receive, in violation of 34 C.F.R. §104.44 and 28 C.F.R. § 35.130; and

2. Whether the UA retaliated against the Student after she attempted to assert her rights as a student with a disability, in violation of 34 C.F.R. §104.61 and 28 C.F.R. § 35.134.

During the course of this investigation, OCR examined and analyzed relevant documents generated by the complainant, the complainant's attorney and the UA. These documents included, but were not limited to; email correspondence between the Student and UA personnel, internal UA email correspondence, UA student files, and UA policies and procedures. OCR noted that all of the UA policies and procedures that we reviewed were non-discriminatory on their face (i.e., disability related policies and procedures, Section 504/Title II grievance procedures). OCR also noted that the UA has adopted and published a non-discrimination statement, which prohibits discrimination on all the prohibited bases OCR. Additionally, from March 17-19, 2014, OCR conducted an onsite to the UA campus. While onsite, OCR gathered information from interviews with relevant witnesses, which included UA faculty and staff from the Fulbright College of Arts and Sciences, the Department of Mathematical Sciences (MASC), the Mathematics Resource and Teaching Center (MRTC), the Graduate School and the Dean of Students Office.

A finding that a recipient has violated one of the laws 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). When there is a significant conflict in the evidence and OCR is unable to resolve that conflict, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.

After the investigation began, but before OCR reached an investigative compliance determination, the UA expressed a desire to voluntarily resolve Issue 1. In Issue 1, the complainant specifically alleged that the UA failed to provide her with auxiliary aids and services, commencing in October 2011. At that time, the student was an undergraduate student in the math department. Our investigation disclosed that the Student continued on with her studies as a graduate student in the math department and graduated from UA in December 2013 with a Masters degree in **XXX**. On **XXX XXX, XXX**, the complainant registered with the UA's disability services office, the Center for Educational Access (CEA), for a chronic condition that resulted in **XXX XXX XXX** surgery in **XXX** 2012.

Although, the UA did provide the Student with academic adjustments and related aids and services, which ensured that the Student received a laptop/tablet for her studies and personally accommodated the Student's request for a tailor made degree plan (i.e., independent studies, specified professors and contact persons), the UA also committed to provide the Student with **XXX XXX XXX** and pledged to **XXX** the Student's classes.

As stated above, OCR's review of the UA's policies and procedures regarding its responsibility to comply with Section 504/Title II revealed that they are non-discriminatory on their face. Additionally, OCR's investigation did not reveal a concern or problem with the UA's policies and procedures regarding the provision of auxiliary

aids and services and academic adjustments. However, OCR's investigation found that the UA had some difficulties coordinating within the *math department* and ensuring that the Student was assigned to classrooms that were **XXX XXX**. Additionally, due to technical difficulties, the UA failed to **XXX** one of the Student's classes for **XXX** weeks. OCR's investigation revealed that the math department could benefit from Section 504/Title II training, with emphasizes on the importance of adhering to the requirements of the regulations.

Regarding the above issue, consistent with Section 302 of OCR's Complaint Processing Manual, the UA submitted the attached Voluntary Resolution Agreement (Agreement) on May 14, 2014, which OCR has determined addresses the compliance issues raised in the complaint and which when fully implemented, will resolve this complaint. Accordingly, as of the date of this letter, OCR will cease all investigative actions regarding Issue 1; however, OCR will actively monitor the implementation of the Agreement by the UA to determine whether the commitments made by the UA have been implemented consistently with the terms of the Agreement. If the UA fails to implement the Agreement, as specified, OCR will resume its investigation of the above issues. If the UA determines a need to modify any portion of the Agreement, the UA may submit, for consideration, proposed revisions to OCR.

Therefore, based on OCR's monitoring of the implementation of the Agreement, we are closing the investigative phase of Issue 1 in accordance with our case processing procedures. However, regarding Issue 2, OCR's investigation was unable to substantiate a violation of Section 504/Title II. The bases for OCR's determination are outlined below.

Legal Standard for Retaliation

In order to establish whether retaliation occurred in this case, it is necessary for OCR to determine whether: (1) the complainant was involved in a protected activity (that is, exercised a right or took some action that is protected under the Federal laws that OCR enforces); (2) the recipient was aware of the complainant's involvement in a protected activity; (3) the complainant was subjected to an adverse action contemporaneously with or subsequent to the protected activity; (4) there was a causal connection between the protected activity and adverse action(s). If one of the elements cannot be established, then OCR finds insufficient evidence of a violation. If all these elements establish a *prima facie* case, OCR next considers whether the recipient has identified a legitimate, nondiscriminatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for discrimination. While OCR would need to address all of the elements in order to find a violation, OCR need not address all these elements in order to find insufficient evidence of a violation, where the evidence otherwise demonstrates that retaliation cannot be established.

In determining whether a complainant was subjected to an adverse action, OCR considers whether the recipient's action(s) significantly disadvantaged an individual as to his or her ability to gain the benefits of the recipient's program in a lasting and tangible manner or

acted as a deterrent to further protected activity. Merely unpleasant or transient incidents usually are not considered adverse.

Issue 2: Findings of Facts and Analysis

The student alleged that the UA subjected her to multiple adverse actions because she attempted to assert her rights as a student with a disability. As such, OCR investigated the issue to determine whether the UA retaliated against the Student after she attempted to assert her rights as a student with a disability, in violation of 34 C.F.R. §104.61 and 28 C.F.R. § 35.134.

Protected Activity & Notice

OCR's investigation determined that, in the XXX 2011, the Student registered with the CEA office as a student with a disability. At that time, the UA committed to provide the Student with several academic adjustments and auxiliary aids (AAs), which included but were not limited to, assigning the Student to XXX XXX XXX and ensuring that her classes would XXX XXX in her absence. As such, OCR determined that elements one and two of the retaliation analysis have been established. The Student was involved in a protected activity as a person with disability who attempted to assert her rights and the UA was aware of this protected activity, as it acknowledged her as a registered student with a disability who met the technical standards of the program and interacted with her throughout her tenure as an UA student with a disability.

Adverse Action

During her remaining time as an undergraduate and graduate student, the Student believed that the UA committed adverse acts against her because she continued to assert her rights to receive her AAs, on a consistent basis. OCR will first address the alleged actions which the investigation determined did not rise to the level of an action adverse. OCR will then address those actions for which a prima facie case of retaliation was established by the investigation, but where OCR determined that a legitimate, nondiscriminatory, non-pretextual reason existed.

The Student was provided an opportunity to respond to and rebut OCR's findings relative to the retaliation allegation and the alleged adverse acts committed by the UA. The Student's responses did not yield sufficient information to overturn these findings, as described below.

No Adverse Action Established

Alleged Adverse Action #1: The UA delayed the Student's request for a XXX XXX on a routine XXX XXX form because the professor, "XXX XXX XXX XXX XXX XXX XXX XXX him", in XXX 2011;

Regarding the alleged statement, OCR's investigation did not reveal any corroboration to attribute it the professor (Prof. A) as alleged. OCR interviewed Prof. A and other persons who may have been privy to this statement, or any other questionable comments relative to the Student. These interviews and OCR's review of documentation could not establish that this statement was made. Regarding Prof. A's delay in **XXX** (i.e., **XXX XXX**) a form, OCR determined that the form was signed by Prof. A on **XXX XXX, XXX**. Prof. A informed OCR that he did sign **XXX XXX** and did not purposefully delay **XXX XXX**, but that he **XXX XXX** when he received it. The investigation could not establish that the approval on **XXX XXX, 2011**, caused the Student any tangible or lasting harm and as such, did not rise to the level of an adverse action. The Student did not provide a rebuttal response.

*Adverse Action #2: delayed the Student's **XXX XXX** as a **XXX XXX XXX XXX XXX XXX XXX** (i.e., initially left off **XXX XXX**); Adverse Action #7: refused and delayed the Student's **XXX XXX XXX XXX XXX XXX** semester until the day before classes began on **XXX XXX XXX**;*

OCR's investigation determined that **XXX** assignments are made by the Chair, Vice Chair, Graduate Advisor and Course Coordinators of the MASC. Not all **XXX XXX XXX** assignments are **XXX** assignments, though the majority are, and the MASC attempts to make assignments based on the students' preference. The UA provided OCR with a description regarding the assignment of GAs and noted that tentative "**xxx** assignments are generally made prior to enrollment." However, these **XXX** assignments are very fluid based on actual enrollments and may change even after the commencement of classes. The Student's preferred **XXX** assignment was **XXX**.

The UA informed OCR that the Student's class assignments as a **XXX XXX** for the **XXX XXX** semester were not delayed. At the time assignments were beginning to be made, it was unclear whether the Student would be released to return to work/school, as the Student had not provided **XXX XXX XXX XXX XXX**. After having been made aware that the Student would be returning for the Spring 2012 semester, she was given a **XXX** assignment. The UA informed OCR that at the time the Student did not have a **XXX** assignment neither did eight other GAs and that this was not an uncommon occurrence (i.e., making **XXX** assignments even after the commencement of the semester because of changing course schedules).

OCR's investigation determined that although the Student did receive a **XXX** assignment, she did not receive this assignment until the day before school started for the **XXX XXX** semester. The UA provided OCR with information via interviews and documentation, to support its contention that although it was aware that the Student would return for the spring 2013 semester in the fall 2012, they were uncertain **XXX XXX XXX XXX** and how it would impact what type of **XXX** assignment she would receive. The UA informed OCR that although it was unsure if the Student would be **XXX XXX XXX XXX XXX**, the Student was designated to receive a **XXX** assignment. OCR reviewed an email dated **XXX XXX XXX**, from the Dean of the college, which informed Prof. M to coordinate with the Student, "**XXX XXX XXX XXX XXX XXX XXX XXX XXX**

the UA's response and stated that the UA initially appointed Prof. M to be **XXX XXX** person for her in **XXX** and she confirmed that this arrangement was agreeable to her. As such, OCR determined that the UA provided a legitimate, nondiscriminatory and non-pretexual reason for limiting communication between the Student and specified UA personnel.

*Adverse Action #11: as of **XXX** failed to complete the grading of the Student's **XXX XXX XXX**.*

OCR's investigation determined that as of **XXX**, the Student had not received final grades for all of her previous courses because she had not submitted all of the work to be graded. OCR reviewed email correspondence from the Student, her professors and her advisors. As late as **XXX**, the UA had not received all of the Student's completed work. The Student confirmed that ultimately in late **XXX**, the UA did receive all of her work and graded it accordingly. As such, OCR determined that the UA provided a legitimate, nondiscriminatory and non-pretexual reason for not awarding final grades to the Student as of October 2013.

Regarding Issue 2, OCR determined that the Student was involved in a protected activity, of which the UA was aware. However, OCR's investigation determined either there was no sufficient information to establish that an adverse action occurred or that the UA had a legitimate, nondiscriminatory and non-pretexual explanation for the actions it took relative to the Student. As such, OCR's investigation did not reveal sufficient information to substantiate a violation of Section 504/Title II, relative to Issue 2.

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.

Under OCR procedures, we are obligated to advise the institution against whom the complaint is filed that intimidation or retaliation against a complainant is prohibited by regulations enforced by this agency. Specifically, the regulations enforced by OCR, directly or by reference, state 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 regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceedings or hearing held in connection with a complaint.

Under the Freedom of Information Act, 5 U.S.C. § 552, it may be necessary to release this document 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.

This concludes OCR's consideration of this complaint. We would like to extend our appreciation for the assistance provided to OCR throughout this investigation to XXX
XXX

If you have any questions, please feel free to contact Melissa Huling Malonson, Senior Attorney, at (214) 661-9637, or John Stephens, Compliance Team Leader at (214) 661-9600.

Sincerely,

Taylor D. August, Director
Office for Civil Rights
Dallas Office

Enclosure

Cc: **XXX XXX**. General Counsel