



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

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DENVER, CO 80204-3582

REGION VIII

ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

December 15, 2020

Kirt Hamm, Administrator
Conservatory of Recording Arts and Sciences
2300 East Broadway Road
Tempe, AZ 85282

Re: OCR Case Number 08-20-2325
Resolution Letter

Dear Mr. Hamm:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received on August 19, 2020, against the Conservatory of Recording Arts and Sciences (Conservatory). The complaint alleged that the Conservatory discriminated against an Applicant on the basis of disability and retaliated against the Applicant for opposing discrimination.

Specifically, the Complainant alleges, on behalf of her client (Applicant), that the Conservatory discriminated against the Applicant based on his disability by:

1. Denying him admission to the Conservatory despite his qualifications based on his disability and request for reasonable accommodations;
2. Making a pre-admission inquiry regarding the Applicant's disability by: a) requiring the applicant to restart the admissions process after he was accepted once he disclosed his disability and request for accommodations; b) refusing to approve the applicant's admission prior to considering his accommodation request; c) requiring all applicants to answer disability and accommodations related questions during the admissions process; d) tasking the admissions department with evaluating requests for accommodations; and e) requiring students to request accommodations during the admission process and waive their right to reasonable accommodations if not requested during the admissions process.
3. Retaliating against the Applicant for requesting accommodations and opposing the Conservatory's discriminatory practices by: a) subjecting him to intimidation and threats regarding his request for accommodations and questioning of the Conservatory's accommodations process; b) requiring him to restart the admissions process once he disclosed his disability and need for accommodations; and c) withdrawing the Conservatory's offer of admission to the Applicant despite his qualifications.

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

4. Failing to act on the Applicant's request for accommodations and to engage in the interactive process; and
5. Discouraging disabled persons from applying to the Conservatory through statements about the rigors of the audio engineering industry on the school's website and application.

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 (FFA). As a recipient of FFA from the Department, the Conservatory is subject to Section 504 and its implementing regulation. Accordingly, OCR has jurisdiction over the Conservatory. Additional information about the laws OCR enforces is available on our website at www.ed.gov/ocr.

On October 15, 2020, we notified the Conservatory that OCR was opening an investigation of the above allegations, and we sent the Conservatory a data request. Prior to the deadline for responding to the data request, the Conservatory asked to resolve this complaint pursuant to Section 302 of OCR's *Case Processing Manual*. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Legal Standards

Non-discriminatory Treatment of Students

Section 504 and the regulation at 34 CFR § 104.4(a) provides 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 which receives Federal financial assistance.

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.

Admissions and Recruitment

The Section 504 implementing regulation at 34 C.F.R. § 104.42(a) prohibits a postsecondary institution from denying a qualified disabled person admission on the basis of disability or from subjecting him or her to discrimination in admission or recruitment.

In addition, the Section 504 implementing regulation at 34 C.F.R. § 104.42(b)(4) prohibits a postsecondary institution from making a pre-admission inquiry as to whether an applicant for admission is a disabled person. After admission, the institution may

make inquiries on a confidential basis as to any disabilities that may require accommodation.

There is an exception at 34 C.F.R. § 104.42(c) that permits an institution to make a pre-admission inquiry if it is taking remedial action to correct the effects of past discrimination pursuant to 34 C.F.R. § 104.6(a) or when the institution is taking voluntary action to overcome the effects of conditions that resulted in limited participation of disabled individuals in its educational programs or activities. However, the recipient must make clear that the information requested is voluntary, intended for use solely in connection with its remedial action obligations or its voluntary action efforts, and that refusal to provide the information will not subject the applicant to any adverse treatment.

Academic Adjustments

The Section 504 regulations, at 34 C.F.R. § 104.44(a), require post-secondary institutions to make modifications to their academic requirements that are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating, against qualified individuals with disabilities. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific required courses, and adaptation of the manner in which courses are conducted. However, academic requirements that recipient colleges and universities can demonstrate are essential to the program of instruction being pursued or to any directly related licensing requirement will not be regarded as discriminatory.

Under the requirements of Section 504, a student with a disability is obligated to notify the college or university of the nature of the disability and the need for a modification, adjustment, aid or service. Once a college or university receives such notice it has an obligation to engage the student in an interactive process concerning the student's disability and related needs. As part of this process, the college or university may request that the student provide documentation, such as medical, psychological or educational assessments, of the impairment and functional limitation.

Retaliation

Section 504, at 34 C.F.R. § 104.61, incorporates Title VI's prohibition on retaliation. Title VI, at 34 C.F.R. § 100.7(e), prohibits a recipient or other person from intimidating, threatening, coercing, or discriminating against any individual because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the regulation.

A recipient engages in unlawful retaliation when it takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future. To find a *prima facie* case of retaliation, each of the following three elements must be established:

The individual or someone on behalf of the individual engaged in a protected activity or the recipient believed the individual or someone on behalf of the individual might engage in a protected activity in the future;

An individual experienced an adverse action caused by the recipient; and

There is some evidence of a causal connection between the protected activity and the adverse action.

A protected activity is any action taken to further a right guaranteed by the statutes and regulations enforced by OCR or to express opposition to any practice made unlawful by the statutes and regulations enforced by OCR.

An act is an adverse action if it is likely to dissuade a reasonable person in the individual's position from making or supporting an allegation of discrimination or from otherwise exercising a right under the statutes or regulations enforced by OCR. Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.

In determining whether the recipient took the adverse action because an individual engaged in a protected activity or for the purpose of interfering with a protected activity, OCR considers whether there is some evidence of a causal connection between the adverse action and the protected activity. The evidence may include changes in the treatment of the individual after protected activity occurred, the proximity in time between protected activity and adverse action, the recipient's treatment of the individual compared to similarly-situated individuals, or the recipient's deviation from established policies or practices.

If all the elements of a *prima facie* case of retaliation are established, then OCR considers whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action. If so, then OCR considers whether the reason for the adverse action is genuine or a pretext for retaliation, or whether the recipient had multiple motives for taking the adverse action.

Policies and Procedures

The regulation at 34 CFR § 104.7(a) requires a recipient that employs fifteen or more persons to designate at least one person to coordinate its efforts to comply with Section 504.

Pursuant to 34 C.F.R. § 104.7(b), a recipient employing 15 or more persons must adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

The regulation at 34 CFR § 104.8(a) requires a recipient that employs fifteen or more persons to take appropriate initial and continuing steps to notify applicants that it does not discriminate on the basis of disability in violation of Section 504 and its implementing regulations. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 104.7(a).

Pursuant to 34 CFR § 104.8(b), if a recipient publishes or uses recruitment materials or publications containing general information that it makes available to applicants, it shall include in those materials or publications a statement of the policy described in section 104.8(a).

Investigation to Date

OCR's investigation included an interview of the Applicant; review of documents pertinent to the complaint allegations, including the Applicant's application for admission, correspondence accepting, enrolling, and later rejecting the Applicant, the Applicant's request for accommodations and supporting documentation, the Applicant's written complaint regarding disability discrimination, and the Conservatory's ADA policy on its website. OCR staff additionally listened to recordings of the Applicant's complaints to XXX and XXX regarding disability discrimination.

Prior to responding to OCR's data request, the Conservatory expressed a willingness to resolve the above complaint allegations. Pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), a complaint may be resolved when, before the conclusion of an investigation, the Recipient expresses an interest in resolving the complaint and OCR determines that it is appropriate to resolve because OCR's investigation has identified concerns that can be addressed through a resolution agreement. The Conservatory has voluntarily agreed to take actions to remedy the compliance concerns raised by the allegations in this Complaint.

Resolution

The Conservatory signed the enclosed Resolution Agreement on December 14, 2020, which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information that was obtained during OCR's investigation, and are consistent with applicable law and regulation. OCR will monitor the Conservatory's implementation of the Agreement until the Conservatory is in compliance with the statutes and regulations at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the Conservatory'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 the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the Conservatory may not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), 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 personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the Conservatory's cooperation in the resolution of this complaint. If you have any questions, please contact XXX, the OCR attorney assigned to this complaint, at XXX, or by email at XXX.

Sincerely,

/s/

Thomas M. Rock
Supervisory General Attorney

Enclosure: Resolution Agreement