



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD., SUITE 310
DENVER, CO 80204-3582

REGION VIII

ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

June 12, 2023

Dr. Jeremy Haefner
University of Denver, Chancellor
Via

Mr. Howard Kallem
University of Denver, Interim Associate Vice Chancellor for Equal Opportunity and Title IX
Howard.Kallem@du.edu

Mr. Jim Goh
Outside Counsel
jgoh@constangy.com

Via email only

RE: OCR Complaint No. 08212184-University of Denver

Dear Chancellor Haefner:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has resolved the above-referenced complaint filed against the University of Denver (DU or Recipient). The Complainant alleged that DU discriminated based on disability in the following ways:

- (1) Through January 2021, DU discriminated against the Complainant based on disability when personnel failed to refer the Complainant to DU's Disability Services Program office (DSP) though they were aware of the Complainant's disabilities and requests for accommodations, in violation of its own policy/handbook; and
- (2) On January 13, 2021, DU retaliated against the Complainant for asserting their rights under Section 504 as a person with a disability when the Josef Korbel School of International Studies dismissed the Complainant from its graduate program the same day the Complainant submitted medical documentation to DU's Title IX office.

On September 9, 2021, OCR opened an investigation into the above allegations under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability by recipients of

federal financial assistance. Section 504 also prohibits retaliation. Because DU receives federal financial assistance from the Department, OCR has jurisdiction over it under Section 504.

As part of its investigation, OCR reviewed information provided by the Complainant and DU, conducted interviews with the Complainant and relevant witnesses from DU, and discussed the allegations with DU and its representatives.

Before OCR completed its investigation, DU asked to resolve the allegations under investigation voluntarily pursuant to Section 302 of OCR's *Case Processing Manual* (CPM). Section 302 provides that OCR may resolve a complaint at any time when, before the conclusion of its investigation, the recipient expresses an interest in resolving the complaint and OCR determines that such a resolution is appropriate. OCR determined that a Section 302 resolution was appropriate because the investigation to date identified compliance concerns regarding the issues under investigation, as described below in this letter. By implementing the enclosed Section 302 Resolution Agreement (Agreement), DU will resolve OCR's compliance concerns under Section 504.

Legal Standards

Disability Discrimination

Under the Section 504 regulations, no qualified individual 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 in a program of the recipient.¹ To determine whether a recipient has discriminated against an individual on the basis of disability under Section 504, OCR assesses whether there is evidence that the school's actions resulted in the denial or limitation of the recipient's services, benefits, or opportunities to the individual with a disability. If there is such evidence, OCR examines whether the recipient provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for disability discrimination.

For OCR to find disability discrimination in the context of this case, the preponderance of the evidence must establish that DU's failure to refer the Complainant to DSP resulted in a denial or limitation of its services, benefits, or opportunities to the Complainant.

Retaliation

Title IV § 100.7 (e) as incorporated into Section 504 § 104.6 states 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 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 identity of complainants shall be kept confidential

¹ 34 C.F.R. §§ 104.4(a) and (b).

except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

The following three elements must be satisfied to establish a prima facie case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action, and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Facts

OCR's review indicates that the Complainant was enrolled as a graduate student at DU's Josef Korbel School of International Studies beginning in the Fall semester of 2019. Shortly thereafter, the Complainant suffered a series of medical and personal issues over the next roughly two years that necessitated requesting "Incompletes" for numerous classes. The Complainant completed the coursework for some of these classes, converting the "Incompletes" into grades, but was unable to do so for several classes, which triggered the "Incompletes" being converted into "Fs". On January 13, 2021, the Complainant was dismissed from DU due to her low grade point average (GPA) stemming from incomplete coursework. During this time, the Complainant did not self-identify as having a disability to DSP or seek accommodations through DU's formal process outlined below.

Regarding Allegation 1, the Complainant alleges that DU discriminated against her based on disability when personnel failed to refer the Complainant to DSP, in violation of its own 2021-2022 Handbook for Students with Disabilities, Medical and Mental Health Conditions (Handbook). While OCR does not enforce DU policy, it is helpful to look at this policy to see if it comports with Section 504.

The Handbook states on page 6 that "Faculty shall refer students who self-identify as having a disability to DSP. Students who want to request a disability accommodation must first register with DSP. DSP will make the determination of eligibility for accommodation and will also make the determination as to the appropriate reasonable accommodation." Further, page 7 defines and explains "informal agreements," as opposed to accommodations, stating that, when a student requests an informal agreement, "Faculty may ask for verification (e.g. doctors' note; receipt from medical center) from students requesting a minor arrangement such as a make-up exam or assignment extension for a temporary, minor illness or injury (e.g., colds/flu, broken hand/arm). Note: An informal arrangement is not considered an accommodation. Only the DSP can grant accommodations. If it appears that a more formal accommodation may be necessary, the faculty should refer the student to the DSP." Page 8 goes on "Whenever students disclose a disability, or the need for a disability-related accommodation, they should be referred to DSP. If an injury, illness, or temporary impairment creates increased challenges for the student then the faculty should refer the student to DSP for possible short-term accommodations." Page 12 clarifies that "To be eligible for accommodations at the University of Denver, the student must: Self-identify to DSP ... [and] Provide appropriate supporting documentation..."

While the Handbook, in line with Section 504, clearly indicates that, to be eligible for accommodations, a student must self-identify to DSP and provide appropriate supporting documentation, DU policy is vague on what constitutes a short-term issue that can be handled by professor and what is a disability. This vagueness could confuse personnel and prevent appropriate referral of the student to DSP. Even so, the Handbook says that “Faculty shall refer students who self-identify as having a disability to DSP,” but also says that students with a disability seeking accommodations need to self-identify to DSP. This policy is confusing as to whose obligation it is to seek accommodations from DSP once a student has self-identified to a staff member and raises a compliance concern for OCR.

Regarding Allegation 2, the Complainant alleges DU dismissed her from her graduate program because she exercised her rights as a student with a disability. OCR interviewed the Dean of the Josef Korbel School and the Director of Graduate Student Affairs at the Josef Korbel School. Both witnesses confirmed that the decision to dismiss the Complainant (i.e., the adverse action) was made prior to January 13, 2021, the date the Complainant engaged in the protected activity of providing documentation of her disability to DU.

However, an act can be adverse if it is likely to dissuade a reasonable person from exercising a right or privilege secured under Section 504. It is undisputed the adverse action happened on the day the Student engaged in her protected activity. Ultimately, the fact that DU dismissed the Complainant on the same day she submitted medical documentation to DU could dissuade a reasonable person from exercising a right or privilege secured under Section 504. This is a concern to OCR.

Prior to OCR determining whether DU’s actions outlined in the allegations above violated Section 504, DU expressed interest in resolving OCR’s concerns under Section 302 of OCR’s CPM, and OCR determined that it was appropriate to do so.

Conclusion

DU voluntarily signed the enclosed Agreement to resolve OCR’s compliance concerns identified in the investigation and discussed above. The Agreement details the specific actions DU will take and the dates for their implementation. When fully implemented, the Agreement will address the evidence obtained and all the allegations investigated to date. OCR will monitor the implementation of the Agreement until DU is in compliance with the terms of the Agreement and the statutes and regulations at issue in the case.

This concludes OCR’s investigation of the complaint. This letter should not be interpreted to address DU’s compliance with any other statutory or 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 OCR finds a violation.

Please be advised that the Recipient must 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, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

If you have any questions about this letter, please contact Mr. Craig Nydick, the attorney assigned to this complaint, by telephone at (303) 844-7104 or by email at craig.nydick@ed.gov.

Sincerely,

Craig Nydick
Acting Team Leader
For
Michael D. Todd
Supervisory Attorney
OCR Denver Office

Enclosure: Signed Resolution Agreement