



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; SUITE 1545
SAN FRANCISCO, CA 94102

August 26, 2016

Andrew K. Benton
President and Chief Executive Officer
Pepperdine University
24255 Pacific Coast Highway
Malibu, CA 90263

(In reply, please refer to case no. 09-15-2412.)

Dear President Benton:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Pepperdine University (University). The Complainant alleged that the University discriminated against her on the basis of disability.¹ Specifically, OCR investigated whether the University failed to respond promptly and equitably to the Complainant's internal complaint, made on January 20, 2015, alleging that the Complainant was: 1) harassed based on disability; and, 2) did not receive academic accommodations.²

OCR investigated this complaint pursuant to its authority under Section 504 of the Rehabilitation Act of 1973. Section 504 and its implementing regulation prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. The University receives Department funds, and, therefore, is subject to the requirements of Section 504 and its implementing regulation.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the University. OCR found that the University was out of compliance with Section 504 and its implementing regulation because, while it provided an appropriate and equitable investigative process with respect to the failure to accommodate allegation, it did not provide a prompt resolution. OCR, however, did not complete its investigation into whether the University failed to conduct an appropriate and equitable investigation with respect to the Complainant's

¹ OCR previously provided the University with the identity of the Complainant. We are withholding the Complainant's name from this letter to protect this individual's privacy.

² OCR's initial letter notifying the University of the instant complaint included four separate allegations, two related to the University's alleged failure to provide the Complainant with appropriate academic accommodations and one alleged that the Complainant was subjected to harassment on the basis of disability. During the investigation, OCR determined that the Complainant had filed an internal complaint with respect to all of the underlying allegations and that the University had investigated the complaint and issued a decision. As such, OCR reviewed the University's investigation of the complaint to determine whether it provided a resolution and remedy using legal standards that meet the requirements of Section 504 and its implementing regulations, and a comparable process that meets OCR's requirements.

allegation regarding harassment on the basis of disability. OCR's investigation to date raised concerns about whether University's investigation was adequate under the circumstances.

Under OCR's complaint processing procedures, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint and OCR determines that a Resolution Agreement (Agreement) is appropriate. Case Processing Manual § 302. During the course of OCR's investigation, the University expressed an interest in resolving the complaint and OCR determined that such a resolution was appropriate. On August 16, 2016, the University submitted the attached Agreement which, when implemented, is intended to resolve the allegations OCR opened for investigation.

The applicable legal standards, the facts gathered to date, and the reasons for OCR's determinations are summarized below.

Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.43(a), provide that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any postsecondary education program of a recipient.

The Section 504 regulations, at 34 C.F.R. §104.7(b), further require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination.

They also require recipient colleges and universities 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 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. 34 C.F.R. §104.44(a).

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of Federal financial assistance. Universities are responsible under Section 504 for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Under Section 504 and its regulations, if a student is harassed based on disability by an employee, a university is responsible for determining what occurred and responding

appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The university must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

OCR evaluates the appropriateness of the responsive action to alleged discrimination on the basis of disability by assessing whether it was prompt, thorough, and effective. What constitutes a reasonable response to discrimination will differ depending upon the circumstances. However, in all cases the recipient must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, and remedy the effects of the discrimination on the student who was discriminated against. A university must also take steps to prevent the discrimination from recurring.

Findings of Fact

Disability Harassment Allegation

- The Complainant was enrolled in the University's Graziadio Graduate School of Business and Management in the Fall of 2014. The Complainant was registered with the University's Disability Services Office (DSO) as a student with a disability for the entire fall term. Relevant to this complaint, her approved accommodations included extended time on exams and quizzes and a reader.
- The fall term had two parts, session A and session B. During session A, the Complainant was enrolled in Professor A's class. She was enrolled in Professor B's class during session B.
- The Graziadio School's Non-Academic Student Grievance Procedures, which address investigation of complaints made by students regarding discrimination on the basis of disability, provide that an investigation will be completed within a total of 56 days of a complaint being submitted.
- On November 5, 2014, the Complainant emailed a member of the DSO to complain about an exchange with Professor B on November X, 2014, alleging that he was "very condescending" and "[made her] feel horrible like [she] was the stupidest person in the world." The Complainant also noted that she had experienced trouble throughout the term with Professor B filling out the necessary paperwork for her to access modified versions of his quizzes.
- On the same day, the Assistant Director of the DSO wrote to the Complainant to "encourage [her] regarding [her] experience XXXXXXXXX...I hope you are . . . finding peace and clarity."

- On November 11, 2014, a DSO staff member emailed the Complainant and stated that the DSO executive director “is aware of your complaint and we will notify the Associate Dean of your concerns.” On the same day, the DSO Director emailed a member of her staff suggesting that “[i]t might be good for the Exec. Director or an Associate Dean to respond to [the Complainant] . . . [that] the grievance with the prof has been noted.” The University did not provide any further emails evidencing that the Executive Director or Associate Dean responded to the Complainant, nor was the Complainant informed how or if her complaint would be handled.
- On January 7, 2015, the Complainant emailed a member of the DSO staff asking for help documenting her concerns with both Professor A and Professor B, including reference to Professor B’s “verbal assault” and allegations regarding the failure to provide accommodations in both classes.
- On January 20, 2015, the Complainant sent her complaint to the Interim Dean of the Economics Department. On January 23, 2015, the Interim Dean of the Economic Department forwarded the complaint to the Interim Associate Dean, who served as the Grievance Officer (GO).
- The GO sent undated letters via certified mail to the DSO, and Professor A and Professor B, indicating that they had 14 days to respond to queries that he posed to each of them. The letter sent to the DSO, which was emailed on or about February 12, 2015, also sought information around the alleged “verbal assault.” The letter to Professor B failed to ask any questions regarding the alleged disability harassment. On April 21, 2015, the GO emailed Professor A asking for additional information.
- On May 7, 2015, the GO emailed the Complainant stating that he had completed his investigation. On July 15, 2015, the Complainant emailed the GO asking for an update, as she had not heard from the GO since his May 7 email.
- On July 27, 2015, the GO issued his investigative report, 188 days after the Complainant sent her complaint to the Interim Dean of the Economics Department, and 264 days after the Complainant first complained to a member of the DSO staff.
- To investigate the disability harassment allegation:
 - The GO interviewed the Complainant. His notes from the interview include that the Complainant indicated that a member of the DSO staff was nearby when the Complainant was on the phone with Professor B during the offending interaction, that the Complainant declined to tell the investigator what Professor B said to her, but noted his “attitudes and vulgarity, and that Professor B was “nasty” to the Complainant the whole

term, and made her feel “dumb and unworthy,” was very condescending and “hurt her in a way no other prof had.”

- The GO received a response from the DSO director and staff that “guess[ed]” when the verbal assault by Professor B occurred, but which otherwise focused on the provision of testing accommodations. There was no evidence presented that the GO followed up with the DSO staff about their cursory response.
- On March 2, 2015, the GO received a written response from Professor B, which addressed the Complainant’s access to testing accommodations, and failed to respond to the GO’s query about any conversations Professor B had with the Complainant about her testing accommodations, and seeking Professor B’s summary of any such conversations. The documents received to date do not include any further follow-up by the GO with Professor B.

Failure to Provide Approved Accommodations Allegation

- The DSO’s Exam Proctoring Request Form requires that students seeking exam accommodations provide notice to the DSO at least 14 days prior to the administration of a final exam.
- Complainant did not request a reader for the final exam for Professor A’s class in keeping with DSO’s policy. Instead, she requested a reader during the exam and then after the test, requested to retake the test with a reader. Complainant stated that she did not think she would need a reader based on Professor A’s representation that the final exam would be similar to the quizzes and mid-terms, which she had been taking without a reader.
- Professor B administered a computerized mid-term exam. The day before the mid-term, November X, 2014, the Complainant received a link to the exam that would allow her to receive the approved extended time on the test. On November X, 2014, Complainant, along with all other members of the class, received a link to the unmodified mid-term exam.
- On November X, 2014, the Complainant tried accessing the modified exam to no avail. She sought and obtained help from the DSO and Professor B. She was ultimately able to access the modified version of the exam, 40 minutes later than she was scheduled to take her exam.
- On November 5, 2014, the Complaint wrote to DSO staff about the problems she had encountered accessing her modified mid-term exam.
- On January 20, 2015, the Complainant submitted a complaint to the interim dean of the Economics department about both Professor A and Professor B’s alleged

failures to provide approved accommodations. The Complainant requested that she be refunded her tuition for fall 2014 for all classes.

- On a date unknown, the GO sent letters to the DSO, Professor A and Professor B. Each letter sought information about the provision of accommodations.
- To investigate, the GO:
 - Corresponded with the DSO and Professor A to gather relevant information about the operative policies concerning accommodations and the circumstances around the final exam. He also obtained copies of the quizzes, midterm and final exam from Professor A to independently evaluate the Complainant's claim that the final differed materially in nature from the other tests.
 - Obtained a written response from Professor B, which explained that the Complainant received all the time due her on every test administered in his class, and which asserted that the problems encountered accessing the modified mid-term exam were caused by mistakes on the Complainant's part.

University's Notice of Findings

- On July 27, 2015, the GO sent the Complainant a determination letter summarizing his findings. Therein, the GO found that the Complainant's rights were not violated because she had failed to request the reader for Professor A's final exam in a timely manner, was aware of the requirement to do so, and the final exam did not differ materially from the quizzes. The GO also found that the Complainant's rights were not violated because Professor B had made a modified version of the mid-term available to her in a timely manner. However, the GO also concluded that because it might have been confusing for Complainant to receive two links from Professor B with two different versions of the exam, the Complainant should be refunded her tuition for Professor B's class.
- With respect to the harassment allegations, the GO concluded that "in the absence of knowledge about the specific comments that [Professor B] made to [the Complainant], [he] could not adjudicate" the allegations.
- The Complainant confirmed that the University refunded her tuition for Professor B's class. The Complainant did not raise a concern with OCR or the University about the grade received in the class.

Analysis & Conclusions of Law

Where, as here, the allegations filed with OCR have been investigated through a recipient's internal grievance procedures, OCR first thoroughly reviews all documentation of the recipient's investigation and resolution of the complaint to determine whether the recipient provided a resolution and remedy using legal standards that meet Section 504 and 34 C.F.R. § 104.7(b), and a comparable process that meets OCR's requirements. If OCR finds that the recipient has met these requirements, OCR generally will not conduct its own independent investigation. If OCR finds that the recipient has not met these requirements, OCR will conduct its own independent investigation.

Issue 1: *Whether the University responded promptly and equitably to the Complainant's internal complaint, made on January 20, 2015, alleging that she did not receive reasonable accommodations.*

OCR determined that the GO conducted a thorough and unbiased investigation, correctly applied Section 504 legal standards, utilized a preponderance of the evidence standard to the evidence gathered, and reached determinations that reasonably appear to be supported by the evidence with regard to the testing accommodations. OCR determined that the determination letter issued to the Complainant summarizing the investigation properly recognized the legal standard used, outlined the allegations investigated, the evidence gathered and the rationale for each determination and provided a remedy that was similar to one that OCR would have provided.

For these reasons, OCR concluded that University's investigation of the Complainant's testing accommodation allegations was consistent with the requirements of Section 504 and that the University used a process comparable to one used by OCR in reaching its determination. However, OCR also found that the University's investigation of the Complainant's internal grievance was not prompt, as required by Section 504's regulations and its own procedures. The relevant grievance procedure states that an investigation will be completed and a grievance officer's report will issue within fifty-six days of a complaint being submitted. Here, one hundred and eighty-eight days passed between the submission of the formal July 20 complaint and the issuance of the GO's report. Accordingly, OCR concluded that the University violated Section 504 by failing to provide the Complainant with a prompt resolution of her complaint.

Issue 2: *Whether the University responded promptly and equitably to the Complainant's internal complaint made on January 20, 2015, alleging that she was harassed based on disability.*

OCR's investigation to date raised concerns about the adequacy and reliability of the investigation conducted into the Complainant's harassment allegations. OCR recognizes that the Complainant refused to repeat the harassing comments allegedly made to her by Professor B on November X, 2014, which understandably impeded the University's ability to fully investigate the allegations. However, OCR also notes that the Complainant provided considerable specificity when she stated that Professor B was very condescending to her and made her "feel dumb and unworthy" in the context of her

seeking to make use of her approved accommodations, and that she also provided information that other college staff may have overheard the comments. The GO posed initial inquiries about the harassment claims to the DSO, both about interactions with Professor B over the course of the term and about the specific alleged “verbal assault.” However, the evidence reviewed to date suggests that the GO accepted cursory responses from the DSO office without further inquiry, and may not have posed any direct questions to Professor B related to the Complainant’s harassment allegations.

To complete its investigation and reach a finding, OCR would need to interview the GO, DSO staff, and Professor B to further assess whether the harassment occurred and whether the response to the allegations was timely and sufficient. However, on August 16 2016, the University entered into the attached Agreement with OCR in which it agreed to: provide training on its obligation to promptly and equitably investigate complaints of harassment and discrimination based on disability; and distribute to all administrators who serve as grievance officers within its graduate programs a guidance memorandum that includes the information detailed in the training.

Conclusion

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. OCR is notifying the Complainant concurrently.

When fully implemented, the enclosed Agreement is intended to address the compliance concerns and the violation identified by OCR during this investigation. OCR will monitor the implementation of the agreement until the University is in compliance with Section 504 and its implementing regulation.

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 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.

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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank your staff, especially Thomas H. Knudsen, for their cooperation and courtesy in resolving this matter. If you have any questions regarding this letter, please contact Araceli Martínez-Olguín, Civil Rights Attorney, at (415) 486-5589 or amartinez-olguin@ed.gov.

Sincerely,

/s/

Katherine Riggs
Acting Team Leader

Enclosure: Resolution Agreement

cc: Thomas H. Knudsen, Senior Counsel
[via email]