



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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

July 26, 2018

Dr. Elisa Stephens
President
Academy of Art University
79 New Montgomery Street
San Francisco, California 94105

(In reply, please refer to case no.09-16-2299)

Dear Dr. Stephens:

This letter is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Academy of Art University.

Specifically, the complaint alleges the following:

1. Whether during the 2014 term the University discriminated against the Complainant when it failed to provide her with academic adjustments in the form of additional time to complete assignments, a flexible schedule, transportation, and a chemical-free environment in violation of Section 504.
2. Whether the Complainant was subjected to harassment by University employees based on race and disability.
3. Whether the University failed to respond to the Complainants' grievance dated August XX, 2014, alleging that she had been discriminated against based on race and disability.
4. Whether the University retaliated against the Complainant after she filed a grievance alleging race and disability discrimination when the University refused to allow her to register for classes in January 2015.
5. Whether the University discriminated against the Complainant and students with mobility impairments because the University's facility located at 740 Taylor Street in San Francisco is not accessible to individuals with mobility disabilities.

OCR investigated the complaint under the authority of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its implementing regulation, 34 C.F.R. Part 100. Title VI prohibits discrimination on the bases of race, color, or national origin in programs and activities operated by recipients of Federal financial assistance.

OCR is also responsible for enforcing 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. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. As a recipient of federal financial assistance, the University is subject to Title VI, Section 504, and its implementing regulations.

During its investigation, OCR reviewed information provided by the Complainant and the University and interviewed the Complainant, University officials and conducted an onsite review of the 740 Taylor Street building.

Allegation 1: Whether the University failed to Provide Modifications and Academic Adjustments under Section 504.

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. §104.44(a), 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 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.

Although students may request academic adjustments at any time, students needing services are advised to notify the institution as early as possible to ensure that the institution has enough time to review their request and provide an appropriate academic adjustment. Students should not wait until after completing a course or activity or receiving a poor grade to request services and then expect the grade to be changed or to be able to retake the course.

Under Section 504, a university should engage a student in an interactive process concerning her disabilities and needs. As a part of the process, a university may request a student to provide documentation, such as medical, psychological or educational assessments of the impairment and functional limitation. At the postsecondary level, students are responsible for knowing these procedures and are expected to be responsible for their own academic programs and progress in the same ways that nondisabled students are responsible for them.

A university may set reasonable standards for documentation and may require a student to provide documentation prepared by an appropriate professional, such as a medical doctor, psychologist, or other qualified diagnostician. The required documentation may include one or more of the following: a diagnosis of a current disability, as well as supporting information, such as the date of the diagnosis, how that diagnosis was reached, and the credentials of the diagnosing professional; information on how the disability affects a major life activity; and, information on how the disability affects a student's academic performance. If the documentation provided by a student does not meet the University's requirements, a school official should advise the student in a timely manner what additional documentation is needed.

Factual Findings

The evidence shows that the Complainant first notified the University about her disabilities on January XX, 2014. The same day the University requested documentation about her disabilities. Though the Complainant had not submitted documentation as required by the University accommodation process, the Classroom Services Office (CSO) offered to support her in dealing with absences related to her late enrollment and lack of funds. In mid-February, when the Complainant suffered an injury to her knee, the CSO again requested accommodation documents and also provided support to her by exploring whether she needed to carry her equipment to class.

When the Complainant requested transportation to 740 Taylor Street, the CSO again requested medical documentation from the Complainant. The CSO also continued to assist her. Specifically, on February XX, 2014, the CSO Director advised the Complainant about paratransit information and reminded her to speak to her doctor about disability related accommodations. The Director also advised the Complainant to speak to her instructors and the Program Director to excuse absences from the first few weeks of school due to her inability to obtain funding from the California Department of Rehabilitation (DOR) for course materials and transportation. Also, the Program Director met with the Complainant and worked out a plan to allow her to catch up on missed classes and assignments during the first four weeks of classes. The CSO Director also arranged for transportation on campus to divert their route to allow her to walk to her classes more easily.

On October XX, 2014, the Complainant finally submitted the needed documentation to the CSO Director. Eight days after the Complainant submitted documentation, the University approved the Complainant for academic adjustments. On October XX, 2014, the Complainant provided documentation about problems with her vision, and the University added an adjustment to address this issue.

In November 2014, the Complainant made complaints about Instructor 4 not providing other academic adjustments. However, none of these were requested by the Complainant previously or discussed during the interactive process with CSO in October. The Complainant did not request any further adjustments from the CSO after the exchange with Instructor 4, or advise CSO that she believed that Instructor 4 was not providing required accommodations.

Analysis

The Complainant alleges that she suffered discrimination because she made requests for academic adjustments in January 2014 and they were not addressed until October 2014. However, she did not provide the needed documentation requested by the University until that time. Each time the Complainant provided the needed medical documentation to verify her disabilities and what she needed, the University engaged in an interactive process with the Student, as required under Section 504, and provided approved academic adjustments. Accordingly, there is insufficient evidence to show noncompliance with Section 504 with respect to the failure to timely provide academic adjustments.

Allegation 2: Whether the Student was subjected to harassment by University employees based on race and disability.

Legal Standards

The regulations implementing Title VI, at 34 C.F.R. §100.3(a) and (b), prohibit discrimination based on race, color or national origin by recipients of Federal financial assistance. Universities are responsible under Title VI and the regulations for providing students with a nondiscriminatory educational environment. Harassment of a student based on race, color or national origin can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Universities provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in harassment on the basis of race, color or national origin that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the university is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504 and the regulations, if a student is harassed based on disability by an employee, the 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.

Factual Findings

On August XX, 2014, the Complainant submitted a nine-page long grievance to the University's Executive Vice President of Educational Services (EVPES) to be investigated by the Grievance Committee (Committee). The Complainant's grievance stated that she experienced race and disability discrimination. On August XX and XX, 2014, the Complainant submitted additional documents to the Grievance office. In her grievance documents, the Complainant stated that she was "profiled" based on race and disability by two instructors in the Spring semester (Instructors 1 and 2).

With regard to Instructor 1, the Complainant stated that Instructor 1 "profiled her negatively" and allowed another student to critique her work. She asserted that because she had lacked funds to get to school, this resulted in further "profiling" from Instructor 1. She said that she met with the Director of XXXXXXXXXXXX who stated that he would meet with Instructor 1 and that this made issues worse because "she continued her racial slurs and her targeting."

As examples of the racial slurs and targeting, Complainant stated that when she would arrive late, Instructor 1 would say, "late" and that Instructor 1 gave her an "F" grade on an assignment that she did not deserve. For another example, the Complainant described that on one occasion, when she told Instructor 1 that she was late due to police activity on the BART train, Instructor 1 asked whether the train was stopped because of the Complainant. The Complainant infers that Instructor 1's query regarding whether the BART train was stopped due to the Complainant was based on race because the Complainant, as she described to OCR, was the only Black student in the class. She alleges that the comment was discriminatory because Instructor 1 thinks that police activity on BART was caused by a Black person.

When the Complainant asked Instructor 1 about the incident and why she did not treat an Asian student who was late in the same manner, Instructor 1 said that the Asian student had been in the class and only stepped out for a moment. Complainant also stated that during a class break, a classmate negatively critiqued the Complainant's work and thereafter the Complainant received an undeserved failing grade on the assignment.

In an interview with OCR about the Complainant's allegation, Instructor 1 told OCR that she recalled making the statement regarding the BART incident, but told OCR that she intended the statement as a question for clarification as to why the Complainant was so late to class. Instructor 1 also asserted to OCR that when the other student negatively critiqued the Complainant's work during a break, she told the other student to stop and step away. She further asserted that she never gave grades publically, but used a grade matrix when grading all her students. Instructor 1 also stated that she tells students when they are late because a student's lateness is disruptive to the rest of the class.

With regard to Instructor 2, the Complainant asserted that Instructor 2 dropped her mid-term grade from an A- to a C due to her being late to class. She also stated that Instructor 2 stated that the class would be taught from the "Western Perspective" and that she was denied the ability to present about an African XXXXXXXXXXXX. The Complainant claimed that her grade was reduced by Instructor 2 because the Student advised the Instructor she should use the phrase "people of color" in class, and because she shared her opinion that the "Manifest Destiny"

Doctrine was racist. When OCR sought information about this particular allegation, neither the Complainant nor the University provided the assignment that Instructor 2 allegedly graded down. OCR was not able to interview Instructor 2 because she is no longer employed by the University.

The Complainant included a list of statements made by her instructors regarding XXXXXX equipment (not race or disability related) or her being late that she asserted were evidence of discrimination. She also listed assignments in which she believes she deserved a higher grade. She also complained in her grievance about her instructors' refusal to excuse her absences, change her assignments because she did not have the required books, or accept late work due to her physical therapy and doctor's appointments.

With regard to Instructor 1, the Instructor told OCR that she did ask if the incident on the BART involved the Student because of the way the Student phrased her description of the incident; she said that this was all that was asked or said about the incident.

The crux of the Complainant's disability harassment complaint is that her instructors failed to excuse her absences or her assignments that were submitted late during the Spring and Summer when she had not yet submitted her documentation for accommodations.

Analysis

OCR looks at the totality of the circumstances to determine whether the alleged harassing conduct is sufficiently serious that it denies or limits the student's ability to participate in or benefit from the recipient's program.

While an instructor presuming that police activity involved an African American student could be inappropriate and evidence of race-based stereotypes, OCR has not found evidence that Instructor 1 was motivated by racial animus. Instructor 1 explained to OCR that regardless of race, she comments on a student's lateness in class because of the class disruption it causes. Moreover, the Complainant conceded to OCR that she had been late to Instructor 1's class previously. Additionally, the incident as alleged by the Complainant is not sufficiently severe persistent or pervasive to constitute racial harassment.

As to the Asian student whom the Complainant claims was also late, and did not receive a negative comment from Instructor 1, the evidence is conflicting. The Complainant asserts that the Asian student similarly arrived late, but that only the Complainant was called late because she is Black. Instructor 1 said that the Asian student had stepped out but had previously been in the class on time. Regarding the negative critique by the other student during a break, there is no evidence that this incident was connected to the Complainant receiving a failing grade. However, even if OCR were able to establish that these incidents took place, these incidents do not indicate that the Complainant was harassed based on her race or was treated differently because of race.

With regard to Instructor 2, there is insufficient evidence to show that the Complainant's comments that Instructor 2 should use the term "people of color" and that the Manifest Destiny Doctrine was racist, are connected to her failing class grade, or that the failing grade was a result

of racial bias. Instructor 2 told OCR that the Complainant received a low grade because she struggled to understand the technical aspects of XXXXXXXXXXXX and that she had a hard time accepting feedback or criticism. She told OCR that the Complainant never had an assignment ready to be critiqued in class or only had one because she fell behind in the beginning of the semester.

The Complainant also alleged that Instructor 2's comment that the class was taught from a Western Perspective was racially discriminatory. When it comes to matters of pedagogy and curriculum, OCR gives deference to a University's academic freedom to determine curricular content. Teaching a class from a "Western Perspective" does not violate Title VI.

The Complainant's failure to follow the University procedures for obtaining academic adjustments resulted in some of her absences not being treated as excused. This is not evidence of disability-based harassment.

For the foregoing reasons, there is insufficient evidence to show that the Complainant was subjected to disability or race-based harassment.

Allegation 3: Failure to respond to the Complainant's grievance dated August XX, 2014, alleging race and disability discrimination.

Legal Standards

The Title VI implementing regulations, at 34 C.F.R. §100.3(a) and (b), provide that a recipient of Federal financial assistance may not, directly or through contractual or other arrangements, on the ground of race, color or national origin, exclude persons from participation in its programs, deny them any service or benefits of its programs, or provide any service or benefit which is different or provided in a different manner from that provided to others. Section 100.3(b)(2) provides that, in determining the types of services or benefits that will be provided, recipients may not utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin.

Title VI does not specifically require that a recipient have a grievance procedure for complaints of race, color and national origin discrimination. The Section 504 regulations, at 34 C.F.R. §104.7(b), 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. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a university's grievance procedures are prompt and equitable, such as whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of

the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

When a student has been subjected to discrimination based on race or color, or if a student alleges discrimination based on disability, a university has a duty to respond. OCR evaluates the appropriateness of the responsive action to discrimination on the basis of race, color or national origin by assessing whether it was timely, reasonable, and effective.

In examining a University's response to notice of disability-based discrimination, what constitutes a reasonable response to discrimination will differ depending upon the circumstances. However, in all cases the university must timely 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. The university must also take steps reasonably calculated to prevent the discrimination from recurring.

Factual Findings

Allegations 1 and 2, which OCR opened for investigation, are issues that the Complainant also raised in her grievance that she filed with the University. When a complainant has filed the same allegations with OCR that she filed through a University's internal grievance process, generally OCR will not conduct its own investigation and will instead review the results of the University's determination and decide whether the University provided a comparable resolution process pursuant to legal standards that are acceptable to OCR. If OCR finds that the University did not provide a comparable resolution process, OCR may investigate the complaint or may require that the University do so.

The grievance was filed on August XX, 2014 and the University's Grievance letter was issued on January XX, 2015, five months later. While the University's resolution of the Complainant's grievance took approximately 5 months, in this case there were mitigating factors that caused the process to take so long. Specifically, the allegations raised by the Complainant were lengthy and she added to them on several occasions. Second, her allegations involved complaints about various University employees over the course of several months.

The Executive Vice-President of Educational Services (EPVES) is the University's Coordinator for compliance with Section 504 and Title VI. However, in her interview with OCR, she professed only knowledge of Title IX, and stated that she had received a number of trainings on Title IX.

The University's grievance policy states that as a Step 1, students should first resolve concerns informally by personal contact with the individual in question. The policy does not specifically explain the types of discrimination complaints that it can be used for, but states that for "complaints related to other matters (other than academic or financial concerns) students should seek out a faculty or staff member for assistance." If the issue is not resolved at Step 1, at Step 2, the student should "seek out a manager in the appropriate area for assistance." If this does not resolve the matter, there is a Step 3 in which a student can submit a letter of grievance to the

Grievance committee. The Policy states that the Committee shall investigate grievance claims and hold formal hearings, as necessary, and notes that this applies to “serious student problems or complaints, especially those ...involving allegations of discrimination.”

The policy does not provide timeframes for the grievance resolution process. Under University Policy,¹ the Committee investigates claims and holds formal hearings, when necessary. Typically, hearings are held when the grievance involves serious student problems and complaints, such as student discipline, discrimination or improper conduct. The policy further provides that the Committee “will consider all grievances in a timely manner upon formal written notice of a grievance and attempt to resolve them directly.” Within a “reasonable time” after the Committee meeting, written notice of the Committee’s decision is provided to the parties. The decisions of the Committee are final and binding, and are not appealable.

The University’s EVPES told OCR that when she receives a grievance, her office coordinates the gathering of documents and conducts some follow-up with witnesses related to the complaint. In lieu of an interview, a witness may provide a written statement of relevant events. The EVPES said that this material is then provided to the Committee members for review. In this matter, the EVPES advised OCR that she delegated the matter to her Administrative Assistant (the Assistant) for handling.

The University EVPES told OCR that attorneys, advocates, and witnesses, are not permitted during a Committee hearing. A complainant can only bring an individual for support if that individual does not talk during the hearing. The EVPES explained that the hearing is really a conversation between the complainant and the Committee to determine what can be done to resolve the complainant’s concerns.

The University EVPES also told OCR that the Grievance Committee uses a *reasonable person standard* to evaluate the evidence during its hearings.

On October X, 2014, approximately 54 days after the Complainant filed her grievance, the Grievance Committee advised her in writing that she would have the opportunity to meet with the Grievance Committee which would make the final decision on her grievance, but requested that she condense her list of concerns, along with her desired outcomes for each. The Complainant was informed that this list was needed before a meeting with the Committee could be scheduled.

The University EVPES told OCR that in cases where a student provides a long grievance, her office usually asks the complainant to provide a condensed list of items and list of desired outcomes, with the goal of assisting the Committee in helping the complainant find a satisfactory resolution to the grievance.

Analysis

¹ The University EVPES stated that harassment claims under Title IX go through a different process than those under Title VI and Section 504.

Given the complexity of the Student's grievance documents, OCR finds that the University's response was prompt.

However, based on the evidence, OCR cannot find that the University conducted an investigation into the race discrimination allegations in a reasonable and effective manner or into the disability discrimination allegations in an equitable manner. Specifically, there is no evidence that, other than obtaining statements from Instructor 1 and DSS, that the University conducted an investigation into the Complainant's allegations including, for example, interviewing the Student. From the notes provided by the University regarding the Grievance Committee meeting, discrimination was not listed as a subject for discussion. Moreover, a review of the letter dated January XX, 2015, provided to the Complainant regarding the outcome of the Grievance Committee hearing and the University's supposed investigation fails to articulate any finding as to the allegations of race and disability discrimination.

Additionally, the University does not have grievance procedures that comport with the requirements of Section 504. The University's Grievance policy is vague and is clearly deficient under Section 504. The University's "grievance policy" does not specifically address where to file complaints; does not address application of the procedure to complaints alleging discrimination by employees, other students, or third parties; does not state that the investigation will be adequate, reliable, and impartial; does not provide that the parties will have the opportunity to present witnesses and other evidence; does not state that there are designated and reasonably prompt timeframes for major stages of the complaint process; and fails to provide an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Accordingly, OCR finds compliance concerns regarding that the University's actions and a violation with respect to the lack of a compliant Section 504 grievance procedure. The University signed a resolution agreement addressing the deficiencies in its grievance process and to remedy the University's lack of understanding regarding how to respond appropriately to notice of discrimination.

Allegation 4: Whether the University retaliated against the Complainant after she filed a grievance alleging race and disability discrimination when the University refused to allow her to register for classes in January 2015.

Legal Standards

The Title VI regulations, at 34 C.F.R. §100.7(e), prohibit universities from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) and prohibit universities from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the university, under circumstances that suggest a connection between the protected activity and the

adverse action. If a preliminary connection is found, OCR asks whether the university can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Factual Findings

The Complainant made complaints about racial discrimination and disability discrimination to the Director and to other University staff, and in her grievance. After submitting her grievance on August XX, 2014, the University advised Complainant that her registration would be blocked for Spring 2015 until she met with the Grievance Committee in person.

University staff in the Classroom Services Office documented that Complainant was rude to staff in person in July 2014, yelled at them on the phone and then hung up on them. However, the University did not take action to address the Complainant's rudeness prior to her filing of her complaint in August 2014, nor initially after she filed her grievance. Her rudeness towards staff members did not trigger the University to take action to address it until after the Complainant sent an inappropriate lengthy email to Instructor 4 on November XX, 2014.

In response, the University provided the Complainant a copy of the Code of Conduct and informed her that she was not being disciplined. According to the University, and email correspondence from Instructor 4 during that time period, this did not resolve the matter. On December X, Instructor 4 communicated that the Complainant engaged in rude behavior toward her during class by critiquing her teaching and that this was now disruptive. Professor 4 complained on December X, 2014 that she was hostile toward her in class the prior week, with Professor 4 reporting that the Complainant was angry and aggressive. Professor 4 stated that she no longer felt safe with the Complainant her class. On December X, the Director of XXXXXXXXXXXX requested a meeting with the Complainant and she refused to meet.

On January XX, 2015, in an email to the Complainant reminding her of the Grievance Committee hearing, the University informed her that the Committee also needed to address staff and faculty complaints of harassment committed by the Complainant.

Analysis

Complainant engaged in a protected activity when she complained of race and disability discrimination to the University and in her grievance. The University took adverse action against Complainant by blocking her registration for the Spring 2015 semester.

The University's facially legitimate, non-discriminatory reason for blocking the Complainant's registration was that staff and faculty had come forward with complaints about her alleged harassment of them, including aggressive pressure or intimidation, and this matter needed to be addressed prior to allowing the Complainant to continue with her registration. The University also asserted that she needed to complete the hearing process regarding her grievance prior to continuing with her registration and the Complainant failed to follow procedures in the grievance process, which caused delays. By email dated January XX, 2015, the Assistant advised the

Complainant these were the reasons why her grievance hearing needed to be held prior to her registration for the semester.

A student's failure to adhere to the code of conduct by harassing others and failing to follow the procedures for a hearing process resulting in delays could both be legitimate non-retaliatory reasons to block a student's registration.

OCR next examined both reasons proffered by the University to determine if they were a pretext for retaliation. While in some circumstances, a University can address student alleged misconduct even when a grievance process launched by the student is pending, in this case the University did not proffer to OCR any reason why the same committee that was addressing the Complainant's discrimination allegations was designated as the body that would also address harassment allegations being made against the Complainant. Converting a hearing process that was intended to address allegations of discrimination into a student conduct process or a hearing process in which the Complainant's behavior will be the subject of scrutiny, could dissuade a reasonable person from pursuing a grievance with the University.

With regard to the second reason, that the Complainant failed to follow the hearing procedures causing delay, the procedure that she failed to follow was a request that she produce a condensed version of her grievance. There is no evidence that the University's grievance process requires a Student to submit a condensed version of a grievance prior to a hearing being scheduled. Moreover, in circumstances in which the Student is alleging disability and race discrimination, such a requirement may not be consistent with the University's obligation to respond to notice of possible discrimination. Further, there is no evidence that University policy requires that the grievance process be complete prior to a student being able to register for classes. If such were the policy, this also could certainly dissuade any student from filing a grievance for fear that it would interrupt their ability to register for upcoming semesters. However, after the grievance hearing, the University offered to allow the Complainant the ability to register for Spring 2015 classes and provide her with any needed adjustments.

In sum, the evidence shows that the Complainant demonstrated inappropriate communications with University staff prior to her filing a grievance. However, University policy does not require that a student's registration be held up pending the resolution of a grievance alleging, among other things, discrimination. OCR would need to do more investigation to determine if the University's motive in delaying the Complainant's registration pending the outcome of the hearing was in fact, retaliatory, as opposed to poor judgment on the part of the University.

For these reasons, OCR has compliance concerns about whether the Complainant was retaliated against when she was not permitted to register for classes in the Spring of 2015, prior to January XX, 2015. The University requested to sign a Voluntary Resolution Agreement, which was signed on July 24, 2018, to remedy these concerns, and OCR determined that it was appropriate to resolve this issue with such an agreement.

Allegation 5: Whether the University excluded students with mobility impairments from participation in educational programs because the facility located at 740 Taylor Street in San Francisco is not accessible to individuals with mobility disabilities.

Legal Standards

The regulations implementing Section 504 provide that no qualified person with a disability shall, because a recipient/public entity's facilities are inaccessible to or unusable by disabled persons, be denied the benefits of, excluded from participation in, or otherwise be subjected to discrimination under any program, service, or activity of the recipient, 34 C.F.R. § 104.21.

The regulations contain two standards for determining whether a recipient's programs, activities, and services are accessible to individuals with disabilities. One standard applies to "existing facilities" while the other covers "new construction" and "alterations." The applicable standard of compliance depends upon the date of construction and/or the date of any alterations to the facility.

Existing Facilities

The Section 504 regulations, at 34 C.F.R. § 104.22, apply to "existing facilities," and define them as any facility or part of a facility where construction was commenced prior to June 3, 1977. The regulations provide that, with respect to existing facilities, the recipient shall operate its programs, services, and activities so that, when viewed in their entirety, they are readily accessible to and usable by persons with disabilities (hereinafter "the program accessibility standard").

Accessibility of existing facilities is determined not by compliance with a particular architectural accessibility standard, but by considering whether a recipient program, service, or activity offered within an existing facility, when viewed in its entirety, is accessible to and usable by individuals with disabilities. The recipient may comply with the existing facility standard through the reassignment of programs, services, and activities to accessible buildings, alteration of existing facilities, or any other methods that result in making each of its programs, services, and activities, when viewed in their entirety, accessible to individuals with disabilities. In choosing among available methods for redressing program inaccessibility, the recipient must give priority to those methods that offer programs, services, and activities to individuals with disabilities in the most integrated setting appropriate as well as methods that entail achieving access independently and safely.

Under some circumstances, the concepts of program access and facilities access are related. This is because it may be necessary to remove an architectural barrier to create program access. A program offered exclusively in a particular building on a campus may not be accessible absent a ramp or accessible washroom to the particular building. Under such circumstances, in evaluating existing facilities, facility accessibility standards may be used to guide or inform an understanding of whether persons with disabilities face barriers to participating in the program, service, or activity provided in a particular facility. In reviewing program accessibility for an existing facility, the Uniform Federal Accessibility Guidelines (UFAS) may be used as a guide to

understanding whether individuals with disabilities can participate in or benefit from the program, activity, or service.

Pursuant to 28 U.S.C. 35.150(a)(3), a public entity is not required to take an action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

New Construction/Alterations

The Section 504 regulations, at 34 C.F.R. § 104.23, also apply to “new construction or alterations,” defined as any facility or part of a facility where construction was commenced after June 3, 1977. The regulations provide that each facility or part of a facility constructed by, on behalf of, or for the use of the recipient/public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by persons with disabilities. The regulations further provide that each facility or part of a facility altered by, on behalf of, or for the use of the recipient/public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by persons with disabilities.

The regulations specify the standard to be used in determining the accessibility of new construction and alterations. The Section 504 regulations, at 34 C.F.R. § 104.23(c), delineate the American National Standards Specifications for Making Buildings and Facilities Accessible to and Usable by the Physical Handicapped (ANSI 117.1 – 1961 (1971)) as the minimum standard for determining accessibility for facilities constructed or altered on or after June 3, 1977 and before January 18, 1991. The provisions of UFAS set forth the designated standard for facilities constructed or altered on or after January 18, 1991.

The Section 504 regulations provide that recipients/public entities may depart from the particular technical and scoping requirements of these architectural standards, if substantially equivalent or greater access and usability of the facility is provided. 34 C.F.R. § 104.23(c). Deciding which of the available accessibility standards must be used is determined based on the date of commencement of physical construction. 28 C.F.R. § 35.151(c).

Factual Findings

The Section 504 regulations apply to the University because it is private. The building was constructed in 1918 and, therefore, the construction/alterations accessibility standards apply. While the ANSI 117.1 – 1961 (1971) provides specifications for elevators, it also permits administrative authorities to grant exemptions from the requirements in cases of practical difficulty, unnecessary hardship or extreme differences, but only when equivalent facilitation and protection are secured.

In 2008, when 740 Taylor underwent seismic retrofitting, the University created an accessible entrance through use of a chair lift. The University also created an accessible bathroom on the first floor, but did not add an elevator to the building. Under OCR's Policy Guidance applicable to construction after January 18, 1991 and before September 15, 2010, the University could be found compliant with Section 504 ADAAG 1991.

All levels of the building are less than 3000 square feet. The building does not have an elevator, but does have a lift from the street level to the lobby. Students with mobility impairments are provided program access by relocating classroom meeting locations to accessible locations in 740 Taylor or to other University facilities that are accessible.

Architectural drawings provided by the University show that each floor consists of the following:

- The basement has two darkrooms, a work room, and a storage room, and three stairways (one internal stair way, and two that are outside the building to the street).
- The first floor has a reception area, three classrooms, a storage room, and a unisex ADA compliant bathroom. There are also two internal stairways (one that goes to the basement and the other to the upper floors) and stairs to the street. There is also a chair lift at the entrance for individuals with mobility impairments.
- The second floor consists of two classrooms, a lounge, a darkroom, a women's bathroom and a men's bathroom. There are also two stairways to access other floors in the building.
- The third floor consists of two classrooms, two offices, and a storage room. The two stairways end on this floor.

The architectural plans for the seismic retrofit state that “[t]he existing building would be exempt from providing an elevator for accessibility per CBC 1133B.1, Exception 3.” CBC 1133B.1, Exception 3 (2007) applies to Entrances and states that “In existing buildings where the enforcing agency determines that compliance with building standards of this section would create an unreasonable hardship, an exception shall be granted when equivalent facilitation is provided. Equivalent facilitation would require at least one entrance to be accessible to and usable by persons with disabilities.” The Unreasonable Hardship Request in the plans is for exemption of CBC 1133B.3 (Ramps) which was approved based on the University's building of an accessible entrance with a chair lift.

Analysis

OCR conducted an onsite review of the first floor of the 740 Taylor Street facility. Measurements of the entrance of the building, the lift, the path of travel to the first floor, and of the ADA compliant bathroom were completed. After reviewing the evidence, OCR concludes

that there is insufficient evidence to show that the University violated Section 504 because the building is inaccessible to students with mobility impairments.

Conclusion

Prior to OCR making a final determination regarding Allegation 4 above, the University expressed an interest in voluntarily resolving it pursuant to Section 302 of OCR's Case Processing Manual², and OCR agreed it was appropriate to do so. Because OCR had completed its investigation of Allegation 3, concerning the University's deficient Section 504 grievance procedures, this allegation was resolved pursuant to Section 303(b) of OCR's Case Processing Manual. On July 24, 2018, without admitting to any violation of law, the University signed the enclosed Resolution Agreement, which, when fully implemented, is intended to address allegations 3 and 4, in the complaint.

Based on the commitments made in the enclosed Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter. OCR will monitor the implementation of the Resolution Agreement until the University is in compliance with its terms. Upon completion of the obligations under the Resolution Agreement, OCR will close the case.

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, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual 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, 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.

The Complainant may have a right to file a private suit in federal court whether or not OCR finds a violation.

OCR thanks Stacey Leask, Esq., Counsel for the University, for the courtesy and cooperation extended to OCR during its investigation. If you have any questions, please contact Judith O'Boyle, Attorney, at (415) 486-XXXX or by email at Judith.Boyle@ed.gov.

² <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

Sincerely,

/s/

James Wood
Team Leader

Enclosure