



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

February 2, 2017

Dr. Joseph Castro
President
California State University, Fresno
5200 N. Barton Avenue, M/S ML48
Fresno, California 93740

(In reply, please refer to case no. 09-17-2023.)

Dear President Castro:

The U.S. Department of Education, Office for Civil Rights (OCR) has resolved the above-referenced complaint against the California State University, Fresno (Recipient). The complaint alleged that the Recipient discriminated against the Complainant on the basis of disability. Specifically, OCR began an investigation of the following issue:

1. Whether the Recipient failed to allow the Complainant, her service animal, and her full time aide the ability to fully participate in the band program in a nondiscriminatory manner.

OCR investigated this complaint pursuant to its authority under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990. Section 504 and its implementing regulation prohibit discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II and its implementing regulation prohibit discrimination on the basis of disability by public entities. The University receives Department funds, is a public education system, and is therefore subject to the requirements of Section 504, Title II, and their implementing regulations.

After reviewing the documents provided by the Recipient, OCR has determined that the Recipient has taken steps to resolve the issue, and the Recipient has agreed to take additional actions in the future to resolve the complaint. Pursuant to Section 302 of OCR's Case Processing Manual,¹ allegations and issues under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and issues and OCR determines that

¹ OCR's Case Processing Manual may be found at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>

it is appropriate to resolve them with an agreement during the course of the investigation.

Issue 1: Whether the Recipient failed to allow the Complainant, her service animal, and her full time aide the ability to fully participate in the band program in a nondiscriminatory manner.

Legal Standard

Under both the Section 504 regulations, at 34 C.F.R. §104.4(b)(1)(i), (ii) and (iii), and the Title II regulations, at 28 C.F.R. §35.130(b)(1)(i), (ii) and (iii), universities, in providing any aid, benefit or service, may not deny a qualified person with a disability an opportunity to participate, afford a qualified person with a disability an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded to others, or provide a qualified person with a disability with an aid, benefit or service that is not as effective as that provided to others.

In addition, the Title II regulations, at 28 C.F.R. §35.130(b)(7), require public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Whether or not a particular modification or service would fundamentally alter the program is determined on a case-by-case basis. While cost may be considered, the fact that providing a service to a disabled individual would result in additional cost does not of itself constitute an undue burden on the program.

The Title II regulations, at 28 C.F.R. §35.104, confer on individuals with disabilities the right to use a service animal in the programs and activities of all public entities but limit the type of animal to a dog only. The dog must be individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by a service animal must be directly related to the individual's disability.²

Furthermore, the Title II regulations, in their service animal provisions, at 28 C.F.R. §35.136(a), provide a specific and express application of section 35.130(b)(7)'s modification requirements in situations where an individual with a disability desires to

² Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

use a service animal to participate in the public entity's programs, activities, or services. It requires a public entity to modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The intent of the regulation is to provide to a service animal user the broadest access possible to a public entity's programs and activities and, as such, as provided by 28 C.F.R. §35.136(g), a service animal user has the ability to go anywhere with his or her service animal that any individual without a disability is permitted to go.

The Title II regulations, at 28 C.F.R. §35.136(f), also limit the extent of inquiry that may be made of an individual using a service animal by prohibiting a public entity from asking about the nature or extent of a person's disability and limiting the permissible questions that may be asked in order to determine whether an animal qualifies as a service animal to only two: if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.³

Factual Background

- The complaint alleged that a band volunteer informed the Complainant that her service dog and aide could not be at a football game because they were in the way when the volunteers were setting up the music equipment before the band performance. The Complaint also alleged that at a subsequent football game, the band volunteers delayed setting up the Complainant's music equipment, and at an away game, the Complainant was delayed in setting up before the band performance because the stadium did not have advance notice of the service dog. In addition, the Complainant alleged that without prior notice the Recipient did not allow the Complainant to have her aide assist her in a football game due to an altercation between the aide and a band volunteer the prior month.
- In October 2016, before OCR opened the complaint for investigation, the Recipient agreed to the Complainant's list of requests she made regarding her participation in band with her service dog, and confirmed that she did not have any subsequent issues with participating in band other than needing more water at a game in late October. The list included among other items, that the

³ There are additional obligations and prohibitions imposed on both individuals with disabilities and public entities with respect to service animals including: public entities have the ability to exclude any animal that is out of control and the handler does not take effective action to control it or it is not housebroken (§35.136(b)); a service animal must be under the control of its handler generally through the use of a leash, harness, or other similar device unless such a device interferes with the animal's ability to perform its services or the handler is incapable of using such a device in which case the animal must otherwise be under control (§35.136(d)); a public entity is not responsible for the care or supervision of a service animal (§35.136(e)); and, a public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets (§35.136(h)). Because these other obligations and prohibitions do not appear to be involved in this matter, OCR will not further elaborate on them.

Recipient would assign one to two volunteers to help move and set up the Complainant's music equipment; allow her to bring her service dog's kennel to home games, and keep the kennel as close as possible to her; during band rehearsals allow the Complainant to utilize her service dog's kennel or have the dog in a down stay position; and allow the Complainant to sit down when needed with her dog as she performs tasks.

- The Recipient confirmed that the Complainant was delayed in setting up before a band performance at an away game because the stadium did not have advance notice of the service dog. In addition, the Recipient also confirmed that the band director did not provide the Complainant with prior notice that she could not have her aide assist her in a football game due to an altercation between the aide and a band volunteer the prior month. As a result, the Complainant was not able to participate in the band performance because she was not prepared to handle the dog without her aide.

Analysis

Based on the facts gathered to date, OCR has significant concerns with the band volunteers treating the Complainant differently from other non-disabled band members by delaying setting up the Complainant's music equipment, and informing her that her service animal and aide could not have access to a performance. The facts gathered also showed that the Recipient did not ensure the Complainant could access a stadium with her service animal for a band performance at an away game, which delayed the Complainant's entry for setting up her music equipment. The information further demonstrated that the Complainant did not have access to another band performance because the band director did not provide access to the Complainant's aide. If the Complainant was provided advance notice that her aide would not have access, she could have arrived prepared to handle the service animal alone. If OCR completed the investigation we would conduct interviews with the band director, band volunteers involved, and the relevant staff in the Services for Students with Disabilities (SSD) Office. These interviews would seek to determine whether the band volunteers treated the Complainant differently than non-disabled band members, what protocols the Recipient had to ensure access for band members with disabilities performing at away games and when issues arise related to aides for students with disabilities, and training the Recipient provides band volunteers and the band director regarding access and students with disabilities' right to use a service animal at band performances and practices. The interviews would also garner information about the SSD Office's process for coordinating with the band program about access and other issues for students with disabilities.

Summary and Resolution

Prior to concluding its investigation and to address the issues alleged in the complaint, the Recipient, without admitting to any violation of law, entered into the enclosed

resolution agreement which is aligned with the complaint allegation and the information obtained by OCR during its investigation.

Under the agreement, the Recipient will, circulate to the relevant personnel in the SSD Office and the band program a defined protocol between the band program and SSD Office, and a defined protocol for security clearance at offsite events for academic adjustments; and training for the band director and volunteers to review the Recipient's policies and criteria for accommodating students with disabilities pursuant to the requirements of Section 504 and Title II.

Conclusion:

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, and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of agreement until the Recipient is in compliance with Section 504 and Title II, which were at issue in the case.

This concludes the investigation of this complaint. OCR's determination in this matter should not be interpreted to address the Recipient's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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 Recipient 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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Gemini McCasland, Attorney, at (415) 486-5536, or via email at gemini.mccasland@ed.gov.

Sincerely,

/s/

James M. Wood
Team Leader

Cc: Darryl Hamm
University Counsel

Deborah Adishian-Astone
Vice President for Administration/Interim CFO