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OFFICE FOR CIVIL RIGHTS

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January 11, 2018

Dr. Len Jessup
President
University of Nevada Las Vegas
4505 South Maryland Parkway
Las Vegas, Nevada 89154-1001

Re: University of Nevada-Las Vegas
OCR Reference No. 10162107

Dear Dr. Jessup:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) is closing its investigation of the above-referenced complaint against the University of Nevada-Las Vegas (the university). The complaint alleged that:

1. the university discriminated against a student on the basis of disability, during the fall 2015 semester, by failing to timely implement the student's approved accommodations of: (a) note-taker; (b) access to a padded chair; and (c) excused absences; and
2. the Philosophy 101 instructor retaliated against the student for raising disability-related concerns with the university's Disability Resource Center (DRC), by removing his disability furniture from the class and assigning him a failing grade for the class.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) as amended, 29 U.S.C. § 794, and its implementing regulations and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, *et. seq.*, and its implementing regulations. These statutes prohibit discrimination on the basis of disability in programs and activities that receive federal financial assistance and by public entities, respectively. The statutes also prohibit retaliation against an individual for the purpose of interfering with a right secured by the statutes, or because an individual has made a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under the statutes. The university is a recipient of federal financial assistance from this Department and is a public entity, and is therefore subject to Section 504 and Title II.

As set forth below, OCR determined that the evidence did not support a conclusion that the university violated Section 504 or Title II with regard to Allegations Nos. 1(b) and 1(c) and Allegation No. 2. Prior to the completion of OCR's investigation into Allegation No. 1(a), the university expressed an interest in voluntarily resolving this allegation and signed the enclosed Voluntary Resolution Agreement (agreement) to address the concerns raised in Allegation No. 1(a).

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

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Findings of Fact - Allegation No. 1 (b): Disability Furniture

During the fall 2015 semester, the student, who is disabled, was enrolled in English 231 and Philosophy 101. The university approved a padded chair for the student's use in his English 231 and Philosophy 101 classes. Both classes were held twice per week for 75-minutes per session. According to the student, during the fall 2015 semester, the university delayed for more than 1 month in providing him with a padded chair for his English 231 class. The student stated that the university's failure to timely provide him with a padded chair resulted in severe spinal pain, which necessitated an increase in his pain medication, causing drowsiness and an inability to focus. Consequently, the student asserted that the delay in providing him with a padded chair contributed to him performing poorly in the class. The student received a C- grade in the class.

The English 231 instructor recalled that the student used the padded chair on the first day of class. She did not recall a period during which the student did not have the padded chair.

The university's DRC representative also disputed the student's allegation that he did not receive a padded chair until later in the semester. The representative stated that the DRC promptly issued a padded chair to the student at the beginning of the semester and that the student began using the padded chair for his classes effective the first day of the semester. The DRC representative told OCR that the student did not raise any concerns regarding the absence of a padded chair in English 231. The student did not provide any additional information to corroborate his allegation that he did not receive a padded chair for English 231.

Regarding the Philosophy 101 class, the student stated that the university did not provide him with a padded chair until 2 months into the semester. According to the student, because of the absence of the padded chair, he ultimately received a failing grade because of the spinal pain and associated medications.

The instructor for Philosophy 101 disputed the student's allegation that he did not have a padded chair until 2 months into the semester. The instructor told OCR that the student began using a padded chair approximately the first or second day of the class. The instructor recalled one occasion, during the fall 2015 semester, when at the beginning of class the student reported his padded chair missing from its designated location in the classroom. The instructor told OCR that he promptly assisted a DRC representative in helping relocate the student's chair and returning it to its location within minutes of the student reporting the chair missing. The instructor denied removing or relocating the student's chair. The instructor told OCR that following that incident, the DRC placed a note on the chair warning anyone against removing or relocating the chair.

The DRC representative also disputed the student's account that he did not have a chair for 2 months for Philosophy 101. The DRC representative recalled that the student received a padded chair at the beginning of the semester. The DRC representative told OCR that during the fall 2015 semester, the student reported his suspicions that other students may be using his padded chair. The DRC representative stated that she discussed the student's concerns with the class instructor. The DRC representative recalled an incident at the beginning of the semester during which the student reported the padded chair was missing from class. Following that report, the DRC representative and the instructor

located the chair tucked in an area behind the instructor's podium. The DRC representative explained that it appeared someone had stored the chair behind the podium to prevent it from being used or moved by other students. Consequently, the DRC representative placed a note on the chair warning anyone against moving it. The DRC representative told OCR that there were a few other occasions when the student reported the chair missing from class; however, on each occasion the DRC representative visited the classroom and confirmed that the chair was situated in its designated location and had not been moved.

Findings of Fact - Allegation No. 1 (c): Excused Absences

The student stated that during the fall 2015 semester, the English 231 instructor held a pop quiz while the student was away at a medical appointment. According to the student, upon his return to class from the medical appointment, the instructor refused to allow him to make up the missed test, despite the student explaining to the instructor the purpose of his absence. The student could not recall exactly when in the semester the quiz was held.

The university has policies and procedures for disabled students to request accommodations. At the beginning of each semester, a disabled student is required to reselect or reactivate his or her approved accommodations by completing an accommodations request form on-line. The DRC representative explained that, while a student may, for instance, be approved for 10 accommodations overall, each student must electronically select from the pre-approved list specific accommodations that he or she would need, based on the classes the student is taking that semester.

The DRC representative stated that while the student's main list of accommodations included a provision for excused absences for disability-related appointments, the student did not reactivate that specific provision as a necessary accommodation for the fall 2015 semester. OCR's review of the student's electronic selection of accommodations for the fall 2015 semester confirmed that the student did not select the provision for disability-related excused absences. The instructor did not recall having any discussion with the student about a missed quiz.

Analysis and Conclusion - Padded Chair & Excused Absences

The regulation implementing Section 504 at 34 CFR 104.44(a) requires a recipient postsecondary institution to make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate, on the basis of disability, against qualified students with disabilities, unless the institution can demonstrate that the adjustment will alter an academic requirement that is essential to the instruction being pursued by the student. The Section 504 regulation at 34 CFR 104.44(b) states that a recipient must take such steps as are necessary to ensure that no disabled student is discriminated against because of the absence of educational auxiliary aids. The regulation implementing Title II provides, at 28 CFR 35.160(b)(1), that a public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

Regarding the padded chair, OCR found that the university provided the student with a padded chair at the beginning of the fall 2015 semester. While the chair may have occasionally been temporarily moved from its location, OCR found that those instances were infrequent and that the Philosophy 101 instructor and the DRC promptly located and returned the chair to its location. OCR did not find that the university failed to furnish the student with the approved auxiliary aid of a padded chair.

Regarding the excused absences, OCR found that during the fall 2015 semester, the student did not indicate on the accommodations request form a need for disability-related absences. Additionally, the student did not recall when he missed the quiz and the English 231 instructor did not recall having a conversation with the student regarding a missed quiz. The evidence did not support a conclusion that the university failed to provide the student with approved excused absences for a disability-related appointment as alleged.

Findings of Fact - Allegation No. 2: Retaliation by the Philosophy 101 Instructor

The student stated that during the fall 2015 semester, because of drowsiness caused by his pain medications, he was unclear about instructions for an assignment in his Philosophy 101 class and he sought clarification from the instructor. According to the student, the instructor responded by telling the student to write whatever he wanted. The student stated he complained to the DRC about the instructor's response. The student alleges that after he complained to the DRC, the instructor retaliated by removing the student's padded chair from the class and giving the student a failing grade for the class.

The Philosophy 101 instructor disputed the student's allegation that he took away the student's padded chair. The instructor stated that the student did seek clarification on an assignment. The instructor stated that despite the assignment being self-explanatory, he still provided the student with a clarifying response. According to the instructor, the student then referred to the instructor as a "pompous ass."

A review of e-mail correspondences between the instructor and the student regarding clarifications on the assignment in question reveal that the instructor advised the student to read the instructions carefully and "if you need to, read them more than once." The student responded by asking the instructor whether the instructor was being rude to him because he was a disabled veteran, "or are you such an (sic) pompous ass to your students?" The instructor responded that he did not intend to be rude to the student. The instructor re-sent the assignment to the student with the associated instructions for completion. Nowhere in the e-mail correspondence did the instructor tell the student to write "whatever" he wished.

Records from the DRC revealed that during the fall 2015 semester, the student contacted the DRC regarding receiving 60 percent on a writing assignment in the Philosophy 101 course. The student told the DRC representatives that he believed the Philosophy 101 instructor gave him a 60 percent grade in response to the student asking the instructor for clarification on the assignment. Specifically, on October 14, 2015, the student stated in an e-mail to the DRC that: "I really feel I got dinged for not understanding and asking for help, without really getting any." In response to the student's e-mail, the DRC contacted the instructor about the student's concern. The instructor explained to the DRC that: "on the mid-term, (the student) missed 4 out of 6 multiple choice questions. These were defining terms from throughout the semester. On the essays (the student) received 24/35 and 25/35. For the first essay,

he wrote on the wrong topic. For the second essay, he wrote primarily about his personal experiences without explaining the key terms of the essay and without explicitly connecting his experiences to the specific issue of the essay.” The instructor explained to OCR that the student received an overall grade of D on the mid-term as well as a final grade of D in the class at the end of the semester.

The instructor denied that he gave the student a failing grade in the class in response to the student raising concerns with the DRC. According to the instructor, the student earned 54 percent on the final exam, which is a failing grade, and the student’s grade was a reflection of the student’s performance on the final exam.

Analysis and Conclusion - Alleged Retaliation

The issue OCR investigated was whether the Philosophy 101 instructor retaliated against the student by removing his disability-related chair and giving the student a failing grade because the student raised disability-related concerns with the DRC.

34 CFR 100.7(e) as incorporated by 34 CFR 104.61; and 28 CFR 35.134 provide that public entities and recipients of federal financial assistance shall not intimidate, threaten, coerce, or discriminate against any individual either because a person has participated in a complaint process under these regulations or for the purpose of interfering with any right or privilege secured by these regulations. To find that retaliation has occurred in violation of Section 504 and Title II, the evidence must establish that: (1) the individual engaged in a protected activity; (2) the individual experienced a materially adverse action by the recipient; (3) there is some evidence of a causal connection between the protected activity and the adverse action; and (4) there is no legitimate, non-discriminatory reason for the adverse action or the legitimate, non-discriminatory reason is pretextual.

The evidence established that the student engaged in a protected activity when he raised concerns with the DRC about the Philosophy 101 instructor’s response to his questions regarding an assignment.

OCR did not find evidence that the student experienced an adverse action relating to his padded chair. As noted above, OCR found that when the student reported that the padded chair was removed or missing, both the instructor and DRC representative either confirmed that the chair was where it was supposed to be or they promptly located the chair and returned to the designated location for the student’s use prior to the start of class. The evidence did not establish that the instructor hid or removed the student’s padded chair as alleged.

The evidence, however, did establish that the student experienced an adverse action when he received a failing grade from the instructor in the Philosophy 101 course. Given the temporal proximity between when the student complained to DRC about the instructor and the student’s failing grade, there is some evidence of a causal connection between the protected activity and the adverse action. The evidence, however, established that the university had a legitimate non-discriminatory reason for why the student received a failing grade for Philosophy 101. OCR’s investigation revealed that the student missed 4 out of 6 multiple choice questions and received a combined score of 49 out of 70 on the two essays on the mid-term which constituted a D grade on the mid-term, and scored a 54 percent on the final class exam

which was a failing grade. In short, the student's failing scores on both the mid-term exam and the final exam were a reflection of the student's poor performance rather than discriminatory retaliation. There is no evidence that the legitimate reasons given by the university for the student's Philosophy 101 grade were pretext for discrimination.

Because the evidence does not establish that the Philosophy 101 instructor retaliated against the student for the purpose of interfering with a right secured under Section 504 or Title II, OCR has determined that the findings do not support a conclusion that the university failed to comply with Section 504 or Title II regarding this issue.

Allegation No. 1(a) - Note-Taker

Section 504 at 34 C.F.R. § 104.44(a) states that a recipient shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability. Section 504 at 34 C.F.R. § 104.44(d) states that a recipient shall take such steps as are necessary to ensure that no student with a disability is denied benefits, excluded from participation, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

The regulation implementing Title II at 28 C.F.R. § 35.130 states that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity. Title II at 28 C.F.R. § 35.160(b)(1) states that a public entity shall furnish appropriate auxiliary-aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in and enjoy the benefits of, a service, program, or activity of a public entity.

The investigation to date established that on August 12, 2015, the student requested a note-taker for his fall 2015 classes. Classes for fall semester began on August 24, 2015. For English 231, the investigation thus far revealed that although the student requested a note-taker on August 12, 2015, the university did not assign the student a note-taker until October 12, 2015. Records from the university indicated that, consistent with the university's procedures at the time, following the student's request for a note-taker, the university's DRC sent an e-mail to the student's classmates seeking a note-taker for the student. On September 2, 2015, the student notified the DRC that he had not received a note-taker for English 231. According to DRC staff notes, DRC staff members made several unsuccessful attempts to obtain a classmate to serve as a note-taker for the student before the university finally hired a note-taker for the student on October 7, 2015.

Regarding the Philosophy 101 course, the student stated that he could not recall exactly when he received a note-taker for the class but that it was not until later in the semester. The DRC representative stated that the student received a note-taker for the class upon request, and that the student did not report any concerns about note-taking for that class. Records from the university did not document whether or when the student received note-taking services for Philosophy 101.

Based on the evidence gathered to date, OCR has a concern that the university did not provide the student with the requested accommodation in a timely fashion and institute interim measures to allow the student meaningfully participate in the classes while the DRC sought note-takers.

In accordance with Section 302 of the OCR *Case Processing Manual*, a complaint may be resolved at any time when, before the conclusion of an investigation, a recipient expresses an interest in resolving the complaint allegations and OCR determines that it is appropriate to resolve the issues under investigation with an agreement during the course of an investigation. In this case, the university requested to resolve allegation No. 1(a) prior to the conclusion of OCR's investigation. In light of the university's willingness to address the concerns identified by OCR comprehensively without further investigation, OCR determined entering into a voluntary resolution agreement was appropriate. Subsequent discussions with the university resulted in the university signing the enclosed agreement.

The actions the university will take under the agreement include:

- reviewing and revising its policies, procedures, and practices regarding the provision of academic adjustments and auxiliary aids, specifically note-takers, for students with disabilities;
- ensuring that its procedures specify that if it determines that a student requires certain academic adjustments that are not readily available, it will take steps to ensure that the student is not in the interim denied the opportunity to participate in academic programs or activities, by utilizing available alternatives to minimize the impact of delay;
- providing training to relevant staff members regarding its legal obligations to provide disability-related services to students with disabilities; and
- Offering the student the opportunity to retake the courses for which he did not receive note-takers, or, if the student requests tuition refunds for those courses, the university will fully refund the student's fees.

This letter sets forth OCR's determination in an individual OCR case and should not be interpreted to address the university's compliance with any other regulatory provisions or to address any issues other than those addressed in this letter. 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 student may have the right to file a private suit in federal court regardless of OCR's determination.

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 student 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

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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.

OCR will monitor the implementation of the agreement and will close the complaint when OCR determines that the terms of the agreement have been satisfied. OCR looks forward to receiving the reports as set forth in the agreement.

Thank you for the cooperation that you and your staff extended to OCR staff in resolving this complaint. If you have any questions, please feel free to contact Kwame Amoateng, Attorney, by telephone at (206) 607-1602, or by e-mail at kwame.amoateng@ed.gov.

Sincerely,

Sukien Luu
Supervisory Attorney

Enclosure: Voluntary Resolution Agreement