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OFFICE FOR CIVIL RIGHTS

915 2ND AVE., SUITE 3310
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July 25, 2017

Dr. James L. Gaudino
President
Central Washington University
400 E. University Way
Ellensburg, Washington 98926-7501

Re: Central Washington University
OCR Reference No. 10162203

Dear Dr. Gaudino:

This is to inform you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against Central Washington University (university). OCR investigated whether the university failed to provide auxiliary aids and adjustments to address a student's disability needs from January 2016 through June 2016.

OCR accepted this complaint for resolution under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). These laws prohibit discrimination in programs and activities receiving federal financial assistance and by public entities, respectively. The university receives federal financial assistance from this Department and is a public entity, and is therefore subject to these laws.

OCR's findings of fact and conclusions, set forth below, are based upon information and documents provided by the complainant and the university. OCR determined that there was sufficient evidence to support a conclusion that the university failed to comply with Section 504 and Title II. Specifically, the university failed to comply with the regulation implementing Section 504 at 34 C.F.R. § 104.44(a), and failed to comply with the regulation implementing Title II at 28 C.F.R. §§ 35.130(b)(7) and 35.164.

After notifying the university of the violation, OCR and the university entered into discussions regarding a Settlement Agreement (Agreement) that would serve to voluntarily resolve this violation. The university has made a commitment in the Agreement to undertake actions that, when completed, will fully address the violation identified by OCR.

Findings of Fact

The student enrolled in a master's degree program in XXXXXXXXXX at the university in the fall of 2015. She had previously been an undergraduate student at the university, graduating with two undergraduate degrees in spring 2015. The student was also employed by the university's XXXXXXXXXX as an XXXXXXXXXXXXXXXX.

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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The university has a procedure by which students with disabilities may request disability accommodations, CWUR 1-30-040. It states that students must contact Disability Services (DS), request an accommodation, provide DS with documentation from a professional or medical expert, and participate in an interactive process and intake meeting with a DS staff member. DS then generates a student profile for any academic adjustments and auxiliary aids. Students need to submit classroom academic adjustment requests to faculty each quarter through the DS on-line process. The procedure states that faculty are not required to provide academic adjustments until the student submits the request through the DS on-line process, and that students must follow up each quarterly request with communication to the faculty member to discuss the specifics of how each academic adjustment will work in the course. It does not address what should occur when DS finds that a student's documentation is insufficient to support a requested accommodation.

In late 2013 or January 2014, the student e-mailed her professors for the upcoming semester to inform them about her disability, multiple chemical sensitivity (MCS). The evidence does not indicate that the student formally requested accommodations from the DS office at this time. On January 5, 2014, the DS Director (Director), who at that time was employed in a Consultant role in the DS office assisting students with accessibility, e-mailed the student, letting the student know that some professors, concerned about the student's e-mail, had reached out to the Director. The Director shared some language with the student that the Director had sent the professors, consisting of a sample notice that the professors could share with other students in the class to let them know that a classmate had a fragrance allergy and that the classmate requested that students not use fragrances.

The Director confirmed to OCR that she assisted the student informally by giving the sample notice to the student's professors in early January 2014, but that the student was not receiving formal DS accommodations at that time. The Director assisted the student despite being unsure that the student had a disability.

In October 2014, the student complained about fragrance reactions occurring in her XXXXXXXXXX classes. Following the student's report, the Director again assisted the student informally by providing the student with remote access to the XXXXXXXX class on one or two occasions using a small webcam aimed at the classroom board. The Director told OCR that she assisted the student at this point as a courtesy, not as an accommodation. The Director also made it possible for the student to use a separate vehicle for a field trip for a class at the student's request due to her concern over sharing a vehicle with fellow students. However, these accommodations were informal since the DS office did not yet recognize the student's MCS as a disability, and had not formally approved any accommodations at that time.

It is unclear what documentation the student had provided to DS at this point regarding her disability, but it is not disputed that, prior to October 2014, the DS office had documentation from the student about a fragrance sensitivity. The Director told OCR that she requested additional medical documentation from the student around October 2014, as the Director felt that the documentation previously provided by the student was not sufficient to determine the student's disability or disability-related needs. In response, the student provided an October 15, 2014, letter from her medical provider stating that the student was under his care for MCS and that the university should let her fellow students and teachers know that she has MCS, and ask if they would be willing to not wear fragrances. The letter stated that if fellow students still wore fragrances, the university should allow the student to set up a distance learning or interpreting method so she could participate in class and do interpreting work remotely.

The Director told OCR that she reached out to colleagues at other institutions after receiving the October 2014 letter to ask whether the student’s documentation was sufficient, and that she was told that she needed to know specifically what the student was allergic to. One of the colleagues told the Director that if she had already provided remote access then she could not categorically deny it later by calling it a fundamental alteration of the nature of the student’s program.

When OCR asked the Director if she had asked the student for additional documentation in 2015 or 2016, the Director said that at some point she stopped pursuing additional documentation; that she had talked about it with the student but it was upsetting to the student who told the Director that the student felt that the Director did not believe the student had a disability. While the Director told OCR that she did not specifically recall asking the student for additional documentation after the October 2014 request, the Director told OCR that she must have asked the student for additional documentation given that the student submitted another statement from her provider in September 2015. This statement said that the student had substantial limitations in interacting with others and in several areas of learning, including reading, writing, spelling, concentrating, memorizing, listening, and processing. The Director told OCR that this documentation was not sufficient to show what the student’s limitations were, but that she did not tell this to the student.

In fall 2014 and throughout 2015, the student reported to DS problems with encountering fragrances in her classes. In October 2015, as the student continued to report problems with encountering fragrances in her classes, a DS Accommodations Specialist (Specialist) approved the accommodation of “reasonable sensitivity to disability-related issues” for the student. He wrote to the student that professors could not require students to sit farther back in the classroom if they were wearing fragrances, and that other students could not be required to not wear fragrances. He wrote to the student that remoting into a class was not a reasonable alternative for classes that required students to be present in class as it altered a core element of the course itself, but he did not refer to any specific classes. He wrote to the student that she would need to discuss with her instructors what was meant by “reasonable sensitivity” and said that the university was in compliance with the ADA. The Specialist told OCR this language was intended to be a way for a student to have a general accommodation rather than having the DS office create individual accommodations for individual students, and that students with this accommodation would have to use an interactive process to explain to professors what it meant. The Director told OCR that it was intended as a catch-all and worded generally to alert faculty that there was something that could be an issue with a student, like a student needing to leave class abruptly for various reasons.

For winter quarter 2016, the student was enrolled in two classes: XXXXXXXXXXXXXXXXXXXX and was also enrolled in XXXXXXXXXXXXXXXXXXXX. On January 5, 2016, the DS office approved the accommodation of “reasonable accommodations for disability-related issues” and provided that the student’s professors make a request in class that the classroom be fragrance-free due to a student in the class having MCS. Later in January, the DS office approved the accommodation of an alternative testing site, which the student requested so that she would not have to take tests in the classroom where she might encounter an MCS trigger.

On January 18, 2016, the student e-mailed the Director that she got very sick in her XXXXXXXXXXXX class and had to leave, and wrote that she had texted the Specialist about needing remote access to that class. On January 19, 2016, the Specialist e-mailed the student to say that it would be a few more days until the class was set up remotely, and that once it was set up, the student would be able to use DS’s

private room in the library during her class times for remote access. In OCR interviews, the DS staff stated that this was not an approved accommodation for the student, and that they did it because the professor did not object.

The remote access system that the university set up for the student's XXXXXXXXXX class did not always work, and the student texted and e-mailed DS staff about the problems several times. The Specialist told OCR that he and the university's technical services fixed the issues, but the student told OCR that she missed at least half of the XXXXXXXXXXXXX class because she had to leave the classroom due to fragrance issues, and also due to the technology problems when attempting to attend remotely. A university tech services employee informed the student that she could use her home computer for remote access, and once the student began doing that, she was able to attend the last few XXXXXXXXXX classes.

On February 1, 2016, the student texted the Specialist to say that she was having problems with fragrances in her XXXXXXXXXX class, and asked whether she could use Skype to remotely attend the class, which was fine with the professor. The Specialist said that she could as long as the professor agreed.

In February 2016, the student e-mailed the Specialist to say that one of her professors had requested that she and some other graduate students attend some of the professor's XXXXXX lectures as it would be useful for their studies. She asked for remote access to these lectures. She noted that the lectures were in the same room as the XXXXXXXXXX class, which had a camera in it. The Director responded to the student on February 19, 2016, that "allowing you to access your class remotely is outside of what the school is required to do." She wrote that the university had been able to make it happen for another class because the teacher gave permission and the classroom was equipped for distance education, but "I can't promise that we can do this for any or all of your other classes....Changing a class from an in person class to 'distance ed', which is what we are essentially doing, is considered an alteration of the fundamental nature of the class." She wrote, "It sounds like there has been some difficulty with the equipment, unfortunately, we have very limited ability to deal with that."

The student stated that she perceived the February 19, 2016, e-mail as a denial of remote access for the XXXXXXXXXXXXX lectures and also a denial of future opportunities for remote access, and the DS staff told OCR that it was meant as such a denial. The student did not attend the three XXXXXXXXXXXXX lectures.

On March 23, 2016, the student requested remote access for a spring 2016 quarter XXXXXX class, and told OCR that the DS office was willing to provide it for her because the class was in a classroom where there was supposed to be a camera, but that the camera did not work, so the student used Skype to attend the class remotely. On March 24, 2016, the student told the Specialist that she missed half of the winter 2016 XXXXXXXXXXXXX class due to malfunctioning equipment at the private room in the library, and that she had to hire a tutor to let her know what was happening in the classroom.

The Director told OCR that she would never grant remote access as an accommodation because she considered remote access to be, in general, a fundamental alteration of a course, and that to grant the accommodation of remote access was outside the scope of what she was authorized to do. She told OCR that she assisted the student with remote access to the XXXXXXXXXXXXXXXXXXXX class as a courtesy. She told OCR that she had not made an individualized determination of whether it would be a fundamental alteration of any of the classes or lectures for which the student requested remote access. The Director told

OCR that if the student requested remote access in the future, it would be a logistical challenge because the university did not have the equipment or the hours to spend on setting up the remote access.

Analysis and Conclusion

The issue investigated was whether the university discriminated against the student, on the basis of disability, by failing to provide auxiliary aids and adjustments to address the student's disability needs from January 2016 through June 2016.

The regulation implementing Section 504, at 34 C.F.R. § 104.44(a), provides that a recipient shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of disability against a qualified disabled student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory. The regulation implementing Title II, at 28 C.F.R. § 35.130(b)(7), provides that a public entity shall 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.

Under the Title II regulation at 28 C.F.R § 35.164, when a public entity believes that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, the public entity has the burden of proving that the action 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 the 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 must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

An educational institution decides what requirements are essential for its program as long as each requirement has a rational relationship to the program of instruction and is not a pretext for discrimination. OCR does not substitute its judgment for the academic judgment of educators.

The evidence shows that the university has a procedure in place for students with disabilities to request accommodations/academic adjustments. The student followed the procedure and provided the university with notice of her need for accommodations in 2014 and 2015. The university felt that her documentation was insufficient, and received additional documentation from the student in 2014 and 2015. The Director told OCR that she still did not believe the documentation was sufficient, but did not notify the student of this, and did not use this reason to deny accommodations for the student.

When the recipient determines a student's documentation is insufficient to allow the recipient to determine whether the student has a disability, or to determine appropriate academic adjustments or auxiliary aids, the recipient should notify the student of the deficiencies in the documentation.

There is no dispute that, in winter quarter 2016, the student was provided with the following accommodations: a notation of “reasonable accommodations for disability-related issues” that was meant to alert the student’s professors that the student would be discussing disability-related issues with them; a statement for the student’s professors to make in class requesting that the classroom be fragrance-free due to a student in the class having MCS; and an alternative testing site. While the student was occasionally given remote access to classes as a courtesy, the student was not approved for remote access to her classes or to lectures that she had been asked to attend by a professor. The Director told the student that remote access was not allowed because it was an alteration of the fundamental nature of the class, although OCR found that the Director did not make an individualized determination of whether remote access would constitute such a fundamental alteration. OCR further determined that the university’s decision to provide remote access as a courtesy in some of her courses indicates that in-person attendance is not essential in at least some of the courses in the student’s program of study.

Based on the above evidence, OCR finds that the university violated Section 504 and Title II when it denied the student remote access as an alteration to the fundamental nature of the student’s courses and lectures, without engaging in an individualized evaluation of the courses and lectures to determine whether or not the requested accommodation fundamentally altered the nature of the courses and lectures.

The university has voluntarily agreed to resolve the above described violation as set forth in the enclosed Agreement which, when fully implemented, will resolve the identified violation. The actions the university will take under the Agreement include the following:

- review and revise its policies and procedures with regard to the provision of academic adjustments and auxiliary aids and services to students with disabilities related to student documentation; fundamental alteration of essential program requirements; and modifications to academic requirements that are essential to the program of instruction;
- provide written notice of its revised policies and procedures to all students, staff, administrators and faculty;
- train university academic administrators, disability services staff, and faculty regarding its revised policies and procedures; and
- offer to reimburse the affected student for expenses she incurred.

OCR will monitor the university’s implementation of the Agreement and will close the complaint when OCR determines that the terms of the Agreement have been satisfied. The university’s first monitoring report is due in accordance with Action Item C(1) of the Agreement.

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 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, 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.

Thank you and your staff for your cooperation during the investigation of this complaint. If you have any questions, please contact Amy Klosterman, Attorney, by telephone at (206) 607-1622, or by e-mail at amy.klosterman@ed.gov.

Sincerely,

Paul Goodwin
Team Leader

Enclosure: Settlement Agreement