



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

September 26, 2016

Dr. Ángel Cabrera, President
George Mason University
4400 University Drive
Fairfax, Virginia 22030

Re: OCR Complaint No. 11-16-2083
Letter of Findings

Dear Dr. Cabrera:

The Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) has completed its investigation of the complaint we received on December 29, 2015 against George Mason University (the University). The Complainant alleged that the University discriminated against him on the basis of disability. Specifically, the complaint alleged that:

1. The University failed to provide the Complainant approved academic adjustments such as flexible attendance in his XXXX course in XXXX; and
2. The University treated him differently than other students when the XXXX professor excluded him from classroom participation by limiting the number of questions he could ask.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department.

In reaching a determination, OCR reviewed documentation submitted by the Complainant and the University and interviewed pertinent staff and students. After carefully considering all of the information obtained during the investigation, OCR identified a compliance concern regarding allegation 1a. The University agreed to resolve the compliance concerns through the enclosed resolution agreement. However, OCR found insufficient evidence to support allegations 1b and 2. The basis for our findings is set forth below.

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

Factual Background

At the time that he filed the complaint, the Complainant was a XXXX student at the University. Beginning in XXXX, he registered with the University's Disability Services (DS) as a student with a disability and followed DS procedures¹ for requesting academic adjustments. For the XXXX semester, the Complainant's Faculty Contact Sheet for academic adjustments approved by DS listed the following: extended time for quizzes, tests, and exams (1.5 time); breaks during class and exams (including flexibility to make up any work missed while out of class); flexibility with attendance for disability-related absences and consideration in allowing make-up work; audio recording of lectures; and extended time for out-of-class assignments. The Complainant gave a copy of his Faculty Contact Sheet to the Professor of his XXXX course at the beginning of XXXX.

The XXXX course syllabus delineated that student grades were based on assignments, quizzes, a project, and class participation. At the end of the semester, the Professor calculated the Complainant's final grade to be 86 (B). The Complainant emailed the Professor in XXXX to express concern about his course grade on several fronts: 1) his class participation part of the grade was 70 out of 100 points, but the Complainant had flexibility with attendance as an academic adjustment for his disability and had offered to make up work for missed classes; 2) the Professor had limited the Complainant's questions in class; and 3) the Complainant's calculation of his grade was 87.083 (B+) based on the points the Professor listed for him in each category. The Complainant also forwarded the email to his DS counselor for advice on what he should do about his grade because he felt that he had not been given flexibility with attendance in the course. At the end of the exchange of emails between the Professor, the DS counselor, and the Complainant, the Professor changed the Complainant's final grade to B+.

At the beginning of September 2015, the Complainant wrote a letter appealing his grade in the XXXX course; his stated reasons for the grade appeal were that the Professor failed to provide his flexibility with attendance and extended time for tests and quizzes academic adjustments. The XXXX for XXXX Studies handled the matter, reviewing the Complainant's materials and meeting with the Complainant via telephone on XXXX. After their discussion, the Complainant did not move his grade appeal to a full committee hearing and the University took no further action on the grade appeal. On XXXX, OCR opened the complaint for investigation after receiving it from the Department of Justice.

Legal Standards and Analysis

¹ The University has a policy—Policy 1203: Non-Discrimination and Reasonable Accommodation on the Basis of Disability—that addresses its responsibility to provide academic adjustments to qualified students with disabilities so that they have equally effective opportunities to participate in or benefit from University educational programs, services and activities. *See* <http://universitypolicy.gmu.edu/policies/non-discrimination-and-reasonable-accommodation-on-the-basis-of-disability/>. The University also has a procedure for students to provide documentation of their disability and request academic adjustments and auxiliary aids and services and for DS to identify appropriate academic adjustments and auxiliary aids and services that the University will provide. *See* <http://ods.gmu.edu/students/services.php>.

Allegation 1: The University failed to provide the Complainant approved academic adjustments such as flexible attendance in his XXXX course in Spring 2015.

The Section 504 regulation, at 34 C.F.R. § 104.43(a), provides that a qualified person with a disability may not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any postsecondary aids, benefits or services on the basis of disability. The regulation at § 104.44(a) requires a university to modify its academic requirements as 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. The regulation at § 104.44(d) requires a university to ensure that no qualified individual with a disability is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. OCR interprets the Title II regulation to require public universities to provide academic adjustments and auxiliary aids to the same extent as required under Section 504.

Universities may establish reasonable requirements and procedures for students to provide documentation of their disability and request academic adjustments and auxiliary aids and services. Students are responsible for obtaining disability documentation and for knowing and following the procedures established by the university. Once the student has provided adequate notice and documentation of his/her disability and the need for modifications due to the disability, the university must provide the student with appropriate academic adjustments and auxiliary aids and services that are necessary to afford the student an equal opportunity to participate in a school's program. However, the university is not required to make adjustments or provide aids or services that would result in a fundamental alteration of the university's program or impose an undue burden. Both Section 504 and Title II envision a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between the university and the student. If a university denies a request for a modification, it should clearly communicate the reasons for its decision to the student so that the student has a reasonable opportunity to respond and provide additional documentation that would address the university's objections.

Section 504 and Title II do not require a university to modify academic requirements that are essential to the instruction being pursued by the student or to any directly related licensing requirement. In reviewing an institution's determination that a specific standard or requirement is an essential program requirement that cannot be modified, OCR considers whether that requirement is educationally justifiable. The requirement should be essential to the educational purpose or objective of a program or class. OCR policy requires, among other factors, that decisions regarding essential requirements be made by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful and rational review of the academic program and its requirements; and that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability. OCR affords considerable deference to academic decisions made by post-secondary institutions, including what is or is not an essential program requirement.

Flexible Attendance

In response to the Complainant's contention that he was not awarded full participation points, receiving 70 out of 100 possible points, the Professor reasoned that "[t]he participation grade was meant to reflect the intangible aspects and skills developed through face-to-face, real-time discussions, debates...with potential peers and colleagues that are critical in most professional environments." "The in-class attendance requirement was explicit from the first day of the course. If [the Complainant] knew or felt he might have a major issue with attendance, he should have brought it up earlier to clarify how it factored in the grade or he could have dropped the course."

Indeed, documentation from the University evidence that the Professor did not award full points for the Complainant's class participation grade due to class absences. In an email dated XXXX, addressing the Complainant's concerns, the Professor wrote, "You are missing points for missing a large number of classes (at least 3+ by my count which is a significant portion of the semester)." The Professor noted that in-class attendance scores, and thus class participation points, were lowered for students that exceeded the number of allowable absences for the course at 10%. The Professor reasoned that the in-class attendance requirement was purposed to reinforce the notion that professionals who graduate from the XXXX program will be expected to show up to work consistently at their organizations. The Professor further cited that he based the number of allowable absences at 10%, which he believed reflected an industry ballpark number of the number of paid leave days employees receive. Although the Professor acknowledged that he was aware of the Complainant's accommodation letter, he believed that that any further consideration for the Complainant's class participation score "violates the spirit of your disability letter and is unfair to other students."

Although the University cited that there was "no evidence" that the Complainant ever requested flexible attendance adjustments in the course, the Complainant told OCR that after exceeding the allowable limit for excused absences, he approached the Professor about using his flexibility with attendance accommodation. Specifically, the Complainant recalled he advised the Professor of a disability-related absence and proposed an alternative assignment to make-up for the in-class work and participation: he would watch the videotapes of student presentations on BlackBoard and provide feedback on a form like all of the other students did. The Complainant contended that the Professor responded, "Don't worry about it." Therefore, the Complainant believed that the Professor was excusing him from making up the work for the missed class. The Professor told OCR that the Complainant talked with him several times after class to discuss his absences, but the Professor did not recall clearly that instance when the Complainant approached him about missing one of the student presentation classes. The Professor admitted that the Complainant "could have" made that proposal and that he himself "could have" made some sort of a response like that. However, the Professor also explained that he had never seen flexibility with attendance on a Faculty Contact Sheet prior to that semester, had not received any information on how to implement that accommodation, and had no experience with providing the flexibility before the Complainant might have asked for it.

Yet, despite active participation when he was in class, the Complainant only received 70 out of 100 points for class participation because the Professor believed that the Complainant missed a

significant amount of class participation when the Complainant was absent from three or four class sessions. There was no evidence that the Professor provided the Complainant any flexibility in attendance during the course beyond the one or two absences allowed for all students based on the Professor's idea of an acceptable absence rate of 10% in the industry workplace.

The University raised as a defense to its obligation to provide the Complainant "flexibility with attendance," as specified in his Faculty Contact Sheet, that 90% attendance was essential to the XXXX course. The Faculty Contact Sheet also specifies that "Absences cannot interfere with the fundamental outcomes of the course." Therefore, OCR reviewed the University's determination that attendance in that course is an essential program requirement that cannot be modified. The University's documentation shows that the Psychology Department has long considered class attendance and in-class participation to be an integral component of the XXXX course. The curriculum for the course, which has existed for about 20 years at the University, has been reviewed by relevant curriculum committees over the years. OCR therefore assumes that the University's decision about the course's essential attendance requirement meets the initial factors of "made by a group of people who are trained, knowledgeable and experienced in the area" and "through a careful, thoughtful and rational review of the academic program and its requirements." However, the Professor's interpretation of essential attendance—"I based the number of allowable absences for the course at 10% which reflects an industry ballpark number of the number of paid leave days (sick, holiday, vacation, etc) many employees receive"—does not appear to meet those same factors.

In any case, even affording deference to the academic decision on essential course requirements, OCR cannot find that the decision in this case was educationally justifiable under Section 504 because there was no evidence that decision-makers considered a series of alternatives for the attendance requirement, as well as whether the essential requirement in question can be modified for a specific student with a disability. Neither the curriculum materials nor the University's statements show any consideration of attendance alternatives.

The Professor's syllabus for the course in the Spring 2015 semester states that active participation by class members is necessary, evaluated partly by attendance and partly from questions and comments in class. However, the Complainant's Faculty Contact Sheet mentions under the flexibility with attendance academic adjustment that "consideration in allowing make-up work is appropriate." In light of the Complainant's proposed alternative assignment to make up for at least one missed class—watching the videos of students' project presentations and providing feedback like other students did in class—it is reasonable to conclude that attendance alternatives were feasible for at least parts of the course, yet the evidence does not establish that either the curriculum committees or the Professor entertained any such possibilities. Therefore, OCR finds that the University failed to establish that the Professor was not required to implement the Complainant's flexibility with attendance academic adjustment because it did not establish that attendance was an essential requirement of the XXXX course.

Based on a preponderance of the evidence, OCR finds that the University failed to implement the Complainant's approved academic adjustment of flexibility in attendance in the XXXX course.

Extended Test Time

During the course of the investigation, the Complainant raised with OCR a concern that he was not fully provided another approved academic adjustment in the PSYC 645 course. The Complainant's Faculty Contact Sheet provides that he was entitled to 1.5 extended time for quizzes, tests, and exams. As stated above, the Complainant complied with University procedure to distribute his Faculty Contact Sheet to the Professor to provide notice of his approved accommodations. At that time, neither the Complainant nor the Professor discussed the specifics of how the extended time would be implemented.

The Complainant stated he was particularly affected by not receiving extended time for some of the course's "pop" quizzes. Due to the unscheduled nature of the quizzes, it was not possible for the Complainant to submit the DS testing form at least one week prior to each quiz, per DS's requested practice. The DS counselor explained to OCR that in situations where a course has pop quizzes, professors and students are expected to work out arrangements for the professor to direct the student to the testing center or another location to take the quiz.²

The Professor gave four pop quizzes during the course; the first two quizzes were completed in class, but for the other 2 quizzes, the Professor allowed students to complete them online or at home. Because the quizzes did not have a set time limit, the Professor periodically asked students for a show of hands to determine if any students needed additional time, and if any did, he would allow more time until the majority of students were done and then he would announce that students had 5-10 more minutes for the quiz. The Professor told OCR that he did not recall the Complainant asking for additional time on any quiz. Although the Professor acknowledged that the Complainant may have raised his hand during a pop quiz, he credibly stated that the Complainant did not consistently raise his hand to indicate that he need more time. The Professor, in a statement prepared for the OCR investigation, further posited that "the time available for quizzes had little impact on [the Complainant's] assignment/quizzes sub-score. If it did, [the Complainant] did not tell [the Professor] and [the Professor] had no way of knowing otherwise." The Complainant also did not express concern to the Professor about the implementation of his extended time accommodation at any point during the semester.

The Complainant told OCR that he felt rushed due to the Professor's practice of "asking by a show of hands several times [to determine] who is done or needs extra time." He contended that such practice contributed to his test taking anxiety. Yet, he acknowledged that he did not "follow up with any further concerns" regarding his extended test time provision because he believed the Professor was "dismissive and unapproachable." The Complainant also did not request to take any in-class quizzes in a location outside of the classroom to address his concern about raising his hand when he needed additional time.

Here, there was no evidence that the Complainant raised concerns with the Professor or anyone else regarding the implementation of the extended test time provision for pop quizzes. In instances where academic adjustments are not provided or not working for a student, it is incumbent on the student to notify faculty and staff as part of the interactive and collaborative

² OCR notes that the University should consider establishing best practices to ensure that registered students with disabilities who are entitled to extended test time are not adversely impacted when DS offices, and thus the testing center, are closed during class hours, as was the case for the evening course at issue.

process between a university and a student inherent in Section 504. Because the Complainant failed to notify the University about his concerns related to provision of extended time on pop quizzes, the University did not have an opportunity to make any necessary adjustments for the Complainant. Therefore, OCR finds insufficient evidence that the University failed to implement the Complainant's approved academic adjustment for extended test time in the PSYC 645 course.

Allegation 2: The University treated the Complainant differently than other students when the Research Methods professor excluded him from classroom participation by limiting the number of questions he could ask.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether a university treated a student with a disability less favorably than similarly situated individuals without disabilities. If so, OCR then determines whether the university had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the university is a pretext, or excuse, for unlawful discrimination.

The Complainant told OCR that during class discussion, the Professor told him he had asked enough questions and the Professor wanted to hear from other students. The Complainant never heard the Professor limit any other students on their questions. The Complainant said that the Professor only said something one time out loud in class to everyone about limiting his questions, and after that day, the Professor simply ignored the Complainant's hand in the air so he could not ask more questions. Because the Complainant contended that he needed to ask clarifying questions due to his disability, he believed the Professor's actions were discriminatory.

Testimony from other students in the class indicated that they recalled the Professor making some kind of statement about having heard from one student and wanting to hear from other students as well. The students interpreted the Professor's statement as an effort to encourage others to participate in class discussions rather than as a limitation on one student's number of questions. Because the Complainant perceived the Professor's statement as a limitation and because there is no evidence that the Professor made any similar statements toward any other student, OCR assumed for purposes of this analysis that the Professor treated the Complainant differently than similarly situated individuals without disabilities, although we cannot say for certain that the one statement was unfavorable.

The University reasoned that the Professor managed class discussion to allow wide participation among students. As such, the University contended that the Professor's management of class discussion to ensure wide participation did not disadvantage the Complainant based on his disability. Indeed, the Complainant's class participation grade was rated 4 out of 5 and above the class median of 5.

OCR interviewed some students enrolled in the XXXX course and corroborated the University's stated reasoning through witness testimony. One student believed that the

Professor “tried to get more people to talk,” but did not recall if the Professor was rude about it. Similarly, another student thought the Professor said something along the lines of “Thanks, let’s hear from someone else now,” and said “It didn’t feel hostile and it didn’t feel directed at one student to shut up.” That student interpreted the Professor’s actions as trying to get everyone involved and encouraging others to be active. Based on the foregoing, OCR found that the University articulated a legitimate non-discriminatory reason for making a statement about the Complainant’s questions.

OCR further examined whether the stated reasoning advanced by the University was pretext, or an excuse for unlawful discrimination. The Complainant told OCR that he managed his own participation so as not to prevent anyone else from participating. He said that often after the Professor spoke, there would be awkward silences while the 25 students just sat there. After waiting through some silence, the Complainant recounted that he would then try to ask questions, but the Professor one time said to him, “We’ve heard enough from you.” . The Complainant told OCR that after he talked with the DS Counselor about this, the ODS Counselor spoke with the Professor. OCR interviewed the DS Counselor, whom indicated that she did not recall any conversation with the Complainant or the Professor regarding this matter. She further noted that she was unfamiliar with the Complainant’s need to ask additional questions due to his disability and stated that such an accommodation was not listed on his Faculty Contact Sheet. Further, other students’ recollections of the Professor’s statement do not corroborate the Complainant’s interpretation of the statement as a limitation on the number of questions the Complainant asked. OCR evaluated the conflicting accounts and determined that a preponderance of the available evidence did not establish pretext; therefore, there is insufficient evidence to show the Complainant was treated differently due to disability.

Conclusion

On September 9, 2016, the University agreed to implement the enclosed Resolution Agreement (Agreement), which commits the University to take specific steps to address the identified areas of noncompliance with regard to allegation 1. The Agreement entered into by the University is designed to resolve the issues of noncompliance. Under Section 303(b) of OCR’s *Case Processing Manual*, a complaint will be considered resolved and the University deemed compliant if the University enters into an agreement that, fully performed, will remedy the identified areas of noncompliance (pursuant to Section 303(b)). OCR will monitor closely the University’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. OCR may conduct additional visits and may request additional information as necessary to determine whether the University has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II with regard to the issues raised. As stated in the Agreement entered into the by the University on September 9, 2016, if the University fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings, including to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings, including to enforce the Agreement, OCR shall give the University written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information discussed above that was obtained during OCR’s

investigation, and are consistent with applicable law and regulation.

This concludes OCR's investigation of the complaint. This letter 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. 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 must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the University's cooperation in the resolution of this complaint. If you have any questions regarding this letter, please contact Kristi Bleyer at 202-453-5901 or Kristi.Bleyer@ed.gov or Erika Westry at 202-453-7025 or Erika.Westry@ed.gov.

Sincerely,

/S/
Michael Hing
Supervisory Attorney, Team 1
Office for Civil Rights
District of Columbia Office

Enclosure (as stated)

cc: XXXX