



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW  
WASHINGTON, DC 20202-1475

REGION XI  
NORTH CAROLINA  
SOUTH CAROLINA  
VIRGINIA  
WASHINGTON, DC

October 7, 2016

David O. Belcher  
Chancellor  
Western Carolina University  
501 H.F. Robinson Administration Bldg.  
Cullowhee, NC 28723

Re: OCR Complaint No. 11-16-2114  
Resolution Letter

Dear Dr. Belcher:

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 February 17, 2016 against Western Carolina University (the University). The Complainant alleged that the University discriminated against her on the basis of disability. Specifically, the complaint alleged that the University:

1. Failed to engage in the interactive process during fall 2015 when it refused to provide to the Complainant appropriate modifications or a list of possible academic adjustments for studio majors;
2. Failed to train faculty adequately to comply with Section 504; and
3. Fails to notify students how to file a disability grievance and to identify the University's Section 504 Coordinator.

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 documents provided by the Complainant and the University.

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

During the investigation, OCR identified a compliance concern regarding Allegation 3, based on a review of the documentation provided. Additionally, before OCR completed its investigation, the University expressed a willingness to resolve the remaining allegations in the complaint by taking the steps set out in the enclosed Resolution Agreement (Agreement). What follows is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Agreement.

### **Legal Standards**

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. 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. Once the student has provided adequate notice and documentation of his or 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.

In determining what modifications are appropriate for a student with a disability, the university should familiarize itself with the student's disability and documentation, explore potential modifications, and exercise professional judgment. The question of whether a university has to make modifications to its academic requirements or provide auxiliary aids is determined on a case-by-case basis. OCR generally does not substitute its judgment for that of qualified educators and professionals regarding modifications. Instead, OCR reviews relevant factual evidence to determine whether a university acted in a reasonable manner and whether it took appropriate steps consistent with Section 504 and Title II in making decisions regarding a student's eligibility for academic adjustments. 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.

Next, the Section 504 regulation, at 34 C.F.R. § 104.7(a), requires each university that employs 15 or more persons to designate at least one person to coordinate its efforts to comply with Section 504. The Title II regulation, at 28 C.F.R. § 35.107(a), requires each public university that employs 50 or more persons to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title II, including any investigation of complaints alleging noncompliance with Title II.

Finally, the Section 504 regulation, at 34 C.F.R. § 104.7(b), requires universities that employ 15 or more people to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of Section 504 violations. The Title II regulation, at 28 C.F.R. § 35.107(b), requires public universities that employ 50 or more people to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of Title II violations.

OCR examines a number of factors in evaluating whether a university's grievance procedures are prompt and equitable, including whether the procedures provide for: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and evidence; designated and reasonably prompt timeframes for major stages of the complaint process; written notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent discrimination from recurring and to correct its effects.

## **Background**

The Complainant was a XXXX at the University during the 2014-2015 academic year, majoring in XXXX. The Complainant, who has disabilities, initially disclosed her disability to the Office of Disability Services in fall 2013.<sup>1</sup> As a result of her contact, she requested and received academic adjustments related to her learning disability.<sup>2</sup> During subsequent semesters, she provided documentation to support the need for services related to depression and anxiety, including a housing change and therapy dog. The Complainant failed two XXXX courses during the fall 2014 and spring 2015 semesters that were prerequisite for continuing in the XXXX program. The Complainant followed the University's three-step grade appeal process for each of the failed courses, and in both cases, the University determined to deny her appeals, concluding that she had been graded fairly and not based on an impermissible factor such as disability.

Subsequently, the Complainant filed a disability grievance in July 2015, using University Policy 53, entitled "Sexual Harassment, Sexual Misconduct, and Other Unlawful Discrimination." After an investigation that included a review of records associated with the Complainant's underlying grade appeals as well as interviews with faculty and staff involved in the courses and the appeals, on August 21, 2015, the Chief Compliance Officer concluded that he could not substantiate disability-based harassment or discriminatory treatment. The Complainant appealed the determination, and on September 21, 2015, the Associate Vice Chancellor found no evidence to support the claim on appeal. This step exhausted the appeals available to the Complainant.

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<sup>1</sup> The Office of Disability Services is now known as the Office of Accessibility Resources.

<sup>2</sup> The University and the Complainant frequently refer to academic adjustments and auxiliary aids as "accommodations." The Section 504 regulation addressing post-secondary education refers to "academic adjustments and auxiliary aids," while the Title II regulation refers to "reasonable modifications." When the term "accommodations" is used in this document, it refers to academic adjustments and auxiliary aids as those terms are used in 34 C.F.R. § 104.44 and reasonable modifications as that term is used in 28 C.F.R. § 35.130(b)(7).

Meanwhile, on August 19, 2015, the Complainant and the Director of the Office of Disability Services (Director) began the interactive process to determine the Complainant's need for academic adjustments during the fall 2015 term.

## **Discussion**

### ***Allegations 1 and 2***

OCR interviewed the Complainant, reviewed the University's response to this allegation, and reviewed email messages between the Complainant and the Director regarding the August 19, 2015 discussion. According to the information OCR has gathered to date, on August 19, 2015, the Complainant requested a list of accommodations available to studio majors, and the Director responded that a list did not exist. According to the Complainant, the Director said she was receiving all that was offered, and indicated the only other available adjustments were for individuals who use wheelchairs. In an email message dated October 5, 2015, the Complainant again requested a list of available accommodations for studio classes. The Director responded on October 6, 2015, writing that a list of possible accommodations was not available because academic adjustments were determined on a case-by-case basis.

On August 19, 2015, the Complainant and Director agreed to remove an adjustment the Complainant was not using from the list developed in earlier semesters and, among others, to include adjustments for extended time on tests and on in-class assignments. Although the Director granted the Complainant extended time on tests and on in-class assignments, she denied the Complainant's request for extended time on projects, saying, according to the Complainant, the adjustment was unavailable because it "only hurts students." In an October 6, 2015 email to the Complainant that summarized their August 2015 discussion, the Director wrote that she could not agree to grant extended time on projects because the Complainant was likely to have sufficient time to finish the project within the take-home period, even if completion took her twice as long as it took students without disabilities; that type of adjustment tended to work against students, resulting in a pile-up of work at the end of the semester; and the Complainant's documentation did not support the request. The University told OCR that the Director reached the decision that it could not provide extended time on class projects based on her experience with students who had a similar disability profile and that such an adjustment tends to work against them, compounding depression and anxiety. The interactive discussion ended after the Director denied the request.

The University provided information to OCR to support that it recently provided training to new faculty regarding faculty responsibilities to students with disabilities. The University also provided information about comprehensive resources, including a detailed faculty handbook that explains how to implement academic adjustments and address disability-related concerns with students, which is readily available to faculty. How often faculty makes use of these comprehensive resources is unclear.

During OCR's investigation, the University expressed interest in voluntarily resolving the complaint, including these allegations. In light of the University's willingness to address the interactive process with the Complainant and interest in increasing training efforts, OCR

determined that voluntary resolution before completion of the investigation was appropriate. The University signed an Agreement to resolve these allegations on October 2, 2016, and agreed to engage in an interactive process with the Complainant to consider her requests for academic adjustments. The University also agreed to provide training to faculty to ensure their understanding of the University's process to respond to a student's request for academic adjustments and/or auxiliary aids and services, necessary documentation, the interactive process, and essential academic requirements, and to address responsibilities of faculty to implement academic adjustments and auxiliary aids and services.

### *Allegation 3*

The University has developed a policy statement on non-discrimination and equal opportunity, which prohibits unlawful discrimination based on protected classes, including disability. The policy states that it applies to students, faculty, staff, trustees, agents, and contractors. It directs individuals to file complaints of alleged discrimination using Policy 53, discussed below.

The University provided OCR with information to show that it has developed grievance procedures available to students like the Complainant, available as part of Policy 53, "Sexual Harassment, Sexual Misconduct, and Other Unlawful Discrimination." OCR reviewed the procedure for compliance under Section 504 and Title II.<sup>3</sup> The procedure directs individuals with sexual harassment complaints against employees or other discrimination complaints to the Title IX Coordinator. The procedure provides that students may report alleged discrimination by employees, preferably in writing, by contacting the Title IX Coordinator within 15 days of the alleged conduct, although the University carved an exception to initiate investigation at any time, depending on the nature of the conduct. The procedure continues that the Title IX Coordinator will investigate thoroughly and impartially within 45 days. The Title IX Coordinator will provide the Vice Chancellor a written report that includes the key evidentiary findings based on a preponderance of the evidence, whether the alleged conduct constituted a violation, and a recommended resolution. The Vice Chancellor will determine what, if any, University action is necessary. Finally, the Title IX Coordinator will provide a written response to the student and respondent employee. The procedure gives both parties the right to appeal in writing within 15 days of the decision based on an erroneous finding, a violation of federal or state law or University policy, or a flawed process. The Human Resources director has 30 days to respond to the appeal, and no further appeal is allowed by either party.

At the outset of OCR's investigation, the University acknowledged that it had not provided notice of the Section 504 Coordinator whom it had designated. OCR reviewed the data submitted by the University, including its policy and procedures, and discussed OCR's compliance concerns with the University's Chief Equity Officer to inform the development of an appropriate voluntary resolution agreement to remedy this violation.

OCR found that the University is not in compliance with the Section 504 regulation with regard to its notice of non-discrimination. The Section 504 regulation at 34 C.F.R. § 104.7(a) requires that recipients identify a responsible employee designated to coordinate compliance with Section 504. The University's notice non-discrimination does not designate an individual to coordinate

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<sup>3</sup> OCR did not review the procedure for the purposes of Title IX, which has some different requirements.

compliance efforts under Section 504, and it does not provide contact information for the University's Section 504 Coordinator.

Further, in its response to OCR, the University told OCR that it had designated as its Section 504 Coordinator the University's associate general counsel. OCR has concerns about this designation because it may present a possible conflict of interest when the general counsel's responsibilities include defending the University from legal action and providing legal advice regarding Section 504 compliance.

OCR next considered the University's grievance procedures in a two-fold manner. OCR found that, contrary to the allegation, the University has a Section 504 grievance procedure, which is found in the policy entitled "Sexual Harassment, Sexual Misconduct, and Other Unlawful Discrimination," and directs all complaints of discrimination to the Title IX Coordinator. While the University's choice to combine its Title IX procedure with its other discrimination grievance procedures does not result in a violation of Section 504, we note that the procedure's emphasis on Title IX and the sole reference to the Title IX Coordinator could create confusion, as it did for the Complainant, about the use of the procedure. Further, although the Title IX Coordinator may have other responsibilities, the procedure does not list investigation of non-Title IX related complaints among those responsibilities, and the procedure also does not address how the Title IX Coordinator interacts with the Section 504 Coordinator to coordinate efforts to comply with Section 504.

Finally, OCR found that the University's grievance procedure failed to appropriately describe the investigative process. The Section 504 regulation, at 34 C.F.R. § 104.7(b), states that grievance procedures must incorporate appropriate due process standards that provide for prompt and equitable resolution of complaints. OCR interprets this to require the University to notify parties of their opportunity to present evidence and witnesses, as well as for the investigator to seek necessary information, from documents or individuals, independent of what the parties have provided. While OCR's review of the University's handling of the Complainant's grievance reflects that the University gathered this information and conducts independent inquiry in practice, the procedures do not do so.

OCR concludes that the University failed to designate an individual to coordinate the University's Section 504 compliance efforts in its notice and grievance procedure. Additionally, the grievance procedures must explain the Title IX Coordinator's role in Section 504 compliance efforts as well as include that the parties have the opportunity to offer evidence and witnesses, which the investigator must consider in addition to completing independent inquiry of necessary information. The University agreed to resolve this compliance concern by entering into the enclosed voluntary resolution agreement (Agreement), which requires it to take corrective action as well as allows it to make additional discretionary changes to the grievance procedure. The University agreed to revise its notice of non-discrimination and grievance procedures, including, for instance, to provide notice of its Section 504 Coordinator and to explain the investigative process set forth by the grievance procedures. The University also agreed to provide training to faculty and staff regarding the revised grievance procedures.

## **Conclusion**

Pursuant to Section 302 of OCR's *Case Processing Manual*, the University signed the enclosed Agreement on October 2, 2016 which, when fully implemented, will resolve Allegations 1 and 2 raised in this complaint. The provisions of the Agreement are aligned with Allegations 1 and 2, the 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.

The Agreement entered into by the University also is designed to resolve the issues of noncompliance related to Allegation 3. 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 by the University on October 2, 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.

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 Amy S. Williams, the OCR attorney assigned to this complaint, at 202-453-5933 or [amy.williams2@ed.gov](mailto:amy.williams2@ed.gov).

Sincerely,

/S/

Letisha Morgan  
Supervisory Investigator, Team II  
Office for Civil Rights  
District of Columbia Office

Enclosure

cc: Wes Chancey, Chief Compliance Officer