



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

September 17, 2016

Jonathan R. Alger
President
James Madison University
MSC 7608
Harrisonburg, Virginia 22807

Re: OCR Complaint No. 11-16-2148
Resolution Letter

Dear President Alger:

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 March 22, 2016 against James Madison University (the University). The Complainant alleged that the University discriminated against her on the basis of disability XXXX. Specifically, the complaint alleged that the University failed to investigate complaints of disability discrimination that she filed on XXXX with the University's Office of Equal Opportunity.

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. Because the University receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504 and Title II.

Before OCR completed its investigation, the University expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement. The following is a discussion of the relevant legal standards and information obtained by OCR during the investigation that informed the development of the Resolution Agreement.

Background

The Complainant has been a student at the University since the XXXX. She is diagnosed with XXXX. She submitted two Discrimination/Harassment Complaint Intake Forms to the

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

University’s Office of Equal Opportunity and Title IX. One was date stamped XXXX and the other was date stamped XXXX. The Complainant indicated on both complaints that the nature of the discrimination/harassment included disability.

In the XXXX complaint, the Complainant listed the alleged discrimination and/or harassment as: “[k]icked out of class by instructor who refused to follow accommodation letter; [t]easing about grades; [l]ate/absent punishment; [and] [n]ot getting help I need from Disability Services.” She identified one of her professors as well as staff in the Office of Disability Services as the people who were discriminating against or harassing her. In the XXXX complaint, the Complainant alleged that a professor was bullying her in class by making fun of her disability and accusing her of being dangerous, and that the professor also discussed her disability with other students. She also stated that another professor called her “stupid” in class.¹

Legal Standards

Response to Disability Discrimination/Harassment

A University’s failure to respond promptly and effectively to disability-based harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Section 504 and Title II. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student’s ability to participate in or benefit from the University’s programs, activities, or services. When such harassment is based on disability, it violates Section 504 and Title II.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a University must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a University must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Section 504 Grievance Procedures

¹ The Complainant made additional allegations that OCR determined were not related to her disability.

In order to review a University's response to complaint of disability-based harassment, OCR must also review the University's Section 504 grievance procedures. 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 University 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 the following: notice of the procedures to students, parents and employees, including where to file complaints; application of the procedures to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other 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 recurrence of any discrimination and to correct its effects.

Analysis

Grievance Procedures

OCR first reviewed the University's discrimination and harassment policy, Policy 1324, (the Policy) to determine whether it provides for a prompt and equitable process for responding to complaints of disability discrimination and harassment. As required by the Section 504 regulation, the Policy applies to individuals alleging they were discriminated against or harassed by an employee of the university or by a third party,² indicates how individuals may file complaints with the Office of Equal Opportunity³ and states that "University will take prompt and effective steps reasonably calculated to end discrimination and harassment, eliminate any hostile environment and its effects, and prevent the discrimination or harassment from recurring." However, OCR identified several concerns with the Policy as described below.

- *Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence*

Section 6.2.3 of the Policy states that the Director of the Office of Equal Opportunity (the Director) "shall conduct an investigation of the complaint in any manner the [Director] deems appropriate." It does not indicate that the parties will have the opportunity to present witnesses or other evidence.

² The policy that applies to complaints against other students can be found in the *JMU Student Handbook*.

³ The Policy states that a formal complaint may be filed by "providing the Title IX Officer with a signed, written document detailing the allegations." OCR recommends that it also reference the online complaint form that can be found on the University's Title IX website, <https://www.jmu.edu/titleIX/how-to-file-a-complaint/intake-form.shtml>, and that it include the address of the Office of Equal Opportunity.

- *Promptness of Process*

When evaluating whether grievance procedures provide for prompt and equitable resolution of a disability discrimination complaint, OCR looks at whether the procedures contain reasonably prompt timeframes for the major stages of the complaint process. According to Section 6.2.4 of the Policy, “[n]ot later than 60 days after the complaint commencement date, the [Director] shall provide the appropriate office with authority over the respondent (i.e., the supervisor for an employee or the sponsoring department for an affiliate or a visitor) with a confidential written report of the [Director]’s preliminary findings, with a copy to the appropriate vice president organizationally above the respondent.” Then, it is “up to the appropriate office to determine what steps to take, including whether to institute disciplinary procedures against the respondent for misconduct, subject to review by the appropriate vice president.” The Policy does not provide a timeframe for the decision from the appropriate office and vice president to determine whether or not disciplinary action will be initiated. Thus, the Policy, as written, has the potential to extend the complaint investigation process beyond what is reasonably prompt.

- *Notice of outcome*

The Policy requires that notice be provided to the parties if the Director dismisses the complaint before doing an investigation because he or she determines that the Policy does not apply to the complaint; finds “that the evidence does not justify a preliminary finding of violation”; or “finds that the evidence justifies a preliminary finding of violation” and is “referring the complaint to the appropriate office for potential further proceedings.” In only some of these instances, however, does the Policy explicitly state that such notice will be in writing. The Policy also does not require that the University give parties notice of the final outcome of the investigation in the cases when the complaint is referred to another office for potential further proceedings.

University’s Response to the Complaints

OCR interviewed the Director, who stated that he considered in the XXXX complaint to be a formal complaint that triggered the process outlined in the Policy. He met with the Complainant on XXXX to discuss the complaint and requested that she provide more details regarding her allegations. He also informed her that he would start investigating her allegations.

The Director stated that over the six month period after the Complainant filed the XXXX complaint, he interviewed 15 or 16 people regarding the allegations. The Complainant also provided the Director with a five page list of issues in the summer of XXXX. The Director reported to OCR that he considered the list to be allegations, some of which he was already investigating and others that were additional allegations. He told OCR that he dismissed some of the allegations because they did not contain specific information, but he did not notify the Complainant in writing regarding which allegations he dismissed. He also stated that he treated the XXXX complaint as a continuation of the XXXX complaint and considered it to also trigger the procedures in the Policy.

The Director asserted that he found that no discrimination or harassment occurred. He stated that he wrote a report of his findings in XXXX, but could not recall to whom he gave the report. He

also acknowledged that he did not give notice in writing to the Complainant of the disposition of any of the allegations.

Based on the information above, OCR identified preliminary concerns about the University's response to the Complainant's grievances and the implementation of the Policy. Specifically, OCR has concerns about the promptness of the University's response, since the Director acknowledged that he wrote a report of his findings in November 2015, approximately seven months after the Complainant filed her initial complaint on April 6, 2015. Additionally, contrary to the Policy, the Director acknowledged that the Complainant was not given a written notice of outcome. The University, to this point, has not provided OCR with notes from the investigation, including the meetings the Director had with the Complainant or the report of the Director's findings.

Based on currently held information, OCR has concerns about the Policy and the University's response to the Complainant's April 6 and October 23 complaints. Pursuant to Section 302 of OCR's *Case Processing Manual*, the University signed the enclosed Resolution Agreement on September 17, 2016 which, when fully implemented, will resolve the allegation raised in this complaint. The provisions of the Agreement are aligned with this allegation, 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. OCR will monitor the University's implementation of the Agreement until the University is in compliance with the statute and regulation at issue in the case. Failure to implement the Agreement could result in OCR reopening the complaint.

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, please contact Jennifer Barmon, the OCR attorney assigned to this complaint, at 202-453-6751 or Jennifer.barmon@ed.gov, or Tracey Solomon, the OCR investigator assigned to this complaint, at (202) 453-5930 or Tracey.Solomon@ed.gov.

Sincerely,

/S/

David Hensel
Supervisory Attorney, Team III
Office for Civil Rights
District of Columbia Office

Enclosure

cc: Jack Knight, Esq.