

September 29, 2014

David Ochmann, Esq.
Nichole DeCaprio, Esq.
Kent State University
Office of General Counsel
Executive Offices
Second Floor Library
P.O. Box 5190
Kent, Ohio 44242-0001

Re: OCR Docket #15-14-2192

Dear Mr. Ochmann and Ms. DeCaprio:

This letter is to notify you of the disposition of the complaint filed on May 30, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR), alleging discrimination against a student (the Student) on the basis of disability. Specifically, the complaint alleged that during the 2013-2014 academic year, the University failed to provide the Student with appropriate academic adjustments and failed to maintain appropriate disability-related grievance procedures and to have a Section 504 coordinator. Her complaint further alleged that the University graded her more harshly in the spring of 2014 in her XXXXXXXX XXXXXXXX XXXXXXXX course in response to other students having filed OCR complaints alleging discrimination on the basis of disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the U.S. Department of Education (the Department). OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and as a public entity, the University is subject to Section 504 and Title II. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegations, OCR investigated the following issues:

1. whether the University failed to make such modifications to its academic requirements as were necessary to ensure that such requirements did not discriminate or have the effect of discriminating against a qualified student with a disability on the basis of disability in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.44;
2. whether the University failed to make reasonable modifications in policies, practices, or procedures when the modifications were necessary to avoid discrimination on the basis of disability in violation of the Title II implementing regulation at 28 C.F.R. § 35.130(b)(7);
3. whether the University failed to designate an employee to coordinate its efforts to comply with Section 504 and Title II in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.7(a) and the Title II implementing regulation at 28 C.F.R. § 35.107(a);
4. whether the University failed to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504 and Title II in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.7(b) and the Title II implementing regulation at 28 C.F.R. § 35.107(b); and
5. whether the University intimidated, threatened, coerced, or discriminated against an individual for the purpose of interfering with any right or privilege secured by Section 504 or Title II or because that individual made a complaint under Section 504 or Title II in violation of the Section 504 implementing regulation at 34 C.F.R. § 104.61 and the Title II implementing regulation at 28 C.F.R. § 35.134.

Because the Title II implementing regulation provided no greater protection than the Section 504 implementing regulation with respect to the issues raised in this complaint, OCR applied Section 504 standards in analyzing the complaint allegations.

In its investigation of this complaint to date, OCR interviewed the Student, other students with disabilities in the program, and one of the Student's University instructors. OCR also spoke a number of times with University counsel. In addition, OCR reviewed documentation submitted by the University and the students. After a careful review of this information, we have determined that the evidence is not sufficient to support a finding that the University retaliated against the Student in violation of Section 504 as alleged. With respect to the allegations regarding disability-related grievance procedures and a Section 504 coordinator, these matters are currently being addressed in the monitoring of a separate OCR case against the University, case #15-08-2026, and these

issues will continue to be handled through that monitoring. With respect to the remaining allegation, prior to the completion of OCR’s investigation, the University asked to voluntarily resolve the complaint pursuant to Section 302 of OCR’s Complaint Processing Manual (the Manual) and signed the enclosed resolution agreement (the Agreement), which, once implemented, will fully address that allegation. We set forth below a summary of OCR’s investigation to date.

OCR’s Investigation to Date

I. Alleged Failure to Provide Appropriate Academic Adjustments

A. Background

Information obtained to date shows that, in 2012, the University acquired what was then known as the Ohio College of Podiatric Medicine (the College). Counsel confirmed that the University has been in the process of integrating the College’s disability-related policies and procedures with those of the broader University. The University’s disability-related policies and procedures for satellite campuses are currently under review in a separate OCR case currently in monitoring (#15-08-2026). Counsel stated in writing that those policies and procedures will apply to the College.

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xxxxxxx xxx xxxxxxxxxx xxxxxxxx xxxxxx The standard program is a four-year
educational program through which students obtain a Doctor of Podiatric Medicine
(DPM) degree.

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The Student and other students with disabilities whom OCR interviewed said the University’s responses to their individual requests for academic adjustments were vague, confusing, and arbitrary. xxx xxxxxxxxxx xxx xxxxxxxxxx xxxxxxxxxx xx xxxxxxxxxxxxxxxx xx
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xxxxxxx xxxxxxxxxxxxxxxx The other students interviewed told OCR about similar
situations in which the University did not clearly communicate their approved academic
adjustments to them and did not consistently deliver them.

The students also described a range of problems in the administration of their academic adjustments, as best they could determine what those adjustments were. For example:

- Throughout the fall of 2013, they said that the University prevented them and other students with disabilities from utilizing extended time on quizzes in multiple courses. Although the computers on which they took their quizzes were pre-set to permit them time and a half, once the standard amount of time was up (i.e., the

time limit set for the rest of the class), proctors instructed the class to close their computers and, frequently, would begin reviewing the answers. Not wanting to appear to be cheating or to disclose themselves as people with disabilities, the students closed their computers as instructed and did not use the extra time.

- The students said they encountered problems accessing extended time in the laboratory portions of their exams.¹ On those exams (including XXXXXX XXXXXX XXXXXXXX in the fall of 2013 and XXXXXX XXXXXXXX XXXXXXXX in the spring of 2014), they did not get full time and a half but rather received only 10-20 minutes extra, depending on instructor preference. All students with disabilities were treated the same in this regard.

The students further explained that during this additional time, students with disabilities were subjected to different rules than those governing the rest of the class. For example, the laboratory exam began with the entire class rotating among a number of stations set up with cadavers. Each student was assigned to a station and had one minute to answer a question about what he or she observed at that station. A buzzer would then sound, signaling that it was time for all students to move on to the next station. A number of rest stations were sprinkled within the area for rotations where students could pause or check their work for a minute. Teaching Assistants (TAs) were present to proctor the exams but mainly sat on stools spaced out throughout the room and supervised students from a distance. Once the initial laboratory exam session concluded, the rest of the class exited, while students with disabilities stood to the side.

The students with disabilities then got a set, consistent amount of extra time to complete the exams, with no individual variations based on each student's disability-related needs. In addition, the instructor assigned individual TAs to follow each student around as he or she moved from station to station throughout the laboratory. The students reported that this made it difficult to concentrate, as they felt they were being watched and followed. From each student's assigned starting station, students were permitted to use the extra time however he or she would like. For example, a student could use all 10 minutes on one question or split it between multiple stations to work on a number of questions. However, students could move only forward in the rotation, not backwards, and they could

¹ Most of the first year courses consisted of lecture and laboratory components, each of which had separate exams.

not move to a station occupied by another student. Thus, if a student needed to use extra time on a particular station and another student was occupying that station for the entire 10 minutes, the student had no opportunity to see that station. Additionally, there were no rest stations in use during the extra 10 minutes.

- The students were unsure whether they were entitled to have quizzes in a reduced-distraction environment; sometimes they were permitted to take quizzes in a conference room, but, at other times, they were not, such as in lower extremity anatomy, microbiology, and human systems biology. One student said that, after advocating to take those quizzes in private settings, the students with disabilities were permitted to take XXXXX XXXXXXXXXXXX XXXXXXXX and XXXXXXXXXXX XXXXXXXXXXX quizzes in a conference room. However, when another student asked if the group could also take their XXXXXXXXXXXXXXXX quizzes in the conference room, they were told no. Even when taking exams in the more private setting of the conference room, the students reported that the room—while quieter than the main classroom—was still “noisy and distracting.” Approximately seven students with disabilities took their quizzes around a conference table, in a conference room with glass doors that were never shut. The conference room itself was in a high traffic area between faculty and administrative offices, where other students came frequently to pick up tests or speak with staff.
- The students said that they were told by staff members throughout the year that disability-related services for laboratory exams, as well as certain types of quizzes (such as those that involved case studies or those that the instructor labeled “fun activities”), were not permitted because they were “clinical” in nature.

None of the students reported being able to locate a disability-related grievance procedure for the College, despite asking multiple staff members where to find one. One student said she attempted to contact the disability services office on the University’s main campus for assistance, but the office’s web site did not list the College as a supported campus. In addition, the students said that, despite asking many times, they obtained no information from staff as to who served as the College’s Section 504 coordinator.

OCR interviewed the students’ instructor for XXXXX XXXXXXXXXXX XXX XXXXXXX XXXXX (Instructor), who also serves as the College’s XXXXXXXXXXX XXXX for basic sciences. She has been with the College for more than XX years. She said that she had only limited knowledge of the College’s process with respect to students with disabilities, had no training in this area, and had no awareness of who oversees disability-related matters for the College. She said that no student had ever asked her about disability-related needs or concerns.

The Instructor said that she had no involvement with the provision of extended time during lecture exams but that she oversaw the process in connection with laboratory exams. Substantiating the students’ account, she said that students with disabilities are provided 20 extra minutes in XXXXXXX XXXXXXXXXXX and 10 extra minutes in XXXXX XXXXXXXXXXX, regardless of the length of the general exam (which could take 60-80

minutes, depending on the number of questions.) She said the amount of extra time students with disabilities could obtain on laboratory exams was determined by the College 10-20 years ago. She said this amount of time was appropriate to the clinical setting and prepared students for real-life practice. She said that providing students with time and a half would “significantly alter” the curriculum. She confirmed the accuracy of the remainder of the students’ account of those exams; however, she said that the purpose of assigning each student a personal TA during the “extra time” period was to make sure students did not get lost in the room.

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B. Legal Standards Concerning Provision of Academic Adjustments

The Section 504 regulation provides, at 34 C.F.R. § 104.44(a), 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, against a qualified person with a disability on the basis of disability. The Section 504 regulation defines a person with a disability, at 34 C.F.R. § 104.3(j)(1)(i), as any person who has a physical or mental impairment which substantially limits one or more major life activities. With respect to postsecondary education services, pursuant to 34 C.F.R. § 104.3(l)(3), a qualified person with a disability is a person with a disability who meets the academic and technical standards requisite to admission or continued participation in the recipient’s educational program or activity.

With appropriate notice to students, postsecondary institutions such as the University may require students with disabilities to follow reasonable procedures to request academic adjustments. Students are responsible for knowing and following these procedures. Students who want a university to provide such services must let the university know that they need assistance for a reason related to a mental or physical impairment that could constitute a disability.

Furthermore, a university may generally require a student to provide documentation that permits the institution to determine that the student currently has a disability, that is, an impairment that substantially limits a major life activity, and that supports the need for an academic adjustment so that the institution may work with the student to identify appropriate services. Institutions may set their own requirements for documentation so long as they are reasonable and comply with Section 504. A university may, for example, require that a student’s documentation be prepared by an appropriate professional, such as a medical doctor, psychologist, or other qualified diagnostician. The kind of documentation necessary to evidence that a student possesses a disability varies depending on the nature of the disability. A diagnosis of impairment alone does not establish that an individual has a disability within the meaning of Section 504.

A university is not required to conduct or pay for an evaluation to document a student's disability and to support the need for an academic adjustment. Should a student provide documentation that does not contain information sufficient to establish whether the student currently has a disability and to support the need for services, a university should inform the student in a timely manner specifically what additional documentation is needed.

A university is required to afford people with disabilities an equal opportunity to obtain the same results, gain the same benefits of the university's program, and reach the same levels of achievement as people without disabilities, but a university is not required to guarantee identical results or certain levels of achievement, such as a passing grade.

Although students may request academic adjustments at any time, students needing services should notify the institution as early as possible to ensure that the institution has enough time to review their request and provide an appropriate academic adjustment. Students should not wait until after completing a course or activity or receiving a poor grade to request services and then expect the grade to be changed or to be able to retake the course.

Under both Section 504 and Title II, postsecondary institutions are not required to make modifications that would fundamentally alter the nature of the service, program, or activity. While a university must accommodate course or other academic requirements to the needs of an individual student with a disability, academic requirements that can be demonstrated by the institution to be essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory and need not be changed. With regard to whether a requested academic adjustment or auxiliary aid would fundamentally alter an essential program requirement, courts and OCR give deference to an institution's academic decision-making. However, in order to receive such deference, relevant officials within the institution are required to have engaged in a reasoned deliberation, including a diligent assessment of available options.

An appropriate deliberative process should include a group of people making the decision who are trained, knowledgeable, and experienced in the relevant areas. While it reasonably might be expected that a course instructor would be included in the process of determining what requirements are essential to participation, allowing an individual professor to have ultimate decision-making authority or to unilaterally deny an accommodation is not in keeping with the diligent, well-reasoned, collaborative process that warrants the accordance of deference by OCR to the judgments of academic institutions. The decision makers must consider a series of alternatives, and the decision should be a careful, thoughtful, and rational review of the academic program and its requirements. In addition, a postsecondary institution also does not have to provide an academic adjustment that would result in undue financial or administrative burdens, considering the institution's resources as a whole. The institution should still provide adjustments or services that do not reach that level.

C. Voluntary Resolution

As noted above, before OCR completed its investigation, the University expressed an interest in resolving the allegation regarding the provision of academic adjustments under Section 302 of the Manual. The Manual provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegations. Such a request does not constitute an admission of liability on the part of the University, nor does it constitute a determination by OCR that the University has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegations or the information obtained during the investigation and consistent with applicable regulations.

The University has signed the enclosed resolution agreement (Agreement), which, once implemented, will fully address the complaint allegations in accordance with Section 504 and Title II. Under the terms of the Agreement, the University will:

- reimburse the Student for the cost of tuition, books, University-required fees, and University-required supplies she paid for the spring 2014 semester;
- offer the Student the opportunity to re-enroll in the College in the XXXX XX XXXX XX XXXX, at the same cost as she would have incurred had she participated in and completed her program as scheduled for XXXX on. Should she choose to re-enroll, her need for academic adjustments based on disability will be handled according to an appropriate process, including policies and procedures approved by OCR;
- offer the Student the option of having her transcript modified to reflect withdrawal in specific courses where provision of academic adjustments was of concern; and
- return the Student to good standing with the University.

In addition, on July 15, 2014, OCR provided training to relevant College staff on the requirements of Section 504 and Title II, including the prohibition against discrimination on the basis of disability, as well as who is eligible for Section 504 and Title II protection, student and institutional responsibilities relating to disability-related academic adjustments and auxiliary aids and services, limitations on such services, how institution should work with students to determine such services, requirements for grievance procedures, prohibited retaliation, and the need to designate a person or persons to ensure compliance with Section 504 and Title II. In light of the signed agreement and this training, as well as the policy revisions and training currently underway in the monitoring of another case involving the University, as described below, OCR has determined that this complaint allegation is resolved. OCR will monitor the University's implementation of the Agreement. Should the University fail to fully implement the agreement, OCR will reopen the case and resume its investigation of the complaint allegation.

II. Alleged Retaliation

A. Background

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OCR examined when the University would have had notice of the Reporting Students' OCR complaints or assertions of rights under Section 504 or Title II. The Reporting Student said she met with the Instructor and two other administrators on XXXXXXXX X XXXX, to discuss her need for improved accommodations, including the XXXXXXXXXXX program. In addition, OCR notified the University of the Reporting Students' OCR complaints and specific allegations on April 23, 2013 and April 28, 2014, respectively.

X---Paragraph deleted---X

OCR reviewed all three of the Student's exams, as well as those of the Reporting Students and three other students identified by the Student as having been graded differently (those of the Witness Student and of two other students who were not students with disabilities). All of the exams were short answer; for example, an exam might ask a student to name a specific structure marked on a cadaver with a colored string. OCR compared the exams and grades against the answer keys provided by the University and did not find any noticeable difference in grading between the Student's exams and any others.

OCR attempted, unsuccessfully, to reach the Witness Student via telephone to obtain more information concerning the grading in question. OCR also provided the Student an opportunity to respond to xxx xxxxxxxxxxxxxx denial of retaliation; she stated that it would be hard to substantiate the retaliation without information from the Witness Student. She added that she believed the instructor knew of one of the Reporting Students' advocacy, because the Reporting Student and the instructor met at some point in the semester regarding the Reporting Student's concerns. She provided no further information to support that xxx xxxxxxxxxxxxxx retaliated against her due to the Reporting Students' advocacy. OCR separately obtained information from the relevant Reporting Student to confirm that the meeting occurred as described.

B. Legal Standards Concerning Retaliation

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference the regulation implementing Title VI of the Civil Rights Act of 1964, at 34 C.F.R. § 100.7(e), which prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by the regulation or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the regulation.

To establish a *prima facie* case of retaliation under Section 504, *i.e.*, one that supports an

inference of retaliation, OCR determines: (1) whether the individual engaged in an activity protected by that law, such as asserting rights or opposing prohibited discrimination; (2) whether the recipient had notice of the individual's protected activity; (3) whether the recipient took an adverse action at the same time as or after the protected activity; and (4) whether a causal connection between the protected activity and the adverse action can be inferred. The manner in which an individual protests perceived disability discrimination must be reasonable in order for the anti-retaliation provisions to apply. In addition, to constitute an adverse action, the recipient's action must have significantly disadvantaged the individual as to his or her status as a student or employee or his or her ability to gain the benefits of the program, or the action could reasonably have acted as a deterrent to further protected activity.

If all of these elements establish a *prima facie* case of retaliation, OCR next considers whether the recipient has articulated what could constitute a legitimate, non-retaliatory reason for taking the adverse action. If so, OCR then considers whether the reason asserted is a pretext for prohibited retaliation.

While OCR would need to address all of the elements in order to find a violation, OCR need not address all these elements in order to find insufficient evidence of a violation where the evidence otherwise demonstrates that retaliation cannot be established.

In this case, it is undisputed that the Reporting Students filed OCR complaints prior to the end of the academic year, which would constitute protected activity, and there is evidence from one of those students that she shared concerns regarding disability-related needs with the Instructor directly. However, even assuming that the students engaged in protected activity and that the Instructor was aware of such protected activity, the Instructor denied separately grading the exams in question, and OCR's examination of the exams did not demonstrate a difference in the grading of the Student's exams, as alleged. The witness identified by the Student as someone who knew about the difference in grading did not respond to OCR's contact, and the Student provided no further evidence to support her allegation. Thus, the evidence is not sufficient to support a finding that the Instructor took adverse action against the Student by grading her exams more harshly than those of students without disabilities and thus to support a finding that retaliation occurred.

III. Alleged Failure to Designate a Section 504/Title II Coordinator and Failure to Have Appropriate Grievance Procedures

The complaint alleged that the University failed to maintain appropriate disability-related grievance procedures and to have a Section 504 coordinator. As noted above, these matters are currently being addressed in the monitoring of a separate OCR case against the University, case #15-08-2026, in which those issues will be handled for all of the University's satellite campuses as well as its main campus. OCR did not, therefore, conduct a separate investigation of those allegations.

IV. Conclusion

This concludes OCR's investigation of the complaint and 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.

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, a complainant may file another complaint alleging such treatment.

A complainant may file a private suit in federal court whether or not OCR finds a violation.

We appreciate your cooperation and that of the University during the preliminary investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, please contact me at (216) 522-XXXX or at XXXXXXXXXX. You may also contact XXX XXXXX XXXXXX at (216) 522-XXXX or at XXXXXXXXXXXXXXX. For questions about implementation of the Agreement, please contact XXX XXXXX, who will be monitoring the University's implementation of the Agreement. We look forward to receiving the University's first monitoring report by January 2, 2015. Should you choose to submit your monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

/s/

Karla K. Ussery
Senior Attorney

Enclosure