



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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MICHIGAN
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June 29, 2015

Victor A. Zambardi
Vice President for Legal Affairs
Oakland University
203 Wilson Hall
2200 North Squirrel Road
Rochester, Michigan 48309-4401

Re: OCR Docket #15-15-2042

Dear Mr. Zambardi:

This letter is to notify you of the disposition of a complaint filed on December 23, 2014, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Oakland University (the University), alleging that the University discriminated against students on the basis of disability. Specifically, the complaint alleged that the University has a practice of limiting students who need a reduced distraction environment during testing to testing in their regular classroom at a separate table with noise-cancelling headphones, without an individualized determination as to whether that meets the students' disability-related needs. The complaint alleged that the determination is made for reasons relating to University resources and applies even if a student is permitted additional time to complete testing.

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 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 school system, the University is subject to these laws, and OCR therefore had jurisdiction to investigate this complaint.

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

- 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(a); and

- 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).

In its investigation of this complaint to date, OCR interviewed the Complainant and spoke with University counsel. In addition, OCR reviewed documentation submitted by both parties. 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 the complaint allegation. We set forth below a summary of OCR's investigation to date.

OCR's Investigation to Date

The complaint alleged that students who need reduced distraction environments during testing have to rely on University professors to arrange such services and that University disability services staff members (DSS staff) do not assist if a professor encounters difficulties in arranging such testing environments. According to the Complainant, DSS staff members suggest that students who need reduced distraction environments be served by taking tests in their regular classrooms, facing away from the rest of the class and at a separate table, with the option of using noise cancelling headphones, as well. If a student refuses this method of providing services, DSS staff members state that the student is refusing services and must test without accommodations. This method of providing services is used even when a student is approved to take more time on a test than other students receive. The Complainant contended that DSS staff members utilize this method because the Disability Services Office space is small, so it can provide testing arrangements for only select students, such as blind students.

In support of the allegation, the Complainant provided a DSS letter that approved a student for a reduced distraction testing environment and extra time on tests but also stated that, if a student is approved for only extra time, the professor arranges provision of that service. The letter also included language about testing options, such as use of ear plugs or noise cancelling headphones; positioning a student facing the wall for less distraction; or a professor finding a separate room for testing (relying on department chairs should a professor be unable to do so). The Complainant also provided other information to support that professors are told that finding places to test students is their responsibility, that they are to consult department chairs if this proves problematic, and that, even if a professor states that he/she has no means to arrange appropriate services, the responsibility still rests with the professor.

The University's February 10, 2015, response to an OCR request for information states that, after the DSS office consults with each student to determine the student's individual needs, the student interacts with his/her professor to discuss each class and the particular testing environment. The response states that, if a student and a professor cannot construct a plan that meets the student's needs, the student is to return to the DSS office to determine alternative solutions.

In response to OCR's request for a list of locations used for students needing a reduced distraction environment for testing, the University stated that testing occurs in traditional University classrooms and faculty and administrative offices and the University provided a map

of the University with 14 buildings highlighted. The University also informed OCR that its DSS consists of three full-time professional staff, including an administrative assistant, and four student “desk” employees. The list of employees also includes 22 proctors and over 100 note takers. The University informed OCR that, during the 2014-2015 academic year, 605 students registered with the University’s DSS Office, with 175 approved for a reduced distraction environment for testing. The University also stated that only four students voluntarily used noise cancelling headphones as a means of obtaining a reduced distraction environment during that year, and only two headphones were checked out as of the University counsel’s February 10, 2015, contact with OCR.

While the University’s DSS policy states that students need to arrange testing with their professor if the only testing service they receive is extended time, a Student Checklist listing services states that in some instances a student can test in the DSS Office but also states that students must be finished with exams by 5:00 p.m., because the DSS office is open only from 8:00 a.m. to 5:00 p.m.

OCR also notes that the University’s DSS policy states:

Make an appointment with the Office of Disability Support Services a minimum of six weeks before services are required.... After reasonable accommodations are determined, the DSS office will prepare the Faculty Notification Letters (FNL) that list accommodations approved by DSS. Students must request accommodations prior to the beginning of every semester by submitting the online form OR using the form available in the DSS office.
<http://wwwp.oakland.edu/dss/>

Applicable Legal Standards and OCR Policy

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, on the basis of disability, against a qualified student with a disability. Similarly, the regulation implementing Title II, at 28 C.F.R. § 35.130(b)(7), provides that a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. Neither of these regulations limit modifications to only those that are “reasonable.”

Reasonable accommodation is a concept found in employment law under both Section 504 at 34 C.F.R. § 104.12 and Title I of the Americans with Disabilities Act of 1990 at 29 C.F.R. § 1630.9. Under 34 C.F.R. § 104.12(a), a recipient must make reasonable accommodation (making facilities accessible, job restructuring, modification of equipment or devices, etc.) to known physical and mental limitations of an otherwise qualified employee unless the recipient can demonstrate that to do so would impose an undue hardship on the operation of its program. Under Section 504 at Subpart E, the part of Section 504 that deals with postsecondary education, recipients are not required to provide reasonable accommodations;

rather, a recipient must provide academic adjustments (modifications to its academic requirements) as are necessary to ensure that the requirements do not discriminate or have the effect of discriminating against a qualified student with a disability. 34 C.F.R. § 104.44(a). A recipient must provide such adjustments unless they lower essential academic standards or fundamentally alter the program in question. A recipient institution must also take steps necessary to ensure that students are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in a recipient's program or activities because of the lack of auxiliary aids and services for students with impaired sensory, manual, or speaking skills. 34 C.F.R. § 104.44(d). Provision of auxiliary aids and services must be effective, but a recipient need not provide personal services/devices. Thus, the requirements for reasonable accommodation and the limitations on services are different from those found in the non-employment context.

A postsecondary educational institution must analyze the appropriateness of an academic adjustment or auxiliary aid or service in its specific context, on a case-by-case basis, and make an individualized determination as to whether a disability-related modification or service lowers essential academic standards, fundamentally alters the nature of a program, or constitutes an undue burden; accordingly, any blanket policy prohibiting the use of any academic adjustment or auxiliary aid or service or any practice that mandates a blanket use of a particular adjustment, aid, or service that necessarily fails to consider whether such service is appropriate in a particular situation constitutes a violation of Section 504.

In addition, a recipient postsecondary institution may not, in providing any aid, benefit, or service, directly or through contractual, licensing, or other arrangements, provide different or separate aid, benefits, or services to persons with disabilities or to any class of persons with disabilities unless such action is necessary to provide them with aids, benefits, or services that are as effective as those provided to others. 34 C.F.R. § 104.44(b)(1)(iv); 28 C.F.R. § 35.130(b)(1)(iv). Different treatment is permissible only when there is a legitimate, educational justification for such treatment and no less discriminatory alternatives that would achieve comparable effects.

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 Case Processing 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 Agreement, which, once implemented, will fully address the complaint allegation in accordance with Section 504 and Title II. The terms of the Agreement require the University to provide training to DSS staff by an individual

knowledgeable about the requirements of Section 504 and Title II at the postsecondary level on how to conduct an individualized determination with a student regarding the student's disability-related need for a reduced-distraction environment during tests and quizzes. The training will also include appropriate documentation requirements. The Agreement further requires that, within seven days of DSS staff members receiving that training, they will send a notice to every current student who has a reduced distraction environment listed as an approved service in a Faculty Notification Letter, stating that the student can return to the DSS office to discuss the specifics of this service's provision, using appropriate standards, with a DSS staff person. In addition, the Agreement requires the University to remove the word "reasonable" from any documents relating to services for students with disabilities and to remove the specific timeline for requesting services.

Conclusion

Given the foregoing, OCR considers this complaint resolved. This concludes OCR's investigation of the complaints 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. A complainant may file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the University may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the harmed individual may file another complaint alleging such treatment.

If you have any questions about this letter or the resolution of the complaint, you may contact me by telephone at 216-522-7634. For questions about implementation of the Agreement, please contact Ms. Kimberly Kilby, who will be monitoring the University's implementation, by telephone at 216-522-2574 or by e-mail at Kimbelry.Kilby@ed.gov. We look forward to receiving the University's first monitoring report by July 24, 2015.

Sincerely,

/s/

Donald S. Yarab
Supervisory Attorney/Team Leader