

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, January 12, 2007 4:04 PM
To: (b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: FW: Can you please help me with the following?

-----Original Message-----

From: (b)(6); (b)(7)(C)
Sent: Friday, January 12, 2007 3:45 PM
To: (b)(6); (b)(7)(C)
Subject: FW: Can you please help me with the following?

Pass this little Tidbit on to your boss. Thanks.

Whether or not an individual who is appealing" an issue in an university setting regarding academic performance before a panel of school personnel and who cannot self advocate because of a significant learning disability should be allowed to have an advocate present at the appeal?

The university's policy says that they are not allowed to have an advocate, only allowed to have an advisor and are only allowed to comment on procedural matters.

This a thought from another individual:

It would seem to me that this issue falls under two areas: (1) an "equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services" and (2) "reasonable modification to policy, practice, or procedure".

Can this person participate effectively in this proceeding without an advocate? And, regarding reasonable modifications, we know that fundamental alteration is the ONLY defense to not allowing reasonable modifications. Would allowing an advocate fundamentally alter the nature of the proceeding? This is your call.

Both of these general non-discrimination requirements apply whether this is a state university or private university.

UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights
Atlanta Office - Southern Division
61 Forsyth Street, SW
Suite 19T70
Atlanta, Georgia 30303

DISCRIMINATION COMPLAINT FORM

Please Print

NAME (Complainant): (b)(6); (b)(7)(C)

MAILING ADDRESS: (b)(6); (b)(7)(C)

CITY/STATE/ZIP C

HOME PHONE NUMBER: AREA CODE () BEST TIME TO CALL:

WORK PHONE NUMBER: AREA CODE () BEST TIME TO CALL:

PERSON DISCRIMINATED AGAINST (if other than Complainant):

MAILING ADDRESS (if different from above):

C/O Law Office of Matthew W. Dietz 999 Ponce de Leon Blvd. Suite 735

CITY/STATE/ZIP CODE: Coral Gables, FL 33134

PHONE NUMBER: AREA CODE (305) 669-2822 BEST TIME TO CALL:

Fax: (305) 442-4181

COLLEGE/INSTITUTION/SCHOOL DISTRICT (which you believe has discriminated):

NAME (RECIPIENT): American University ()

MAILING ADDRESS: 4404 Massachusetts Ave. NW

CITY/STATE/ZIP CODE: Washington, DC 20016-8012

PHONE NUMBER: AREA CODE (202) 885-2446

INJURED PARTY WAS DISCRIMINATED AGAINST BECAUSE OF (check only those that apply):

_____ Race or Color _____ Sex _____ National Origin
_____ Disability _____ Age

WHEN DID DISCRIMINATION OCCUR? Month _____ Day _____, Year _____

IF DISCRIMINATION OCCURRED MORE THAN 180 DAYS AGO, PLEASE INDICATE IF YOU
WISH TO REQUEST A WAIVER. X
YES _____ NO _____

IF YES, PLEASE INDICATE REASON(S) THE COMPLAINT WAS NOT FILED IN A TIMELY MANNER.

Pursuant to Section 108(d), the complaint filed, within the 180-day period,
an internal complaint, including a due process hearing, alleging the same
discriminatory conduct that is the subject of the OCR complaint, and the
complaint is filed no later than 60 days after the internal grievance is
DESCRIBE THE ALLEGED DISCRIMINATION: concluded.

Please see attached.

If additional space is required, use reverse side of this form or insert additional pages.

HAVE EFFORTS BEEN MADE TO RESOLVE THIS COMPLAINT THROUGH THE COLLEGE/INSTITUTION/SCHOOL DISTRICT'S INTERNAL GRIEVANCE PROCEDURE?

 X YES NO

IF YES, WHAT IS THE STATUS OF THE GRIEVANCE? PLEASE EXPLAIN: _____

The college denied the requested accommodations.

WHAT DO YOU CONSIDER AN EQUITABLE RESOLUTION TO THIS COMPLAINT: 1) An
additional opportunity to remain on a probationary period in light of

(b)(6); (b)(7)(C)

health.

2) The right to be represented for due process grievance hearing at
American University.

If additional space is required, use reverse side of this form or insert additional pages.

HAS THIS COMPLAINT BEEN FILED WITH ANY OTHER FEDERAL, STATE OR LOCAL GOVERNMENT AGENCY?

_____ YES _____ ☒ NO

IF YES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

NAME OF AGENCY: _____

CONTACT PERSON AND TITLE: _____

MAILING ADDRESS: _____

CITY/STATE/ZIP CODE: _____

PHONE NUMBER: AREA CODE (_____) _____

DATE COMPLAINT FILED: _____

WITH RESPECT TO THIS COMPLAINT, HAS A CIVIL SUIT OR IS OTHER LEGAL ACTION PENDING?

_____ YES _____ ☒ NO

NAME OF ATTORNEY: _____

PHONE NUMBER: AREA CODE (_____) _____

HAVE YOU, OR THE PERSON DISCRIMINATED AGAINST, EVER FILED ANY OTHER COMPLAINT(S) WITH OCR?

_____ YES _____ ☒ NO

COMPLAINT WAS FILED AGAINST: _____

DATE COMPLAINT FILED: _____ COMPLAINT NUMBER (if known) 04 - ____ - ____

BRIEFLY, WHAT WAS YOUR PREVIOUS COMPLAINT ABOUT: _____

WHAT WAS THE RESULT OF THE ABOVE-REFERENCED COMPLAINT?: _____

THE DISCRIMINATION COMPLAINT FORM MUST
BE SIGNED BY THE COMPLAINANT

(b)(6); (b)(7)(C)

PRINT NAME OF COMPLAINANT
(b)(6); (b)(7)(C)

SIGNATURE OF COMPLAINANT

1-13-06

DATE OF SIGNATURE

IF THIS COMPLAINT IS ON YOUR BEHALF OR THAT OF
ANOTHER INDIVIDUAL, THE COMPLAINANT MUST ALSO SIGN
THE ATTACHED CONSENT AGREEMENT(S) BEFORE OCR CAN
TAKE ANY PRELIMINARY ACTION.

PLEASE TAKE A MOMENT TO ANSWER THE FOLLOWING:

HOW DID YOU LEARN OF THE OFFICE FOR CIVIL RIGHTS?

NEWSPAPER _____ FRIEND _____ RADIO/TV _____ OCR PRESENTATION _____

OTHER (EXPLAIN) Attorney, Matthew W. Dietz

Description of the Alleged Discrimination
Page 1 of 3

(b)(6); (b)(7)(C) is a person with a disability as defined by Section 504 of the Rehabilitation Act, and Section 102 of the Americans with Disabilities Act. He lives (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) American University discriminated against Mr. (b)(6); (b)(7)(C) on the basis of his disability by failing to consider his (b)(6); (b)(7)(C) when American University decided to discontinue his probation and dismiss him from the University in June of 2005. Furthermore, American University fails to afford its students with learning disabilities or other disabilities that would require assistance in self-advocacy adequate due process by refusing to permit an advocate at the grievance hearings.

HISTORY

Since age six, (b)(6); (b)(7)(C) has been diagnosed with (b)(6); (b)(7)(C) and has been receiving accommodations throughout primary school and secondary school. Mr. (b)(6); (b)(7)(C) matriculated at American University in the Fall 2003 semester, where he was given many accommodations for his learning disability. During the Fall 2003 semester, (b)(6); (b)(7)(C) In Spring 2004 (b)(6); (b)(7)(C) Fall 2004 (b)(6); (b)(7)(C) and Spring 2005 (b)(6); (b)(7)(C), Mr. (b)(6); (b)(7)(C) had a cumulative grade point average below the required 2.0 grade point average. He was initially placed upon academic probation after the spring 2004 and fall 2004 semesters and was academically terminated after the spring 2005 semester.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Husted, "This decision process is based on information, academic information that I have in hand. I knew what (b)(6); (b)(7)(C) would need to finish American University, and I knew we were asking him to perform at a level that he had not performed at American University. There was nothing in, in the letter from (b)(6); (b)(7)(C) or in his testimony here on our first meeting that would have led me to believe he could achieve what he needed to achieve to get out" (Vol II, p.60). Notwithstanding, it was well within the discretion of the Dean of Academic Affairs to extend probation for one more semester if proper circumstances presented, and he felt that the student was able to succeed. (see Vol II, p.121 "if the bad patch is explained somehow")

As a result of the grievance hearing, the panel decided to accept additional evidence of (b)(6); (b)(7)(C) disability; but discounted the additional information and dismissed it

(b)(6); (b)(7)(C)

aggravated his existing disability, and as such, currently, no new accommodation is required. American University's refusal to give (b)(6); (b)(7)(C) another opportunity to succeed at American University in light of these intervening important medical circumstances is considered to be discrimination based upon a disability, as Mr. Husted refused to take into account a disability when he could have and should have done so in his determination to academically dismiss (b)(6); (b)(7)(C). I do not believe that there would be a doubt that if the intervening circumstances of (b)(6); (b)(7)(C) condition was due to a hospitalization due to physical injuries rather than physiological injuries, Mr. (b)(6); (b)(7)(C) would be denied the opportunity to have an additional chance to succeed at American University.

Further, pursuant to American University's 504 Grievance Procedures, (b)(6); (b)(7)(C) was required to advocate for himself during the 504 complaint process. Due to his substantial learning disabilities, Joshua Forman is not able to effectively self advocate and requested an accommodation to have his father to advocate on behalf. American University's policy is to permit an advisor, however the advisor role is entirely passive.

As demonstrated by the transcripts attached hereto, Mr. (b)(6); (b)(7)(C) was not an effective advocate, especially in light of the others who appeared at the grievance hearing, such as Deans of the University, 504 personnel, and University professors. In addition, Professor (b)(6); (b)(7)(C) who was a member of the hearing board, is a nationally renowned expert on mental health and disability law. (b)(6); (b)(7)(C) questions were not only the most insightful, but should have been the types of questions asked of Mr. (b)(6); (b)(7)(C) or an advocate of Mr. (b)(6); (b)(7)(C) had one been allowed.

The failure to grant a reasonable accommodation for a persons disability with regard to self advocacy is a denial of due process when one is not on equal footing with the personnel from disability services within the university, the administrators from the university, and professors in the law school in the university that are knowledgeable on this subject. In essence, the due process component of the American University grievance procedure, without effective and efficient advocacy is a denial of due process and a failure to accommodate when it involves one's disability.



U.S. DEPARTMENT OF EDUCATION

P.O. BOX 14620

WASHINGTON, DC 20044-4620

OCR_DC@ed.gov

OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, Virginia, North Carolina, South Carolina

November 30, 2007

BY U.S.P.S., RETURN RECEIPT REQUESTED

Dr. Cornelius Kerwin, President
American University
4400 Massachusetts Avenue, N.W.
Washington, D.C. 20016

RE: OCR Complaint #11-06-2025
Resolution Letter

Dear Dr. Kerwin:

This letter advises you of the disposition of the above-referenced complaint of discrimination filed with the District of Columbia Office, Office for Civil Rights (OCR), U.S. Department of Education (Department), against American University (University) in Washington, D.C. The Complainant alleged that the University discriminated against him based on his disabilities. Specifically, the Complainant alleged that:

1. The University failed to reconsider his academic dismissal and provide reasonable modifications, including extension of his academic probation and a reduced course load, after additional disability information was identified; and
2. The University fails to provide students with disabilities adequate due process by refusing to permit them to have an advocate present during hearings resulting from disability-related grievances.

OCR is responsible for enforcing certain Federal civil rights statutes and regulations, including Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, 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. The University is a recipient of Federal financial assistance from the Department and, therefore, is subject to the provisions of Section 504 and its implementing regulation.¹

¹ We note that the University, a private institution, is not subject to Title II of the Americans with Disabilities Act of 1990 (ADA), which prohibits disability discrimination by state and local government entities and under which OCR has jurisdiction to investigate complaints. The University is subject to Title III of the ADA, which covers private entities that are "public accommodations"; the U.S. Department of Justice enforces Title III of the ADA.

In reaching a determination on the above allegations, OCR reviewed documentation submitted by the University and the Complainant. OCR also conducted interviews with members of the University's staff and communicated with the Complainant, his father, and his attorney. OCR's determinations follow.

BACKGROUND

The University has two components that serve students with disabilities: one is the Academic Support Center (ASC), which provides support for all students to facilitate their achievement at the University with specific focus on individuals with learning disabilities and attention disorders; the second component is Disability Support Services (DSS), which works to ensure that persons with temporary impairments or permanent physical and mental disabilities have an equal opportunity to participate in the University's programs, services, and activities.

(b)(6); (b)(7)(C)

2003, registered with the ASC as a student with disabilities, and participated in the Learning Services Program, the ASC's support program for freshmen with learning disabilities; the ASC also sent letters to the Complainant's professors indicating the Complainant's classroom accommodations for his (b)(6); (b)(7)(C). Per the ASC's confidential memoranda sent to his professors, the Complainant should receive the following academic adjustments and services: testing accommodations (providing a scribe or supplementing written exams with an oral component), a note taker, a quiet room to take exams, use of a computer and calculator, a tutor, and extended time on exams and in-class written assignments.

During the Fall 2003 semester, the Complainant requested and was granted a medical withdrawal. When the Complainant returned to the University for the Spring 2004 semester, he carried a reduced course load of 10 credits. He received a Grade Point Average (GPA) of (b)(6); (b)(7)(C) and earned seven credit hours for the semester.

The University's regulation 25.10.12.B1 states the conditions for academic probation and dismissal: "An undergraduate student who fails to achieve and maintain a 2.0 (C) average during the first semester of full-time study or the equivalent in part-time study, is not in good academic standing and is subject to the academic action of probation or dismissal. A student whose cumulative grade point average is at any time between 1.0 (D) and 2.0 (C) may be dismissed or at the discretion of the student's dean, be placed on academic probation for one semester or one year.... Students who fail to meet the conditions of probation may anticipate dismissal at the end of the probation period."

On June 3, 2004, the Complainant received a letter from the Associate Dean for Academic Affairs (Associate Dean) informing him that his academic progress had been reviewed and it was determined that he had not made satisfactory progress and that he was being placed on academic probation for the Fall 2004 semester. The ASC continued to work with the Complainant, assigning him a counselor and sending letters to his professors about his academic adjustments and services.

For the Fall 2004 semester, the Complainant's GPA was (b)(6); (b)(7)(C) The Associate Dean wrote a second letter to the Complainant on January 31, 2005, informing him that he had made progress toward retaining a good academic standing but he had not achieved a cumulative GPA of 2.0 and as a result he would continue to be on probation for the next semester. The letter also stated that he had to achieve a cumulative GPA of 2.0 or better by the end of the Spring 2005 semester or he would be dismissed.

(b)(6); (b)(7)(C)

At the end of the Spring 2005 semester, the Complainant had a GPA of (b)(6); (b)(7)(C) credits completed. His overall GPA was (b)(6); (b)(7)(C) credits completed. He failed (b)(6); (b)(7)(C) and his highest grade at the University was a (b)(6); (b)(7)(C)

On June 1, 2005, the Associate Dean wrote a letter to the Complainant explaining that he had been dismissed from the University effective the end of the Spring 2005 semester. He explained to the Complainant that the University's regulation states that a student who is not making satisfactory progress toward a degree is subject to dismissal and that his record showed a lack of satisfactory progress. The letter also stated that, except under extraordinary circumstances, dismissed students may not be readmitted to the University or enrolled as a non-degree student at the University for a full year after the effective date of the dismissal.

On June 3, 2005, the Complainant's father wrote a letter to the Associate Dean on the Complainant's behalf requesting a full appeal to determine whether readmission could be granted. He also requested information on the University's appeal process and a list of the attendees at the meeting when the decision was made to dismiss the Complainant. After the Complainant's father and the Associate Dean spoke on the telephone to discuss these requests, on June 8, 2005, the Complainant's father wrote another letter to the Associate Dean requesting reconsideration of the Complainant's dismissal. He asked the Dean to readmit the Complainant

(b)(6); (b)(7)(C)

The Associate Dean reviewed the Complainant's past accommodations with the University's ASC and learned that the Complainant had a documented (b)(6); (b)(7)(C) that the ASC provided the Complainant with requested academic adjustments and services for his classes, and that the Complainant did not always take advantage of these academic adjustments and services. Based on his review, the Associate Dean concluded that there were no signs of satisfactory progress toward completion of the Complainant's degree and reaffirmed his dismissal decision.

In a June 27, 2005, letter, the Associate Dean informed the Complainant's father that after a careful and thorough review of the Complainant's academic record, he would not rescind the Complainant's academic dismissal from the University.

Also on June 27, 2005, the Complainant's father wrote to the Associate Dean memorializing a recent telephone conversation about how the dismissal decision was made. The Associate Dean responded the same day in a letter clarifying what he told the father in the previous telephone conversation and advising that if the Complainant and his father believed the Complainant had not been provided reasonable accommodations from the University, then they needed to follow the disability grievance procedures under the University's Discrimination and Discriminatory Harassment Policy.

The University's Discrimination and Discriminatory Harassment Policy (Policy) protects "the rights of individuals with disabilities to be free from harassment and discrimination, and to be reasonably accommodated" by the University. Students who feel that their rights under the Policy have been violated may file a complaint with the University under the grievance procedures listed under "Disabilities: Student Services" in the Student Handbook. The stated purpose of the grievance procedures is to provide corrective actions as warranted; action may include "reasonable accommodation or adjustments, measures to reverse the effects of discrimination, and/or measures to ensure proper ongoing accommodations."²

On July 25, 2005, the Complainant filed a disability grievance with the University, alleging that the University discriminated against him based on his disability. The Complainant alleged that the ASC denied him reasonable accommodations and that the Associate Dean did not take his recent medical condition and disability into consideration when he academically dismissed him.

(b)(6); (b)(7)(C)

Committee, the Complainant withdrew his first allegation and modified his second allegation to state that the Associate Dean failed to reconsider his dismissal based on a purported new disability. The hearing before the Disability Grievance Committee reconvened on September 12, 2005, to finish presentation of the evidence.

The Disability Grievance Committee gave the Complainant the opportunity to submit additional documentation of a new disability, and on October 10, 2006, the Complainant submitted a DSS Psychological Disabilities-Functional Limitations form signed by the Complainant's doctor on October 6, 2005. The form provided information on the Complainant's current mental impairments, which, according to the doctor, substantially limited the activity of learning as a result of, for example, reduced thinking speed.

² We note that the term "reasonable accommodation" appears in the employment provisions of Section 504 and the ADA. While the Section 504 regulation addressing postsecondary education uses "necessary," not "reasonable," in defining academic adjustments, 34 C.F.R. § 104.44, the ADA Title II regulation requires "reasonable modifications to policies, practices, or procedures," 28 C.F.R. § 35.130(b)(7), and OCR has interpreted the provisions as essentially the same. Furthermore, the ADA Title III regulation requires "reasonable modifications in policies, practices, or procedures." 28 C.F.R. § 36.302.

The Disability Grievance Committee issued its outcome letter on November 17, 2005, informing the Complainant that it had determined that the University did not discriminate against him based on disability. The hearing record attached to the letter provided more detail about the Disability Grievance Committee's findings: the Complainant's documentation failed to substantiate a new disability and there was no evidence to justify a probation extension and reduced course load as disability modifications. The letter informed the Complainant that he could file an appeal based on new information that would significantly alter the findings of the facts, improper procedures in handling the formal grievance that are significant and resulted in an adverse finding, or inappropriate remedy. The Complainant did not appeal the Disability Grievance Committee decision through University procedures. Instead, the Complainant filed this complaint with OCR on January 17, 2006.

ANALYSIS

In analyzing a disability discrimination complaint under Section 504, OCR first determines if the person allegedly subjected to discrimination is a qualified individual with a disability. Section 504 provides that no qualified individual with a disability may, by reason of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any postsecondary education aid, benefit, or service. 34 C.F.R. § 104.43(a). The term "individual with a disability" is defined under the Section 504 implementing regulation as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. § 104.3(j)(1)(i)-(iii). With respect to postsecondary education services, a qualified individual with a disability is any person with a disability who meets the academic and technical standards requisite to admission to or participation in a recipient's educational program or activity. § 104.3(l)(3).

Based on OCR's review of the evidence provided, OCR has determined that, within the meaning of Section 504, the Complainant is an individual with a disability relevant to the issues raised by the

(b)(6); (b)(7)(C)

services. Further, OCR finds that the Complainant was a qualified individual with a disability because he satisfied the University's admission requirements. At issue in this complaint is whether the Complainant was qualified for continued participation in University programs.

Section 504 obligates postsecondary institutions to provide necessary academic adjustments and auxiliary aids to students with disabilities. However, academic requirements that the institution can demonstrate are essential to the program do not have to be modified and the decision not to make modifications will not be regarded as discriminatory. § 104.44(a). In addition, postsecondary institutions may not impose upon students with disabilities rules that have the effect of limiting those students' participation in an education program or activity. § 104.44(b).

In a postsecondary setting, the responsibility lies with the student to identify and document a disability and to request academic adjustments and modifications. Then, the postsecondary institution and the student both have a duty to engage in an interactive process of assisting in the search for appropriate accommodations.

ALLEGATION 1: The Complainant alleged that the University failed to reconsider his academic dismissal and provide reasonable modifications, including extension of his academic probation and a reduced course load, after additional disability information was identified.

(b)(6); (b)(7)(C)

Committee also noted that additional information the Complainant provided to the University regarding his asserted new disabilities did not call for any new academic adjustments for the Complainant.

(b)(6); (b)(7)(C)

OCR notes that even though the University did not have notice of the Complainant's asserted new disability before July 25, it did reconsider his academic dismissal at that time in light of his previously identified disabilities. After the Complainant was academically dismissed, the Complainant's father asked the Associate Dean to reconsider the dismissal decision in a June 8, 2005, letter, which explained that the Complainant had a new team of health care providers and a study coach to assist him. The Associate Dean told OCR that the concern in the Complainant's reconsideration request was that the accommodations were not being given; however, no detailed information was provided on which accommodation the Complainant had not been provided. The Associate Dean said that he reviewed the accommodations records, and in his June 27, 2005, response letter, he stated that he reconsidered the dismissal but did not change the outcome. The Associate Dean told OCR that he has changed reconsideration decisions from a dismissal to another semester of probation a couple of times but for other reasons, such as a plausible explanation of how a student would do better with one more semester; however, in his experience, probation extension in lieu of dismissal has never resulted in a student succeeding. He explained to OCR that he uses his discretion under the Academic Probation and Dismissal policy, determining on a case-by-case basis whether to place a student on probation rather than dismissing him or her. In the Complainant's case, the Associate Dean's discretion came into play when he considered the Complainant's courses, major, track record, and progress and when

he compared the Complainant's records to the 2.0 goals. After the first semester the Complainant completed, the Spring 2004 semester, the Associate Dean considered that he was a freshman and did not dismiss him, but rather placed him on probation, because of his (b)(6); (b)(7)(C). In his June 2005 reconsideration, the Associate Dean took into account the Complainant's circumstances, but he did not find a plausible explanation for how the Complainant would do better with another semester, as he had previously taken a reduced course load with academic adjustments and services but had not made progress; while he was able to attend classes, take exams, and meet with his advisor, he was on a downward academic trend.

After the Complainant filed a disability grievance with the University on July 25, alleging that the University discriminated against him based on his disability, and he submitted his doctor's July 25, 2005, letter explaining the Spring 2005 (b)(6); (b)(7)(C) and subsequent treatment, the University considered the new information with regard to his dismissal. Although the Associate Dean declined to reconsider the dismissal a second time as part of the disability grievance informal mediation option, he did review the doctor's letter about the (b)(6); (b)(7)(C) along with the Complainant's other grievance materials; however, he determined that there were no reasons to reverse the academic dismissal. He explained to OCR that he looked at the (b)(6); (b)(7)(C) to see if it prevented the Complainant from attending classes and found that overall it did not. Subsequently, the Disability Grievance Committee reviewed the Complainant's new documentation submitted at the time he filed his disability grievance and concluded that because the documentation did not establish a new disability, the Associate Dean was not required to reconsider the academic dismissal a second time at that point. However, because the Complainant had raised the issue of a new disability during the grievance process, the Disability Grievance Committee requested additional documentation about the new condition, which the Complainant provided in October 2005. Based on a review of all the documentation, the Disability Grievance Committee determined that the documentation did not establish a new ongoing disability, nor did it require any new modifications. Therefore, the Disability Grievance Committee concluded that there had not been discrimination.

OCR notes that we are not in a position to second-guess educational decisions that are within the purview of a university, such as decisions about academic performance; rather, OCR reviews a university's actions to determine if there was any discrimination in the decision process. Based on the above information, OCR finds that there is insufficient evidence to conclude that the University discriminated against the Complainant on the basis of disability as claimed in this allegation. Both the Associate Dean and the Disability Grievance Committee considered the Complainant's July 25, 2005, documentation submitted in support of an asserted new disability, and the Disability Grievance Committee also gave the Complainant an opportunity to submit further documentation for its consideration.

We further note that the Complainant was not entitled to extension of probation as a disability modification because when he failed to meet the University's academic requirements, he was no longer qualified to continue participating in University programs. It would matter that the Complainant did not meet the University's academic requirements due to his disability only if the University failed to provide him with necessary academic adjustments and services while he was attending the University (an allegation the Complainant withdrew at the start of his disability grievance hearing). Furthermore, the University is not required to reconsider academic dismissal for disability-related reasons unless it reconsiders dismissals for other reasons as well. The

University did reconsider the Complainant's dismissal in light of his previously identified disabilities and found no reason to overturn the dismissal; this also is an educational decision that OCR does not second-guess.

ALLEGATION 2: The Complainant also alleged that the University fails to provide students with disabilities adequate due process by refusing to permit them to have an advocate present during hearings resulting from disability-related grievances.

The Complainant specifically contended that while the University permits an advisor at disability grievance hearings, it does not permit an advocate or representative as a modification for students with disabilities who require assistance with self-advocacy because of their disability. The Complainant's father elaborated that the Complainant needed someone at the hearing with whom to consult and who could speak for him during the hearing because his LD causes him to be anxious, disorganized, and unable to process information under pressure.

The Section 504 regulation, at 34 C.F.R. § 104.7(b), requires all recipients, including postsecondary institutions, to "adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints." OCR has identified a number of elements that a university's Section 504 grievance procedures must contain in order to provide "prompt and equitable" resolution. These elements include: notice to students and employees of the procedures; application of the procedures to complaints alleging discrimination or harassment; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for the major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that the university will take steps to prevent recurrence of any discrimination or harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

As noted above in Background, the University does have grievance procedures for students with disabilities who believe that they have been subjected to discrimination. At the end of June 2005, the University's Section 504 Coordinator met with the Complainant and his academic advisor to discuss how to file a grievance and to review the grievance process. In early July, the Complainant's father contacted the Section 504 Coordinator, mentioned that the Complainant was planning on filing a disability grievance with the University, and requested to attend the (b)(6); (b)(7)(C) In an interview with OCR, the Section 504 Coordinator said that after her phone conversation with the father, she contacted DSS about whether it would be reasonable for the father to be the Complainant's advisor at a grievance hearing; the Section 504 Coordinator later corrected this statement to clarify that she actually spoke with the ASC Director about the father's participation at a hearing. The Section 504 Coordinator said she was told that there was documentation of the Complainant's anxiety disability, but the Complainant's documentation did not have any recommendations for modifications for his (b)(6); (b)(7)(C) In an interview with OCR, the ASC Director recalled the Section 504 Coordinator calling her to inquire about what accommodations the Complainant might need in the hearing, but she did not recall any mention of his anxiety and she focused on his LD and (b)(6); (b)(7)(C) in their discussions. According to the Section 504 Coordinator, on July 11, 2005, the Complainant's father again telephoned her, explaining that the Complainant needed him to attend the hearing or else the Complainant would decompensate.

After the Complainant filed his disability discrimination complaint with the University on July 25, 2005, and after the Associate Dean declined to attempt informal mediation of the complaint, the Section 504 Coordinator sent the Complainant a letter dated August 15, 2005, in which she advised the Complainant of his grievance hearing date (August 24, 2005). The letter also advised the Complainant that he “was entitled to one advisor to assist [him] throughout the hearing. Advisors must be a student, staff, or faculty member at [the] University. The role of the advisor is limited and passive. The advisor may observe the hearing and advise [him] during the hearing. Advisors may not do the following: (1) represent the parties; (2) object during the hearing; (3) address the Grievance Committee unless it is to ask a procedural question; (4) examine or cross-examine witnesses and parties; or (5) be engaged in the hearing in any fashion.” The letter further advised the Complainant to contact her no later than three days before the hearing if he needed an accommodation for a disability.

Also on August 15, 2005, the Complainant met with the Section 504 Coordinator to discuss his difficulties in finding an advisor from the University community, and his father sent the Section 504 Coordinator a facsimile asking “how [the Complainant] is supposed to get a fair hearing if he’s not able to find anybody within the University to assist him and he’s not being allowed to secure outside assistance.” The Complainant’s father also sent a memorandum dated August 16, 2005, to the Section 504 Coordinator contending that the Complainant would be prejudiced by the University’s decision not to allow him to use an outside advisor or to provide him with an advisor that could be fair and objective as a reasonable modification to the grievance procedures; he further requested that the Complainant be allowed to use a tape recorder or court reporter as an auxiliary aid at the hearing. The Complainant’s father requested in another August 16, 2005, memorandum to the Section 504 Coordinator to know “who specifically made the determination that [the Complainant] is not allowed to have any outside advocates assisting him,” and on what grounds the decision was made and whether his disability was considered in the determination. The Section 504 Coordinator informed the Complainant in an August 18, 2005, letter that she had decided to make an exception to the disability grievance hearing process and allow the Complainant’s father to act as his advisor during the hearing, but his father needed to adhere to the same restrictions as any advisor. The Section 504 Coordinator also sent a letter dated August 19, 2005, to the Complainant in which she responded to questions he submitted with his complaint; in this letter, she stated that the University “does not assign coaches for any proceeding held at the university. I refer you to my letter dated August 18 regarding your father’s participation as an advisor during the proceeding. Please be sure that your father understands the limited role of the advisor and that he acts in accordance with the rules I have outlined in the letter.” In addition, in a memorandum to the Complainant and his father dated August 31, 2005, the Section 504 Coordinator clarified that “the role of advisors during the [grievance] proceeding is limited to consultation and support. Any disruptive behavior (which includes loud sighs and other body gestures and outbursts that are distracting to the committee) on the part of advisors will be cause for removal.” The Section 504 Coordinator explained to OCR in her interview that the premise for only allowing advisors at grievance hearings is so that outside parties do not serve as legal counsel. She also said that her decision to permit the Complainant’s father, who happens to be a lawyer, to be his advisor at the hearing was an exception to policy, but she made it in the interest of fairness because he had not been able to find someone on campus and in an effort to make the Complainant comfortable, not because of his disability.

The Complainant and his father did not believe that allowing the father to act as the Complainant's advisor was responsive to the request for a modification for the Complainant's LD and anxiety because his father was still not allowed to speak on his behalf. The Complainant's father stated that because of the Complainant's LD, he needed a representative or an advocate during the hearing, someone to speak on his behalf, and he was not afforded that because, as an advisor, his father could not speak on his behalf.

OCR reviewed the University's disability grievance procedures and could not find any explicit or implicit references to advisors during hearings. The procedures state only that the "504 coordinator will advise both parties of the procedures under this process" and that "[p]arties to a grievance will have an opportunity to state their case at the hearing." The University directed OCR to a policy provision permitting advisors with restrictions on their participation, but this provision is in the University's "Student Conduct Code" and applies to disciplinary conferences or hearings. That provision states that "the role of advisors is limited to consultation" and that advisors may be present but "may not address hearing bodies, speak in disciplinary proceedings, or question witnesses." The provision explains that "[b]ecause the purpose of this disciplinary process is to provide a fair review of alleged violations of the Code rather than a formal legal proceeding, participation of persons acting as legal counsel is not permitted." The University asserted that in all its other student judicial proceedings, students are entitled only to an advisor and are not permitted to have an advocate because doing so would make the proceedings more adversarial in nature; it further asserted that permitting representation in the form of an advocate would fundamentally alter the disability grievance process, which is not a legal proceeding. The University also clarified that it is its "practice" to allow disability grievants to have an advisor, as derived from the Student Conduct Code. It also emphasized that requiring grievants to be allowed to be represented by a legal or non-legal party other than an advisor would make the hearings "more adversarial, complicated, legalistic, and time consuming."

The disability grievance procedures also do not mention a complainant's right to modifications needed because of his or her disability during the grievance hearing. However, the Section 504 Coordinator said that she includes information about how to request disability accommodations in the letter she sends to student-grievants notifying them of the hearing date and she invites students to provide her with information about their disability needs in her initial conversations with them. Nevertheless, it is not clear whether any restriction to advisors during a disability grievance hearing may or may not be modified for disability-related reasons, such as where a grievant cannot fully and effectively participate in a hearing because of a disability. Without an opportunity to establish the need for a representative beyond the advisor role, a student with a disability could be effectively limited in participating in a grievance hearing.

Under Section 504, universities must make reasonable, informed decisions about what requirements are "essential" to its programs and activities. These decisions must be objective, individualized determinations by professionals knowledgeable and experienced in the program or activity and must take into account the following factors: the nature or purpose of the program or activity; the substance of the requirement and its relationship to the functional elements of the program or activity; and whether exceptions or alternatives are permitted.

The University has not provided OCR sufficient evidence to establish that it is essential to the disability grievance process to restrict a grievant to no more assistance than an advisor during a

hearing. The Section 504 Coordinator told OCR that the disability grievance procedures were first published in the fall of 2003 at the initiation of the disability projects team, in consultation with legal counsel, but there was no documentation—only a practice indicating that the restricted advisor role was applicable to disability grievance hearings. There also was no documentation as to how the different natures of a disciplinary proceeding and a disability grievance might have affected the restriction to an advisor, nor was there any evidence as to whether possible exceptions or alternatives to the advisor limitation had been considered for the disability grievance process. To the contrary, the University generalized that with an advisor a grievant can “most likely make whatever points through his/her case presentation, the questioning of witnesses and opening and closing statements that his/her representative could.”

OCR had concerns that the University’s disability grievance procedures do not provide adequate notice to complainants of all of the essential elements of the procedures, particularly whether the student disciplinary proceedings’ provision of an advisor and its description of that person’s limited role also apply to disability grievance hearings and that complainants are entitled to modifications for disabilities during grievance hearings where they can document the need for such modifications. [This notice is especially important to distinguishing between disciplinary proceedings brought against a student and grievance proceedings that permit students to raise possible wrongs against them; notice also advises students prior to filing a grievance of essential elements of the process as well as of their right to request disability modifications during the process.] To address these procedural concerns, the University agreed to revise its disability grievance procedures, as delineated in the Commitment to Resolve (CTR) signed by you on November 5, 2007 (copy enclosed).

OCR further looked to see how the University applied its grievance procedures to the Complainant. Because the Complainant claimed that he requested a disability accommodation during his grievance hearing, OCR also looked to see how the University responded to that request. Section 504 envisions a deliberative, interactive process for determining the appropriate accommodations to be provided.

The Complainant argued that even before he received the August 15 letter advising him of his right to disability accommodations during his grievance proceedings, his father had communicated with the Section 504 Coordinator concerning the Complainant’s disability-related need for someone at the hearing who could assist him with processing information under pressure, staying organized, and presenting his case. However, the Complainant’s father said that at that time the Section 504 Coordinator explained neither the right to accommodations during a hearing nor the interactive process for determining necessary accommodations, and she denied the father’s request.

The Section 504 Coordinator told OCR that the University has never permitted a student to have an advocate or representative at a disability grievance hearing because that had never been requested, although she claimed that the University would consider such a request on a case-by-case basis. However, the Complainant’s father’s request, repeated at several points prior to the hearing, appears to be just such a request. Furthermore, the Section 504 Coordinator had informed the Complainant in an August 19, 2005, letter that the University “does not assign coaches for any proceeding.” The Complainant could reasonably have understood this statement to mean that he would not be permitted a coach as a disability modification.

The Section 504 Coordinator told OCR that when the Complainant's father inquired in July about coming to the hearing because of the Complainant's (b)(6); (b)(7)(C) she sought further advice. The ASC Director recalled that the Section 504 Coordinator inquired about modifications the Complainant might need in the grievance hearing, and in particular whether the father needed to (b)(6); (b)(7)(C)

the hearing. The Complainant's father told OCR that the Section 504 Coordinator never explained this rationale to him or the Complainant and never gave the Complainant an opportunity to clarify his disability-related needs or to provide additional documentation about necessary modifications to address the Complainant's (b)(6); (b)(7)(C) during the grievance hearing.

In her August 15, 2005, letter to the Complainant notifying him of the date of his grievance hearing, the Section 504 Coordinator wrote that the Complainant should contact her before the hearing if he needed an accommodation for a disability. After that letter, the Complainant's father repeated the request for assistance beyond an advisor for the Complainant during the hearing and he asked for an explanation as to why the request had been denied, but there is no documentation that he ever received such an explanation. The Complainant's father also specifically asked if the Student's disability had been considered. The Section 504 Coordinator did not provide an explanation or indicate whether or how the Student's disability had been considered, and instead sent a letter on August 18 permitting the father to serve as the advisor in the interest of fairness, but not because of the Complainant's disability.

The Complainant's father said that he informed the Section 504 Coordinator that the Complainant needed a representative who understood his disabilities and could help him process information under pressure, such as a social worker, counselor, or psychiatrist, but he ended up being the compromise when the Section 504 Coordinator insisted that the Complainant could only have an advisor at the hearing. Considering that the Section 504 Coordinator and at least one member of the Complainant's disability grievance committee are lawyers, OCR observes that the Complainant likely could have been intimidated by the hearing procedure.

The Section 504 Coordinator did arrange for a note taker who provided notes at the end of the hearing. The ASC Director told OCR that the Complainant never asked to look at the notes during the hearing, but the Complainant's father explained to OCR that the Complainant cannot process written information under pressure in order to formulate follow-up questions. Thus, while receiving notes after an academic class might have addressed the Complainant's disability-related needs, it is not clear that the note taker services as provided at the hearing were of much

(b)(6); (b)(7)(C)

The University asserted that it made an exception to the disability grievance hearing process by allowing the Complainant's father to act as his hearing advisor not as a modification for his

disability, but in order to be fair to the Complainant after he had exhausted his efforts to find an advisor on campus, and that in effect the Complainant received all the assistance to which he would have been entitled for disability reasons because his father was permitted a lot of leeway in the hearing. The Section 504 Coordinator, who also was the disability grievance hearing administrator, and the ASC Director both told OCR that the Complainant's father did considerably more than an advisor normally does, such as preparing written questions that the Complainant would read to witnesses and whispering questions that the Complainant would repeat verbatim. The DSS Director, who served on the Complainant's disability grievance hearing panel, told OCR that the panel reviewed the Complainant's disability documentation in the context of his grievance allegation. She noted that the Complainant did not appear confused, stuck to his script with his father's help, and did not request any modifications during the hearing, and she could not think of any other modifications that he might have needed at the

(b)(6); (b)(7)(C)

processing information as it was received, consulting with him, and speaking on his behalf, so that he could effectively participate in the hearing and present his case.

OCR requested from the Complainant's father documentation that would support the

(b)(6); (b)(7)(C)

as well as his father's statement that this disability necessitated modifications in the grievance hearing. The documentation provided to OCR, which the Complainant also had provided to the University over the years, mentions that the Complainant was taking medication due to (b)(6); (b)(7)(C). The Complainant's psycho-educational reports from 2002 noted that his (b)(6); (b)(7)(C) created a "consistent inconsistency" in his auditory concentration and rote auditory working memory and required accommodations such as testing in a distraction-reduced environment; they also observed that he needed to practice self-advocacy skills and recommended that he have a "study buddy" to work with class notes and an "academic coach" to guide him daily in setting goals, prioritizing activities, and organizing his schedule. An October 21, 2004, memorandum from the Complainant and his father to the ASC requests modifications for his (b)(6); (b)(7)(C) and problems noted in his psycho-educational reports. Notes from a March 16, 2005, meeting with the Complainant, his father, his academic advisor, the ASC Director, his psychologist, and other University representatives, held at the Complainant's request, indicate that the Complainant stated that he still had difficulty with organization, writing, and advocating for himself, and all agreed that a daily coach would help him; the ASC Director took responsibility for looking into finding a graduate student or professional coach to assist the Complainant with reviewing his emails, being aware of what he needed to do, and completing assignments.

OCR had concerns that the University did not adequately consider the Complainant's and his father's requests for modifications for his disabilities before the grievance hearing. While the Complainant and his father made several attempts to notify the University of his disability-related need for modifications at the grievance hearing, the University did not adequately engage the Complainant in a deliberative, interactive process for determining what modifications were necessary for his effective participation at the hearing. There does not appear to have been input by DSS or by other individuals familiar with the Complainant on whether his disabilities necessitated any modifications at the hearing beyond or instead of those provided in the classroom. It also is not clear what disability documentation the Section 504 Coordinator reviewed after receiving the modification requests. The hearing modification determination

process applied to the Complainant also does not appear to have allowed him an opportunity to present additional documentation if necessary or to seek a modification other than an advisor with participation restrictions. However, OCR finds it moot to pursue this concern further because the Complainant now attends another university where he is happy and he does not intend to seek readmission to the University. We note that in the future it could benefit the University to pay particular attention to following a deliberative, interactive process when processing requests for disability modifications to the disability grievance process.

This concludes OCR's investigation of the above allegations, and we are closing this complaint effective as of the date of this letter. OCR will monitor the University's implementation of the provisions in the CTR. Once the CTR is fully implemented, the concerns identified during OCR's investigation will be resolved. If the University fails to implement the CTR, OCR will resume its investigation of the complaint allegations.


This determination letter addresses only the issues discussed herein and should not be construed to cover any other issues regarding compliance with Section 504 or its implementing regulation.

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 OCR complaint resolution process. If this happens, the individual may file a complaint with OCR alleging harassment or intimidation.

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

We wish to thank you and your staff for the cooperation we received during our investigation. If you have any questions, please contact Zelma Rush, the assigned investigator, at (202) 786-0504 or Zelma.Rush@ed.gov.

Sincerely,



Sheralyn Goldbecker
Team Leader, Team IV

cc: Justin Perillo, Assistant General Counsel

COMMITMENT TO RESOLVE
OCR Complaint #11-06-2025

To resolve the second allegation in the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), American University (AU) submits the following Commitment to Resolve Statement ("Statement") regarding AU's compliance with Section 504 of the Rehabilitation Act of 1973. The Statement is not intended to be, nor shall it be construed as, a finding by OCR of a violation or non-compliance by AU or by any of its officers, agents, or employees, or as an admission of any such violation, liability, or wrongdoing by AU, its officers, agents, or employees. AU agrees to fully implement the following provisions:

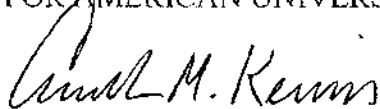
1. By December 1, 2007, AU will determine whether its current practice of providing a campus advisor is "essential" to its disability grievance hearing process. AU will provide OCR documentation of the objective, individualized determination, including who participated in the determination.

2. a) By January 4, 2008, AU will revise its disability grievance procedures pursuant to the determinations AU makes regarding Item 1, as well as of the right to reasonable modifications to nonessential elements for disability reasons as determined through an interactive process.

b) By January 18, 2008, AU will provide notice to all students about the revised disability grievance procedures.

c) By January 25, 2008, AU will submit to OCR documentation of the revised grievance procedures as well as of the notice to students.

FOR AMERICAN UNIVERSITY:



Dr. Cornelius Kerwin, President

11-5-07

Date