



U.S. DEPARTMENT OF EDUCATION

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OFFICE FOR CIVIL RIGHTS
WESTERN DIVISION

DENVER OFFICE
Arizona, Colorado, New Mexico, Utah, Wyoming

July 16, 2010

Matthew S. Holland, Ph.D.
President
Utah Valley University
800 West University Parkway
Orem, UT 84058

Re: Utah Valley University
Case Number: 08102026-B

Dear President Holland:

We received a complaint of discrimination against the University on November 30, 2009. The Complainant alleged the University discriminated against him on the basis of disability (hearing impairment). Specifically, he alleged the University penalized him when he missed classes without providing two hours' notice to the University so it could cancel his sign language interpreters. We have finished our investigation of the complaint. We find that the evidence is insufficient to establish that the University discriminated against the Complainant as alleged.

Jurisdiction

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, which prohibit discrimination on the basis of disability in programs and activities funded by the U.S. Department of Education; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation, which prohibit discrimination on the basis of disability by public entities. The University is a public entity and a recipient of Federal financial assistance from our Department and is subject to these laws.

Legal Issue: Whether the University denied the complainant an opportunity to participate in or benefit from the University's academic program that was not equal to that afforded others. 34 C.F.R. § 104.44(d)(1). 28 C.F.R. §§ 35.160(b) and 35.130(b)(1)(ii).¹ We also considered

¹ We note that the complainant has consistently couched his allegation in terms of different treatment: he was charged a no-show fee for interpreter services for certain classes which he missed, while non-disabled students are not charged for missing classes. Non-disabled students are not similarly situated in this circumstance; the complainant was not charged a fee for missing class—he was charged for failing on more than three occasions to notify the University's sign language service coordinator in a timely way of an upcoming absence in time to cancel his interpreter services. We have not analyzed his allegation as one of discrimination rooted in different treatment, but rather as an allegation of violation of the regulations cited herein.

whether the charges imposed on the Complainant constituted a prohibited surcharge in violation of 28 C.F.R. § 35.130(f).

There is no dispute that the Complainant is a qualified person with a disability and meets the academic and technical standards requisite for admission and participation in the University's education program. *See* 34 C.F.R. §§ 104.3(j)(1) and 104.3(l)(3). According to 28 C.F.R. §§ 35.160(a) and (b), a public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. Additionally, 28 C.F.R. § 35.130(f) specifically provides a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Americans with Disabilities Act or its implementing regulation. *See also* 34 C.F.R. § 104.44(d).

Unlike the ADA regulations, the Section 504 regulation does not explicitly prohibit the imposition of surcharges on individuals with disabilities. However, OCR interprets the provisions of the Section 504 regulation consistently with the Title II regulation, including the Title II prohibition against surcharges.² For example, the Section 504 regulation prohibits recipients from limiting individuals with disabilities from: "[A]ny right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service." 34 C.F.R. § 104.4(b)(1)(vii). Recipients are also generally prohibited from excluding individuals with disabilities from participation in, denying them the benefits of, or otherwise discriminating against them in any program or activity. 34 C.F.R. § 104.43(a).

Further, OCR interprets 28 C.F.R. §§ 35.130(b)(1)(ii) and (iii) to require universities and colleges to provide appropriate auxiliary aids to the same extent as is required under Section 504. Under 28 C.F.R. § 35.160(a), a public entity shall take appropriate steps to ensure that communications with participants with disabilities are as effective as communications with others.

Background

The Complainant alleges that Utah Valley University discriminated against him when it charged him fees for missing classes when he failed to timely notify the disability services office so that sign language interpreter services for the classes could be cancelled. The University's published

his interpreter services. We have not analyzed his allegation as one of discrimination rooted in different treatment, but rather as an allegation of violation of the regulations cited herein.

² OCR and several courts have required covered entities to assume the cost of providing auxiliary aids and services that are necessary to ensure the participation of individuals with disabilities in their programs and activities. 34 C.F.R. § 104.44(d). *See*, Transition of Students With Disabilities to Postsecondary Education: A Guide for High School Educators, March 2007, at Q & A #19: "Who pays for auxiliary aids and services? Once the needed auxiliary aids and services have been identified, institutions may not require students with disabilities to pay part or all of the costs of such aids and services, nor may institutions charge students with disabilities more for participating in programs or activities than they charge students who do not have disabilities. . . ." The guidance is available at <http://www2.ed.gov/about/offices/list/ocr/transitionguide.html>.

policy is that a "no-show" occurs when a student fails to provide at least two hours' notice that he or she is not going to attend a class for which interpreter services are being provided. After three no-shows in one course, the student is charged \$30 for the fourth and each subsequent no-show in that course.

The complainant was charged \$180 in the fall [REDACTED] semester for accumulated no-shows in two courses. The charge was reduced to \$90 pursuant to the University's charge reduction policy. The student missed 20 classes in one course, eight of which were no-shows without cancellation notice, and he had four no-shows without cancellation notice in another course. Other students with disabilities in need of interpreter services in SYs [REDACTED] and [REDACTED] have similarly been charged for no-shows.

Summary of Findings

The complainant is a qualified student with a disability and has for several years relied on the University's provision of sign language interpreters to provide effective communication for classes he takes at the University. The University has a published "no-show" procedure solely for students who receive sign language interpreter services. The procedure provides, in part, that a "no-show" occurs when a student for whom sign language interpreter services are provided fails to attend a class without providing the interpreter coordinator at least two hours' notice (or less for exigent circumstances) so that the interpreter services can be cancelled for that class period or the interpreter re-assigned. The procedure provides six different communication methods a student can use to cancel an interpreter. If a student has more than three no-shows in one course, the student is charged \$30 for the fourth and each subsequent failure in that course to notify the University so that the interpreter can be cancelled.³ No-shows are accumulated in other courses in the same way. The policy includes a way for the student to reduce the charges.

The complainant most recently signed a "Student Contract for Interpreting/ Transcribing Services" on August 4, [REDACTED] acknowledging and agreeing to abide by the University's "'No-Show' Procedure" outlined above. In the fall [REDACTED] semester, the complainant missed 20 classes in one course, of which eight were no-shows. He was charged \$150 for the five no-shows after the first three. In another course he was a no-show four times and was charged \$30 for the fourth no-show in that class. His total charges were \$180 for the six no-shows; that figure was ultimately reduced to \$90.⁴

The University explained that it has more than 50 deaf or hard of hearing students who require sign language interpreter services, with additional service requests from employees, community members, and others. The University typically tries to send two interpreters to each course. The University hires the interpreters and currently has approximately 50 part-time interpreters and two full-time staff interpreters. The interpreter pay schedule is based on level of certification and

³ If the student provides an explanation as to which a particular no-show may be due to emergency or extenuating circumstances, then that no-show is "excused" and no fee assessment is made for that absence.

⁴ The Standard provides that for accumulated no-show fees of between \$180 and \$210, the charged student may participate in No Show and Academic Success Workshops and reduce the charged fee to \$90. The University reported that a number of other students were charged no-show fees in the past two academic years, one having accumulated fees totaling \$1800; many of the students successfully reduced their fees.

years of experience. The University estimates most interpreters are paid about \$20-30 an hour. Consequently, its costs are about \$36.50 to \$80 per class hour (for the two interpreters required for each class). The University must pay an interpreter (or vendor when outside interpreters are used) full price when a student with a hearing impairment "no shows" or late cancels by failing to provide the requisite advance notice of cancellation of the interpreter services.

The University's "No-Show Procedure" allows an exception to the policy for emergency situations which preclude students giving the two hours' cancellation notice. The policy's stated goal is to facilitate students' understanding of the importance of respecting the fiscal and administrative requirements of the service, the importance of attendance to their overall college success, and creating a pattern of responsible behavior that will serve them well outside the academic environment. A large amount of the fees assessed are waived or reduced by the University. The University considers its cancellation policy (one or two hours, depending on the time the class is scheduled) reasonable, because it typically has to provide 24 hours' notice for cancelling services from a local vendor.⁵

The University explained that it does not rely on its no-show policy as a revenue stream (and the no-show charges do not cover the cost of the interpreter services not used) but, rather, uses it as one tool to help manage finite and difficult-to-administer resources. The University identified other areas in which similar charges are imposed—catering services,⁶ facility rentals,⁷ *et cetera*.

Analysis

The organizing principle we applied to analyze this case is that the University cannot convert what is a right created by law and regulation (*i.e.*, the provision of auxiliary aids and services necessary to ensure students with disabilities an equal opportunity to access the University's benefits and programs) into a privilege that can be revoked or a commodity for which the student may be made to pay. Conversely, delivering interpreters on a cost effective basis requires advance planning and the cooperation of the students served for the University to avoid paying for interpreters who are not utilized. The Complainant cannot expect interpreters, any more than any other university service, to be provided when he does not fulfill the necessary prerequisites directly related to delivery of the interpreter service at issue here.

As a first step in our analysis, we confirm the fundamental principle established in the regulations cited above: the burden is on the University to ensure that no student with a disability is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the University because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. Auxiliary aids include sign language interpreters. The University is responsible, then, for

⁵ We observed that many other recipients require 24 hours or more notice of cancellation as part of their no-show policies applicable to students. The local vendor for the University, when used, charges for a minimum of two hours worth of services plus travel expenses any time it provides interpreters.

⁶ Requires 48 hours' cancellation or the full charge is imposed.

⁷ Requires 48 hours' cancellation notice or half the charge is imposed.

ensuring that sign language interpreters are provided, when determined to be needed, to students like the complainant to ensure their equal access to the University's programs and activities.

The University has expended significant cost and administrative effort to meet this obligation. As noted above, Title II and Section 504 prohibit covered entities from imposing surcharges to recoup the costs associated with meeting their legal obligations. At issue in this case is whether the University's overall scheme for imposing no-show charges is a prohibited surcharge. In determining whether the no-show charges are illegal surcharges, consistent with Executive Order 12250, we defer to the interpretation of the U.S. Department of Justice (DOJ), which has primary enforcement authority over the Title II regulation and its language prohibiting the imposition of surcharges. We reached our conclusions in this case after consulting with DOJ; consistent with that consultation, we find that the imposed no-show fees are not prohibited surcharges under the narrow facts presented by this case.

Here, services that remain unused by the student with a disability do not actually serve the purpose of ensuring the equal opportunity to which the student is entitled. The imposition of surcharges is only prohibited for services required by the ADA and Section 504. The University could permissibly charge the Complainant for providing services that go beyond what is legally required. Here, the University is providing -- and paying for -- sign language interpreting services that are not serving any purpose, as the student has failed to show for class and has also failed to cancel the needed services by following the University's reasonable procedures. At that point, we would expect the University to make it explicitly clear to the student that warnings have proven unsuccessful and further failures to cooperate with the administrative procedure for providing interpreter services may result in the previously stipulated charges. If, as in the present case, the student's habitual no-shows continue *without good cause*, the burden may be shifted to the student and the announced charges may be imposed for subsequent, persistent no-shows, without running afoul of the ADA's and Section 504's prohibition of surcharges.

During this process we anticipate the University's procedure would (and, according to its published policy does) provide for emergency or unforeseeable circumstances that would excuse a student's no-show, even where there had been other no-shows in the particular course. This process enables the covered entity to treat each student on a case-by-case basis by excusing legitimately unannounced absences, while maintaining clear and rigorously followed procedures for providing interpreters. Finally, the University's procedure appropriately allows for students to cure their no-shows to reduce or seek waiver of appropriately imposed charges. In the present case, the student followed the procedure and reduced imposed charges by 50%.

We find that in general the University's policy of imposing charges for persistent, unexcused no-shows is not an illegal surcharge that violates Title II or Section 504. 28 C.F.R. §§ 35.160(b) or 35.130(f), or 34 C.F.R. § 104.44(d). In doing so, we do not suggest that the University may forego continuing to provide sign language interpreter services for students who habitually, but intermittently, fail to attend class without notice. When the student does attend class, the covered entity must provide appropriate auxiliary aids and services that will ensure communication for the deaf student that is as effective for him or her as for others. However, the University may work out prior agreements with students to recoup part of the cost of providing sign language interpreter services when a habitual offender fails to attend classes on an intermittent basis and without cancellation.

Conclusion

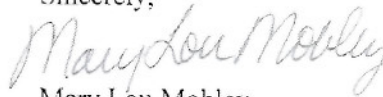
Under the limited circumstances described in this case, we find insufficient evidence from which to conclude that the University violated the controlling regulations implementing Title II and Section 504. We caution that this letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Department of Education regulations prohibit the University from intimidating or harassing anyone who files a complaint with our office or who takes part in an investigation. The complainant may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions, you may contact Mr. Jim Long, the Senior Attorney assigned to this case and the primary contact for this case, at (303) 844-6299.

Sincerely,

A handwritten signature in cursive script that reads "Mary Lou Mobley".

Mary Lou Mobley
Regional Director