

February 17, 2005

Father Bernard O'Connor
President
DeSales University
2755 Station Ave.
Center Valley, PA 18034-9568

OCR Docket # 03-04-2041

Dear Father O'Connor:

This letter is to advise you that we have completed our case resolution activities and reached a determination in the above-referenced complaint that was filed on February 20, 2004, with the Office for Civil Rights (OCR), U.S. Department of Education (Department) against DeSales University (the University). The complaint was filed by _____ (the Complainant), who alleged that the University discriminated against him on the basis of disability. Specifically, the Complainant alleged that the University discriminated by (1) forcing him to leave the campus from December 2-4, 2003, and (2) denying him the opportunity to live in campus housing for the 2004 spring semester.

OCR conducted a complaint investigation under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104, which prohibit recipients of Federal financial assistance from the Department from discriminating on the basis of disability. The College is a recipient of financial assistance from the Department, and, therefore, must comply with the laws enforced by OCR.

In reaching our determinations, OCR reviewed the complaint and additional documents provided by the University and the Complainant. We conducted interviews with University officials and staff, as well as the Complainant, and obtained information from other sources. OCR concludes that the Complainant was a qualified individual with a disability under Section 504 during the events raised by this case. OCR further concludes that there was insufficient evidence to support a conclusion of noncompliance with respect to the University's decision that the Complainant must leave campus on

December 3, 2003. However, OCR did find that the process that the University followed in making its decision to deny the Complainant campus housing for the spring 2004 semester was not in compliance with Section 504, at 34 C.F.R. §§ 104.4(b)(1)(i) and 104.4(b)(1)(vii).

Moreover, during our investigation, OCR became aware of another compliance concern that was not raised in this complaint. OCR determined that the University failed to establish a grievance procedure for the prompt and equitable resolution of complaints of disability discrimination, as required by Section 504, at 34 C.F.R. § 104.7. The basis for our determination follows.

Background

The Complainant enrolled in the University as a full-time student in the fall semester of 2003. The only physical or mental impairments that he noted on his medical history form were depression, lactose intolerance and hypoglycemia. The University confirmed that the Complainant received academic adjustments during the fall 2003 semester. The only other modifications to its services or programs made at the request of the Complainant concerned the frequency of meals and the variety of food.

The Complainant told OCR that he had "clinical depression," a learning disability and Attention Deficit Disorder (ADD). He stated that he needs counseling so that he does not become further depressed, and his learning disability affects his ability to learn. He also said that his interpretation of what people say to him is many times incorrect.

The University provides medical care for students at its Health Center, and individual counseling at its Counseling Center. The Complainant sought counseling for depression on a few occasions during the 2003 fall semester. He also visited the Health Center, seeking medical treatment for a variety of minor ailments and injuries. The Director of the Health Center believed the Complainant's maladies to be legitimate, but exaggerated. The Director of the Health Center reported that she believed the Complainant had mental health problems and urged him to see the campus doctor, which the Complainant did on November 19, 2003. On November 24, 2003, the Director of the Health Center provided the Complainant with a list of psychiatric practitioners and encouraged him to seek treatment.

Allegation 1 - December 2-3, 2003

On December 2 or 3, 2003, the Complainant posted a sign outside his dorm room stating in large letters, "The Once Alive & Depressed Have A Voice!" He also posted information concerning suicide, as well as a printout with what appear to be numerous suicide notes of unknown others. The Complainant told OCR he printed these notes to raise awareness about suicide.

Sometime later, the Complainant was escorted by campus security to the Residence Life office. The Director of Residence Life reported that she observed an ace bandage on the Complainant's arm, and showing under the edge of the bandage were the letters "GY" scratched into the Complainant's skin. Around the same time, University officials determined, without speaking to the Complainant, that he must leave campus until an outside doctor evaluated him. The Complainant left campus.

On December 4, 2003, the Complainant returned to campus with a doctor's note written on a prescription pad, stating that he had been evaluated and was medically cleared to return to school. The same day, the doctor faxed a partially illegible, handwritten psychological evaluation to the Director of Counseling. The Director of the Counseling Center conferred by telephone with the Complainant's doctor, but did not attempt to clarify the illegible portions of the report pertaining to the Complainant's diagnosis.

The University permitted the Complainant to return to campus and resume residency as of that date. The Director of Counseling reported to OCR that he stressed to the Complainant the need to continue counseling, but acknowledged that he did not require the Complainant to submit to any formal treatment plan. The only conditions established for the Complainant, as detailed in a letter to him dated December 5, 2003, were that he participate in three sessions with his doctor on December 10, 12 and 15, 2003, and submit "a complete report" from his doctor on his three sessions, by December 19, 2003.

The Complainant attended the three sessions, as confirmed by a December 19, 2003 letter the Complainant's doctor sent to the University. The doctor did not identify a mental impairment or make a formal diagnosis, but stated in the letter that "skilled and empathetic psychotherapy is most definitely indicated" for the Complainant. Additionally, he predicted that the "current state of Psychology and Psychiatry should be able to intervene successfully through a coordinated effort between practitioners in the area working in concert with DeSales University." He stated that as long as the Complainant continued in regular psychotherapy, the Complainant and the University could expect a "profitable mutual outcome." The University did not contact the Complainant's doctor again until February or March of 2004, after this complaint was filed, and the University acknowledged that its purpose was to request a typed copy of the December 5th report.

The Complainant completed the fall semester while living on campus. During the time period from December 5 to 19, 2003, the University

identified as notable two incidents involving the Complainant. While he was taking a final exam in a room apart from other students, the Complainant drew on a blackboard a picture of a boy and a girl on a mountain as part of answer, a behavior seen by the University as attention seeking. Additionally, on December 17, 2003, the Complainant visited the Health Center and requested a tranquilizer dart for use on emergency room staff of the hospital that he said had kept him waiting during an emergency room visit the night before. The Director of Student Health, to whom the remark was directed, said that she thought such an action was unlikely to occur.

Allegation 2 - Denial of Housing

The Complainant had been advised in a letter of December 5, 2003, that after he completed counseling and the University had received a report from his doctor, the University's Health Review Committee (HRC) would meet to decide whether the Complainant would be permitted to live in campus residence during spring 2004. This letter listed four factors that would impact on the decision: evidence that the Complainant had shown a strong commitment to the counseling process; whether the Complainant required further treatment and the nature and length of that treatment; whether the Complainant had the emotional and behavioral stability necessary to return to University residency in the Spring; and, what benefits, both short-term and long-term, the Complainant would derive from participating in the residential process.

The HRC consisted of the Dean of Students (the Dean) and the Directors of Residence Life, the Counseling Center, and the Health Center. This group met on December 19, 2003, for the purpose of reviewing the Complainant's eligibility for housing during the spring semester of 2004. Their assessment did not include interviews with either the Complainant or his doctor. The HRC determined that the Complainant's three consultations with his doctor in December were not sufficient evidence of a strong commitment to the counseling process because his motive was to get back on campus, not seek help with his problems. The HRC also determined that the Complainant was in a persistent state of conflict with the University environment and this would not improve if he did not get treatment for his mental disorder.

By letter dated December 19, 2003, the University notified the Complainant that because of his "continued difficulty with and adjustment to the campus residential environment and the University's inability to provide [him] with the resources needed for [his] psychological and emotional well-being" he would not be able to continue in residence. The Complainant was instructed to write to the

Dean if he disagreed with this decision, which he did not do. The Complainant returned to attend classes as a full-time day student during spring 2004, residing off campus, and filed this complaint.

Pertinent University Policies

The University has a disciplinary process to address violations of University policy, including a judicial system for addressing violations of the standards of student conduct. None of these policies were invoked to restrict the Complainant's entitlement to housing.

The University has a Section 504 Coordinator, and a system for providing academic adjustments, but it had not adopted procedures for the resolution of complaints alleging discrimination on the basis of disability.

The University has a policy in the Student Handbook, "Guidelines for University-Initiated Withdrawal" (hereafter "Guidelines"). The Guidelines state that "an immediate assessment of the student's condition may be required" which is "normally" done by the HRC. The process is to have the student's parents in for a meeting, following which the student must leave campus and obtain an outside evaluation that clears the student to return.

However, the University removed the Complainant on December 3, 2003 pursuant to an "unwritten protocol" for responding to suicidal ideation by a student. In these instances, the University reported, the Dean and the Director of Counseling may confer informally regarding the student, and if it is clear that the student is deemed a danger, the student will be asked to leave campus and may not return until he or she is evaluated and deemed not to be a danger by an outside doctor. The Dean maintained that the posting of the notes was sufficient reason to trigger the requirement that he leave and obtain an evaluation.

Analysis

Qualified Individual with a Disability

Under 34 C.F.R. §104.3(j)(1), an individual with a disability is 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 an impairment. "Is regarded as having an impairment" means (a) has a physical or mental impairment that does not substantially limit major life activities, but is

treated by a recipient as constituting such limitation (b) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (c) has none of the impairments defined in section one above, but is treated by a recipient as having such an impairment. 34 C.F.R. §104.3(j)(2)(iv)

OCR has determined that the Complainant is a qualified person under 34 C.F.R. §104.3(j)(1). Although he was not formally diagnosed as having a mental impairment and the University provided no records to confirm the existence of a mental impairment, the University treated the Complainant as having such an impairment and took adverse action against him on that basis when it required him to leave campus on December 3, 2003, and later denied him housing privileges. University staff and officials concluded that the Complainant had a mental disorder that significantly impaired his ability to interact in an appropriate manner within the University environment. They reported that they saw in the Complainant's statements and actions evidence of paranoia, suspicion or persecution and believed that the Complainant would benefit from psychiatric treatment. The primary manifestation of the disorder, according to University staff and officials, was the Complainant's disruptive behavior in the form of requests for their services, time and attention, and inappropriate behavior in the social environment (or, "acting out").

Direct Threat Standard

Under Section 504, the "direct threat" standard applies to situations where a college proposes to take adverse action against a student whose conduct resulting from a disability poses a significant risk to the health or safety of the student or others. A significant risk constitutes a high probability of substantial harm and not just a slightly increased, speculative, or remote risk. In a "direct threat" situation, a University needs to make an individualized and objective assessment of the student's ability to safely participate in the University's program, based on a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. The assessment must determine the nature, duration, and severity of the risk; the probability that the potentially threatening injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will sufficiently mitigate the risk. The student must not be subject to adverse action on the basis of unfounded fear, prejudice and stereotypes.

OCR has long made clear that nothing in Section 504 prevents

educational institutions from addressing the dangers posed by an individual who represents a "direct threat" to the health and safety of self or others, even if such an individual is a person with a disability, as that individual may no longer be qualified for a particular educational program or activity under 34 C.F.R. § 104.3(k)(3). Following a proper determination of a direct threat, an educational institution may require as a precondition to a student's return that the student provide documentation that the student has taken steps to reduce the previous threat (e.g., followed a treatment plan, submitted periodic reports, granted permission for the institution to talk to the treating professional). However, educational institutions cannot require that a student's disability-related behavior no longer occur, unless that behavior creates a direct threat that cannot be eliminated through reasonable modifications.

OCR has further recognized that the application of the "direct threat" principle is modified in response to exceptional circumstances, such as situations where safety is of immediate concern. In these instances, a college may take interim steps pending a final decision regarding adverse action against a student as long as minimal due process (such as notice and an initial opportunity to address the evidence) is provided in the interim and full due process (including a hearing and the right to appeal) is offered later.

December 2-4, 2003 Removal

OCR examined the circumstances under which the University temporarily removed the Complainant from campus. OCR accords significant discretion to decisions of postsecondary institutions made through a fair due process proceeding. We note that the Complainant was not given notice that the University believed he had a serious mental impairment that may require long-term treatment. Nevertheless, on December 4, the Complainant was able to meet the conditions for his return and resume University life without restriction. We conclude that its actions represented a reasonable response to a situation where safety was believed to be of immediate concern. We find insufficient evidence that the University's process violated Section 504 regarding this temporary removal of the Complainant from campus.

Denial of Housing

OCR's investigation revealed compliance concerns under § 104.4(b)(1)(i) due to the University's actions in excluding the Complainant from participation in housing for students, and under §

104.4(b)(1)(vii) due to the limitations it imposed upon the Complainant's enjoyment of a right, privilege or advantage. The basis for our conclusion is that the University failed to make an individualized and objective assessment of the Complainant's ability to safely participate in the University's program.

The University did not take any actions to establish whether the Complainant had the serious mental disorders they suspected he had, or any psychological disability. The HRC could have consulted with the Complainant's doctor concerning the nature of any threat the Complainant might have posed, based on his behavior suggesting suicidal ideation, his self-cutting, his tranquilizer remark and any of the Complainant's other behaviors that caused them concern. However, no member of the HRC sought such clarification. The HRC found the Complainant's commitment to counseling to be deficient even though he attended all three of the sessions required by the University and his doctor reported on the sessions to the University. There is no evidence that the University required the Complainant to report on a treatment plan as a condition for participating in housing. The Complainant met the conditions established by the University for his return on December 5. Significantly, the University did not take any actions to restrict the Complainant's access to any programs or activities on campus while it was in the process of considering his housing eligibility. Upon his return to campus, the Complainant enjoyed unrestricted access to housing until December 19, 2003. Although the University noted two incidents involving the Complainant which concerned them during the period between December 5 and December 19, the University's response to these intervening events did not indicate that they perceived the Complainant to be a direct threat at the time that these actions occurred or that the actions themselves were considered threatening.

We found that members of the HRC, and other University officials, took into account the Complainant's entire history, including his use of resources that the University found excessive, when it made the decision to deny the Complainant housing. University officials who interacted with the Complainant stated that when the Complainant sought assistance, he often began with high-level officials and exaggerated or misrepresented events, which caused significant confusion and problems. One HRC member reported she could not continue expending the amount of time on the Complainant that she had during the first semester. University officials reported that they explained to the Complainant repeatedly how to use more diplomatic, or more appropriate ways of pursuing resolution of his problems. Other than giving him such advice, the University did not report any other steps to modify or limit the Complainant's use of University resources

or staff.

OCR found that the University had legitimate concerns about the disruption caused by the Complainant's non-threatening behaviors; however, the HRC conditioned the Complainant's receipt of housing, in part, on a showing that he had eliminated behaviors they believed were manifestations of a psychological impairment, including behaviors that no one claimed to have created a direct threat. We found no evidence that University officials tried to address the Complainant's disruptive behaviors by modifying its usual policies or practices in a nondiscriminatory manner acceptable under Section 504. The University did not provide the Complainant with an opportunity to present evidence or to be heard concerning his continuing in University housing, and gave him no notice that it would consider all of his disruptive behaviors in reaching a decision on this matter.

We also found that the University had no grievance procedures under which the Complainant could challenge the decision to deny him housing, raising a compliance concern under the Section 504 regulation.

In order to resolve the issues raised by this complaint, the University has agreed to take the actions outlined in the enclosed Commitments to Resolve, which address and fully resolve OCR's concerns. Based on the Commitments, we consider the University to be in compliance with Section 504. As is our standard practice, OCR will monitor implementation of the Commitments.

This completes our consideration of this complaint. This letter is not intended, nor should it be construed, to cover other civil rights matters that may exist but are not discussed herein.

Please be advised that Federal regulations prohibit recipients of Federal financial assistance from taking actions that intimidate, threaten, coerce or discriminate against individuals who exercise their statutory rights, file a complaint with our office or take part in the complaint resolution process. If any such actions occur, the Complainant may file another complaint alleging such intimidation or retaliation.

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 that, if released, could constitute an unwarranted invasion of privacy.

We would like to thank the University for its cooperation during the course of this investigation, in particular, Mr. Tom Traud, Counsel for the University. If you have any questions, please do not hesitate to contact Vicki Piel at (215) 656-8512.

Sincerely,

LouAnn Pearthree
Team Leader
Philadelphia Office

Enclosure

03042041
DeSales University
Commitments to Resolve

To resolve the allegations in the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights (OCR), under Section 504 of the Rehabilitation Act of 1973 (Section 504), DeSales University (the University) makes the following commitments to OCR:

The University affirms that no qualified person with a disability shall, on the basis of disability, or perceived disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the University, including the benefit of housing. In providing housing, the University affirms that it will not, on the basis of disability, limit a qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. Sections 104.4(a) and 104.4(b)(vii).

The specific actions the University agrees to take are:

1. By March 31, 2005, the University will draft grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504. Such complaints may include, but are not limited to, an allegation that the University has denied a student a benefit or service on the basis of disability. Upon being notified by OCR that its grievance procedures comport with the requirements of Section 504, within 60 days, the University will adopt and publish the procedures. 34 C.F.R. Section 104.7(b).

2. The University will take steps to publicize the grievance procedures annually by posting them in dormitories and other locations on campus where student activities are held, and by publishing them in one or more of its relevant student publications (e.g. student handbook, student newspaper).

3. Effective immediately, where the risk of harm may not be considered imminent (i.e. situations determined by the University not to be an emergency), and the University seeks to determine whether a student with a disability, is a "direct threat" to self or others on that basis, the University will include the following in its process:

a. The University will ensure the decision to deny a benefit is based on objective and independent medical judgments. The University will conduct an individualized and objective assessment, taking into account the nature, duration, severity of the risk and the likelihood, imminence, and nature of potential harmful conduct. The University will annually appoint an independent psychiatrist to review any proposed action and who will submit a report to the Section 504 Compliance Officer.

b. While completing this assessment, the University may set interim conditions provided that the student is given notice of the University's actions, is given an opportunity to provide evidence on his own behalf, and the conditions are in accord with Commitment 4 below.

4. Effective immediately, as a part of the process outlined in Commitment 3, the University will consider whether reasonable modification of any other relevant University policies, practices or procedures will sufficiently mitigate the risk posed by the student.

a. In a case where the University believes that the student's behavior is caused by a disability, the University may inquire whether the student wishes to request reasonable modifications due to a disability.

b. Before determining that it is unable to modify its normal policies for a student with a disability on the basis that to do so would fundamentally alter the nature of its program or seriously hinder the University in the accomplishment of its mission, the University will identify the purpose and rationale for the program(s) at issue. In making this inquiry, the University may take into account the University's overall mission as well as specific technical requirements for certain programs or activities.

c. Before determining that the University is unable to modify its normal policies for a student with a disability on the basis that to do so creates an undue burden, the University will evaluate the modification needed in light of the University's overall resources.

5. Effective immediately, if the University determines that a student poses a direct threat to self or others, the University may condition the student's receipt of a benefit on a showing that the student is no longer a threat. Such evidence may include a treatment plan or periodic reports from a physician. The University will not, however, condition the provision of a benefit on a showing by a student that he has eliminated behaviors that are a manifestation of a disability, unless such behavior created the direct threat.

6. In the event that the complainant is readmitted to the University at some point in the future and seeks to live on campus, the University will reconsider the complainant's request for housing in accordance with Commitments 3, 4 and 5 above. Should the complainant return to the University, he will be subject to the same code of conduct as applies to other students or individuals on campus, unless, upon the request of the complainant, the University has previously granted a modification thereto as an accommodation to the complainant.

7. Without admitting any liability and in order to resolve the case without the necessity of any further investigation, the University will reimburse the complainant the difference, if any, between the amount he paid for a motel during the spring semester of 2004 and the amount it would have cost him to reside on campus. Such payment shall be made within 30 days after the complainant proves the motel payments made during the spring semester of 2004.

Reporting Requirements:

By May 1, 2005, the University will provide to OCR:

1. A copy of the procedures drafted pursuant to Commitment 1.
2. In the event that the complainant is readmitted to the University and seeks to live on campus, the University will forward documentation that the University has reassessed the complainant's request for housing for the semester in question, pursuant to Commitments 3, 4, 5 and 6. This documentation will include a description of the process used by the University, the names and titles of the decision maker(s), any guidance provided to decision makers, a copy of all evidence used

as a basis for the decision, the name(s) and affiliation(s) of any professionals or other witnesses consulted, the University's decision, and the specific basis for the decision. Evidence will be included showing that the complainant was given notice and an opportunity to present evidence. If the decision was not in his favor, the University will provide proof that the complainant was advised how to contest the decision.

3. Documentation of the payment to the complainant pursuant to Commitment 7.

By December 1, 2005, the University will provide to OCR:

4. A copy of all publication(s) where these provisions appear, and a description of the other steps that it has taken to publicize the procedures, pursuant to Commitment 2.

President or designee
DeSales University

Date