



**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
600 SUPERIOR AVENUE EAST, SUITE 750
CLEVELAND, OHIO 44114-2611**

MAR 18 2005

Dr. Jean Scott
President
Marietta College
215 Fifth Street
Marietta, Ohio 45750

Re: 15-04-2060

Dear Dr. Scott:

This letter is to advise you of the disposition of the above-referenced complaint, which was received by the U.S. Department of Education, Office for Civil Rights (OCR), on September 20, 2004. The complaint alleged that Marietta College (College) excluded a former student (Student), from participation in its academic program on the basis of disability. Specifically, the complaint alleged that, after a psychologist on staff at the College shared information about the Student's disability (depression) and history of suicide attempts with a College Dean, the College determined that the Student was a threat to himself and dismissed him on September 19, 2004.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its implementing regulation at 34 C.F.R. Part 104. Section 504 prohibits discrimination based on disability by recipients of Federal financial assistance from the U.S. Department of Education. The College is a recipient of Federal financial assistance from the Department. OCR, therefore, has jurisdiction over this complaint.

In making a determination on this complaint, OCR interviewed the complainants and College staff members with direct knowledge of the allegation. In addition, OCR reviewed documentation provided by the complainants and the College related to the allegation. Based on a careful analysis of this information, OCR determined that the College's actions in this situation did not comply with the requirements of the Section

504 regulation. However, the College has agreed to take action to resolve the compliance issues raised during this investigation. The basis for OCR's determination is discussed below.

The Student was admitted to the College as a freshman for its fall 2004 term. Before the College's academic year began in August 2004, the Student and his parents attended the College's Summer Schedule Days, which is an annual College activity held for students to schedule classes and to orient students and parents to the College. During this time, the Dean of Student Life (Dean) conducted a session for parents on College resources. The Dean indicated that, after this session, the Student's parents spoke to the him about the type of counseling services the College offered, indicating that the Student would need counseling once he began attending the College. The Dean advised them to contact the College's psychologist. The Student's mother then called the psychologist in mid-August to request counseling services for the Student. During that conversation, she told the psychologist that the Student had attempted suicide in spring 2003 and gave the psychologist consent to speak to the Student's psychiatrist in New York. The psychologist later contacted the Student's parents and asked to meet with them without the Student during their planned visit to the College for a parents' weekend so that he could better understand the Student's needs. The Student's father indicated that when they met with the psychologist on September 18, however, they realized that the psychologist had shared with the College administration information about the Student's depression and past suicide attempts. According to the Student's parents, the College then used that information to involuntarily dismiss the Student from the College, after he had only been a student there for approximately one month, based on the Student's depression and history of suicide attempts.

Pursuant to the Section 504 implementing regulation, at 34 C.F.R. § 104.3(j)(1), an individual with a disability is any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Under 34 C.F.R. § 104.3(j)(2)(i)(b), a physical or mental impairment includes any mental or psychological disorder. Under 34 C.F.R. § 104.3(l)(3), a qualified individual with a disability with respect to postsecondary education is one who meets the academic and technical standards requisite to participation in the recipient's education program. Further, the Section 504 regulation at, 34 C.F.R. § 104.3(j)(2)(iv), states that a person regarded as having a disability is a person who does not have a physical or mental impairment that substantially limits a major life activity but who is treated by others as having such a limitation. Pursuant to 34 C.F.R. § 104.43, no qualified student with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any postsecondary education program or activity.

The Student met the academic standards required for admission to the College. The College also acknowledged that it was aware of the Student's depression and past suicide attempts. The College does not dispute that, pursuant to its Emergency Withdrawal

Policy, it involuntarily dismissed the Student from its program on September 19, 2004. The College contends, however, that its dismissal of the Student was legitimate and not discriminatory because information that the College had gathered about the Student through its psychologist supported that the Student posed a direct threat to himself.

Although Section 504 does not prohibit a postsecondary education institution from taking action to address an imminent risk of danger posed by an individual with a disability who represents a direct threat to the health and safety of himself/herself or others, such action must be grounded in sound evidence and cannot be based on unfounded fears, prejudice, or stereotypes regarding individuals with psychiatric disabilities to ensure that such individuals are not discriminated against because of their disability. To rise to the level of a direct threat, there must be a high probability of substantial harm and not just a slightly increased, speculative, or remote risk. In a direct threat situation, a postsecondary education institution needs to make an individualized and objective assessment of the student's ability to safely participate in the institution's program based on a reasonable medical judgment relying on the most current medical knowledge 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. Due process requires a postsecondary institution to adhere to procedures that ensure that students with disabilities are not subject to adverse action on the basis of unfounded fear, prejudice, or stereotypes. A nondiscriminatory belief must be based on observation of a student's conduct, actions, and statements, not merely knowledge or beliefs that a student is an individual with a disability. In exceptional circumstances, such as situations where safety is of immediate concern, a college may take interim steps pending a final decision regarding an adverse action against a student as long as minimal due process, such as notice and an 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.

Because the College asserted a direct threat defense in support of its dismissal of the Student, OCR gathered evidence from the College regarding its decision to dismiss the Student and analyzed it applying the direct threat principles stated above.

The College indicated that it based its decision on information provided by its psychologist. The psychologist first expressed concerns to the Dean about the Student on September 14. At that time, the psychologist indicated that his concerns were that the Student seemed evasive and uncooperative during his first counseling session with him on August 26 and was not interested in having counseling sessions more than once or twice a month. This concerned the psychologist because, according to him, the Student's New York psychiatrist stressed to him during a telephone conversation that the Student needed weekly counseling and cautioned that the Student does not give any warning before his suicide attempts. In addition, the psychologist had reviewed records obtained from the psychiatrist that described the Student's depression and suicidal tendencies. The psychologist also indicated that the Student's Resident Dorm Director contacted him in

early September to advise that the Student's roommate had reported that the Student was acting strangely and frequently talked about death. The psychologist further expressed concern that, around this same time, the Student allowed his medication to lapse, although the psychologist acknowledged that the Student reported this to him and that the Student's parents sent the Student a new prescription so that any lapse of medication was for only a brief period of time.

On the same day that the psychologist spoke to the Dean, the psychologist told OCR that he saw the Student on campus and approached him to ask why the Student had not contacted him since their first session. He stated that the Student responded by saying that he was fine and that he felt that meeting more than once a month was unnecessary; however, the Student agreed to meet with the psychologist a second time on September 16. The psychologist stated that he called the New York psychiatrist to advise her that the Student was avoiding therapy, and she again stressed that the Student needed weekly counseling and that, if he did not want to meet with the psychologist, to try and get him off-campus counseling. The psychologist indicated he reported this conversation to the Dean and made unsuccessful attempts to identify an off-campus psychiatrist for the Student. Finally, the psychologist stated that during his second session with the Student on September 16, the Student boasted that if he was going to commit suicide again no one would ever know and advised the psychologist of a third suicide attempt that the Student claimed no one knew about. After this second session, the psychologist went to the Dean and expressed his concern that the Student's statements during that session constituted a veiled threat to kill himself. Based on this information, the College decided to suggest in the meeting with the parents two days later that the Student voluntarily withdraw based on medical need and that, if the Student did not agree to withdraw voluntarily, the College would exercise its emergency involuntary withdrawal policy, which provides that Students who threaten or attempt suicide may be involuntarily withdrawn from the College.

The College indicated that the parents rejected the College's offer to voluntarily withdraw the Student for medical need at their meeting on September 18 so that when they met with the Student and his parents the next day, the College advised them that they were involuntarily withdrawing the Student from the College. The parents objected but were told by the College that the action might only be temporary if they, as a condition of the Student's return, provided documentation that the Student was seeing a qualified mental health professional and that he was mentally stable. In addition, the Student would have to agree to a behavior contract upon his return. The parents indicated that they would not agree to these conditions because they did not believe the College should be dismissing the Student and that the Student would not return. As a result, the College refunded the Student's tuition and room and board.

During its investigation, OCR determined that the decision to involuntarily withdraw the Student from the College was based on a discussion between the Dean, the College President, and the College's legal counsel, based on the information provided by the College's psychologist. Although the psychologist's interactions with the Student may

have given the College some grounds for concern about how the Student was adapting to College life, OCR finds that the information was not sufficient to demonstrate the existence of the type of high probability of substantial harm to the Student, as opposed to a slightly increased or speculative risk, necessary to support a direct threat defense. In total, the psychologist met with the Student for two one-hour sessions. The College never conducted an individualized and objective assessment of the Student's ability to safely participate in the College's program, based on a reasonable medical judgment, and did not consider whether the perceived risk of injury to the Student could have been mitigated by reasonable modifications of College policies, practices, or procedures. Also, although the College offered the parents the opportunity to provide information regarding the Student's proposed treatment plan and mental stability as conditions for a possible return to the College, the parents were never explicitly advised of their right to appeal and challenge the dismissal decision itself. Furthermore, OCR's investigation revealed that the College does not have a grievance procedure for disability discrimination complaints or a Section 504 coordinator as required by the Section 504 regulation at 34 C.F.R. § 104.37.

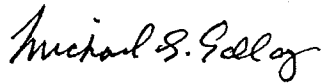
On March 18, 2005, the College voluntarily agreed to implement the enclosed agreement to resolve the compliance issues identified during the complaint investigation. Pursuant to the agreement, the College will designate a responsible employee to serve as its Section 504 coordinator and publish the name or title and contact information for that employee on a continuing basis in its recruitment materials and general publications, including its Student Handbook; send an offer of readmission to the Student for the 2005-2006 school year; amend its Emergency Withdrawal Policy to include language that makes clear that a decision to subject a student with a disability to an emergency withdrawal will be made in consultation with persons knowledgeable about the College's obligations under Federal disability civil rights laws and direct threat standards, including the College's Section 504 Coordinator, and with appropriate medical or other professionals; amend its Emergency Withdrawal Policy to ensure that it contains language that complies with current law on when the College can involuntarily withdraw a student with a disability; amend its Emergency Withdrawal Policy to include conditions for a student's return to the College after an emergency withdrawal, consistent with Federal disability laws and with consideration of the individual circumstances of each student; develop and notify students and staff of grievance procedures that provide for prompt and equitable complaint resolution for disability discrimination complaints; and provide training to its Section 504 coordinator about the College's obligations to students with disabilities under Section 504, including proper implementation and administration of its Emergency Withdrawal Policy and procedures. OCR will monitor the implementation of the agreement. If the College fails to fully implement the agreement, OCR will reopen the complaint.

Based on the above, we are closing this complaint effective the date of this letter. OCR appreciates the courtesy and cooperation shown by your staff and legal counsel during the investigation and resolution of this complaint. We look forward to receiving your

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first monitoring report, which is due on September 22, 2005. If you have any questions or concerns about the resolution of this complaint, please contact Mr. Stephen Buynack at (216) 522-7643 or by email at Stephen.Buynack@ed.gov.

Sincerely,



Michael E. Gallagher
Team Leader, Cleveland Office
Midwestern Division

Enclosure

cc: Christopher E. Hogan, Esq.
Moots, Carter & Hogan, L.P.A.