



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

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March 4, 2015

Belinda S. Miles, Ph.D.
President
Westchester Community College
75 Grasslands Road
Valhalla, New York 10595

Re: Case No. 02-14-2393
Westchester Community College

Dear Dr. Miles:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) in the above-referenced complaint filed against Westchester Community College. The complainant alleged that during spring 2014, the College discriminated against her daughter (the Student), on the basis of her disability, by failing to provide the Student with the necessary academic adjustments and auxiliary aids of extended time on tests in the Student's courses, XXXXX (Course 1); XXXXX (Course 2); and XXXXX (Course 3); and use of a calculator in Course 3 (Allegation 1). The complainant also alleged that the Student's XXXXX professor subjected the Student to harassment because of her disability, by making inappropriate, disability-related comments during spring 2014 (Allegation 2).

OCR is responsible for enforcing 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 discrimination on the basis of disability in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). OCR also is responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation at 28 C.F.R. Part 35. Under the ADA, OCR has jurisdiction over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The College is a recipient of financial assistance from the Department and is a public postsecondary educational institution. Therefore, OCR has jurisdictional authority to investigate this complaint under both Section 504 and the ADA.

In its investigation, OCR interviewed the complainant and the Student, and reviewed information that the complainant and the College submitted.

With respect to Allegation 1, the complainant alleged that during spring 2014, the College discriminated against the Student, on the basis of her disability, by failing to provide the Student

with the academic adjustments and auxiliary aids of extended time on exams (time and one half) on tests in Courses 1, 2, and 3; and use of a calculator in Course 3.¹

The regulation implementing Section 504, at 34 C.F.R. § 104.44, requires recipients to modify academic requirements when necessary to ensure that the requirements are not discriminatory on the basis of disability, and to take steps to ensure that no qualified individual with a disability is subjected to discrimination because of the absence of educational auxiliary aids. At the postsecondary level, it is the student's responsibility to disclose a disabling condition and to request academic adjustments or auxiliary aids. In reviewing allegations regarding the provision of academic adjustments or auxiliary aids, OCR considers whether: (1) the student provided adequate notice to the recipient that the academic adjustments or auxiliary aids were required; (2) the academic adjustments or auxiliary aids were necessary; (3) the appropriate academic adjustments or auxiliary aids were provided; and (4) the academic adjustments or auxiliary aids were of adequate quality and effectiveness.

The Student enrolled as an undergraduate at the College in August 2012; and registered with the College's Disability Services Office as a student with a disability in fall 2012. The Student requested and the College approved the Student to receive extended time on tests and exams (time and one half) and use of a calculator, including for the spring 2014 semester.

The complainant stated that despite her and the Student's frequent contacts with the Disability Services Office and the Student's professors, the Student rarely received the approved academic adjustments in her courses during spring 2014. OCR determined that the Student received failing grades in Courses 1, 2, and 3.²

The College acknowledged that the Student may not have received the required academic adjustments and auxiliary aids on every test and exam, although it endeavored to ensure that these were provided by repeatedly reminding professors to provide them. On March 2, 2015, the College voluntarily entered into the attached resolution agreement to resolve Allegation 1, in accordance with Section 302 of OCR's Case Processing Manual. OCR will monitor implementation of the resolution agreement. If the College fails to comply with the terms of the resolution agreement, OCR will resume its investigation.

With respect to Allegation 2, the complainant alleged that the Student's Course 1 professor (the Professor) subjected the Student to harassment because of her disability, by making inappropriate, disability-related comments during spring 2014. The Student informed OCR that before class on or about April 4, 2014, with only one other student present in the classroom, she approached the Professor to submit her homework. The Student stated that in a calm tone, the Professor told her that she was earning a "D" in Course 1, and asked the Student, "Do you know you are special ed?" The Student stated to OCR that she was upset to learn that she was earning a "D" grade, because she believed that she was doing slightly better in Course 1. The Student

¹ The complainant alleged that during spring 2014, the Student also took a fourth course, XXXXX (Course 4), in which she similarly did not receive extended time on exams; however, the complainant stated that because the Student received a favorable grade in Course 4, she did not wish to include it as part of her allegation.

² The Student received a grade of "F" in Course 1 and Course 3; and a grade of "RC" in Course 2. The College stated that an "RC" is a failing grade signifying that the Student must retake the course in the next regular semester.

stated that she was shocked by the Professor's disability-related comment and found it inappropriate for the Professor to comment about being "special ed" to a student. The Student stated that she did not respond to the Professor and went to her seat. The Student further stated that she was not concerned that the other student had been present in the classroom or possibly had overheard the Professor's comment; and noted that she did not know the other student's name or whether the other student heard the comment. The Student acknowledged that this was the only disability-related comment the Professor allegedly made to her during Course 1.³ Neither the complainant nor the Student indicated that this one alleged comment affected the complainant adversely, other than being "shocked" by the alleged comment. Neither the complainant nor the Student indicated what remedy they were seeking as a result of the alleged comment.

Disability harassment is a form of discrimination prohibited by Section 504, the ADA, and their implementing regulations. Harassing conduct by an employee, a student, or a third party can include verbal, written, graphic, physical or other conduct; or conduct that is physically threatening, harmful or humiliating. Harassment can create a hostile environment if it is sufficiently serious to interfere with or deny a student's participation in or receipt of benefits, services or opportunities in the institution's program. If OCR determines that harassing conduct occurred, and that the recipient had actual or constructive notice of the harassment, OCR will examine additional factors to determine whether a hostile environment existed and whether the recipient took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence, and as appropriate, remedy its effects.

The College's counsel provided a statement to OCR on the Professor's behalf. The Professor denied that she subjected the Student to harassment because of the Student's disability during the spring 2014 semester, or made any harassing comment to the Student because of disability. Rather, the Professor advised that before class on or about April 4, 2014, she told the Student that she was doing poorly in Course 1 and that she wanted to assist the Student with her performance. The College's counsel stated that the Professor has been teaching for over thirty years, and has both professional and personal experience with students with disabilities. The College's counsel stated that the Professor denied making any harassing comment related to disability. As stated above, allegedly there was one other witness to the comment; however, the complainant could not provide the name of the witness and acknowledged that the witness may not have heard the alleged comment.

OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of the evidence substantiates the allegation. Here, OCR did not find that the preponderance of the evidence substantiated the complainant's assertion that the Professor made an allegedly harassing comment to the Student. Furthermore, in addressing allegations of harassment, OCR recognizes that in order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment. Under OCR's standards, in order to establish a hostile

³ Course 1 met weekly for two hours and fifty minutes, beginning on January 25, 2014, and ending on May 11, 2014.

environment, conduct must be sufficiently serious as to limit or deny the student's ability to participate in or benefit from the educational program. This requires that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position. Accordingly, even if true, the alleged comment made on one occasion was not sufficiently serious to constitute a hostile environment in that it did not limit or deny the Student's ability to participate in or benefit from the educational program; and, neither the complainant nor the Student identified any other harm, and both acknowledged that no other incidents of alleged harassment occurred.

Based on all of the above, OCR determined that there was insufficient evidence to substantiate the complainant's allegation that the Professor subjected the Student to harassment because of her disability, by making inappropriate, disability-related comments during spring 2014. Accordingly, OCR will take no further action with respect to Allegation 2.

This concludes OCR's investigation of the complaint and should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The complainant may file a private suit in federal court whether or not OCR finds a violation.

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

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, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding OCR's determination, please contact Michele Ginter-Barbara, Compliance Team Investigator, at (646) 428-3816 or michele.ginter-barbara@ed.gov; Alexander Artz, Compliance Team Attorney, at (646) 428-3901 or alexander.artz@ed.gov; or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or nadja.r.allen.gill@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXX, Esq.