



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
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REGION III
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October 30, 2015

IN RESPONSE, PLEASE REFER TO: 03152311

Dr. Mark Erickson
President
Northampton Community College
3835 Green Pond Road
Bethlehem, Pennsylvania 18020

Dear Dr. Erickson:

This is to advise you that the U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation and reached a determination in the above-referenced complaint filed against Northampton Community College (the College). The Complainant alleged that the College discriminated against XXX on the basis of disability when the professor of XXX XXXXXX XXXX XXXXXX XXXX XXXX:

1. Harassed her by making public and condescending remarks about XXX disability; and
2. Refused to provide the Complainant with academic adjustments unless XXX provided medical documentation detailing specifics about XXX disability and XXX absences.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance and a public entity, the College is subject to the provisions of Section 504 and Title II and their implementing regulations.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

In reaching a determination in this complaint, OCR reviewed documentation provided by the Complainant and the College. OCR also interviewed the Complainant and several College staff members. OCR found insufficient evidence of discrimination as alleged by the Complainant. Nonetheless, OCR did find compliance concerns with the College's Section 504 and Title II grievance procedures, which the College agreed to revise in accordance with the requirements of the enclosed Resolution Agreement (Agreement). The bases for our determinations are summarized below.

Applicable Legal Standard

The regulation implementing Section 504 prohibits the College from discriminating on the basis of disability. The Section 504 regulation, at 34 C.F.R. § 104.4(a), states that no qualified individual shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance. Title II prohibits the same form of discrimination by public entities. Therefore, OCR applies the Section 504 standard when analyzing the same claims under Title II.

When investigating an allegation of disability harassment OCR determines whether: (1) a student was subjected to harassment on the basis of disability; (2) the harassment rose to a level that denied or limited the Complainant's ability to participate in or benefit from the educational program, service or aid; (3) the College had actual or constructive notice of the harassment; and (4) the College failed to take prompt and remedial action to end the harassment and prevent its reoccurrence.

The regulation implementing Section 504, at 34 C.F.R. § 104.44(a), requires a recipient to make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified student with a disability. Recipients are not required to make modifications that are essential to instruction or would fundamentally alter the nature of the service, program, or activity. The regulation at 34 C.F.R. § 104.44(d) requires recipients to take such steps as are necessary to ensure that persons with disabilities are not denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids or services. OCR has interpreted Section 504 consistently to require the reasonable modification of programs, policies, and procedures when necessary to avoid disability-based discrimination, so long as the modifications do not result in a fundamental alteration or undue financial burden.

Recipients may require a student to follow reasonable procedures to request and document the need for academic adjustments and/or other modifications, including modifications to policies, practices, and procedures. In postsecondary settings, if a student with a disability believes that he needs an academic adjustment or other modification, that student has an obligation to identify himself or herself as having a disability and to request the provision of academic adjustments or other modifications. The student is responsible for providing evidence of a condition that requires academic adjustments. In some cases, this will require that the student

provide the results of medical, psychological, or educational diagnostic tests and professional prescriptions for academic adjustments.

The Section 504 implementing regulation, at 34 C.F.R. § 104.7(b), provides that a recipient that employs 15 or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaint allegations of any prohibited actions under Section 504. OCR has identified essential components to providing prompt and equitable resolution of complaints. These include:

- a. notice to students of the procedure, including how and where to file a complaint;
- b. application of the procedure to complaints alleging disability discrimination carried out by students, employees, or third parties;
- c. adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- d. designated and prompt timeframes governing the major stages of the grievance process;
- e. notice to the parties of the outcome of the complaint, and the basis for the decision;
- f. the right of parties to appeal the findings, remedy, or both; and
- g. an assurance that the college will take steps to prevent the recurrence of any prohibited actions and to correct its discriminatory effects on the complainant and others, if appropriate.

Facts

The Complainant is a student at the College, where XXX has been enrolled XXXXX XXX XXX XX XXXX. The Complainant is a student with a disability, and throughout XXX time at the College, XXX has qualified for and received academic adjustments or accommodations. During the spring 2015 semester, the Complainant was enrolled in several courses, XXXX XXX XXXXXXXXXXXX XX XXXXXXXXXXX XXXXX XXXXX XXXXXXX. During the spring 2015 semester, the Complainant was entitled to extended time when taking tests, along with use of a scribe and use of a computer. XX-- Sentence Redacted--XX.

XX--Paragraphs Redacted--XX.

Section 504/Title II Grievance Procedures

The College provided a copy of its revised harassment/discrimination grievance procedure (the revised policy), which applies to all forms of discrimination and harassment, including disability. In various places, however, the policy's language refers only to sexual discrimination, harassment, and misconduct. Nonetheless, the policy does contain the statement that the College "does not discriminate on the basis of race, color, age, gender, sexual orientation, sexual identity, religion, national origin, veteran status, disability, genetic information, or any other basis of prohibited discrimination in its programs and activities. This policy extends to employees, students, or third parties."

The revised policy provides several reporting options. All College employees who are aware of or witness discrimination, harassment, sexual misconduct, or retaliation are required to promptly report to the Title IX Officer (who also functions as the College's Section 504/Title II Coordinator) or a Title IX Deputy Coordinator. Students are also encouraged to do so. Complainants are instructed to "speak to College officials, such as the Title IX Officer or Deputy Coordinators or NCC Security, to make formal reports." As part of the "Formal Resolution Process," readers are informed that "any individual who believes this policy has been violated should contact the Title IX Officer or any Deputy Title IX Coordinator." The contact information of these individuals is included in the policy. The Title IX Officer and Deputy Coordinators also accept anonymous or third-party reports.

Within 5 school days of receiving the complaint, an initial determination of whether the information has merit to indicate a violation of College policy is made. If it appears that a violation may have occurred, an investigation begins. The College will implement interim/protective actions as necessary. An investigator is assigned within five days. Investigations are thorough and impartial and will entail interviews with parties and witnesses, and include obtaining available evidence. The College aims to complete investigations within 60 days, with possible extensions or delays, particularly when criminal charges are being investigated. Upon receipt of the investigative report, the Title IX Officer will forward it to the VP for Enrollment and Student Services for an appropriate hearing under the Student Code of Conduct Procedures.

During a hearing, both parties receive equivalent notice of the process. The person filing the complaint is noted to have the opportunity to be present throughout the entire hearing. The revised policy notes that both parties will have the opportunity to present witnesses with information pertinent to the alleged sexual harassment, sexual misconduct, or sexual assault, and other relevant information. The College will document the proceedings. The decision of whether a policy violation has occurred is determined using the preponderance of the evidence standard. The parties will be notified in writing of the outcome. No time frame is stated for this process, and no appeal rights are noted in the revised policy. An appeal right is noted in the Student Code of Conduct for students found responsible for a violation under the Code, but the application of this right to the policy's hearing procedure is unclear, and evidently applies only to the accused. Disciplinary sanctions are recommended by the Title IX Officer and "forwarded to the decision-making authority," although this process does not clearly identify who decides on the sanctions (the hearing panel, the Title IX Officer, or another individual).

Finally, the revised policy does not include an assurance that the College will take steps to prevent recurrence of discrimination/harassment and correct the discriminatory effects on the complainant and others.

Legal Analysis and Conclusions

Allegation One - Disability Harassment

XX—Paragraph Redacted--XX.

XX—Paragraph Redacted--XX.

Allegation Two – Academic Adjustments

XX—Paragraph Redacted--XX.

XX—Paragraph Redacted--XX.

XX—Paragraph Redacted--XX.

Section 504/Title II Grievance Procedures

OCR identified the following deficiencies with the College’s grievance procedure. Because the policy highlights its application to complaints of sex discrimination, sexual harassment, and sexual misconduct, it could cause a reader to infer that the policy and its grievance procedures apply only to complaints of sex discrimination, sexual harassment, and sexual misconduct. While the policy/procedures do provide several options for reporting, but a vague direction to “speak to College officials” and later instructions to contact the Title IX Officer or a Deputy Title IX Coordinator specifically are somewhat confusing and should be revised to clarify reporting options.

With regard to the ability to present witnesses and other evidence, the policy refers only to sexual harassment, sexual misconduct, or sexual assault, and does not indicate the application to complaints of discrimination filed on other bases. Rather, the policy should explain that investigations of disability discrimination/harassment will also include the opportunity for both parties to present witnesses and other evidence.

Various timeframes are provided in the grievance procedures. For student hearings, however, no specific time frame is stated for the hearing process and outcome notification. In addition, the policy does not explain the rights of the parties to appeal the findings, the remedy, or both, which should be included and should be available to both parties. Finally, the policy lacks an assurance that the College will take steps to prevent recurrence and correct the discriminatory effects of the discrimination on the complainant and others.

The College has agreed to address these procedural compliance concerns by entering into the enclosed agreement with OCR. When fully implemented, the resolution agreement will address all of OCR’s compliance concerns. Consistent with our usual practice, OCR will monitor the implementation of the agreement until we have determined that the College is in compliance with the requirements of the regulations of Section 504, at 34 C.F.R. § 104.7(b), and Title II, at 28 C.F.R. § 35.107(a).

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 have the right to 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 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, we 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.

If you have any questions, please contact Linda Thomas, Equal Opportunity Specialist, at 215-656-8553, or by e-mail at linda.thomas@ed.gov.

Sincerely,

/s/

Melissa M. Corbin
Team Leader

Enclosure

cc: John Freund, Esquire
Keely Collins, Esquire