



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

61 FORSYTH ST., SOUTHWEST, SUITE 19T10
ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

November 16, 2016

Dr. James Klauber
President
Calhoun Community College
P.O. Box 2216
Decatur, AL 35609

Re: Complaint #04-14-2353

Dear Dr. Klauber:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its case resolution process of the above-referenced complaint filed by the Complainant on April 8, 2014, against Calhoun Community College (College) alleging discrimination on the bases of disability and age, as well as retaliation. Specifically, the Complainant alleged that the College failed to provide him academic adjustments and auxiliary aids from XXXXXXXX 2013 until XXX 2014 and subjected him to harassment by repeatedly asking him to change his registered nursing (RN) program (Program) because of his age and disability. He also alleged that he was treated differently than younger students because he was given more labor intensive assignments and not allowed to administer medicine during clinical from XXXXXXXX 2013 until XXX 2014. The Complainant further alleges that the College retaliated against him after he filed a complaint with OCR by failing to provide him his academic adjustments and auxiliary aids.

OCR investigated this complaint pursuant to the following:

- The Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 *et seq.*, and its implementing regulation at 34 C.F.R. Part 110, which prohibit recipients of Federal financial assistance (FFA) from the Department from discriminating on the basis of age.
- Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibits recipients of FFA from the Department from discriminating on the basis of basis of disability.
- Title II of the Americans with Disabilities Act of 1990 (Title II), as amended, 42 U.S.C. § 12131, and its implementing regulation, 28 C.F.R. Part 35 prohibits discrimination on the basis of disability by public entities.

OCR investigated the following legal issues:

1. Whether the College failed to provide the Complainant with academic adjustments and auxiliary aids, in noncompliance with Section 504 and its implementing regulation at 34 C.F. R. §104.44 and the Title II implementing regulation at 28 C.F.R. § 35.130.

2. Whether the College subjected the Complainant to harassment on the bases of disability and age, in noncompliance with Section 504 and its implementing regulation at 34 C.F.R. § 104.4, and the Title II implementing regulation at 28 C.F.R. § 35.130, and the Age Act at 34 C.F.R. 34 C.F.R. § 110.10.
3. Whether the College subjected the Complainant to different treatment on the bases of age and disability, in noncompliance with the Age Act and its implementing regulation at 34 C.F.R. § 110.10 and the Section 504 implementing regulation at 34 C.F.R. § 104.4.
4. Whether the College retaliated against the Complainant, in noncompliance with the Age Act and its implementing regulation at 34 C.F.R. § 110.34, and the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the retaliation prohibition of Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. Sections 2000d *et seq.*, and its implementing regulation at 28 C.F.R. § 100.7(e), and the Title II implementing regulation at 28 C.F.R. § 35.134.

During the course of this investigation, OCR reviewed evidence submitted by the Complainant and the College and interviewed the Complainant. A finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence to prove that it is more likely than not that unlawful discrimination occurred). Prior to the conclusion of the investigation, the College requested to address the complaint allegations with a voluntary resolution agreement (Agreement) pursuant to Section 302 of OCR's *Case Processing Manual* (CPM). However, based on a preponderance of the evidence, OCR found sufficient evidence of non-compliance regarding the College's Section 504 policy and grievance procedures. Provided below is an analysis of OCR's investigation thus far of the legal issue.

Legal Standards

The regulation implementing Section 504 at 34 C.F.R. § 104.43(a) provides that no qualified person 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 academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services.

Section 504 Accommodations in the Postsecondary Setting

The regulation implementing Section 504 at 34 C.F.R. § 104.44(a) provides that, in the postsecondary setting, recipients are required to make such modifications to their 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 applicant or student with a disability. The regulation at 34 C.F.R. § 104.44(d) (1), (2) provides that recipients shall take such steps as are necessary 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 because of the absence of educational auxiliary aids for students with impaired sensory, manual, or other speaking skills. Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readings in libraries for students with visual impairments, classroom equipment adapted for use for students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study or other devices or services of a personal nature.

The Age Act

The regulation implementing the Age Act, at 34 C.F.R. § 110.10(a), states that no person shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a recipient of Department funds. As such, a recipient may not subject a person to different treatment on the basis of age, including harassment based on age that is sufficiently serious to adversely affect a student's ability to participate in or benefit from the educational program.

Retaliation

Retaliation is prohibited under the Age Act and its implementing regulation at 34 C.F.R. § 110.34 and the Section 504 implementing regulation at 34 C.F.R. § 104.61, which incorporates by reference the provisions of the regulation implementing Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. §§ 2000d *et seq.*, at 34 C.F.R. § 100.7(e). The Title VI and Age Act regulations provide that no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation or other matter in connection with a complaint.

The Title II implementing regulation at 28 C.F.R. § 35.134 also prohibits retaliation and is interpreted consistent with Section 504. OCR conducted its investigation in accordance with the applicable Section 504 standards.

Evidence Obtained Thus Far

Procedural Requirements

The Section 504 implementing regulation at 34 C.F.R. § 104.8 (a) requires a recipient that employs 15 or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees that it does not discriminate on the basis of disability in violation of Section 504. The College's Disability Services Handbook contains a notice of nondiscrimination. The nondiscrimination notice includes a prohibition against discrimination in any program or activity on the basis of race, color, national origin, disability, age, gender, marital status or any other protected class.

The Section 504 implementing regulation at 34 C.F.R. § 104.7(b) requires a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process

standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. Similarly, the Title II implementing regulation at 28 C.F.R. § 35.107(b) requires a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of elements in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice to students and employees of the procedures, including where complaints may be filed that is easily understood, easily located, and widely distributed; application of the procedures to complaints alleging discrimination or harassment, carried out by employees, students, other students, or third parties; a provision for an adequate, reliable, and impartial investigation, including an equal opportunity to present witnesses and reliable evidence; designated and reasonably prompt timeframes for the major stages of the grievance process, as well as the process for extending timeliness; written notice to the parties of the outcome of the complaint; and an assurance that the institution will take steps to prevent the recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

The College's 504 Grievance Process for Students refers students to the Student Complaint Process (Complaint Process), which is located in the College's Student Handbook (Handbook). The College's Handbook is contained in the College's Catalog that is on the College's website. The Complaint Process does not contain any of the other elements identified above that are required to show that the grievance procedures are prompt and equitable.

The College's Complaint Process does not include notice to students and employees of the procedures, including where complaints may be filed that is easily understood and easily located because while the Complaint Process is included in the College's Catalog in the section containing the Handbook, it is not identified and available separately on the College's website. There is no language indicating that the Complaint Process is applicable to complaint of discrimination or harassment carried out by employees, other students or third parties. In addition, the Complaint Process does not include an adequate, reliable, and impartial investigation, including an equal opportunity to present witnesses and relevant evidence. Also, the Complaint Process does not contain designated and reasonably prompt timeframes for major stages of the grievance process, as well as the process for extending timeliness, in part, due to its mandatory informal resolution process. Moreover, the Complaint Process does not include a requirement to provide written notice to the parties of the outcome of the complaint. Further, the Complaint Process does not include an assurance that the College will take steps to prevent recurrence of harassment and to correct its discriminatory effects on the complainant and others, if applicable.

Based on the above, OCR concludes that the College's Complaint Process does not comply with the procedural requirements of the Section 504 regulations. Therefore, OCR finds that there is sufficient evidence to support a finding that the College is in noncompliance with Section 504 and Title II with respect to this procedural requirement.

Background

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

www.ed.gov

The Complainant initially enrolled at the College in XXXXXX 2011. He began the College's registered nurse (RN) program (Program) in XXXXXX XXXXXXXX 2012. During this time, he informed the College that he was a person with disabilities with diagnoses of XXXXXXXXXX XXXXX XXXXXXX (XXX) and visual problems. The College approved the Complainant's accommodations¹, but allegedly failed to fully implement them. As a result, the Complainant filed an earlier complaint with OCR in XXXX(Complaint No. XX-XX-XXXX). Therein, the Complainant alleged that College discriminated against him on the bases of age and disability. The parties resolved this complaint amongst themselves, and OCR accepted the Complainant's withdrawal of Complaint No. XX-XX-XXXX.

On XXXXXX X, 2013, the Complainant filed a second OCR complaint (Complaint No. XX-XX-XXXX), which alleged disability discrimination (College's failure to provide academic adjustments) and retaliation (College forced Complaint to retake XXXXXXXXXX XXXXXXXX he had already completed) in XXXXXX and XXXX of 2013. In that matter, OCR found insufficient evidence of disability discrimination and retaliation, and closed the Complaint on XXXXX XX, 2014.

On XXXXXXXXXX X, 2014, after the Complainant filed this current complaint, he filed another OCR complaint that alleged the College retaliated against him by refusing to send XXXX to his correct XXXXXXX and "XXXXXXXXXXXX" him or otherwise prevented him from enrolling in other colleges and universities (Complaint No. XX-XX-XXXX). The College voluntarily agreed to resolve those complaint allegations, and OCR closed that Complaint on XXXXXXX XX, 2015.

Criteria for the RN program

At the time the Complainant filed this complaint, the College's requirements for students to earn an Associate Nursing degree was for the student to either attend the traditional track (day program) for five semesters or the part-time evening track for seven semesters. Both tracks required students to complete 72 credit hours.

Issue 1 – Academic Adjustments and Auxiliary Aids

The College's Accommodations Letter contains language that allows professors to provide academic adjustments and/or auxiliary aids at their discretion. The Accommodations Letter states that "[l]isted below are some strategies that would be helpful in some course, but not practical in all". However, there is no process outlined for making a determination whether a strategy would be helpful or not practical for a particular course. The evidence indicates that College staff used their discretion to modify the Complainant's Accommodations Letter without the prior knowledge or consent of disability services.

¹ As used herein, the term "accommodations" refers to academic adjustments and auxiliary aids and services.

In addition, the evidence indicates that the College did not provide the Complainant accommodations for the clinical portion of the Nursing Program (Program). The evidence further indicates that the College does not have a process for assessing a student's need for accommodations in clinical.

Issue 2 – Harassment on the bases of disability and age

Disability Harassment

The evidence also indicates that College staff suggested that the Complainant consider withdrawing from the nursing program due to the degree of difficulty with the curriculum and the fact that accommodations would not be provided in clinical.

Age Discrimination

Prior to OCR's interview with College staff regarding the Complainant's allegation of age discrimination, the College expressed an interest in a 302 resolution.

Issue 3 – Different Treatment on the bases of disability and age

The College's grievance procedures require students to participate in a mandatory informal complaint resolution process before they can file a formal complaint of discrimination or harassment. In addition, the College requires any formal complaints to be in writing. The information indicates that the College failed to appropriately investigate several of the Complainant's allegations of disability discrimination and harassment regarding the provision of his accommodations and his treatment by faculty and staff at the College.

Issue 4 – Retaliation

The Complainant alleges that the College staff discriminated against him or had others engage in retaliatory actions against him based on his protected activity because he filed previous age and disability complaints against the College.

To determine whether there is a prima facie case of retaliation, OCR must find: (1) that the Complainant engaged in a protected activity; (2) that the recipient was aware of the protected activity; (3) that the recipient took adverse action against the Complainant contemporaneous with or subsequent to participation in a protected activity; and (4) that there is a causal connection between the adverse action and the protected activity. If these elements are established, OCR proceeds to determine whether the recipient has a legitimate, nondiscriminatory reason for its actions that are not a pretext for the retaliation.

Protected Activity and the College's Knowledge of the Protected Activity

As noted above, the Complainant has filed several complaints with OCR against the College alleging age and disability discrimination. The Complainant also filed a complaint of disability discrimination with the College. College staff confirmed that they were aware of the

Complainant's multiple complaints against the College. Therefore, OCR determined that the Complainant engaged in a protected activity and the College had knowledge of the protected activity.

Adverse Action(s)

OCR next examined whether the College took adverse action against the Complainant contemporaneous with or subsequent to the protected activity. To be actionable, the recipient's action must significantly disadvantage the Complainant as to his status as a student or his ability to gain the benefits of the program. In the alternative, even if the challenged action did not meet this standard because it did not objectively or substantially restrict an individual's employment or educational opportunities, the action could be considered to be retaliatory if the challenged action reasonably acted as a deterrent to further protected activity, or if the individual was, because of the challenged action, precluded from pursuing his or her discrimination claims.

College staff acknowledged that the Complainant did not receive any accommodations for his clinical. In addition, the Complainant received two "XX" in Nursing XXX, which resulted in his dismissal from the Program.

OCR determined that failing to provide the Complainant accommodations and his dismissal from the Program were adverse actions against the Complainant.

Causal Connection

Because OCR determined that the College's actions, as stated above, constituted an adverse action, we then proceeded to determine if there was a causal connection between the adverse actions and the Complainant's participation in the protected activity.

OCR considers a variety of factors in assessing whether a causal connection exists. OCR may infer a causal connection based on the proximity in time between the protected activity and the adverse action. Documentation shows that the Complainant filed his initial discrimination complaint against the College on XXXXXXXXXXXX XX, 2012, which was resolved. He filed another complaint against the College on XXXXXXXX X, 2013 alleging that the College continued to discriminate against him when it failed to provide him his accommodations during the XXXXXXXX 2013 and retaliated against him. The Complainant then filed his current complaint alleging that College staff continued to subject him to discrimination and retaliation from XXXXXXXX 2013 until XXX 2014. He received a "X" in Nursing XXX in XXXX 2013 and XXXXXXXX 2014. He was dismissed from the Program in XXXXXXXX 2014.

Accordingly, based on the close temporal proximity between the protected activity and the adverse actions, it appears that the causal connection between the adverse actions and the Complainant's protected activities has been established.

Legitimate Nondiscriminatory Reason for the Recipients Actions

The evidence indicates that College staff may not have provided the Complainant all the educational benefits he was entitled to receive during his matriculation in the College's program. The evidence also indicates that College staff failed to appropriately investigate the Complainant's allegations of discrimination.

Reasons to Resolve Pursuant to CPM Section 302

As noted, the evidence indicates that the Complainant's Accommodations Letter was modified by College staff without prior knowledge or consent of disability services. In addition, evidence indicates that the Complainant was not provided accommodations for the clinical portion of the Program. Also, evidence indicates that College staff suggested that the Complainant withdraw from the nursing program due to the degree of difficulty with the curriculum and the fact that accommodations would not be provided in clinical. The evidence also shows that the College failed to appropriately investigate the Complainant's allegations of discrimination. Further, the evidence indicates that the Complainant may have denied the benefits of the College's educational program after he filed complaints against the College.

Prior to the College's request to resolve this complaint, OCR had not made a determination concerning whether the College's actions regarding the Complainant rose to the level of discrimination on the bases of disability or age, or constituted retaliation. In order to make a determination, OCR must conduct additional interviews with the Complainant's instructors regarding his allegation of retaliation.

Proposed Resolution and Conclusion

The attached Agreement requires the College to: 1) issue a Nondiscrimination Statement regarding its prohibition against age and disability discrimination; 2) revise its Section 504 grievance procedures; 3) revise its Accommodations Procedures; 4) revise its Accommodations Letter; 5) publish and disseminate its revised policies and procedures; 6) conduct training for faculty, staff, and administrators in the Nursing Department regarding its revised policies and procedures and its responsibilities under Section 504 and Title II; 7) provide sensitivity training for select staff at the College; and 8) refund the Complainant for the Nursing XXX course he took in XXX 2013 and XXXXXX 2014, the college will remove the grades of "X" for both courses, the College will offer the Complainant readmission into the Program, the College will allow the Complainant to retake Nursing XXX with all approved accommodations, and the College will send the Complainant a letter offering him counseling to address any disability or age discrimination or harassment he suffered in the Nursing Program and investigate the Complainant's allegations of disability and age discrimination in the Program.

The provisions of the Agreement are aligned with the complaint allegations and the information obtained during the investigation and are consistent with applicable regulations. OCR will monitor the implementation of the agreement until the recipient is in compliance with the statutes and regulations at issue in the case.

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.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent possible, any personally identifiable information, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Intimidation or retaliation against complainants by recipients of Federal financial assistance is prohibited. No recipient may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the laws OCR enforces, or because one has made a complaint, or participated in any manner in an investigation in connection with a complaint.

This concludes OCR's consideration of this complaint, which we are closing effective the date of this letter. If you have any questions regarding this letter, please contact Ledondria H. Saintvil, Attorney, at (404) 974-9373, or me at (404) 974-9367.

Sincerely,

Ebony Calloway-Spencer, Esq.
Compliance Team Leader

Enclosure