



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS -- REGION VII

February 1, 2016

Sent via email to XXXXX

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XXXXX XXXXX XXXXX XXXXX

Re: Docket # 07152240

Dear XXXXX XXXXX:

On June 26, 2015, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received a complaint against your client, Rose State College (College), Midwest City, Oklahoma, alleging discrimination on the basis of disability. For the reasons set out below, we have determined there is sufficient evidence to conclude that the College discriminated against the complainant on the basis of disability as alleged in the complaint.

The Complainant alleges the College discriminated against her client on the basis of disability by failing to allow her client to use her notes for tests in the Elementary Algebra course as an academic adjustment during the Spring 2015 semester.

OCR is responsible for enforcing:

- Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 United States Code (U.S.C.) § 794, and its implementing regulation, 34 Code of Federal Regulations (C.F.R.) Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- 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 Section 504 and Title II. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

In the remainder of this letter, the Complainant is referred to as the “Complainant” and the student is referred to as the “Student.” To protect individuals’ privacy, the names of employees, students, and other parties also are not used in this letter.

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

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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.

In reaching a determination in this complaint, OCR reviewed documents the College provided and interviewed the Complainant, the Student, the Student's parent, and College employees. OCR carefully considered all of the information obtained during our investigation. The legal and factual bases for OCR's determination are set forth below.

## **I. Legal Standards**

### **A. General Anti-discrimination Provisions**

Section 504 and Title II contain similar anti-discrimination provisions prohibiting recipients of Federal financial assistance and public entities, respectively, from discriminating against individuals on the basis of disability. Section 504 mandates "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>1</sup> Title II of the ADA was expressly modeled after Section 504 and states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>2</sup> Moreover, while ADA claims are similar to Section 504 claims, Section 504 imposes a requirement that a person's disability serve as the "sole impetus" for a recipient's adverse action against the complainant.

The regulations implementing Title II delineate specific areas of prohibited discriminatory conduct by public entities, including prohibitions that a public entity may not: 1) deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service, or 2) afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.<sup>3</sup> The Title II regulations further require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity."<sup>4</sup>

### **B. Definition of a Qualified Individual with a Disability**

The Section 504 regulation at 34 C.F.R. § 104.3(j) defines a person with a disability as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an

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<sup>1</sup> 29 U.S.C. § 794.

<sup>2</sup> 42 U.S.C. § 12132.

<sup>3</sup> 28 C.F.R. § 35.130(b)(1)(i) and (ii). Section 504 contains identical prohibitions at 34 C.F.R. § 104.4(b)(1)(i) and (ii).

<sup>4</sup> 28 C.F.R. § 35.130(b)(7).

impairment. Section 504 defines a “qualified” person with a disability as a “handicapped person who meets the essential eligibility requirements for the receipt of such services.” 34 C.F.R. 104.3(l)(4). Title II provides the same disability definition and defines a “qualified” individual with a disability as “an individual with a disability, who, with or without reasonable modification to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>5</sup>

The definition of a qualified individual with a disability was amended by the *ADA Amendments Act of 2008* (Amendments Act), which became effective on January 1, 2009, and amends the definition of disability in Section 7 of the Rehabilitation Act of 1973 as well.<sup>6</sup>

The Amendments Act makes clear that the definition of disability “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”<sup>7</sup> Consistent with this rule of construction for broad coverage, the definition of major life activities was expanded in the Amendments Act to include, but not be limited to, the general activities of “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>8</sup> The Amendments Act also included “major bodily functions” in the definition of major life activities, to include, but not be limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>9</sup> Moreover, “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”<sup>10</sup>

### **C. Academic Adjustments for Students with Disabilities**

The Section 504 implementing regulation 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. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. The Section 504 implementing regulation at 34 C.F.R. § 104.44(d), requires a recipient 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 academic adjustments.

Under the applicable regulations, recipients may require a student to follow reasonable procedures to request and document the need for academic adjustments, including modifications to policies, practices, and procedures. In postsecondary settings generally, if a student with a

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<sup>5</sup> 42 U.S.C. § 12131(2).

<sup>6</sup> P.L. 110-325. This Act does not have a provision allowing for retroactivity.

<sup>7</sup> *Id.*

<sup>8</sup> Section 3 of the Amendments Act (codified at 42 U.S.C. § 12102(2)(A)).

<sup>9</sup> Section 3 of the Amendments Act (codified at 42 U.S.C. § 12102(2)(B)).

<sup>10</sup> Section 3 of the Amendments Act (codified at 42 U.S.C. § 12102(4)(C)).



Student's request, the Disability Coordinator offered the Student the following accommodations: additional time on work being done in class and during evaluations; scheduling test dates; special test location to provide a quiet and reduced distraction environment; special seating near front of classroom; and permission to record lectures. The Disability Coordinator told OCR the Student agreed with the accommodations that were offered to her.

The Student told OCR that she enrolled in a pre-algebra remediation course at the College with Algebra Professor 1 during the XXXXX semester of XXXX. The Student told OCR that Algebra Professor 1 allowed her to use her notes on her exams near the end of the semester, although using notes on exams was not an accommodation listed on her accommodation form.

*XXXXX XXXX Semester*

In the XXXXX XXXX semester, the Student enrolled in an elementary-algebra remediation course with Algebra Professor 2. According to the Student and the parent, on XXXXX 2, XXXX, the Student contacted the Disability Coordinator and verbally requested to be allowed to use her notes on her math exams as an accommodation for her disabilities. The Student and the parent told OCR the Disability Coordinator responded that using her notes on the math exam would not be an approved accommodation for college level exams, and that a lot of students fail and the Student might have to retake the course in order to pass.

The Disability Coordinator told OCR that she does not recall the Student requesting to use her notes on math exams during the XXXXX 2, XXXX, meeting. The Disability Coordinator told OCR she recalls asking the Student whether she required any additional accommodations to those she had the previous semester, and the Student's response was, "no". However, the Disability Coordinator wrote in the College's XXXXX 10, XXXX, response (College's Response) to the Complainant's allegations that,

*"On XXXXX 2, XXXX the student came for accommodation forms for the Spring XXXX semester which began XXXXX 20, XXXX. Again she was asked how the accommodations worked during the previous semester. She indicated that she needed a calculator. We discussed that the Math Department has a departmental policy related to calculator use in their classes. So the statement put on her accommodation form stated: "...and may use an approved calculator when appropriate. We discussed the value of utilizing the Tutoring Center Services and she agreed to check with them and sign up for tutoring. When she left the office she seemed satisfied".*

During her interview, OCR inquired about the apparent inconsistency between the Disability Coordinator's assertion in an interview that the Student did not request any additional accommodation and the Disability Coordinator's statement in the response to OCR's request for data that the Student requested to use a calculator. The Disability Coordinator stated that she must have made a mistake and that it was a long time ago and she sees many students and cannot always recall everything.

The Student's Algebra Professor 2 told OCR he received a phone call from the Student's parent (parent) during the third week of XXXXX XXXX, requesting the Student be allowed to use her notes on her exams. According to the Algebra Professor 2, he told the parent that no students are allowed to use notes on exams and that the Student could use a preprinted card with the math formulas printed on it on her exams. Algebra Professor 2 told OCR that the parent also told him during this telephone conversation that she had also requested that notes be allowed to be used on exams as an accommodation for the Student to the Disability Coordinator and was told by the Disability Coordinator that the notes would not be allowed. The parent told OCR that she requested that notes be allowed to be used on exams to the Disability Coordinator and Algebra Professor 2. The parent also confirmed with OCR that she had told Algebra Professor 2 about her conversation with the Disability Coordinator when the Disability Coordinator had told her that notes would not be allowed on exams.

Algebra Professor 2 told OCR that the math committee met to discuss whether to allow students to use notes on exams as an accommodation and decided that it should not be allowed and that he agrees with the policy against using notes on exams as an accommodation because using notes on exams would create an unfair advantage for those students using notes.

*Disability Coordinator Informed of Student's Request for Accommodation*

The Disability Coordinator told OCR the first time she received a specific request to use notes on exams for the Student was on XXXXX 14, XXXX, when the parent met with the Disability Coordinator and handed her a list of accommodations which the Student was requesting. The Disability Coordinator stated she went through each request with the parent and explained which request would be granted and which would not. She stated during the OCR interview that she explained to the parent that notes would not be allowed to be used on college level exams but there were other accommodations available to the Student such as tutoring and using a formula card.

In the College's Response the College stated that:

*The Complaint is invalid since neither the Student nor the Student's mother requested any such accommodation until XXXXX, XXXX, after the semester was completed.*

OCR obtained and reviewed an email sent from the Disability Coordinator to another College employee on XXXXX 8, XXXX, which discusses the Student's request to use a scientific calculator and notes on exams, which states:

*I spoke with [Algebra Professor 2] today concerning the student who wants permission to use calculator and notes on her math tests.*

The Algebra Professor 2 told OCR that the Student's parent called and requested that notes be allowed on exams as an accommodation for the Student's disability and the professor informed the parent that notes are not allowed.

OCR conducted a second interview with the Disability Coordinator on November 30, 2015, and inquired about the inconsistency between the XXXXX 8, XXXX email and her statement in the College's Response and during her November 9, 2015 OCR interview that the first time she received a request to allow the Student to use notes on exams was in the XXXXX 14, XXXX, meeting with the parent. The Disability Coordinator told OCR she must have forgotten and that the email must be correct because she was aware that the Student had requested an accommodation to use notes on exams and that she felt it was not necessary to address this request, because the Student did not approach her directly with this request and because the last time she had spoken with the Student, the Student was satisfied with her accommodations.

*Disability Coordinator's Response to the Student's Request to Use Notes on Exams as an Accommodation*

The Disability Coordinator told OCR during the November 9, 2015, interview that during the XXXXX 14, XXXX meeting with the parent, the Disability Coordinator explained to the parent that using notes on the exams was not allowed because such an accommodation would create an advantage for the Student and would not be consistent with the purpose of the exam. The Disability Coordinator further noted that she went to speak with math faculty who informed her that notes should not be allowed on exams.

The Disability Coordinator told OCR that notes are not allowed during an exam as an accommodation because every student would like to use notes on math exams.

The Disability Coordinator told OCR that in her 14 years in her position, she has never allowed notes on an exam as an accommodation. The Disability Coordinator also stated during the interview that the Student does not commit enough time to her studies and she does not believe in "fair," and life is not fair, and if it were fair, students would not have disabilities. The Disability Coordinator further stated that she herself would have loved to have notes on her math exams and that if given a chance most students would give an arm to be allowed to use notes on math exams.

The Disability Coordinator told OCR that she believes that notes should not be allowed on exams because each professor writes an exam with the knowledge of what the student has before them at the exam, and the tests are made based on the professor's knowledge. The Disability Coordinator further stated that she spoke with the math professors about having an open book exam and they decided against it because an open book exam would need to be more difficult than a closed book exam which would lead to discrimination claims.

*Math Coordinator's Response to the Student's Request to Use Notes on Exams as an Accommodation*

OCR interviewed the Math Coordinator, who stated that if a student were allowed to use notes on a math exam, it would interfere with an essential component of the course, since the exam is used to test the knowledge and capabilities of a student to perform a specific task and with notes the exam results are not accurate.

*Algebra Professor 2's Response to the Student's Request to Use Notes on Exams as an Accommodation*

OCR interviewed Algebra Professor 2, who stated that he feels the Student is not taking full advantage of the services available in his class. For example, Algebra Professor 2 noted the Student did not retake any of her tests even though she was allowed to retake them.

When OCR asked when Algebra Professor 2 felt it would be appropriate to allow a student to use notes on an exam, he responded: "with an open book exam."

Student's Algebra Professor 2 told OCR that he is on the math committee which decided that notes should not be allowed to be used on math exams. He stated that the reason they decided against allowing notes is because if they were to allow notes to be used on exams, it would provide an unfair advantage to that student. Algebra Professor 2 further noted that he believes students should not be allowed to use notes on exams because they would be able to copy similar problems from their notes onto their exams.

*Developmental Math Courses Departmental Practices*

The College's Response, included its XXX-XX *Developmental Math Courses Departmental Practices* (Departmental Practices), which states:

*"No other additional resources are allowed. Students are NOT allowed to use cheat sheets, notes, nor textbooks on an exam."*

The College also provided a memo dated XXXXX 10, XXXX, which was sent out after this complaint was filed with OCR. The memo states:

*"Our policy is that no other additional resources are allowed besides the Departmental Formula Card. Students are NOT allowed to use cheat sheets, notes, nor textbooks on an exam. Again, the goal is to provide a common experience for our students and deviating from this policy undermines that objective. The only exception is if a student is granted an accommodation in collaboration with Disability Services stating the use of notes/books on an exam."*

The Disability Coordinator told OCR she was unaware of the XXXXX 10, XXXX memo until it was mentioned during her OCR interview and that the policy as stated in the memo was not the policy that the College had in place during the XXXXX XXXX semester.

### **III. Legal Analysis and Conclusion**

OCR carefully reviewed the evidence obtained by OCR during OCR's investigation, including information from the Complainant and the College, including testimony from witnesses.

When, as here, there are conflicting statements regarding the facts, OCR assesses the credibility of the witnesses and reviews all of the available information to determine which facts are more likely to have occurred. The College asserted that the Complainant did not request to use notes on math exams as an accommodation until XXXXX XXXX. The Complainant alleged that she first made the request for the notes on math exams accommodation on XXXXX 2, XXXX.

Using the preponderance of the evidence standard, OCR concludes the evidence establishes that the Student requested that she be allowed to use notes on math exams as an accommodation for her disability during the XXXXX 2, XXXX, meeting with the Disability Coordinator

The Student told OCR she met with the Disability Coordinator on XXXXX 2, XXXX, and requested to use notes on math exams. Algebra Professor 2 told OCR the Student told him in XXXXX XXXX that she requested to use notes on exams as an accommodation from the Disability Coordinator. While the Disability Coordinator originally asserted that she did not receive the accommodations request from the Student until XXXXX XXXX, she subsequently acknowledged she was aware of the Student's request as of XXXXX XXXX.

As stated in the **Legal Standards** above, once the Student made a request for a specific accommodation, the College must engage in an interactive process to determine what, if any, academic adjustments are appropriate in light of the Student's individual needs and the nature of the institution's program.

OCR determined the College failed to meet its obligation to participate in an interactive process with the Student to identify what academic adjustments were appropriate in light of the Student's individual needs and the nature of the College's course and program. The statements made by the Disability Coordinator, Algebra Professor 2, and the Math Coordinator indicate a decision was made to not allow the Student to use notes on math exams based on generalized ideas and notions that the use of notes would be an unfair advantage, without conducting an individualized inquiry into the Student's disability and its impact on her ability to have an equal opportunity to gain the benefits of the College's educational program, and the nature of the course and program. Moreover, the College Departmental Practices explicitly states that notes are not allowed on exams and does not allow for an interactive process to evaluate requests for academic adjustments, such as notes, on a case-by-case basis. Rather, the written denial of notes for exams in the Departmental Practices document constituted a blanket denial of notes for students contrary to the College's duty to conduct an individualized inquiry for requests for academic adjustments.

While the College issued a memo dated August 10, 2015, stating that notes are not allowed to be used on an exam, with an exception for a student who is granted an accommodation to use notes on an exam, the Disability Coordinator was unaware of the memo and told OCR that the memo was not in effect at the time of the Student's request.

Based on a preponderance of the evidence, OCR finds that the College failed to utilize the Title II and Section 504 legal standards and procedures for determining the Student's appropriate auxiliary aids and services to afford the Student an equal opportunity to succeed in her academic studies at the College.

In addition, during the course of OCR's investigation, OCR identified deficiencies in the College's anti-discrimination policies, grievance procedures, and notice of nondiscrimination. OCR found that the current notice of nondiscrimination published in the College's student handbook does not specify a specific contact person with contact information. In addition, OCR found that the College does not publish an online notice of nondiscrimination on its website. Finally, OCR found that the College's grievance procedures does not contain all of the required elements of an anti-discrimination grievance procedure set forth in OCR's guidance documents. The Section 504 regulation at 34 C.F.R. § 104.7(b) requires that a recipient that employs fifteen or more persons adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by Section 504.<sup>11</sup> OCR has issued several guidance documents that set forth the minimum elements for anti-discrimination, anti-harassment, and anti-retaliation policies and procedures.<sup>12</sup>

The Section 504 regulation at 34 C.F.R. § 104.8 also requires a recipient that employs fifteen or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of disability. OCR has issued guidance documents that set forth the minimum elements of a notice of nondiscrimination as well.<sup>13</sup>

Similarly, the Title II regulation at 28 C.F.R. § 35.107 requires a public entity that employs 50 or more persons to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging discrimination based on disability, and a notice of nondiscrimination is required pursuant to 28 C.F.R. § 35.106.

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<sup>11</sup> Adoption of grievance procedures need not be established with respect to complaints from applicants for employment or complaints from applicants for admission to postsecondary educational institutions, pursuant to 34 C.F.R. § 104.7(b).

<sup>12</sup> These OCR guidance documents include OCR's *Title IX Resource Guide* (April 2015), including a section on grievance procedures (p. 4) at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>, and OCR's *Dear Colleague Letter* (April 4, 2011), which may be accessed at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>13</sup> OCR's guidance entitled *Notice of Non-Discrimination* may be accessed at <http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html>, and a section on notices of nondiscrimination may be accessed on page 6 of OCR's *Title IX Resource Guide* (linked above).

To resolve the above-described Section 504 and Title II compliance determinations, the College agreed to enter into a resolution agreement (the Agreement) with OCR on January 26, 2016. Pursuant to the Agreement, the College will: (1) Develop a procedure for providing academic adjustments and/or auxiliary aids to qualified students with a disability; (2) Provide effective training on the College's policies and procedures regarding the provision of academic adjustments, auxiliary aids and services, and modifications necessary for students with disabilities to participate in and benefit from the College's educational services to the administrators and faculty at the College; (3) Publish the procedures for providing academic adjustments and auxiliary aids in the College's student and faculty handbooks and post the procedures on the College's website; and (4) Within ten calendar days after the Agreement is signed, the College will engage in an interactive process with the Student as specifically set out in the Agreement to determine whether any of the Student's academic adjustments and auxiliary aids requests that have not been approved for use are necessary to ensure an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the complainant's needs. The College will also update its notice of nondiscrimination to include a contact person with detailed contact information and update its website to include a working link of its policies and procedures and post a copy of its Section 504/Title II policies and procedures on its website.

OCR will monitor the College's implementation of the Resolution Agreement until the College is in compliance with the statutes and regulations at issue in this case. The full and effective implementation of the Resolution Agreement will address all of OCR's Section 504 and Title II compliance findings.

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.

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 individual may file a complaint alleging such treatment. The Complainant may also 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. 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.

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If you have any questions, please contact XXXXX XXXXX, Attorney at (816) 268- XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at XXXXX.XXXXXX@ed.gov.

Sincerely,

/S/ Earlene Gordon

J. Earlene Gordon  
Supervisory Attorney