



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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April 7, 2017

Dr. Katharine Winograd, President
Central New Mexico Community College
525 Buena Vista Dr. SE
Albuquerque, NM 87106

Re: Central New Mexico Community College
OCR Case Number: 08-15-2248

Dear President Winograd:

We completed our investigation of this case and are notifying you of our determination. We received a complaint alleging that Central New Mexico Community College (College) discriminated on the bases of sex and disability. Specifically, the complainant alleged the College failed to provide a prompt and equitable response to a sexual harassment complaint she filed with the College on or about May 26, 2015. Additionally, the complainant alleged the College denied her request for an academic adjustment on or about September 2015, when it refused to provide her with additional extended time when taking tests.

We conducted our investigation under the authority of Title IX of the Education Amendments of 1972 and its implementing regulation at 34 Code of Federal Regulation Part 106, which prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the Department; Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities.

Our investigation included a review of documentation provided by the complainant and the College, as well as interviews of College staff and administrators and the complainant. We found sufficient evidence to support a conclusion that the College discriminated in violation of Title IX as alleged. We also concluded that the College violated Section 504 and Title II with respect to the provision of extended time on tests as an accommodation.

Prompt and equitable response to the complainant's sexual harassment complaint.

Background

The complainant was a student at the College when she alleged that a tutor employed by the College (Employee) sexually harassed her after she ended their romantic relationship.

According to the complainant, the Employee persisted in making unwelcome sexual gestures and comments to her after she ended the relationship.

Intending to file a sexual harassment grievance against the Employee, the complainant met with the Dean of Students on May 26, 2015. When the complainant explained that she had been subjected to sexual harassment, the Dean asked College security to come to his office to assist the complainant with filing an incident report. The Dean also explained to the complainant that he would have to involve Human Resources (HR) and the Employee's supervisor because the Employee was employed by the College. He told the complainant that HR would contact her to initiate an investigation and if she didn't hear from them within a day or two, she should call him. The Dean told her that he or someone in his office would be willing to meet with HR with her if she wanted them to. The Dean told the complainant they could arrange for Security escorts for her. He also called the tutoring center to make sure the Employee wasn't scheduled to be in the tutoring center at same time as the complainant.

When he received the final incident report from the Security Supervisor on June 4, 2015, the Dean forwarded it to HR. He also shared with HR his notes from his May 26 meeting with the complainant. Because the complainant was registered with the Disability Resource Center (DRC), the Dean advised the Director of that office about the complainant's grievance to ensure the complainant's DRC counselor would be aware of the situation.

On June 9, 2015, the complainant met with the HR Consultant assigned to investigate the complainant's grievance. The HR Consultant took the complainant's statement and the supplemental information the complainant provided consisting of hand-written notes she received from the Employee during their relationship. The HR Consultant said she provided the complainant resources including calling Security or APD. She also referred her to other College offices for additional assistance. Although the complainant reported that the Employee sent her sexually harassing text messages, she said she was unable to provide copies of those texts to the College. The complainant explained that although she requested copies of the texts from her service provider, she never received them.

By letter dated June 10, 2015, the Employee was notified that he was XXXX pending investigation of an allegation that he had engaged in a personal relationship with a student. The Employee was directed to have no contact with College employees or students while on administrative leave. On June 11, 2015, the Employee was provided a "Pre-termination Notice," which advised him that the College was considering terminating his employment because it received an incident report of his inappropriate relationship with a student. It also notified him that his unwelcome sexual advances toward the student were a violation of the College's Sexual Harassment policy. A meeting with the Employee was scheduled for June 15, 2015. On June 11, the Employee submitted his resignation. The College stated it terminated its investigation because the Employee resigned and was unavailable to make a statement.

On June 29, 2015, the former HR Executive Director sent the complainant an email regarding her complaint. He stated that "HR staff looked into [her] allegations and an investigation was conducted." He continued that when the tutor was confronted with her allegations, he chose to resign from CNM. He explained that they decided not to ban the tutor from campus because he

resigned and the complainant stated that since his resignation she had not heard from him and he had not tried to call, text or go by her residence.

College administrators including the Dean and DRC Director continued to meet with the complainant throughout the summer semester to discuss and arrange for additional supports for the complainant to aid her in overcoming the effects of the sexual harassment. The College agreed to provide the complainant with one-on-one tutoring and counseling. The College also committed to look into whether the complainant could retake her math class, at the College's expense, if she did not pass it.

Analysis

The regulation implementing Title IX, at 34 C.F.R. §106.31(a), provides that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity operated by a recipient. Sexual harassment is a form of sex discrimination prohibited by Title IX. If a recipient knows or reasonably should have known about sexual harassment, Title IX requires the recipient to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects. When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. If an investigation reveals that discriminatory harassment has occurred, a recipient must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

We found that the College initiated an investigation of the complainant's claims of sexual harassment within ten business days of the day she filed an incident report. In the interim, the College took steps to ensure the complainant's safety including offering to arrange Security escorts, alerting the complainant to the emergency call boxes on campus and confirming that the Employee was not scheduled to be in the tutoring center when the complainant was there. After initiating the investigation, the College XXXX forbade him to have contact with the complainant or anyone else at the College. He was also prohibited from entering the College campus. The College stated it was unable to complete its investigation because the Employee resigned before he was scheduled to meet with the College's investigator. The College could not compel the former Employee to participate in its investigation. Consequently, the College terminated its investigation.

The complainant said she learned from other tutors at the Student Resource Center that the Employee had quit. She said she approached various HR staff and administrators to ask what had happened with her complaint but she got no response. We found the former HR Executive Director sent the complainant written communication about the College's handling of her complaint and the Employee's resignation on June 29, 2015. We found that the Dean and the DRC Director also sent letters to the complainant describing the College's actions to investigate her complaint of sexual harassment, explaining that the Employee had resigned and outlining the remedial actions the College agreed to provide. The Dean observed that the complainant denied she received his letter although it was sent by certified mail and his office received a signed

receipt. We found that the College did not make formal findings in this case or notify the parties of its final decision.¹

As noted previously, the College agreed to provide the complainant with one-on-one tutoring and counseling. The DRC Director also agreed to ask the College to allow the complainant to retake her math class, at the College's expense, if she did not pass it.

The complainant asserted that the College did not provide sufficient remedial supports and did an inadequate job of delivering those it agreed to provide. For instance, she alleged the College refused to ban the Employee from campus despite her repeated requests that he be banned. By refusing to ban him, the complainant felt the College gave the Employee, who she characterized as a "predator," an open invitation to come back to campus to continue to victimize her and other female students.

The College acknowledged that it did not ban the Employee from campus because it determined there was insufficient cause to do so since the complainant said she had no further contact with the Employee, and the Employee resigned his position. The Dean said during several meetings with the complainant in June and July where they discussed banning the Employee, the complainant stated that she had not seen or been contacted by the Employee since she filed her grievance. The Dean stated that he reminded the complainant several times that escorts were available through Security if she felt unsafe. The College uses a progressive disciplinary process. If an employee's behavior warranted it, the employee could be terminated which, the Dean remarked is essentially banning the employee. The Dean said he explained this to the complainant a number of times but she remained dissatisfied with the College's decision.

The complainant told OCR that she had seen the Employee's vehicle parked near campus but did not relate that she had seen him on campus or that he had contacted her. She stated to a College administrator that she had not had contact with the Employee since she texted him on May 19, 2015, telling him not to call, text or email her. She made similar statements to other College administrators. In reviewing the College's online resources for victims of sexual violence and sexual harassment, we found they include information about Security's escort service that will escort a victim to class or any campus location that individual may need to go to. The complainant stated that students should not have to be escorted.

We also reviewed the College's Sexual Harassment policy (IS-2058) for employees. In addition to explaining how to report a complaint of sexual harassment and the College's procedures for investigating such a complaint, the policy also provides for disciplining an employee who is determined to have violated the policy. The policy provides that the discipline may include termination in appropriate circumstances.

The complainant further asserted that several individuals, including the DRC Director and the Dean, told her that the Employee's file would be "flagged" making it difficult for him to get employment elsewhere. Both denied they told the complainant that the Employee's file would be flagged. Instead, each said he told the complainant that if the Employee were to use the

¹ A demonstration of insufficient evidence is a final decision that should be explained and communicated to all parties.

College as a reference, he would not get a positive reference which could make it difficult for him to get another position. The HR Consultant stated that she had not received any requests for references for the Employee.

The complainant also took issue with the counseling services offered by the College. According to the College, the complainant was welcome to continue meeting with her DRC Counselor. Additionally, the College told the complainant that she could use the off-campus Employee Assistance Program (EAP). The complainant stated that she continued to visit with her DRC counselor but stopped meeting with her because she suspected that the DRC counselor disclosed private information (that the complainant planned to contact an attorney). After that, she said she no longer trusted that she could share her thoughts with the DRC counselor. Regarding the EAP, the complainant stated that she had neither the time nor a vehicle to get to the EAP. The complainant stated she was dedicating a great deal of time to her math class and did not feel she could take time from that to get to and use the services at the EAP office. The complainant also said she did not have a vehicle and the office was a distance away. She said she asked the College to provide her with transportation to the EAP but that did not happen. The College did not acknowledge receiving this request from the complainant.

The complainant was also unhappy with the tutoring offered her by the College. She shared that she was under a lot stress from the situation with the Employee and the grievance she filed; she was consequently falling behind in her math class. She stated she was promised one-on-one math tutoring for two hours per session. The complainant stated that when she went to the tutoring center, she was told the maximum one-on-one tutoring she could receive was two hours per week. She said that she also had trouble getting tutors to help her.

The DRC Director explained that ordinarily students receive group tutoring at the tutoring center. When students come in, he said they sign in, pick up a flag and raise it when they need help. Tutors walk around helping students and give them examples of how they might do something better. He observed that it's very popular and very crowded which does not work well for students with disabilities.

He stated that the DRC counselor talked to the tutoring center supervisor to arrange one-on-one tutoring for the complainant. In an email dated July 29, 2015, the Tutoring Center Supervisor stated that he had introduced the complainant to the tutors and told them that she could receive up to two hours of one-on-one tutoring each week. The DRC Director said when the complainant started saying that she wasn't getting the tutoring that she needed, he or the DRC counselor would contact the tutoring center to follow up. Each time, he said they learned that the complainant was receiving tutoring. The Tutoring Center Supervisor told the DRC Director that the complainant did not sign in when she came to the center as she was supposed to but she was there all the time. We found in emails sent by the complainant in late July that she was working with tutors at the tutoring center but, in one case, was unhappy that she had to schedule her one-on-one time with a tutor according to that tutor's schedule. Another time she said she was receiving tutoring but only for one problem at a time. In an email dated August 8, 2015, the complainant noted that she spent Mondays through Thursdays and many Saturdays from noon to evening in the tutoring center.

In August 2015, the DRC counselor stated he paved the way for the complainant to get tutoring through TRIO, a federal program that accepts only 165 students each year. The DRC Director explained that the TRIO program provides its students with services throughout their postsecondary education until they receive a bachelor's degree. The DRC Director said he learned that there was an opening in the TRIO program so they sent the complainant to apply. He said she was accepted and was receiving tutoring services through TRIO as well. The complainant confirmed that she got tutoring at TRIO but denied that anyone at the DRC told her about the program. She said a guidance counselor told her about TRIO.

With respect to retaking her math class, the complainant said the DRC Director promised that if she was unable to complete her math class, she would be able to retake it at the College's expense. She said when she approached him about retaking the math class, he denied telling her that the College would pay for it. The complainant stated that she chose to take an incomplete because she said it appeared that she was not going to be able to retake the course at the College's expense and she did not want to fail the class.

We found in a July 20, 2015 letter from the DRC Director to the complainant, he stated that if she was not successful in her math class that he would be willing to approach the College administration to request that she be allowed to retake the class at College expense. In early August, the complainant approached the DRC Director about retaking her math class. She indicated to him that there was a particular professor into whose class she preferred enroll but that section of the course was full and was closed to further enrollment. Although there were other open sections in which the complainant could have enrolled, the DRC Director contacted the complainant's preferred instructor August 10, 2015, to inquire whether she would agree to let the complainant enroll in her section of the class. The same day, the DRC Director also contacted the Associate Dean of Math, Science and Engineering who suggested another math professor who he said would be willing to give extra support to the complainant. When the DRC Director presented the complainant with her options: to get on the waitlist for the closed section or enroll in the section with the other professor, the complainant responded that she chose to take an incomplete in her current course.

The DRC Director said he worked with the Dean and the instructor to arrange for the complainant to receive an incomplete in her math class and have five weeks to complete the course. The complainant claimed she made those arrangements herself. Either way, we found the complainant successfully completed the course and graduated in December 2015.

Conclusion

We determined that the College took immediate action to address the complainant's report of sexual harassment by meeting with her, taking her report, collecting her evidence, ensuring her safety by offering to arrange Security escorts while confirming that the Employee was not scheduled to be in the tutoring center when the complainant was there. Ultimately, the College placed the Employee XXXX pending its investigation of the complainant's allegation. The College provided the complainant with additional interim measures to remediate the effects of the alleged discrimination including tutoring, the opportunity to receive counseling and additional time to complete her math course. We determined, however, that the College did not

close the loop by providing the complainant and the Employee with notice of the outcome of its investigation. The Employee's resignation did not remove the College's obligation to provide notice of its findings and conclusions with respect to the complainant's complaint to both parties including the College's evaluation of the evidence (if any) and its conclusion whether its policies had been violated.

Based on the foregoing, OCR found by a preponderance of the evidence that the College failed to respond to the complainant's report of sexual harassment in a prompt and equitable manner. Accordingly, we concluded that the College violated Title IX as alleged.²

Academic adjustment - Extended time on tests

Background

The complainant was registered with the DRC. As an accommodation, beginning December 5, 2014, she received double the amount of time provided to nondisabled students when taking tests and quizzes. On or about July 26, 2015, the complainant sent an email to the DRC Director stating that based on new test results, her neuropsychologist recommended additional extended time for the complainant on tests. On July 27, the DRC Director responded that he welcomed the new letter from the complainant's neuropsychologist because it might impact the complainant's accommodation statement.

Analysis

Section 504 provides, at 34 C.F.R. §104.43, that no qualified individual with a disability shall be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any postsecondary education aid, benefits, or services. The Title II regulations, at 28 C.F.R. §35.130(a), contain a similar prohibition applicable to public postsecondary educational institutions.

The Section 504 regulation, at 34 C.F.R. §104.44(a), requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of disability. Under the Title II regulation, at 28 C.F.R. §35.130(b)(1)(ii) and (iii), public colleges and universities may not afford a qualified individual with a disability opportunities that are not equal to those afforded others, and may not provide aids, benefits or services that are not effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. Under 28 C.F.R. §35.130(b)(7), public colleges and universities must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program

² During our investigation of this complaint, we identified potential compliance concerns that were not at issue in our review of the College's handling of the Complainant's internal complaint. The concerns identified are specific Title IX requirements that the College identify a Title IX coordinator and develop and implement procedures that ensure a prompt and equitable resolution to complaints of sexual harassment. On May 20, 2016, the College entered into an agreement to resolve these concerns. (See OCR case number 08-16-2048). Consequently, we will not redress those concerns in this case.

or activity. Recipients may establish reasonable procedures for requesting and providing approved accommodations

Under the requirements of Section 504, a student with a disability is obligated to notify his or her postsecondary institution of the nature of the student's disability and the need for a modification, adjustment, aid, or service. Once an institution receives such notice, it has an obligation to engage the student in an interactive process concerning the student's disability and related needs.

We found that the complainant provided a copy of her medical provider's report to the DRC. According to the DRC Director, the neuropsychologist's report gave them more detailed information about the complainant's disabilities than they had before. He said the new report made specific recommendations for accommodation which allowed them to tailor the complainant's accommodations to better meet her needs. The complainant's DRC counselor was able to provide faculty with better instructional techniques to use when instructing the complainant.

With respect to extra time on tests, it is undisputed that the complainant requested unlimited time to take tests. The DRC Director said he denied her request because it was unreasonable in the complainant's circumstance. The complainant stated that when the DRC Director refused to provide her unlimited time to take tests, she then asked for a half hour to one hour in addition to double time as needed. She said the DRC Director responded that the College could not provide more than double time on tests. Recognizing her difficulties with math, the DRC Director stated that they agreed to provide the complainant with additional tutoring and extra supports to assist her.

OCR found that the complainant's request for unlimited time to take tests was not supported by her medical provider's recommendation. We found the medical provider recommended that the complainant receive "twice as much time as average" when taking tests – the testing accommodation already included in the complainant's Accommodation Statement beginning in December 2014. Moreover, the College provided the complainant additional accommodations, including tutoring, to support her in her academics.

Based on the above, OCR found insufficient evidence to establish that the College denied the complainant's request for an academic adjustment. Accordingly, we found insufficient evidence to conclude that the College discriminated in violation of Section 504 and Title II as alleged.

Procedural concerns

During our investigation of this complaint, we identified a potential compliance concern regarding the College's provision of extended time on tests as an accommodation. During an interview with OCR staff, the DRC Director stated that when making an accommodation of extended time on tests, the maximum amount of time permitted is twice that allotted to nondisabled students.

No aid or service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the education program or activity. Not all

students with a similar disability benefit equally from an identical auxiliary aid or service. A postsecondary institution must analyze the appropriateness of an accommodation in its specific context. In many cases, double time to take tests may be an appropriate accommodation but there could be instances in which an individual's disability warrants an accommodation exceeding double time on tests. The College's practice of limiting extended time on tests to double that provided to nondisabled individuals does not ensure the individualized evaluation needed to ensure equal opportunity to individuals with disabilities.

Conclusion

In summary, we determined that the College did not violate Section 504 and Title II with respect to the complainant's individual allegation, and did violate Title IX when it did not provide the complainant and Employee with notice of the outcome of its investigation. We also determined that the College did not comply with Section 504, Title II, and their implementing regulations with respect to the provision of extended time on tests as an accommodation for individuals with disabilities.

We thank the College for voluntarily entering into an Agreement to resolve these compliance concerns. OCR is closing the investigative phase of this case effective the date of this letter. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the University has fulfilled all of the terms of the Agreement. When the monitoring phase of this case is complete, OCR will close Case Number 08-15-2248 and will send a letter to the College, copied to the Complainant, stating that this case is closed.

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.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by Federal law.

Under the Freedom of Information Act, we may release this document and related correspondence and records upon request. If we receive a request, we will protect personal information to the extent provided by law.

If you have questions, please contact XXXXXXXXXXX, Attorney Advisor, at XXXXXXXXXXX or me at 303-844-5927.

Sincerely,
/S/

Thomas M. Rock
Supervisory General Attorney

cc: Mark Cornett, DRC Director