



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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November 28, 2017

Dr. Toni Hopper Pendergrass, President
San Juan College
4601 College Blvd.
Farmington, NM 87402

Re: San Juan College
OCR Case Number: 08-16-2150

Dear President Pendergrass:

We are notifying you of our decision in this case. On April 1, 2016, we received a complaint alleging that San Juan College (College) discriminated on the basis of disability. Specifically, the Complainant alleged the College failed to accommodate his disability-related needs, which culminated in his failure of at least one class and withdrawal from the College in the spring 2016 semester.

Our investigation found sufficient evidence to conclude that the College discriminated as alleged. The reasons for our conclusion are set forth in this letter. Upon being advised of these findings, the College voluntarily agreed to enter into a resolution agreement to resolve the violations. A signed copy of the agreement is enclosed with this letter.

I. Jurisdiction

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 Code of Federal Regulation Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the U.S. Department of Education; 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. As a recipient of Federal financial assistance from the Department and a public entity, the College is subject to these laws and regulations.

II. Legal Standards

A. Academic Adjustments and Modifications

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

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

The Section 504 regulations, at 34 C.F.R. §104.44(a), require recipient colleges and universities to make modifications to their academic requirements that are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating, against qualified individuals with disabilities. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific required courses, and adaptation of the manner in which courses are conducted. However, academic requirements that recipient colleges and universities can demonstrate are essential to the program of instruction being pursued or to any directly related licensing requirement will not be regarded as discriminatory.

Under the Title II regulations, 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 or activity. Section 35.103(a) provides that the Title II regulations shall not be construed to permit a lesser standard than is established by the Section 504 regulations. Therefore, OCR interprets the Title II regulations to require public colleges and universities to provide necessary academic adjustments to the same extent as is required under the Section 504 regulations.

B. Section 504/Title II Procedural Requirements

The Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. §104.8 and 28 C.F.R. §35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. §104.7[b] and 28 C.F.R. §35.107[b]). The regulations also require that recipients/public entities designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance (34 C.F.R. §104.7[a] and 28 C.F.R. §35.107[a]).

C. OCR's Evidentiary Standard

In examining evidence gathered in an investigation, OCR uses a "preponderance of the evidence" standard. Simply stated, this means that OCR must conclude, based upon the evidence gathered during our investigation, the College's actions more likely than not constitute a failure to comply with Section 504/Title II when viewed in light of our legal standards.

III. OCR's Investigation

In reaching a compliance determination, OCR reviewed documents provided by the Complainant and the College and interviewed the Complainant, a witness provided by the Complainant, and the College's then-current Director of Nursing.

IV. Factual Findings¹ & Analysis

It is undisputed that the Complainant is an individual with a disability who was a student in the College's Associate's Degree in Nursing Program (Nursing Program). The Program comprises four semesters, called "levels." In the Spring 2016 semester, the Complainant had completed Levels XXX and was taking Level XXX. The Complainant alleged two ways in which the College had failed to accommodate his disability, by (1) refusing to provide a 72-hour waiting period to reschedule tests if needed because of his disability-related treatment; and (2) denying his request for a reduced course load to complete his degree. OCR considered each in turn.

A. 72-Hour Waiting Period

In November 2015, the Complainant submitted a physician letter and received from the DSO an accommodation letter that provided, among other accommodations: "Student will notify instructor when tests need to be rescheduled within 72 hours due to disability related treatment." A separate accommodation on that accommodation letter was subsequently rescinded by the DSO after the Nursing Program raised concerns about it, after which the DSO sent a letter dated December 10, 2015 to Complainant explaining that rescission, but stating in relevant part, "An amended accommodation letter is being provided to indicate that you will continue to receive [various accommodations relating to testing environment] and that the student will notify the instructor when testing need[s] to be rescheduled within 72 hours due to disability related treatment." OCR notes that the Nursing Program thus had the opportunity to address the 72-hour accommodation as it undertook to rescind this other accommodation, but did not. The Nursing Program raised no objections to the 72-hour accommodation, allowing it to be sent to the Complainant, creating the reasonable impression that the 72-hour accommodation remained approved and would be honored in the Spring 2016 semester.

On January 18, 2016, the DSO issued the Complainant's accommodations letters for the Spring 2016 semester, which – as it had in November and December 2015 – included, among other accommodations: "student will notify instructor when tests need to be rescheduled within 72 hours due to disability related treatment." One of the Complainant's nursing instructors responded to the DSO the next day, instructing the DSO to revise the letters for *all* of his classes to state that "exams will be taken the same day or within 24 hours of the scheduled time of the exam unless prior approval of the Nursing Department." The only explanation given was that "timeframes are tight" under the program's schedule. One DSO staff member agreed to redo the accommodation letter, yet another pressed to maintain the 72 hours, explaining that "the documentation provided by the doctor for [the Complainant]'s medical issues is very clear that he should be allowed 72 hours for recovery from his disabling issues before testing . . . I am not comfortable going against the medical advice of his doctor in this matter." The instructor responded:

The XXX Level of nursing requires him to be in class or clinical every day. A 100% accommodation testing timeframe would allow only the afternoons of Monday through Wednesday to complete a didactic exam. He will be in clinicals every week Thursday and Friday. Should he be required to leave clinical early in

¹ OCR found the facts described herein by a preponderance of the evidence.

order to make up an exam, he will be required to make up those clinical hours at a later time. For this reason, we have structured a much shorter turnaround time for his testing in order to ensure [his] success. We are providing a schedule for his accommodated testing with the 24 hour timeframe. We will certainly adjust those hours as circumstances dictate.

The College contends that, despite this exchange, it provided a 72-hour accommodation on a Nursing XXX test scheduled for February 17, 2016, which Complainant ultimately took a week later.

OCR concludes that the preponderance of the evidence establishes that the College failed to accommodate Complainant's disability in the way it addressed his request for an accommodation for a 72-hour waiting period to reschedule tests if needed because of his disability-related treatment. The Complainant provided a physician letter detailing his need for the 72-hour accommodation. The DSO twice authorized the accommodation in letters to the Complainant, first in an accommodation letter in November 2015 and again in December 2015, when it maintained the 72-hour accommodation even after rescinding a separate accommodation. Despite authorization from the Complainant's physician and from the DSO, and despite the Nursing Program addressing the topic of the Complainant's accommodations when rescinding one in late 2015, the Nursing Program refused the Complainant the 72-hour accommodation just weeks later at the start of the Spring 2016 semester. The Nursing Program did not heed a DSO staff member's insistence that the Complainant's doctor had requested this accommodation and that DSO had authorized it.

The Nursing Program's only rationale was that timeframes were tight under Complainant's schedule that semester, but this reasoning was entirely speculative and based on a misunderstanding of the accommodation itself. The accommodation was to be provided on an as-needed basis. The Complainant was not requesting an additional 72 hours on every test, scheduled at the start of the semester, simply the possibility for a 72-hour accommodation if he fell ill during the semester. Rather than waiting to address any episodes of illness if and when they actually arose, however, the College refused the accommodation at the start of the semester, for the entire semester, citing only "tight" timeframes.

Additionally, OCR finds that the preponderance of the evidence establishes a compliance concern as to the procedure used to grant and deny accommodations here. The Nursing Program failed to oppose the 72-hour accommodation when given the opportunity in late 2015, *before* the Complainant enrolled in – and paid tuition for – the Spring 2016 semester, at which time it intervened with the DSO to rescind a separate accommodation. Because OCR has identified this procedural compliance concern, OCR does not find that the College's offer to make adjustments "as circumstances dictate," or the fact that the Complainant ultimately took one test late during the semester, to amount to the College accommodating the Complainant.

Therefore, we conclude that the preponderance of the evidence establishes that, in violation of Section 504 and Title II, the College failed to accommodate the Complainant's disability by refusing to provide a 72-hour waiting period to reschedule tests if needed because of his disability-related treatment.

B. Reduced Course Load

The College does not dispute that it denied the Complainant's request for an accommodation of some type of reduced course load to complete his degree. The College has raised two legal defenses in support of its refusal to provide any type of reduced course load to the Complainant.

1. Fundamental Alteration

First, the College argues that Complainant's request for a reduced course load amounted to a request for a fundamental alteration of the Nursing Program, and therefore the College was justified in denying the request. *See* 28 C.F.R. § 35.130(b)(7)(i) (requiring, pursuant to the ADA, that public entities "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"); *see also Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (establishing similar "substantial modification" defense under Section 504).

When seeking to raise the fundamental alteration defense, "there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation." *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991). This obligation arises – and must be carried out – at the time a request for accommodation is made. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 819 (9th Cir. 1999), as amended (Nov. 19, 1999) (citing *Wynne*, 932 F.2d at 26) (observing that "after-the-fact justification" does not meet this obligation). The institution must "demonstrat[e] that its determination that no reasonable way existed to accommodate [the student's disability] was a reasoned, professional academic judgment, not a mere ipse dixit." *Wynne*, 932 F.2d at 27; *accord Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) (citation and internal quotation marks omitted) ("[T]he ADA imposes an obligation to investigate whether a requested accommodation is reasonable . . . mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement."). An appropriate process should include the following: (1) the decision is made by relevant officials including faculty members; (2) the decision makers consider a series of alternatives, their feasibility, cost and effect on the academic program; and (3) after a reasoned deliberation, the decision makers reach a rationally justifiable conclusion that the available alternatives would result either in lowering of academic standards or requiring substantial program alteration. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997); *see also Wynne*, 932 F.2d at 26. In reviewing the decision of the institution, OCR first "find[s] the basic facts, giving due deference to the school, and then [] evaluate[s] whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available." *Wynne*, 932 F.2d at 27-28.

In its written response prepared for this investigation, the College sought to demonstrate that a reduced course load would have fundamentally altered its Nursing Program. The College asserts that before it could have offered a reduced course load to Complainant, it would have had to obtain approval from the leadership of the College, the New Mexico Board of Nursing, and the Accreditation Commission for Education in Nursing, a process that can take one to two years.

The College cites to accreditation standards and rules from the Accreditation Commission for Education in Nursing (ACEN) and the New Mexico Nursing Education Consortium (NMNEC), as well as the New Mexico Nursing Practice Act. The College also asserts that it offers a curriculum approved by NMNEC and shared among institutions in New Mexico, which is designed to require students to apply complex theory in concurrently taken complex clinical practice courses. A more detailed discussion of these standards and rules is more relevant to, and is contained in, the next section.

According to the College, simultaneity is the fundamental aspect of the program that would have been altered by a reduced course load. Relatedly, the College submits that it would have been difficult for faculty to accurately evaluate student understanding and competency relative to program and level outcomes if one level of the program of study were to be administered part-time over multiple semesters.

Missing, however, from the College's argument is factual evidence that it engaged in a reasoned deliberation of these curricular and legal standards *at the time the Complainant was requesting an accommodation*. OCR interviewed the Director of the Nursing Program, seeking such evidence, but the Director was not able to provide it. To the contrary, the facts establish that each time the Complainant raised the issue of requesting a reduced course load, the Nursing Program mechanically – and swiftly – denied his request.

In October 2014, the Complainant had a general discussion with the College's DSO regarding taking a reduced course load. The DSO then spoke with the Director of Nursing regarding restructuring, and the Director made it clear that the Complainant would need to take a full course load for Spring 2015 and that the Nursing curriculum was to be taken as a block and there was no way to reduce it to a part-time schedule. The Director confirmed in her interview that this exchange occurred over the phone and nothing else was discussed – *i.e.*, that she responded immediately to the request, and denied it on the spot. This exchange illustrates a disconnect that continued throughout the Complainant's time at the College. Every time the topic arose, the College characterized the Complainant to be requesting "part-time" study. While "part time" and a "reduced course load" are obviously similar and could be identical, at no time did the College engage in discussion, either internally or with the Complainant, about what exactly a "reduced course load" might look like, how that might be the same as or different than "part-time" study, or alternatives to a "reduced course load" or "part time" study that might nevertheless accommodate the Complainant's disability-related needs. Herein, OCR uses the terms "part time" and "reduced course load" interchangeably, subject to this understanding.

In January 2015, an individual instructor met with the Complainant regarding his course load, and the two developed several suggestions as to how the Complainant could proceed: (1) additional time periods in which tests could be taken, (2) spreading tests out so that Complainant would not have more than one per week, and (3) giving the Complainant an "Incomplete" for the semester, with the ability to complete tests within an agreed time period and replace the Incomplete with the grades he received. The Nursing Director quickly – in just over one full business day – denied these accommodations, expressing in an email (copied to the Assistant Director of Nursing, the Vice President for Learning, the Vice President for Student Services, and the supervisor of the DSO) her "serious concerns about the process by which these

suggestions were developed and proposed and the nature of the recommendations relative to nursing program integrity.”

In her interview, the Director expressed frustration that this instructor had not worked within “the proper chain of command” or checked to see what would be possible before working individually with the Complainant. When asked if she had had any communications with others regarding the request for part-time study, the Director identified the individuals copied on her email and a few others, but it was clear that no true “discussion” occurred during any of the contacts she described.

The Director first stated that she had had discussions with faculty – in so much as she discussed the fact that Complainant had requested a part-time program of study, which the College does not offer. She stated, “I don’t know that there was much of a discussion” because the College just does not offer part-time study. She also noted that the College was accommodating the Complainant in a number of other ways, seemingly dismissive of Complainant’s disability and/or need for accommodations.

Second, the Director stated that she had discussed the matter with the Vice President for Learning – in that she “just mentioned it” at a meeting, and the Vice President confirmed that the College did not have a part-time program of study in nursing.

Third, the Director discussed the proposal involving incompletes with the Vice President for Student Services. His response was that incompletes are given at the discretion of the instructor. The Director stated that it was the Program’s belief that by allowing Complainant incompletes, it would give him an unfair advantage. When asked how, she stated that Complainant would have more time to study for exams, and the exams are structured so students have to master a lot of content in a short period. She speculated that providing extra time would open the program up to challenges from other students of unfair practices, which those students could bring to the accrediting bodies that accredit the College. When asked if the accrediting bodies would become involved in any other way, the Director stated that the Program would need to file a substantive change report with them before offering a part-time program of study. The Director also confirmed that this change report process was a process that the College had done at least once in the past (not for part-time study) and had taken approximately two years to complete and receive approval for the report and then begin offering the curriculum.

Fourth and finally in terms of communications with others, the Director stated that she also communicated with the Assistant Director of Nursing along the same lines of her concerns expressed in the January email. Again, none of the Director’s contacts with others consisted of more than a conclusory recitation of the fact that part-time study was not available.

The issue of a reduced course load arose for the final time at a March 29, 2016 meeting between the Nursing Program Director, two of Complainant’s instructors, and the Complainant and his witness. OCR interviewed the Complainant, his witness, and the Director, and reviewed notes from the meeting produced by the College and the Complainant and a narrative account from the College. These sources established that the Complainant explained how his health had deteriorated that semester, and he proposed dropping the clinical class where his performance

had been the worst. By the College's own account of this meeting, the instructor of that class explained that he had a XXX% and the school required a XXX% to continue in the program. The Director tried to explain the consequences of withdrawal to Complainant, citing NMNEC criteria (again, discussed in further detail below). She informed the Complainant that, under NMNEC policy, any student who has two failures or withdrawals was to be dismissed from the program and that they could reapply to enter the program after two years. The Complainant brought up a decreased course load and produced his doctor's note indicating his medical need for it. The Director advised him that part-time study had been rejected in the past and that the Nursing Program was neither designed nor accredited to be a part-time program. She stated that the Complainant's requests for accommodations had to be reasonable, and part-time study was not reasonable. Throughout her OCR interview, the Director was unequivocal that part-time study was soundly rejected every time it was brought up.

Therefore, based on the weight of the evidence, and in particular the College's own account of its communications with the Complainant regarding a reduced course load, OCR finds that the College did not meet its obligation to seek suitable means of reasonably accommodating the Complainant. *See Wynne*, 932 F.2d at 25-26. With regard to whether a requested accommodation would alter an essential program requirement, OCR gives great deference to an institution's academic decision-making. However, in order to receive such deference, relevant officials within the institution are required to have engaged in a reasoned deliberation, including a diligent assessment of available options at the time the issue arose. Though the College later relied on a variety of curricular, accreditation, and legal standards to justify its decision to deny part-time study to Complainant, there is no evidence that those standards factored into "a professional, academic judgment that reasonable accommodation is simply not available" *at the time the issue arose*. *Id.* at 27-28; *see also Wong*, 192 F.3d at 819 (citing *Wynne*, 932 F.2d at 26) (rejecting "after-the-fact justification" to support a fundamental alteration argument).

While the Director of the Nursing Program "mentioned" this issue to faculty and College administration officials, there is no evidence that any of those decisionmakers considered alternatives, their feasibility, cost and effect on the academic program. *See Guckenberger*, 974 F. Supp. at 149; *see also Wynne*, 932 F.2d at 26. Each time the subject arose, the College did not entertain any discussion whatsoever of (as differentiated above) a reduced course load or part-time study. As confirmed by the Director in her interview, all discussions that occurred within the College were nothing more than a simple recitation of the fact that part-time study was not available. Thus, as in *Wynne*, the College relied on "the simple conclusory averment" of the head of the Nursing Program, which cannot suffice to establish the fundamental alteration defense. *Wynne*, 932 F.2d at 28. The fact that this averment was repeated to others at the College, as the Director stated in her interview, does not render it any less conclusory, nor does it go any further to satisfy the College's obligation to seek suitable means of reasonably accommodating the Complainant. *See Wynne*, 932 F.2d at 25-26. In fact, even the exact type of reduced course load or part-time study the Complainant sought, or the College could or could not provide, was never addressed, because the issue was rejected so summarily each time it arose. The rejections, therefore, were not based on concrete or specific proposals from either party; instead, they were steadfast refusals by the College to even consider the topic. This falls short of the College's obligation to engage in "a reasoned, professional academic judgment, not a mere ipse dixit,"

Wynne, 932 F.2d at 27, including consideration of a series of alternatives, their feasibility, cost and effect on the academic program. *Guckenberger*, 974 F. Supp. at 149.

Accordingly, we find by a preponderance of the evidence that the College is not entitled to the fundamental alteration defense, because it did not engage in a reasoned deliberation as to the Complainant's request for a reduced course load at the time that request arose.

2. Directly Related to Licensing

The second legal defense that the College raises in support of its refusal to provide a reduced course load to the Complainant is the plain language of 34 C.F.R. § 104.44(a): "Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section."

The College argues that "the whole purpose of the program of study in the San Juan College Department of Nursing is to give its Nursing students the educational experience and knowledge that will allow them to pass the New Mexico Board of Nursing Licensing Examination. Its full time program of study for Nursing . . . are academic requirements that are essential to the instruction and preparation of Nursing students for licensing. Under the language of the Section 504 regulations, these requirements are not to be 'regarded as discrimination within the meaning of this section.'" The College cites to OCR publications relating to Section 504, but only in a conclusory fashion to state that recipients are not required to make modifications that would cause a fundamental alteration.

As described above, OCR's investigation established that the College did not engage in a reasoned deliberation as to the Complainant's request for a reduced course load, and its relationship to licensing requirements, at the time that request arose. The College has not submitted, and OCR's investigation did not establish, any additional evidence that the issue of licensing requirements was discussed at the time of the Complainant's request for an accommodation, beyond what is described above. OCR could reach a compliance determination as to this issue based simply on the College's established refusal to engage in a reasoned deliberation at the time the accommodation request arose. Nevertheless, OCR considered the College's arguments as to how denying the Complainant's request for an accommodation "directly related" to New Mexico nursing licensure requirements. OCR addresses each requirement cited by the College in turn.

i. Accreditation Commission for Education in Nursing

First, the College cites the ACEN, the relevant national accrediting organization for the College's Nursing Program. The College argued that the Complainant's request for part-time study implicated two ACEN requirements: Standard #4/Curriculum and Policy #14/Reporting Substantive Changes.

a. ACEN Standard #4/Curriculum

As to ACEN Standard #4/Curriculum, ACEN accreditation requires compliance with ACEN “Standards” (defined as “Agreed-upon expectations to measure quantity, extent, value, and educational quality) and Criteria (defined as “Statements that identify the elements that need to be examined in valuation of a Standard”). This is set forth in the ACEN Accreditation Manual. The only “Standard” or “Criteria” cited by the College is a portion of Standard #4:

STANDARD 4: Curriculum

The curriculum supports the achievement of the identified student learning outcomes and program outcomes of the nursing education unit consistent with safe practice in contemporary healthcare environments.

4.1

The curriculum incorporates established professional standards, guidelines, and competencies, and has clearly articulated student learning outcomes and program outcomes consistent with contemporary practice.

4.2

The student learning outcomes are used to organize the curriculum, guide the delivery of instruction, direct learning activities, and evaluate student progress.

4.3

The curriculum is developed by the faculty and regularly reviewed to ensure intensity, rigor, and currency.

4.8

The length of time and the credit hours required for program completion are congruent with the attainment of identified student learning outcomes and program outcomes and consistent with the policies of the governing organization, state and national standards, and best practices.

OCR also reviewed the ACEN Accreditation Manual Glossary, which defines:

- “Delivery Formats” to include, without limitation, “traditional in-person/in-a-classroom techniques (e.g., lecture and ‘flipped classroom’) and the use of synchronous and asynchronous technologies (e.g., online and simulation)”;
- “Nursing Program Length” as “Total number of credit/quarter/clock hours required to complete the defined nursing program of study allocated over a specific number of academic terms”
- “Program Completion Rate” as “Percentage of students who graduate within a defined period of time. The definition used by the ACEN for a nursing program completion rate is the number of students who complete the program in no more than 150% of the stated nursing program length, beginning with enrollment in the first nursing course”
- Student outcomes and program outcomes are also defined, neither of which in ways that are temporally limited.

Thus, none of the terms of Standard 4, or the Glossary definitions, expressly prohibit less than full-time study.

The College asserts that the Complainant's request for less than full-time study would have separated theory from practice, depriving him of "the opportunity . . . to apply complex theory in concurrently taken complex clinical practice courses" and "sufficiently develop the knowledge, skills, and attitudes essential for entry-level clinical nursing practice." The College adds, "There is currently no viable process that would ensure that [Standard 4's] curriculum criteria . . . can be met with the student taking a part-time course load each semester."

OCR finds that the College's argument fails for two similar reasons, both tied to the College's failure to engage in a deliberative process at the time the Complainant was requesting accommodations. First, the College did not explain to the Complainant at the time that the reason he could not part-time study was because he would not adequately learn how to apply theory in practice. Instead, the College summarily denied his request and did not, for example, discuss any alternative ways to ensure that the curriculum criteria of ACEN Standard #4, and the application of theory in practice, could potentially be met. Second, and similarly, as the College concedes, there was *currently* no process in place to ensure part-time study comported with Standard 4's curriculum criteria. As described above, the College did not engage in a deliberative process with the Complainant to brainstorm, for example, whether they could agree on a course sequence, or other accommodation, that would achieve that result in the future.

Additionally, OCR observes that the ACEN Glossary defines the term "program completion rate" as the number of students who complete the program in no more than 150% of the stated nursing program length; and "nursing program length" as the total number of credits or hours required to completed the program of study over a specific number of terms. Thus, the Glossary seems to envision that some students might take slightly longer to finish an accredited program, casting further doubt on the College's proposition that full-time study was the only option it could provide.

ii. ACEN Policy #14/Reporting Substantive Changes

Next, the College cites the following excerpts of ACEN Policy #14/Reporting Substantive Changes, arguing that the Complainant's request for accommodation would have effected a "substantive change" to the Nursing Program:

POLICY #14

REPORTING SUBSTANTIVE CHANGES

NURSING PROGRAM OBLIGATION

It is the responsibility of each nursing education unit to notify the ACEN of major changes in a nursing program to ensure maintenance of accreditation status and protection of students in accordance with Policy #14 Reporting Substantive Changes and, when required, seek approval prior to the initiation of the substantive change. Failure to report a substantive change places the accreditation status of a nursing program in jeopardy

A substantive change is a significant modification or expansion of the nature and scope of a nursing program and/or nursing education unit. Based on federal regulations and ACEN policies, a substantive change includes:

- *A significant change in the organizational structure of the nursing education unit that would place a nursing program in non-compliance with the ACEN Standards and Criteria;*
- *Offering a nursing program via distance education;*
- *Changing the method of academic measurement (e.g., from clock hours to credit hours);*
- *Adding courses or nursing programs of study at a degree or credential level different from that which is included in the nursing education unit's current accreditation;*
- *Adding a nursing program option within an accredited nursing program*
- *Changing the number of credit hours or the number of clock hours from currently accepted/approved courses required for successful completion of a nursing program;*
- *Increasing or decreasing the number of credit hours or the number of clock hours, either in content or method of delivery, required for successful completion of a nursing program.*

Though the College states that all changes that implicate these provisions of Policy #14 “require notification, rationales, and approval,” OCR’s investigation established – via publically available information easily locatable on the ACEN’s website – that the Policy itself contains two sections that demonstrate that that is not true for at least some of the provisions the College cites.

These sections are a “Procedure for Reporting” and a chart showing the types of changes and corresponding procedures required. The “Procedure for Reporting” outlines three procedures for the different types of substantive changes: (1) Procedure 1, which requires approval before implementation; (2) Procedure 2, which requires only notification before implementation; and (3) Procedure 3, which applies to certain closures (e.g., of a program or option within a program). The chart lists a number of different types of substantive changes and identifies which procedure, if any, applies to each. Of note, “[o]ffering 25% to 49% of the number of credit hours or the number of clock hours of the nursing courses via distance education” does not trigger any procedure or require any notification or approval. By contrast, “Offering 25% to 49% of the number of credit hours or the number of clock hours of the nursing courses via distance education” triggers Procedure 2. Procedure 1 is triggered by:

Curriculum revisions involving an increase, decrease, or substitution of 25% or greater of the credit hours or clock hours from currently accepted/ approved courses in a nursing program required for completion of a nursing program, including but not limited to: Deleting existing nursing courses and substituting new nursing courses; Deleting existing general education courses and substituting new general education courses.

The Policy also contains a Glossary (which is substantially similar to the Glossary to the Accreditation Manual described above). Of relevance here, the Glossary defines:

- “Distance Education” as “An educational process in which the majority of the instruction occurs when a student and instructor are not in the same place. Distance education . . . includes technology that is used to support regular and substantive interactions between the instructor and the students.”
- “Online/Internet Nursing Course” as “A form of distance education whereby 50% to 100% of the nursing course content is delivered primarily online and asynchronously.”
- “Online Nursing Program” as “A form of distance education whereby 50% to 100% of the credit hours or 50% to 100% of nursing courses are delivered primarily online and asynchronously.”

Again, OCR determines that the College failed to engage in a reasoned deliberation as to how this ACEN Policy would overlap with the Complainant’s request for accommodation at the time of the request. As described above, the College simply denied the request. However, had the College engaged in a reasoned deliberation that included reviewing the Policy, it might have found that the Policy itself states that, for example, “[o]ffering 1% to 24% of the number of credit hours or the number of clock hours of the nursing courses via distance education” would not violate, or require reporting and approval under, the Policy. Distance education itself is defined as a process wherein the “majority” of instruction occurs when a student or instructor are not in the same place. Perhaps 25% of credit hours would have been an accommodation that worked for the Complainant and the Nursing Program. Perhaps one day per week, or per two or three weeks, of instruction where the Complainant and instructors were not in the same place, would have been a reasonable alternative—one that, it seems, would not have been a “substantive change” within the meaning of ACEN Policy #14. Had the College engaged in a reasoned deliberation that considered a series of alternatives, perhaps it would have reached, and made determinations to, such issues. Because it did not consider any alternatives, OCR is unable to find that ACEN Policy #14 necessarily precluded the Complainant’s request for accommodation.

Additionally, OCR’s investigation established that the ACEN offers a number of resources for nursing programs to determine if proposed changes are “substantive” within the meaning of ACEN Policy #14. An FAQ document also easily locatable on the ACEN’s website advertises (1) monthly conference calls “[t]o help orient you to Policy #14”; (2) a workshop for new nurse administrators (the Program Director, in the College’s case); (3) an ACEN employee who is the “Coordinator of Substantive Change,” whose name, job title, and email address (the standardized subchange@acenursing.org) are listed on the “Contact Us” tab of the website; and (4) the ability to call, email, or write with questions about “whether the change is considered substantive.” The FAQ also states that “[a] significant departure from the established curriculum is defined as increasing, decreasing, or substituting 25% or more of the credit hours or clock hours required for completion. This applies to the nursing program of study and/or the overall curriculum.” The College does not assert that it took advantage of any of these resources. Doing so could have been part of a reasoned deliberation that considered alternative means of accommodation.

iii. New Mexico Board of Nursing and New Mexico Nursing Practice Act

The College argues that granting the Complainant's request for an accommodation would have required the approval of the New Mexico Board of Nursing (NMBON). It adds that "the whole purpose of [its] program of study . . . is to give its Nursing students the educational experience and knowledge that will allow them to pass the New Mexico Board of Nursing Licensing Examination." The College observes that there are currently no part-time courses of study approved by the Board in New Mexico, and that its (and other schools' in the state) curriculum is the result of the NMNEC, a collaboration involving nursing faculty and administrators from New Mexico's public colleges and universities. The College argues again that the Complainant's request for part-time study would have required approval of the NMBON and NMNEC.

OCR's investigation confirmed that all nursing programs in New Mexico must maintain approval by the NMBON. *See, e.g.*, N.M.S. §§ 61-3-13(A), 61-3-26. Board-issued regulations at N.M. Admin. Code 16.12.3 set forth the approval process and the "minimum standards for nursing programs":

(B)(2) A nursing program shall develop and implement a curriculum that includes level objectives, course objectives; measurable learning outcomes for each course that:

- (a) reflect its mission and goals;
- (b) are logically consistent between and within courses;
- (c) are designed so that the students who complete the program will have the knowledge and skills necessary to function in accordance with the definition and scope of practice specified in New Mexico Nurse Practice Act.

(3) The curriculum shall extend over a period of time sufficient to provide essential, sequenced learning experiences which enable a student to develop nursing competence and shall evidence an organized pattern of instruction consistent with principles of learning and educational practice.

(4) Clinical experience shall provide opportunities for application of theory and for achievement of the stated objectives in a client care setting or simulation learning settings, and shall include clinical learning experience to develop nursing skills required for safe practice Nursing programs . . . (d) may substitute up to a maximum of fifty percent of a clinical education experiences using simulation programs and practices

N.M. Admin. Code 16.12.3.12. Additionally, Board-issued regulations at N.M. Admin. Code 16.12.3.13 provide, "Major changes that affect the program's compliance with the 'minimum standards for nursing programs' require board approval." The regulations do not define or explain "major changes."

Here, too, nothing expressly prohibits part-time study per se, nor has the College explained how part-time study would be so prohibited. Again, the College did not engage in a reasoned deliberation as to this issue with the Complainant at the time he made his request, nor did the College consider any alternatives that might have, for example, (1) pursuant to N.M. Admin. Code 16.12.3.12(B)(4)(d), "provide[d] opportunities for application of theory and for

achievement of the stated objectives” while permissibly “substitut[ing] up to a maximum of fifty percent of a clinical education experiences using simulation programs and practices . . .”; (2) pursuant to N.M. Admin. Code 16.12.3.12(B)(3), still amounted to a curriculum that “extended over a period of time sufficient to provide essential, sequenced learning experiences . . .”; or (3) otherwise *not* been considered, under N.M. Admin. Code 16.12.3.13, a “major change[] that affect[ed] the program’s compliance with the ‘minimum standards for nursing programs.’” The NMBON also has a Nursing Education Advisory Committee, on which the College’s Nursing Director sat at the relevant time and which is mandated to “provide consultation to nursing programs as requested or as directed by the board.” N.M. Admin. Code 16.12.3.15. This committee could have been another avenue through which to seek advice on the Complainant’s request for accommodation, or alternatives to it.

iv. Actual Licensure Requirements

Finally, the language of the regulation on which the College relies for its licensing argument states: “Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.” 34 C.F.R. § 104.44(a). The only *actual* licensure requirements that the Complainant would have faced were for licensure as a registered nurse in New Mexico were: (1) “successfully complet[ion of] an approved program of nursing for licensure as a registered nurse,” and (2) “pass[ing] the national licensing examination for registered nurses.” N.M.S. §§ 61-3-13(A), 61-3-14. OCR observes that the foregoing standards and requirements, while related to accreditation and approval requirements, are less clearly “essential to . . . directly related licensing requirement[s]” for licensure as a registered nurse in New Mexico. The College has not clearly laid out any argument establishing any direct relationship.

Had the Nursing Program engaged in a reasoned deliberation as to how to accommodate the Complainant, either through some type of reduced course load or other alternative accommodation, the parties may very well have been able to arrive at a result that allowed him to “successfully complete[]” the program and be eligible for licensure. OCR reiterates that the College’s failure to engage in a reasoned deliberation, or consider alternatives, deprived the Complainant of the opportunity to find a route to “successful complet[ion].”

v. Conclusion as to “Directly Related Licensing Requirement[s]”

Thus, based on the evidence and argument submitted by the College, OCR is unable to establish by the preponderance of the evidence that the full-time program of study is “directly related” to any licensing requirements within the meaning of 34 C.F.R. § 104.44(a).

3. Conclusion as to Reduced Course Load

Therefore, because the College is not entitled to the fundamental alteration defense, nor has it been established that Complainant’s accommodation was “essential to . . . any directly related licensing requirement, we conclude that the preponderance of the evidence establishes that, in

violation of Section 504 and Title II, the College failed to accommodate Complainant's disability by denying his request for a reduced course load to complete his degree.

C. Section 504/Title II Procedural Requirements

During the course of OCR's investigation, we also reviewed documents relating to Section 504 and Title II's procedural requirements. We reviewed the College's "General Statement" prohibiting discrimination and a "Policy of Non-Discrimination," both of which appear to be notices of non-discrimination. The latter identifies a "person . . . designated to handle inquiries regarding the non-discrimination policy," who is the Assistant Director of Human Resources and Title IX Coordinator. The College does not have an identified Section 504 or Title II Coordinator and thus the notice of nondiscrimination does not list contact information for such persons. The College's grievance procedures, titled "Complaint Investigation and Determination Policy," apply to both employees and students, but as written only applies to sex discrimination. *Id.* ("San Juan College recognizes the right of all students to file complaints regarding sexual harassment, including sexual assault, dating and domestic violence, and stalking and alleging discrimination on the basis of sex (includes pregnancy), sexual orientation, and gender orientation."). The College's position statement asserts that "it is the same procedure for all forms of discrimination, including discrimination based on disability." The College's lack of a 504/Title II Coordinator, its notice of nondiscrimination that lacks this information, and its lack of grievance procedures for complaints of disability discrimination also constitute technical violations of Section 504 and Title II.

V. Conclusion

We thank the College for voluntarily entering into an agreement with OCR to resolve these issues. 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 will be completed when OCR determines that the College has fulfilled all of the terms of the Agreement. When the monitoring phase of this case is complete, OCR will close Case Number 08-16-2150 and will send a letter to the College, copied to the Complainant, stating that this case is closed. If the College fails to implement the Agreement, we will take appropriate action, as described in the Agreement.

This letter addresses only the issues listed above and should not be interpreted as a determination of the College's compliance or noncompliance with Section 504, Title II, or any other federal law in any other respect.

This letter is a letter of finding(s) issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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 our resolution process are protected from retaliation by Federal law.

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, personal information, which if released, could constitute an unwarranted invasion of privacy.

Thank you for the courtesy and cooperation you and your staff and counsel extended to us during the investigation of this case. If you have any questions, please contact XXX.

Sincerely,

XXX
Supervisory General Attorney

Enclosure: Resolution Agreement

cc via email: XXX, counsel for College