



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

March 4, 2014

Dr. Melinda Nish
Superintendent/President
Southwestern College
900 Otay Lakes Road
Chula Vista, California 91910

(In reply, please refer to case no. 09-13-2306.)

Dear Superintendent Nish:

The U.S. Department of Education, Office for Civil Rights, has completed its resolution process for the above-referenced complaint filed against Southwestern College. The Complainant alleged that the College discriminated against him on the basis of disability.¹

OCR opened the investigation under the authority of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and their implementing regulations. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. Title II prohibits discrimination on the basis of disability by certain public entities. The College receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

OCR gathered evidence through interviews and document review. Based on its assessment of this information, OCR concluded that the College did not discriminate against the Complainant on the basis of disability in the disciplinary process, but found that it did not respond adequately to his internal complaint of discrimination. In addition, OCR identified compliance concerns with respect to the College's discrimination complaint procedures. The specific issues investigated, applicable legal standards, factual summary, and basis for OCR's determination are summarized below.

The Complainant is a veteran, and first enrolled at the College in XXXXXX 2012. Disabled Student Services (DSS) forms refer to the Complainant's disabilities at various times as XXXXXXXXXXXXXXXX XXXXXX XXXXXXXX XXXXXX, XXXX XXXXXXXX, XXXX XXXXXXXXXXXX, XXXXXXXX XXXXXXXXXXXX, and XXXXXXXXXXXXXXXX XXXXXXXXXXXX. Accommodations requested by the Complainant and authorized by DSS included test-related accommodations, priority registration, preferential seating, and note-taking services. There were no documented requests from the Complainant for accommodations regarding his behavior or conduct on campus.

¹ OCR notified the College of the identity of the Complainant during the investigation. We are withholding his name from this letter to protect his privacy.

Committee). Following the hearing, the Grievance Committee submits findings and recommendations to the Dean, who renders a decision and notifies the student. The student then has the opportunity to appeal the decision to the College Superintendent/President.

On XXXX XX, 2012, a College staff member and a campus police officer each filed Misconduct Reports charging the Complainant with disruption/defiance concerning an incident that occurred in the XXXXXXXX. X---paragraph redacted---X.

The Dean notified the Complainant of the Misconduct Reports, and requested that he schedule a meeting with her. The Complainant acknowledged receiving this notice on XXXXXXXXXX XX, 2012, and scheduled a meeting with the Dean for XXXXXXXXXX XX. On XXXXXXXXXX XX, the Complainant sent an e-mail to Professor 1 about "suffering." The e-mail contained profanity, and the Complainant called Professor 1 an insulting name.

Professor 1 forwarded the Complainant's XXXXXXXXXX XX, 2012 e-mail to the Dean. He noted that the Complainant had been in his XXXXXX XXXX XXXXXXXXXXXX class, and that before this e-mail he had not heard from the Complainant since XXXXX XXXXXX. The Professor said that the Complainant appeared to be responding to his statements to the class that students needed to be willing to suffer a little when doing their homework, but that it is "good suffering" like training for a marathon.

Professor 1 also wrote that in XXXX 2012 the Complainant came to meet with him because he was upset about an examination score. The Professor stated that he attempted to discuss the examination with the Complainant, but he was unresponsive. Then, when the Professor said that they would need to discuss the matter later that day, the Complainant told him that he was not leaving. After the Professor insisted, he stated that the Complainant finally left angrily and appeared XX XXXXXX XX XXX XXXXXXXXXXXX XXXXXX X XXXXX at the Professor. The Professor also referenced the XXXXXXXX XX XXX XXXXX incident.

The Dean and the Complainant met on XXXXXXXXXX XX, 2012. The Complainant did not believe that it was inappropriate for him to XXXXX XX XXX XXXXX XXXXXXXX XX XXX XXXXXXXX, even after staff told him not to, because the XXXXXXX XXX XXX XXXXXXXXXXX, XX XXX XXX XX XXXXX XXXXX XXXXX, and he caused no harm by his actions. The Complainant also did not feel that his e-mail to Professor 1 had been inappropriate. He stated that he was just responding to the Professor's previous statements and that his e-mail expressed his opinion that there was no such thing as good suffering. The Dean clarified that the Complainant's refusal to follow staff directives was unacceptable, and that he should not send this type of unprofessional e-mail to any professor.

During this meeting, the Complainant indicated that he was under a lot of stress due to circumstances outside of school. The Dean informed him of the opportunity to meet with the XXXXXXX XXXXXXXXXXXX, and, after he indicated an interest in doing so, contacted the XXXXXXXXXXXX to set up a meeting. The Complainant thereafter met with the XXXXXXX XXXXXXXXXXXX who provided him with XXXXXXXXXX XX XXXXXXX XXXXXXXXXXX XXXXXXXXXXX XXX XXXXXXXX. The Complainant began XXXXXXX XXXX X XXXXXXXXXXX XXXX XXX XX XXXXX XXXXXXXXXXX, XXX XXXXXXXXXXX XXXX XXXXXXX XXXXXXX XX XXX XXXX XXX XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX XXXXXXXXXXX.

The Dean again met with the Complainant on XXXXXXX XX, 2012. The Complainant informed her that he was no longer XXXXXXXXXXX XXX XXXXXXX XXXXXXXXXXX. She indicated that this was his choice, but that maintaining appropriate behavior was not. The Dean noted that he needed to understand that his

behaviors of XXXXXXXX XX XXX XXXXX XXX XXXXX XXXXXXXX XX XXXXXXXX XXXXX were a concern for her. She recommended that the Complainant at least continue to XXX XX XXXXXXXX XXXXXXXXXXXXXXXX XX XXXXX XXXXXXXX XXXXXXXXXXXXXXXX XXXX XX XXXXXXXXXXXX XXXXXXXXXXXX, XXXXXXXXXXXX, etc.

The Complainant met with the XXXXXXXX XXXXXXXXXXXXXXXX again. The Dean was aware that the Complainant had XXXX XX XXXXXXXXXXXXXXXX XXXX XXX XXXXXXXXXXXXXXXX. She told OCR that, even though her investigation of the incident that occurred XX XXX XXXXXXXX was complete, she decided not to issue discipline at that time because she hoped that the Complainant would make progress behaviorally and that disciplinary action would not be necessary.

X---paragraph redacted---X.

On XXXXXXXX XX, 2012, the Complainant sent an e-mail to another XXXX professor, Professor 2. She did not understand what it meant, so she asked the Complainant about it. He explained that he had been XXXXXXXXXXXX XXXXXXXXXXXX XX XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXXXXXX, XXX XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX XXXXXXXX XXXX XX XXXX XX XXXXXXXXXXXX, and wanted to get her opinion about it. The Complainant told OCR that he wanted this professor's opinion on the matter because he felt that she was a believer in civil liberties.

On XXXXXXXX XX, 2012 during winter break the Complainant again e-mailed Professor 2 and two other XXXXXXXXXXXX professors asking "what really happens when you put two spiders in a jar?" Professor 2 again forwarded this e-mail to the Dean. The Dean told OCR that she was unclear about whether this was a further comment about the XXXXXXXX XXXXXXXX incident, or had to do with attention-seeking behavior or some other type of threat. Regardless, she noted that she had previously directed the Complainant not to send e-mails to professors that were unprofessional and that he was disregarding this directive. The Complainant told OCR that his intent to this e-mail was to again refer to the XXXXXXXX XXXXXXXX incident---that one spider had to win.

A campus police report dated XXXXXXXX X, 2013 indicated that the Complainant came to campus injured, bleeding, and crying. He asked to speak with the XXXXXXXX XXXXXXXXXXXXXXXX, who was unavailable. Campus police contacted emergency medical personnel, who advised that he go to the hospital for medical care. The Complainant did not wish to do so, and the police officer determined that he should be involuntarily transferred for treatment. The Dean wrote the Complainant on XXXXXXXX XX, requesting that he schedule an appointment to discuss this incident with her.

On XXXXXXXX XX, 2013, the Dean wrote to the Complainant to document his previous meetings with her on XXXXXXXXXXXX XX and XXXXXXXX XX, 2012. The Dean told OCR that she wrote the Complainant at this time because his behavioral problems had continued. The Dean indicated in her letter that her investigation had been completed. She described the following actions that were taken: XXXXXXXX XX XXX XXXXXXXX XXXXXXXXXXXXXXXX; XXXXXXXX XX XXXXXXXX XXXXXXXXXXXXXXXX; a directive not to send e-mails to faculty members that were not academically related and expressed the Complainant's personal frustration; and a directive to listen and follow instructions from College personnel. In addition, the letter stated that the Complainant would be placed on disciplinary probation for the remainder of his enrollment at the College. The Dean told OCR that the College's decision at that time had not yet taken into account the incident that occurred on XXXXXXXX X.

The Dean told OCR that she chose to impose disciplinary probation because of the incident XX XXX XXXXXXXX and the email to Professor 1. In choosing this type of disciplinary action she took into account the following: that the Complainant disregarded the rights of other students XX XXX XXXXXXXX and

disregarded the authority of College staff; that he did not acknowledge that his behavior XX XXX XXXXXXXX or his email to the professor was inappropriate; that she provided him with XXXXXXXXXXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XXXXXXXXXXXX but he decided not to take advantage of them on an ongoing basis; and that she had directed him not to send unprofessional e-mails to professors and he continued to do so.

The Dean stated that she felt the disciplinary action needed to be more substantial than a verbal warning, which she had already provided, or a written reprimand. Although she could have considered suspension at this point in time, she stated that she did not wish to impose a suspension because she understood that the Complainant was dealing with personal issues off campus, and that a suspension would also impact him financially XXX XX XXX XXXXXXXXXXXX XXXXXXXXXXXX. She stated that her goal was to provide support for the Complainant and allow him to continue his education as long as he was supported enough to adhere to the Conduct Standards. The Dean noted to OCR that in her discussions with the Complainant regarding the Misconduct Reports, he did not request any type of accommodation in terms of his behavior, and he did not indicate that the behavior resulting in the Misconduct Reports was due to a disability.

The Complainant told OCR that he believed that the Dean placed him on disciplinary probation because he did not comply with the College's request to see an XXXXXXXX XXXXXXXXXXXX XXX XX XXXXXXXXXXXX XXXXXXXX XXX XXXXXXXX XXXXXXXXXXXXXXXX. He felt that discipline was imposed because he did not want to participate in treatment for his XXXXXXXXXXXXXXXX condition.

On XXXXXXXX X, 2013, the Dean, the XXXXXXXX XXXXXXXXXXXXXXXX, and the Campus Police Chief met with the Complainant regarding the incident that took place on XXXXXXXX X, as well as the e-mail that he had sent to the XXXXXXXXXXXX professors about spiders. The Dean noted that the Complainant's action in coming onto campus impacted others, and reiterated that the email that he sent to faculty was inappropriate and could be viewed as a threat. Again, the Complainant did not request accommodations with respect to his behavior, nor did he assert that the behavior resulted from his XXXXXXXXXXXXXXXX condition.

The Complainant told OCR that the Police Chief questioned him during this meeting to see if he could extract anything that would be grounds for suspension or expulsion---he felt that they wanted him to self-incriminate by making comments about harming people or causing destruction. The Complainant stated that the XXXXXXXX XXXXXXXXXXXXXXXX said that they wanted to help him, and that he wanted the Complainant to consider XXXX XXXXXXXXXXXX XXXX XXX. However, the Complainant said he was clear that he was not going to go XXXXXXXX XXXXXXXXXXXXXXXX anymore, excused himself, and left the meeting.

By letter dated XXXXXXXX XX, 2013, the Complainant requested a hearing to lift his disciplinary probation. He stated in the letter that he had never violated the discipline code cited as the basis for his probation, and that no evidence had been presented to him that would justify the charges or the sanction.

The disciplinary hearing was held on XXXXXXXX XX, 2013. The Grievance Committee included a professor who was the Chair, a student representative, a classified employee representative, another faculty representative, and an administrator. The Dean was an ex officio member. The Grievance Committee was provided with copies of all of the documentation developed thus far, including the Student Misconduct Reports, Police Reports, correspondence from the Dean, and emails from Complainant and XXXXXXXXXXXX professors. Witnesses included filers of the Misconduct Reports, as well as Professor 1.

The Chair confirmed to OCR that students are allowed within the disciplinary process to raise mitigating factors that may have had an impact on their behavior. He stated that the process allows them to provide documentation to the Dean which can later be included in the packet to the Grievance Committee. In addition, the student can make an opening statement, can question and present information through witnesses, and can make concluding remarks. Although he was offered the opportunity to do so, the Complainant did not submit additional documentation or witnesses. He was allowed to question witnesses at the hearing, and did make opening and closing statements to the Grievance Committee.

X---paragraph redacted---X.

X---paragraph redacted---X.

X---paragraph redacted---X.

The Complainant told the Committee that he did not understand why he was placed on probation in the first place, and that he felt it was just an act of fear by campus staff because of his XXXXXXXXXXXXXXX XXXXXXXX.

X---paragraph redacted---X.

Professor 1 spoke about the incident involving the Complainant meeting with him regarding an examination score, as well as the e-mail that he received from the complainant about "suffering." The Complainant responded that he had been going through a lot of stress, and that he made the statements about the professor in the e-mail because he did not agree with the professor's views on suffering. In response to questions from the Committee, he said that he had the right to express himself to professors in any way that he felt was effective, and that his e-mail was appropriate, was not offensive, and was not criminal. He stated that he was free to exercise his First Amendment rights and to emphasize things to the degree of the emotional state that he was in. The Complainant also confirmed his belief that he was free to call a professor any name he desired as long as it was between just the two of them, and not in the presence of anyone else.

X---paragraph redacted---X.

The responding officer testified about the incident on XXXXXXXX X, 2013 when the Complainant came to campus injured. A Committee member then asked the Complainant a series of questions about his explanations regarding his pattern of behavior, and whether he believed there was any validity to any of the charges against him. The Complainant agreed that perhaps his behavior was not within the norm, but he felt like he was driven to make these decisions because of the rigidity and structure of the XXXXXXXXXXXXXXX department which often led to his frustration. He did not believe that he had broken any rules.

X---paragraph redacted---X.

X---paragraph redacted---X.

In his closing remarks, the Complainant stated that faculty intentionally placed pressure on students through fear and aggression to increase their performance, and that he did the things that he did to use

the same mechanisms and "give them a taste of their own medicine." XX XXXXXX XXXX XXX XXXXXXXX
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XXXXXXXX XX XXXXXXXXXXXX XXX XXXX XX XXXXXXXXXXXX XXXXX XX XXX XXXX XXXXXXXXXXXX, but that was not why he
was going to school. The Complainant stated that his purpose in attending college was to become
someone of status and prestige who could contribute to scientific discoveries that would better
everyone. He stated that after everything he had been through he had no concern for his own life and
no fear of death but he did want to live his life as best as he could, according to his own terms.

The Grievance Committee reviewed each of the incidents discussed at the hearing, along with the
Complainant's remarks, particularly during his closing statement. Due to the complexity of the situation
and potential campus safety concerns, the Committee did not feel qualified to make a disciplinary
recommendation and decided to refer the matter to College Administration for further review and
determination of the appropriate course of action. Pending that review, the Committee recommended
that the Complainant be suspended.

Various administrators then conferred, reviewed all of the evidence, and reached a final determination
not to suspend the Complainant, but to add several conditions to his existing disciplinary probation. By
letter dated XXXXXXXX XX, 2013, the Dean informed the Complainant of the hearing decision and
related discipline. She noted that the Committee found that the Student Misconduct Reports were
justified, the original sanctions imposed were upheld, and additional conditions were imposed due to
statements the Complainant made during the course of the hearing.

By letter dated XXXXX X, 2013 to the Complainant, the Dean listed the specific conditions of probation.
The conditions were that the Complainant: X---paragraph redacted---X.

The Dean told OCR that additional conditions were created out of concern regarding statements the
Complainant had made at the hearing, in light of his previous pattern of behavior. She told OCR that the
College did take mitigating factors into account in reaching the disciplinary decision, and that is why she
decided on a sanction of probation with conditions versus suspension. She felt that she tried to find the
best solution to preserve campus safety and to take into account the Complainant's circumstances and
allow him to continue his education.

X---paragraph redacted---X.

The Complainant appealed the disciplinary decision by letter dated XXXXX X, 2013, and the
Superintendent/President issued a decision rejecting his appeal on XXXXX XX. The Complainant has not
provided the College with information confirming that he has adhered to the disciplinary probation
conditions, and he therefore has not been allowed to reenroll.

OCR reviewed information regarding other College students subjected to formal disciplinary action for
misconduct during the 2011-12 and 2012-13 academic years. The information showed that factors
consistently considered in assigning various levels of discipline included the nature of the misconduct,
whether the student recognized that the misconduct was unacceptable, and whether the misconduct
involved a one-time incident versus a pattern of behavior.

There was only one example of a student who was charged under the same Conduct Standards provision
as the Complainant, disruption/defiance, and whose behavior was somewhat comparable. This student
was repeatedly disruptive in his efforts to dispute a grade, and failed to adhere to several College

directives not to communicate repeatedly with specified offices regarding the grade dispute after a final decision had been reached. Although this student's behavior was not as serious as that demonstrated by the Complainant over time, this student received a more serious sanction of XXXXXXXXXXX XXX XXX XXXXX, with his reenrollment conditioned on XXXXXXXXXXX X XXXXXXXXXXXXXXX XXXXXXXXXXX and XXXXXXXXXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX. He was also placed on disciplinary probation if he was to reenroll. This student was not a disabled individual.

Based on the preponderance of the evidence summarized above, OCR concludes that the College did not discriminate against the Complainant on the basis of disability when it placed him on permanent disciplinary probation and later imposed conditions on his continued enrollment under probation. In reaching this determination OCR considered whether the College failed to follow established disciplinary procedures or practices; whether the Complainant's inability to comply with the Conduct Code resulted from the College's failure to provide him with requested reasonable accommodations; whether the Complainant was treated differently than similarly situated nondisabled students or there was other evidence of intentional discrimination; or whether the College considered mitigating factors in the disciplinary process for nondisabled students and failed to do so for the Complainant's disability.

The facts gathered during the investigation showed that the College followed its established disciplinary procedures and practices with respect to the Complainant's behavior. His behavior over time fell squarely within a category of prohibited conduct under the published Conduct Code, and Misconduct Reports were filed by College personnel. The Dean responded by notifying the Complainant of the charges against him, gathering information from him and other witnesses, attempting to resolve the matter informally, and providing him with written notice of the disciplinary decision. Consistent with the Conduct Code, the College also provided the Complainant with the opportunity to challenge the initial disciplinary decision through a hearing, and to challenge the hearing decision through an appeal to the Superintendent/President.

In addition, OCR found no evidence that the behavior that precipitated the initial assignment of disciplinary probation and the later addition of enrollment conditions resulted from a failure on the College's part to provide the Complainant with reasonable accommodations. The Complainant never requested any accommodations related to his conduct. In addition, he did not allege that the College failed to provide him with his approved academic accommodations or that such a failure caused the behavior that led to his discipline.

With respect to the initial Misconduct Report, the facts show that the Dean met with the Complainant and attempted to foster an understanding that his actions were inappropriate and allow him the opportunity to make behavioral progress outside of the formal disciplinary system through XXXXXXXXXXX XX XXX XXXXXXX XXXXXXXXXXXXXXX XXX XXXXXXX XXXXXXXXXXX. Initially, the Dean did not assign any disciplinary consequences despite the fact that the Complainant continued to deny that his actions were inappropriate. This decision was inconsistent with a discriminatory purpose. Only after the Complainant continued to send inappropriate e-mails to faculty members did the Dean ultimately assign disciplinary probation as a consequence. Student acknowledgement of the misconduct and the number of behavioral incidents that occurred were considerations evident in the Dean's disciplinary practices with nondisabled students also.

The evidence also did not support the Complainant's assertion that the disciplinary probation was imposed solely because he did not agree to XXXXXXXXXXX XXXXXXXXXXX XXXXXXX XXX XXXXXXX XXXXXXXXXXX XXXXXXX XX XXX XXX XXXXXXX XXXXXXXXXXXXXXX. When the Complainant met with the Dean and

informed her that he would not continue to XXX XXX XXXXXXXX XXXXXXXX, the Dean responded that this was his choice but that continued misconduct would not be acceptable. In addition, the Dean did not assign the probation for more than two months after this meeting. She was also not aware at the time that he had XXXXXXXX XXXXXXXX XXXX XXX XXXXXXXX XXXXXXXXXXXXXXX, and she only imposed disciplinary probation after the Complainant continued to send inappropriate e-mails to faculty members.

OCR also concluded that the Dean's subsequent addition of enrollment conditions to the Complainant's disciplinary sanction after the hearing was supported by legitimate, nondiscriminatory reasons. The evidence indicates that the Grievance Committee was seriously concerned about the Complainant's pattern of behavior, particularly in light of the testimony presented at the hearing by witnesses and the Complainant's own statements which included XXXXXXXXXXXX XX XXXXXXXXXXXX XXXX XXXXXXXX XXXXXXXXXXXXXXX, XXXXX XXXXXXXX XX XXXX XXXX, and XXXXXXXX XX XXXX XX XXXXXX. In addition, the Complainant reiterated at the hearing that he continued to feel that his behavior was acceptable and that he felt that he could express himself to faculty members in any way he saw fit. Due to the complexities of the situation, the Committee did not act on its own but recommended that the Complainant be suspended pending College administration review of the record and decision on the sanction.

Following administrative review, the Dean ultimately decided on a lighter sanction---continued probation with conditions---instead of the recommended suspension proposed by the Grievance Committee. Again, this action was not consistent with a discriminatory intent. In addition, OCR identified a similarly situated nondisabled student who received a XXXXXXXXXXXX rather than probation for misconduct that was not as serious as the Complainant's. Although some of the enrollment conditions imposed on the Complainant---a XXXXXXXXXXXXXXXX XXXXXXXXXXXX XXX XXXXXXXXXXXX XX XXXXXXXXXXXXXXX XXXXXXXXXXXX---might have been perceived to be related to the nature his disability, the evidence did not indicate that these conditions were imposed based solely on stereotypes without a finding that misconduct occurred. In fact, similar conditions were also imposed on the nondisabled student.

Finally, OCR found that students in the disciplinary process are allowed to present mitigating factors for the Dean's and the Committee's consideration. The Complainant was accorded this same opportunity through his meetings with the Dean and through his statements to the Committee. However, he did not assert either before or during the hearing that his conduct or statements were a manifestation of his disability and that because of this he was unable to adhere to the Conduct Code.² Instead, the Complainant continued to maintain that his conduct and statements were acceptable and that there was no legitimate basis to charge him under the Conduct Code. That position, however, was not supported by the evidence.

For the reasons outlined above, OCR determined that the College is in compliance with Section 504 and Title II standards with respect to this issue.

Issue II: Whether the College failed to respond adequately to the Complainant's internal complaint alleging that he had been discriminated against based on disability.

² Even if he had made such assertions, the College is allowed to establish rules to maintain a safe and orderly environment and may discipline a student even if the misconduct resulted from a disability as long as it violated an essential conduct code provision.

The Section 504 regulations, at 34 C.F.R. §104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR examines a number of factors in evaluating whether a recipient/public entity's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Under Section 504, Title II, and the regulations, if a student alleges to the college that s/he has been discriminated against based on disability, the college is responsible for determining what occurred and responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough and effective. What constitutes a reasonable response may differ depending upon circumstances. However, in all cases the college must conduct a prompt, thorough and impartial inquiry designed to reliably determine what occurred. If discrimination is found, the college should take reasonable, timely, age-appropriate, and effective corrective action.

The College District's discrimination complaint procedure is Procedure No. 3430, Prohibition of Harassment and Discrimination, which is provided to all new employees and is posted in campus Outlook Public folders and on the College website. The Vice President of Human Resources (VP/HR) receives and coordinates the investigation of complaints of discrimination/harassment, and may appoint other staff or outside organizations to conduct the investigation. The Procedure provides that complaints can be filed only by one who has personally suffered unlawful discrimination, or by one who has learned of such discrimination in his or her official capacity as a faculty member or administrator. It also provides that the complaint must be submitted on the chancellor's office form. However, the VP/HR told OCR that in practice they will accept complaints not presented on the form. The Procedure provides that after a complaint has been filed, the College will determine whether it is properly filed and/or "whether an investigation is required." If the College finds the complaint to be defective, it shall notify the complainant and specify in what requirement the complaint is defective.

Procedure 3430 provides for an optional informal resolution step, as well as an investigation. The investigation includes interviews with the complainant, the accused, and any other persons who may have relevant knowledge concerning the complaint. The investigator is to document the results in a written investigative report, which includes a description of the circumstances giving rise to the complaint, a summary of the testimony of each witness, an analysis of any relevant data or other evidence collected, a specific finding as to whether there is probable cause to believe that discrimination did or did not occur with respect to each allegation, and any other appropriate information.

Within 90 days from receipt of the complaint, the investigation is completed and the VP/HR issues an administrative determination. The complainant receives a copy or summary of the investigative report; a description of action taken, if any, to prevent similar problems from occurring in the future; the proposed resolution of the complaint; and notice of the right to appeal to the Board. Reports to the

complainant are to be prepared so as not to violate any applicable privacy rights of the accused. The complainant can appeal to the Board within 15 days of the administrative determination. The Board then has 45 days to issue its decision, and notice is provided to the complainant.

If the final decision under Procedure 3430 concludes that harassment, discrimination, and/or retaliation occurred, it provides that the District will take disciplinary action against the accused and any other remedial action that it determines to be appropriate. The action will be prompt, effective, and commensurate with the severity of the offense. If discipline is imposed, the nature of the discipline will not be communicated to the complainant. Procedure 3430 also provides that the District will take reasonable steps to prevent the complainant from further harassment/discrimination, and to protect the complainant and witnesses from retaliation.

On XXX X, 2013 the Complainant filed an unlawful discrimination complaint with the VP/HR. The Complainant stated in his complaint that in XXXXXX 2012 he was sent to speak with the Dean re: X--- paragraph redacted---X.

X---paragraph redacted---X.

The Complainant alleged that he was placed on disciplinary probation just for XXXXXXXXXXXX XXXXXXXXXXXX XX XXX XXXXXX XXXXXXXXXXXX. He also said that he was retaliated against for refusing to submit to the demands of campus authorities and has been denied the right to enroll in classes. The Complainant alleged that the College was denying his right to continue his education solely because he XXX X XXXXXXX XXXXXXXXXXXX, and because of the fear that this projects to campus staff and authorities.

VP/HR sent an email to various College personnel on XXX X, 2013, stating that she received a discrimination complaint from the Complainant, but that it was impossible to determine whether his complaint as written merited an investigation. She wanted to review all records from the various offices involved so that she could make a determination regarding whether the complaint was defective.

By letter dated XXX XX, 2013, the VP/HR acknowledged receipt of the Complainant's complaint. She stated that the District took all complaints of discrimination seriously, but his complaint, on its own, did not provide sufficient information to determine whether there was a factual basis to suggest that discrimination may have occurred. The VP/HR noted that she was reviewing documents provided by the Office of Student Affairs in an attempt to fill in the information gaps and spoke with the Complainant and offered to review any additional information he wished to submit.

The Complainant told OCR that the VP/HR told him that if he wanted to submit more evidence he could, but that it was not necessary. He stated that he asked her what else she specifically needed to begin an investigation, and she replied that he did not have to do anything else. The Complainant said that she did not give him details about what was missing, or what more she needed to initiate an investigation.

The VP/HR provided OCR with a document developed by the Chancellor's Office entitled Guidelines for Processing Formal Title 5 Unlawful Discrimination Complaints. The Guidelines state that a complaint should be returned for more information for various reasons, including the following: the complaint does not provide enough information for the district to understand what the complainant believes is discriminatory and who was involved in the alleged discrimination; and the complainant fails to explain why s/he believes the alleged discrimination was based on a protected category. The Guidelines state that the complaint need not be investigated if the complainant fails, even after the district requests

further information, to explain why s/he believes that discrimination occurred. The Guidelines state that the “question is whether the facts alleged by the complainant, assuming they were to be proved true, would tend to suggest that discrimination might have occurred. If not, the complaint should be dismissed for failing to state a prima facie case.”

The VP/HR told OCR that a complaint needs to include enough specificity to allow the College to investigate something. If there isn't, she lets the complainant know that the complaint is defective and requests additional information. If, after receiving further information, she still can't identify a claim of discrimination, she will not accept the complaint for investigation and will advise the complainant of his/her right to file with OCR.

The VP/HR told OCR that she needs an actual complainant, a named alleged discriminator, and reference to some kind of incident or examples of discrimination. The VP/HR stated that she generally sends complainants a letter, listing what information she needs from them to continue with an investigation. In the complainant's case, what he wrote did not suggest a factual basis for discrimination to her but she felt a duty to look at the existing documentation. She did not require the Complainant to provide her with the specific information, because she felt that she had already unsuccessfully attempted to clarify his complaint with him several times when he came by her office to inquire about the status of his complaint. The VP/HR stated that during these meetings the Complainant did not talk about his disability or why he believed he had been discriminated against. In his case, she felt like she needed to look at what documents existed and see what was there.

The VP/HR wrote to the Complainant on XXX XX, 2013, stating that she had reviewed his complaint documents, documents provided by the Office of Student Services, and had listened to the recording of the hearing. She again stated that the complaint, on its own, did not provide sufficient information for the District to determine whether there was a factual basis to suggest that discrimination may have occurred. Based on her review of available materials, the VP/HR did not find any evidence to suggest that discrimination occurred on the basis XX XXXXXX disability re: the disciplinary probation imposed. She re-advised him to meet with the Dean.

The VP/HR explained to OCR that in this instance she did not do a full investigation but she did do more of a preliminary investigation than she generally would have done to decide whether a full investigation was warranted. Here, she did more partially because it was a student complaining, and partially because she just didn't understand what the Complainant's claim was. She basically conducted a partial investigation by reviewing all of the documentation, but did not conduct interviews because there was no evidence to suggest to her that discrimination had occurred.

OCR asked about the portion of the complaint that alleged that the Complainant had been placed on probation with restrictions for exhibiting XXXXXXXX XX XXX XXXXXX XXXXXXXX, and that the College was denying his right to continue his education solely because he XXX X XXXXXXXX XXXXXXXX. The VP/HR stated that the evidence she reviewed showed that the Complainant was not placed on probation, later with conditions, just for XXXXXXXXXXXX XXXXXXXX. The evidence, in her view, showed that he was placed on probation for refusing to mitigate his behavior or take any responsibility for himself.

OCR determined that, as written, Procedure 3430 met many of the basic requirements for a prompt and equitable grievance procedure under Section 504 and Title II. The Procedure provides for publication, application to complaints alleging discrimination by various individuals, a reliable and impartial investigation of complaints, reasonably prompt time frames, notice of the outcome of the complaint,

and an assurance that steps will be taken to prevent recurrence of discrimination and to correct its effects.

However, Procedure 3430 contains three elements that do not meet the Section 504/Title II regulations' requirement that procedures be equitable. First, the Procedure provides that complaints may be filed only by "someone who alleges that he or she has personally suffered unlawful harassment or discrimination, or by someone who has learned of such unlawful harassment or discrimination in his or her official capacity as a District employee." The regulations, at 34 C.F.R. §104.7(b) and 28 C.F.R. §35.107(b), require grievance procedures that provide for the resolution of complaints alleging any action that would be prohibited by the Section 504 or Title II regulations. The current definition of "complainant" in the Procedures unduly limits the ability of individuals who do not fall within these two categories to file complaints of discrimination on behalf of other persons or a class of persons.

In addition, Procedure 3430 states that a complaint must be filed on a particular form prescribed by the Chancellor's Office in order to trigger a formal investigation. This requirement, if enforced, could unduly limit the ability of students and other individuals to file complaints of discrimination. For example, students with certain disabilities may be unable to complete the form unless the College offers assistance. Although the VP/HR told OCR that, in practice, the College does not reject complaints that are not presented on the specified form, potential complainants are not informed of this flexibility because the form requirement appears in the written Procedure.

Finally, Procedure 3430 provides that if discrimination, harassment, and/or retaliation is found and discipline is imposed, the nature of the discipline will never be communicated to the complainant. As noted above, under Section 504 and Title II, the College has an obligation to provide notice to the complainant of the outcome of a discrimination complaint, including any corrective action that was taken if it concluded that discrimination occurred. The College may be required to disclose the nature of disciplinary action taken against an individual who engages in discrimination, notwithstanding considerations of confidentiality, where the sanctions relate directly to the complainant, such as a stay away order. Such information is particularly important in harassment cases because it affects whether a hostile environment has been eliminated. The notice should be adequate to enable a complainant to determine whether the College's actions were sufficient to resolve the complaint.

OCR further concluded that the College failed to respond adequately to the Complainant's internal complaint alleging that he had been discriminated against based on disability. The VP/HR, in responding to the internal complaint, concluded that it did not provide sufficient information to determine whether there was a factual basis to suggest that discrimination may have occurred. While it is acceptable for the College to require a complainant to provide basic facts describing alleged discriminatory treatment, the Guidelines should not be applied in such a way that results in complainants being required to prove their case, as a practical matter, in the written complaint.

Here, the written complaint specifically alleged that the Complainant was placed on disciplinary probation for XXXXXXXXXXXX XXXXXXXXXXX XX XXX XXXXXX XXXXXXXXXXX and XXX XXXXXXXXXXX XX XXXXXXXXXXX XXXXXXXXXXX. He further alleged that the College was denying his right to continue his education solely because he XXX X XXXXXX XXXXXXXXXXX, and because of the fear that this projected to campus staff and authorities. These allegations describe a sufficient factual basis to trigger an investigation. The Complainant named the alleged target of the discrimination (himself), identified the discriminatory action (discipline), and alleged that this action was motivated by his disabling condition rather than legitimate disciplinary concerns.

In addition, while the VP/HR informed the Complainant that she did not feel that his written complaint provided sufficient information to trigger an investigation and offered to review any additional information he submitted, she did not identify what specific information was missing or unclear. Again, the College may implement reasonable requirements with respect to the type of basic information necessary to trigger a complaint investigation, but if it declares a complaint defective on this basis it should notify the complainant of its reasoning with enough specificity so that the complainant can attempt to respond to its concern.

OCR acknowledges that the VP/HR did not declare the complaint to be defective and conduct no investigation at all. In fact, she conducted a partial investigation by reviewing extensive documentation and concluded that there was insufficient evidence that disability discrimination occurred. There may be instances in which it is appropriate for the College to reach a conclusion based solely on document review, particularly if the record is as lengthy and detailed as it was in this instance. However, one of the basic requirements for a complaint procedure under Section 504 and Title II is notice to the parties of the outcome of the complaint. Although Procedure 3430 provides that the investigator is to document the results in a written investigative report, including a description of the circumstances giving rise to the complaint, an analysis of any relevant data or other evidence collected, and a specific finding as to whether there is probable cause to believe that discrimination did or did not occur with respect to each allegation, that did not occur in this case. If a partial investigation is deemed by the College to reach a sound conclusion with respect to a discrimination complaint, the factual basis for that conclusion and related analysis should be clearly communicated to a complainant.

For the reasons outlined above, OCR concludes that the College did not comply with Section 504 and Title II standards with respect to BP 3430, as written, and with respect to its response to the Complainant's internal complaint.

In summary, OCR concluded that the College did not discriminate against the Complainant on the basis of disability in the disciplinary process, but found that it did not respond adequately to his internal complaint of discrimination. In addition, OCR identified compliance concerns with respect to the College's discrimination complaint procedures. The College agreed to address the outstanding compliance concerns through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the College to modify Procedure No. 3430 in various ways, to distribute the modified Procedure, and to conduct training and/or issue written guidance to personnel responsible for implementing the Procedures. OCR did not require the College to take any further action with respect to the Complainant's individual complaint, in that OCR fully investigated the same allegations and determined that discrimination did not occur.

Based on the commitments made in the Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter. OCR will monitor the College's implementation of the Resolution Agreement. 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. OCR is informing the Complainant of the complaint resolution by concurrent letter. The Complainant may file a private suit in Federal court whether or not OCR finds a violation.

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 with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request we will seek to protect, to the extent provided by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR appreciates the courtesy and cooperation extended by you and your staff, especially XXXXX XXXXXXXX, Human Resources Compliance Coordinator, during the complaint resolution process. If you have any questions, please contact Julie Baenziger at (415) 486-5502, or me at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Cc: XXXXX XXXXXXXX
Human Resources Compliance Coordinator