



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

July 18, 2014

Patricia Hsieh
President
San Diego Miramar College
10440 Black Mountain Road
San Diego, California 92126

(In reply, please refer to case no. 09-13-2400.)

Dear President Hsieh:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against San Diego Miramar College (College). The Complainant alleged that the College discriminated against her on the basis of disability.¹ OCR investigated whether the College responded appropriately to that portion of the Complainant's complaint of disability discrimination alleging that a professor made derogatory comments about her disability in his class.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended, and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The College receives Department funds, is a public education system, and is subject to the requirements of Section 504, Title II, and the regulations.

OCR gathered evidence through interviews with the Complainant and College staff and administrators. OCR also reviewed documents submitted by the College and the Complainant. Based on the information collected, OCR found that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II with respect to the College's response to the Complainant's complaint of disability discrimination, which the College agreed to address through a Resolution Agreement.² The facts gathered during the investigation, the applicable legal standards, and the reasons for our determinations are summarized below.

¹ OCR notified the College of the identity of the Complainant when the investigation began, and we are withholding her name from this letter to protect personal privacy.

² In the attached Resolution Agreement, the College agreed to investigate, or to complete an investigation of, the individual allegation of disability discrimination raised by the Complainant in this case. Related modifications to the College's discrimination grievance procedure are being addressed at the Community College District level through a separate Resolution Agreement being negotiated in coordination with OCR case no. 09-12-2017.

The regulations implementing Section 504, at 34 C.F.R. §104.4(a) and (b), prohibit discrimination based on disability by recipients of Federal financial assistance. The Title II regulations, at 28 C.F.R. §35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Public colleges and universities are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Colleges and universities provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the college or university is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the college or university 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 to harassment will differ depending upon circumstances. However, in all cases the response must be tailored to stop the harassment, eliminate the hostile environment if one has been created, and address the problems experienced by the student who was harassed. The college or university must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate.

In addition, the Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. 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's investigation showed the following:

- The Complainant, a returning student, was enrolled in the College's Medical Lab Tech Training program, as part of her Vocational Rehabilitation program, and took two Spring semester 2013 classes that started January XX, 2013. She began the semester under difficult circumstances, including losing her prescription eyeglasses, recovering from surgery, and not having books for the first day. She also failed to attend her first scheduled appointment with a Disability Support Programs & Services (DSPS) Counselor on January XX, 2013 to update and to discuss her

accommodations. As a result, she began attending classes for the Spring semester 2013 without DSPS-approved accommodations.

- The Complainant's reported disabling conditions include XXXXXXXX XXXXX XXXXXXXXXXXX and XXXXXXXX XXXXXX. Prior to the Spring semester 2013, the Complainant had been approved by DSPS to receive accommodations including a note taker, recorder, preferential seating, enlarged font e.g., 18 point for class handouts and tests, and test taking accommodations. After the Complainant made an unscheduled visit to the DSPS office on February X, 2013, she was given a February XX, 2013 appointment with a DSPS Counselor and was thereafter approved to receive accommodations.
- OCR established that a professor of one of the Complainant's classes (the Professor) was aware that the Complainant was a student with a disability in early February, 2013 because the Complainant had approached the Professor shortly after classes began with an outdated DSPS accommodations letter. The DSPS Coordinator also contacted the Professor in early February, 2013, to inform the Professor that the Complainant would be providing him with an updated letter for accommodations after the Complainant met on February XX, 2013 with a DSPS Counselor.
- The Complainant stated to OCR that in early February, 2013, the Professor asked her in the classroom, in front of other students, questions such as "Can't you read?" and "How large does the font have to be for you to see?" She also alleged that other students in the class then made fun of her, laughed at her, and were later reluctant to work with her in class.
- On February XX, 2013, the Complainant met with and complained to the College's Site Compliance Officer (SCO) about the Professor. That day, the College SCO completed a College Complaint Intake form, describing the Complainant's concerns as discrimination due to primary disability, and she included on the form details about the Professor's alleged comments in class, students laughing at her and making fun of her, and students being reluctant to work with her in class. The Complaint Intake form also noted that the Complainant reported that she felt that the Professor had treated her disrespectfully when he told her that accommodations did not have to be provided until authorized by DSPS. The Complaint Intake form also mentioned the Complainant's concerns regarding another professor's response to her requested accommodations.³ The SCO also wrote on the form that the resolution desired by the Complainant was to receive accommodations per DSPS authorization, to take proctored tests, and to do "practicals" with faculty.

³ Although she raised more than one concern with the College, OCR determined that the Complainant raised one timely allegation of discrimination in her complaint to OCR, and notified the Complainant and the College that its investigation that would focus only on the College's response to her allegation concerning the Professor's comments about her eyesight in class.

- The SCO stated to OCR that she explained the College's complaint resolution process to the Complainant on February XX, 2013, told the Complainant she could file a formal complaint, and gave the Complainant a College form that described the difference between informal and formal resolution, after which the Complainant chose informal resolution. The Complainant acknowledged that she was informed of her options and chose to pursue the matter with the SCO through the Informal Complaint Process. The SCO reported that she informed the Complainant that she would meet with the faculty members and with DSPS to help bring resolution to the situation and then would schedule a meeting with the Complainant to summarize the process. The SCO stated to OCR that she believed the Complainant's primary concern was for her request for accommodations to be met.
- The SCO told OCR that she used the College District's discrimination complaint procedure, AP 3435, which includes an Informal Complaint Process, in response to Complainant's complaint. She stated that, as an SCO, she only takes steps to bring resolution to two parties that does not involve a full investigation, but instead includes interviews to try to resolve conflict on an informal level.
- AP 3435 provides that the SCO will undertake efforts to informally resolve any charges including, but not limited to: investigating the allegations; resolving the conflict among the parties; rearrangement of work/academic schedules; obtaining apologies; providing informal counseling and/or training; etc. It further provides that where complainants opt for informal resolution, the SCO will determine whether investigation is necessary to ensure resolution of the matter.
- After February XX, 2013, the SCO met several times with each of Complainant's instructors, including the Professor, as well as with DSPS staff. These meetings focused on how to ensure that the Complainant's accommodations would be provided following appropriate policies and procedures. According to the SCO, she could not recall whether she asked the Professor about his alleged comments about the Complainant's eyesight. If she asked him, she stated that she did not recall his reply.
- Prior to February XX, 2013 and after, the Complainant had several meetings with staff from the College DSPS, a College Dean, and the Chair of her program. Generally, the College focused the topic of these meetings on the Complainant's accommodations, and staff undertook efforts to ensure the Complainant would receive accommodations despite the Complainant's failure to follow the College's DSPS procedures. None of these meetings, however, addressed the Complainant's allegation regarding the Professor's comments in class.
- On March XX, 2013, the SCO emailed the Professor and two of Complainant's other professors and included comments to address the issue of the Complainant's accommodations, and also to instruct the professors to ensure that the classroom environment be conducive to learning and free from discrimination for all students. She stated to OCR that she intended the instruction to the professors regarding the

classroom environment to address the Complainant's allegation that students in the Professor's class made fun of, and laughed at, her. The email did not specifically address the Professor's alleged comments to the Complainant, however, nor did it mention the prohibition against harassment of students by professors.

- The SCO stated to OCR that she did not investigate the Professor's alleged comments in any way, and could not recall if she asked the Professor about the alleged comments or, if she did, what his response was. She also stated that she was not aware of any other College employee with complaint resolution responsibilities who investigated the Professor's alleged comments. The SCO also did not talk to any students in the class about the alleged comments, or whether the students in the class changed the manner in which they interacted with the Complainant. The SCO's informal resolution efforts did not include action to address this specific allegation.
- The SCO told OCR that for other complaints she has resolved by using the Informal Resolution Process, she met face-to-face with the complainants at the end of the process. She stated that the Complainant stopped by her office in early March, 2013 to inquire about her accommodations, and that the Complainant agreed to meet with the SCO on April X, 2013 for a summary about the SCO's informal resolution activities. The Complainant disputed that she was offered a meeting with the SCO on April X, 2013.
- The College Vice President of Student Services (VPSS), who supervises the SCO, stated to OCR that he met with the Complainant between early February, and March XX, 2013, and that during this meeting, the Complainant told him about the Professor making comments in class about her ability to read, and the way it made her feel that other students in the class thereafter did not want to work with her. The VPSS stated that he never saw a copy of the Complainant's February XX, 2013 complaint she filed with the SCO. The VPSS told OCR that he did not look into or attempt to resolve the Complainant's concerns about the Professor's alleged comments because he believed that the SCO or another administrator had already done so.
- The VPSS stated to OCR that he met with the Complainant again on March XX, 2013, and during this meeting he and the Complainant drafted an "Intervention and Corrective Action Plan" (Plan) for the Complainant. The Plan generally described the Complainant's lack of success in current courses and her need for guidance and direction. The Plan's list of the Complainant's concerns did not include the Professor's alleged comments. While the VPSS stated to OCR that the Complainant did not raise her concerns about the Professor's comments to him at the March XX, 2013 meeting, the Complainant stated to OCR that she did raise the Professor's comments with the VPSS during this meeting.
- At the March XX, 2013 meeting, the Complainant accepted the College's offer made by the VPSS to "late drop" her two classes, even though the deadline to late drop

had passed. The Plan also provided that the VPSS would work with other administrators to review other (unspecified) concerns voiced by the Complainant and he would provide the Complainant with an update on or before April X, 2013.

- While the Complainant signed the Plan, which stated that it resolves her concerns and issues, she stated to OCR that the only issue she considered resolved was the issue of getting a late drop for her two classes, but not the issue of the Professor's alleged comments.
- The SCO stated to OCR that after she returned to the College following a brief absence, the VPSS informed her orally that the situation with the Complainant was resolved and that the Complainant would probably no longer attend the April X, 2013 meeting scheduled with the SCO. The SCO stated that she asked no questions of the VPSS about how the Complainant's situation was resolved, or whether the VPSS had investigated and/or resolved the issue of the Professor's comments. She considered the matter closed. The Complainant did not come to the April X meeting, and the SCO had no further communication with the Complainant. As noted above, the Complainant indicated to OCR that she had no meeting scheduled with the SCO on April X.
- The Complainant told OCR that no one from the College ever notified her that they took any steps to investigate, determine what occurred, or informally resolve her allegation about the Professor's comments.

The College has a responsibility under Section 504 and Title II to respond to complaints of disability discrimination, including allegations of disability harassment by College employees, by determining what occurred and responding appropriately. As noted above, OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt, thorough, and effective. As a part of its response, the College may offer a complainant the option of resolving an allegation of disability harassment through an informal process, as long as the informal process is voluntary and the complainant is notified of the right to pursue a formal process at any time. However, if a complainant chooses the informal process the College must ensure that each allegation of harassment is actually addressed through that process. In addition, the College must notify the complainant of the outcome of the informal process in order for the complainant to make an informed decision about whether the allegation has been resolved, or, if not, whether to then exercise his or her right to pursue a formal complaint process.

The preponderance of the evidence gathered during the OCR investigation supports a conclusion that the Complainant raised an allegation of disability discrimination regarding the comments she claimed the Professor made about her disability in class and the College failed to determine what occurred and respond appropriately. When the Complainant filed a February XX, 2013 complaint with the SCO about accommodation issues and the Professor's alleged comments, the SCO specifically informed the Complainant of the informal versus formal complaint processing options,

and confirmed that the Complainant voluntarily chose to pursue the informal process. Thereafter, the SCO and the VPSS took a number of prompt steps in response to the accommodation allegation, including meeting with professors, DSPS, administrators, and the Complainant, issuing written guidance to the professors, and allowing her to “late drop” her classes. However, the SCO’s and the VPSS’s informal resolution efforts did not include any action to examine, address, or resolve the Complainant’s allegation regarding the Professor’s comments. In addition, although the SCO had a general practice of meeting with complainants at the conclusion of an Informal Complaint Process to inform them of the outcome, that did not occur in this instance. The Complainant never received notice from the College of the outcome of its Informal Complaint Process with respect to this specific allegation. Accordingly, she was unable to determine whether her allegation of disability harassment had been resolved, or whether she should pursue it further through the formal complaint process.

OCR notes that it did not analyze through this investigation whether AP 3435, as written, meets the prompt and equitable grievance procedure standards of Section 504 and Title II because the same grievance procedure is being examined in a separate OCR complaint under case number 09-12-2017.

In summary, OCR concluded that the College failed to respond adequately to the Complainant’s internal complaint alleging discrimination because its Informal Complaint Process did not address her allegation of disability harassment by the Professor, and because the College did not notify her of the outcome of that process. The College agreed to address this area of non-compliance, in part, through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the College/District to investigate, or to complete an investigation of, the individual allegation of disability discrimination raised by the Complainant in this case. As noted earlier, OCR is also pursuing related modifications to AP 3435 at the Community College District level through a separate Resolution Agreement being negotiated in coordination with OCR case no. 09-12-2017.

Based on the commitments made in the attached Resolution Agreement and those anticipated in the Resolution Agreement being negotiated in coordination with OCR case no. 09-12-2017, 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, your counsel, and your staff during the complaint resolution process. If you have any questions, please contact David Christensen at (415) 486-5554, or David.Christensen@ed.gov, or me at (415) 486-5555.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Cc: Lesa Wilson
Counsel for the College/District (*via email only*)

Enclosure