



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

August 22, 2014

Mr. John Davis
Vice President
Acting College Director
Mt. Sierra College
101 East Huntington Drive
Monrovia, California 91016

(In reply, please refer to case no. 09-14-2048)

Dear Mr. Davis:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation into the above referenced complaint. The complainant¹ alleged that Mt. Sierra College (College) discriminated against her based on her disability. Specifically, OCR investigated the following:

1. Whether the College failed to implement the complainant's testing accommodations necessary to ensure that she can participate in the education program.
2. Whether the College failed to investigate the complainant's internal complaint that her instructor failed to implement her accommodations.²
3. Whether the College retaliated against the complainant by subjecting her to a student code of conduct process and dismissing her after she complained about the instructor and her accommodations.

OCR investigated the complaint under 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. The College receives Department funds and is therefore subject to the requirements of Section 504.

To investigate this complaint, OCR reviewed documentation submitted by the complainant and the College. OCR also interviewed the complainant, College staff and administrators. Based on a careful review of the facts, OCR determined the College is

¹ OCR notified the College of the identity of the complainant when the investigation began. OCR is withholding the complainant's name from this letter for privacy reasons.

² During the course of the investigation, OCR learned that the College may not have responded to the complainant's internal complaint about the accommodations, therefore, OCR included this allegation in its investigation.

not in compliance with the laws enforced by OCR with regard to Allegations Two and Three, only. The facts, applicable legal standards, and the reasons for our determination are summarized below.

FACTS

The following facts are relevant:

- The complainant was a student at the College and has bipolar disorder. She is African American.
- The College has an anti-discrimination and harassment policy. The policy states that complaints of discrimination or harassment can be made orally or in writing to an instructor, Department Chairperson, administrator, or any other management employee of the College. The policy also states that a grievance may be filed. The College has an academic grievance procedure, and a non-academic grievance procedure.³ The non-academic procedure specifies that it is to be used to resolve discrimination complaints.
- The College's Student Code of Conduct states that students are expected to display "honesty and professionalism" at all times. It describes fourteen (14) different categories of behavior that are causes for disciplinary action. Dishonesty, other than academic dishonesty, is not a listed basis for discipline.
- The Student Code of Conduct states that students who violate the code "will be referred to the Dean of Student Services," who "will fully investigate the facts of the incident and determine what level of disciplinary action is needed." According to the policy, the severity of the violation will determine the disciplinary action, which could include the maximum penalty of expulsion from the College.
- The College does not have an anti-retaliation policy.
- During summer semester 2013, the complainant enrolled in a business course at the College. A letter from the College to the complainant states she is approved to receive the following accommodations: Exams taken in an alternative, secured location proctored by a college administrator; time extensions of one hour on tests, exams, and quizzes; and relocation of the student's workspace away from audible distractions.

³ The academic grievance "shall be used in cases where a grade or similar evaluation is being disputed." The non-academic grievance "shall be used in response to allegations of violations of the Code of Student Conduct, College rules and regulations, and acts or threats of intimidation, discrimination or harassment." The non-academic grievance process requires a student to submit a written request to the Dean for review. The process also requires that the Dean appoint a committee to review the allegation. The committee is to consist of two faculty members and two students. The committee is to consider the relevant testimony and evidence and make a recommendation to the Dean.

- The complainant sometimes used the library resource center (LRC), a facility that consists of computers, books, tables, and chairs, as her reduced-distraction workspace. She told OCR that she also began the mid-term exam in the LRC. However, because she found the LRC too noisy and disruptive, she was moved to another room, the theater, to complete the exam. She also stated that though there was a proctor (the librarian), she did not check on the complainant in the theater. She indicated the proctor had checked on her regularly in the LRC.
- On August 18, 2013, the complainant sent an e-mail to the College Director/Dean of Student Services (College Director) (who is no longer at the College) stating that she was having problems with the instructor and that he was not working with her, as a disabled student; the complainant told OCR this referred to failure to provide her with approved accommodations. She also stated that he “played the race card” with her. She requested a meeting with the College Director.
- On August 30, 2013, the complainant met with the College Director, the Associate Dean of Academic Affairs (Associate Dean), the Business Department Chair, and two other staff. The complainant reported at the meeting that the instructor had used the “N word” in class. The administrators told the complainant that the allegation was serious. There was no discussion at the meeting about the complainant’s accommodations.
- The College assigned the Associate Dean of Academic Affairs to look into the racial discrimination allegation. The Associate Dean stated to OCR this was a situation where either the instructor did it or not and it would result in either the firing of the instructor or the dismissal of the student.
- On September 4, 2013, the complainant sent a follow-up e-mail to the College Director stating that she was being racially harassed by the instructor and reiterating that he was not helping her, as a disabled student.
- The same day, the Associate Dean spoke to the instructor, who denied making the racial statements and any inappropriate behavior. The Associate Dean requested the instructor to provide a chronology of his interactions with the complainant. The Associate Dean also interviewed other students in the business course.
- The College provided OCR with an outline of events prepared by the Associate Dean, the instructor’s chronology, and notes of interviews with the other students in the business course.
- The instructor noted in his chronology that the complainant began the mid-term in the LRC and was moved to theater, but he did not know why. He also outlined

the other accommodations he said he provided, including extra time on assignments, and permitting the complainant to do assignments in the LRC.

- On September 19, 2013, the complainant took the final exam in a classroom, with a proctor and extra time.
- The students interviewed by the Associate Dean said that the instructor had not used racial slurs, or otherwise behaved inappropriately in class.
- In early October 2013, the Associate Dean orally reported the results of his inquiry to the College Director and Vice President of the College (College VP). The Associate Dean concluded that there had not been any racial intimidation or harassment of the complainant by the instructor. He recommended the College expel the complainant because he felt her race allegation was egregious; if the allegation was true, the instructor would have been terminated. The Associate Dean did not make a written report.
- The College Director and the College VP agreed with the Associate Dean. The College VP issued the complainant a Notice of Expulsion dated October 4, 2013. (October 4th letter). The letter stated the complainant was dismissed for violating the Student Code of Conduct, and that she could appeal pursuant to the process outlined in the academic catalog.
- The October 4th letter did not explain the outcome of the College's investigation, or the reason for her expulsion, and no one from the College spoke to the complainant about the results of the investigation or the expulsion at that time.
- On October 8, 2013, the complainant met with the Associate Dean and College VP and demanded the reasons for the expulsion.
- On October 9, 2013, the College mailed the complainant another letter (October 9th letter) that stated she was dismissed because she "accused an instructor to have acted in a very offensive manner and of using racial epithets." The letter stated that the College had investigated and concluded the racial discrimination allegations were false and that her behavior in making the allegations was "in violation of the Student Code of Conduct."
- The October 9th letter concluded that her student status was terminated "pursuant to the Student Code of Conduct in general and more particular 'that students are to display honesty and professionalism.'"
- In interviews with OCR, College administrators exhibited different understandings of the College's grievance process, and did not know what process the College used or should have used to investigate the complainant's discrimination

allegations. They also exhibited different understandings of the College's process for students to request and receive accommodations. Administrators were not aware of other instances of students being expelled for making false allegations.

ANALYSIS

1. *Whether the College failed to implement the complainant's testing accommodations necessary to ensure that she can participate in the education program.*

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 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.

The complainant alleged the College did not provide her with her approved testing accommodations, specifically a proctor and a quiet workspace for concentration purposes. The instructor acknowledged he was aware of the complainant's accommodations and tried to meet her needs.

The evidence shows that the complainant was provided the ability to take assessments in the LRC and theater for the mid-term, and a classroom for the final exam. OCR examined whether moving the complainant to the theater from the LRC during the mid-term exam and failing to provide a proctor for the theater-portion of the mid-term exam constituted a failure to accommodate. Because the complainant had used the LRC previously as a quiet space for classroom work and never communicated to the College that it was not appropriate, it was reasonable for the College to use that space for the complainant's mid-term. When the complainant indicated the LRC was too noisy, the College moved her to the quieter theater. The College provided the complainant as much time as she needed to complete the exam. There is insufficient evidence that the College's use of the LRC constituted a failure to accommodate the complainant, given that the complainant found it sufficiently quiet at other times. Further, the complainant did not describe how the failure of the proctor check on her as frequently in the theater

as in the LRC was detrimental to her. Therefore, OCR finds insufficient evidence of non-compliance with regard to this issue.⁴

2. *Whether the College failed to respond to the complainant's allegation that the instructor did not provide her the testing accommodations.*

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. OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students; 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.

The complainant made a verbal and written complaint to the College that the instructor was not meeting her needs as a disabled student. Further inquiry with the complainant would have clarified that she was alleging failure to provide her with approved accommodations. She also alleged the instructor made a racial slur towards her. She sent several follow-up e-mails to the College Director about the same issues. The College has an anti-discrimination and harassment policy that prohibits both disability and race discrimination. This policy states that complaints can be made orally or in writing to various employees. The College also has a non-academic grievance process it is to use to investigate and resolve race and disability discrimination complaints. In this instance, the College conducted an investigation into the racial allegation that included interviews with the instructor and the other students in the business course and review of some documentary evidence; these were appropriate investigative steps that provided the College with an evidentiary basis to reach a determination about whether racial harassment occurred. During the course of the investigation, the College learned about the implementation of the complainant's testing accommodations; however, it did not specifically investigate or reach conclusions about whether the complainant was discriminated against on the basis of disability. Additionally, the College did not generate a written report regarding either allegation, and the findings were only orally communicated to the College Director and College VP; the College did not provide the complainant with its findings with regard to either allegation until it sent the October 9th letter, which only addressed the race allegation. An equitable process requires that the College provide notice to the complainant of the outcome of her complaint. Moreover,

⁴ As a form of technical assistance, OCR recommends the College change its Academic Policy 504 to include a reference to both the Americans with Disabilities Act (ADA) and Section 504. The College's student handbook's reference to the ADA should also include a reference to the revised Academic Policy 504 and/or Section 504.

while OCR does not enforce the College's own policies and procedures, we note the College was not aware of which procedure it should follow to resolve discrimination complaints, including the complainant's. Therefore, the preponderance of the evidence supports the finding that the College did not respond appropriately to the complainant's disability discrimination allegation.

3. *Whether the College retaliated against the complainant by subjecting her to a student code of conduct process and dismissing her after she complained about the Instructor and her accommodations.*

The Title VI regulations, at 34 C.F.R. § 100.7(e), prohibit school districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title VI. The Section 504 regulations, at 34 C.F.R. § 104.61, incorporate this prohibition. When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the college, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the college can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

Complaining of alleged discrimination on the basis of either disability or race is a protected activity.⁵ The complainant engaged in a protected activity when she complained to College administrators that her instructor was not providing her with approved accommodations, and when she alleged that he had called her a racial slur. The College had ample notice of her protected activity, through her oral and written complaints. Shortly after the College investigated the complainant's allegations, she was expelled. An expulsion from college is an adverse action. The proximity in time between the complainant's protected activity and the adverse action suggest they are causally linked. Additionally, the College acknowledged the expulsion was related to the complainant's allegations of race discrimination.

OCR next examines whether there is a non-retaliatory reason for the College's adverse action. The College stated that the complainant was dismissed not because she complained of discrimination, but because her accusation against the instructor was false. Specifically, College representatives told OCR they believed the complainant acted in bad faith when she alleged that the instructor had used racial epithets in class.

OCR carefully considered the College's asserted reason for dismissing the complainant. OCR acknowledges that the College's investigation did not substantiate the complainant's allegation of racial harassment. However, in addition to bad faith, there

⁵ Although OCR did not specifically investigate the complainant's race allegation, her internal race complaint with the College is protected activity under the laws enforced by OCR. Accordingly, OCR has jurisdiction to investigate and resolve allegations of retaliation related to her race complaint.

may be many explanations for an unsubstantiated allegation, including the complainant's sincerely held but incorrect belief discriminatory conduct occurred, and lack of sufficient evidence to prove an allegation that is nonetheless true. The College did not investigate the complainant's motivations, and did not have an evidentiary basis to conclude that she lied or otherwise acted in bad faith. Rather, there was a presumption of bad faith, as evidenced by the Associate Dean's foregone conclusion that the racial harassment investigation would result in either the complainant's dismissal or the instructor's termination. This is in contravention of the Student Code of Conduct itself, which requires that the Dean of Student Services investigate alleged violations of the code and base discipline on the facts revealed in the investigation. OCR also noted other irregularities in the College's process. For example, while the College's Student Code of Conduct states that students are "expected to display honesty and professionalism," the Student Conduct Code does not specify that dishonesty is a basis for disciplinary action; thus, even had the College determined the complainant violated this standard, it is not clearly a basis for dismissal, and the College provided no evidence of other students being dismissed on this basis. Additionally, although the Student Code of Conduct requires that the Dean of Student Services make disciplinary decisions, the complainant's dismissal letters were signed by the College VP. Moreover, the October 4th letter was devoid of any facts or rationale for the dismissal, and it was only after the complainant demanded an explanation that one was provided. While OCR does not enforce the College's internal processes, these irregularities undermined the legitimacy of College's asserted reason for dismissing the complainant. The College has an anti-discrimination policy, and related grievance procedure; these guiding documents should provide a platform for students to bring concerns to the attention of the College so they may be addressed. Yet if students believe the only possible outcomes of complaints of perceived harassment are substantiation of their allegations, or dismissal, they will be discouraged from reporting; this is the very result anti-retaliation laws are intended to prevent.

For the reasons discussed, OCR concluded that a preponderance of the evidence established the College retaliated against the complainant for complaining of discrimination by expelling her from the College.

CONCLUSION

In summary, OCR concluded that the College did not fail to provide the complainant with her testing accommodations. The College, however, failed to respond adequately to the complainant's internal complaint alleging discrimination. OCR also determined that the College retaliated against the complainant by dismissing her from the College. 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 adopt a complaint procedure that provides for the prompt and equitable resolution of complaints of discrimination. The Resolution Agreement also requires the College to adopt an anti-retaliation policy and to provide a memorandum to the staff regarding the prohibition against retaliation for engaging in any protected activity.

Finally, the Resolution Agreement requires the College to remove the expulsion letters from the complainant's academic record and to inform the complainant of such removal.

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. This letter 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 complainant may file another complaint 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 would like to thank you, your staff, and the College's legal counsel, Ms. Mary Qualiana, for their assistance in resolving this complaint. If you have any questions, please contact, Kana Yang, 415-486-5382 or kana.yang@ed.gov.

Sincerely,

/s/

Anamaria Loya
Team Leader

cc: Mary Qualiana, Special Counsel (e-mail only)
Cooley, LLP