



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

May 28, 2014

Dr. Rachel Rosenthal
President
Folsom Lake College
10 College Parkway
Folsom, California 95630

(In reply, please refer to case number 09-14-2055.)

Dear President Rosenthal:

The U.S. Department of Education, Office for Civil Rights, has completed its resolution process for the above-referenced complaint filed against Folsom Lake College. The issue OCR accepted for investigation was whether the College failed to respond adequately to the Complainant's¹ October 5, 2012 internal complaint alleging that an instructor (Instructor) discriminated against her based on disability by assigning her a failing grade for a class in spring 2012.

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 an interview of the Complainant and review of documents submitted by the Complainant and the College. Based on its assessment of this information, OCR concluded that the College did not fail to respond adequately to the Complainant's internal complaint of discrimination. However, OCR determined that the College's discrimination complaint procedure, as written, did not meet Section 504 and Title II requirements. The College has signed a Resolution Agreement to address this area of noncompliance.

The applicable legal standards, factual summary, and basis for OCR's determination are summarized below.

Legal Standards

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,

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

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 a 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.

Factual Summary and Determination

The Complainant attended the College for one class, XXX XXX, which met from January 27 through March 17, 2012. The course consisted of a three hour session on Friday and an all-day session on Saturday once each month.

The College has a Disabled Students Programs and Services (DSPS) office that provides services and supports for students with disabilities. The College's website clearly notifies students of the process to be used to initiate services. It provides the contact telephone number for the DSPS office, and directs students in need of services and supports to set up an intake appointment. The website informs students that at the intake appointment the student meets with a DSPS counselor and provides documentation of his/her disability. If accommodations are approved, the student is issued letters of accommodations in order to notify instructors of the accommodations the student is to receive. The College Catalog also provides students with information about DSPS office services and supports, as well as a contact telephone number for the office.

The Instructor for XXX XXX assigned the Complainant a failing grade for the course. On March XX, 2012, the Complainant sent an e-mail to the Instructor indicating that she did not feel that she was graded fairly. The Instructor replied on the same date, described her grading system, and explained the basis for the Complainant's grade. The Instructor stated that she spoke with the Complainant during a February class and indicated her concern about both the Complainant's attendance and the fact that the Complainant was sleeping during class. The Instructor noted that the Complainant shared at that time that she thought she had a medical issue, would be seeing a doctor, and would bring a note to class.

However, the Instructor indicated that the Complainant did not bring that note prior to the class concluding.

The Instructor also stated in the e-mail that the Complainant continued to sleep during the March classes, and that several students had complained about the Complainant's lack of participation in group work and the fact that she was distracting the class because she was asleep and snoring on several occasions. The Instructor also indicated that the Complainant did not participate in her group presentation until other members of the group requested that she join them, and during the presentation she again fell asleep and was snoring. The Instructor went on to explain that Complainant's participation grade was lowered due to her lack of contribution to group work, and due to the fact that she was obviously not participating in class when she was asleep. The Instructor also noted that two of the Complainant's written assignments were graded down because one was late and one was incomplete.

The Instructor and the Complainant spoke by telephone on March XX, 2012, and the Instructor confirmed what they discussed in another e-mail to the Complainant on the same date. The Instructor stated that the Complainant told her that she would go to her doctor and request a note no later than March XX, 2012 indicating that she had sleep apnea and what related accommodations were required for a college class. The Instructor noted that she told the Complainant that the course had officially ended, and that they had previously agreed on February XX, 2012 that the Complainant was supposed to have this note to the Instructor by March XX, 2012---prior to the class ending and grades being issued. Since the Complainant missed that deadline, the Instructor indicated that she would not be changing the grade assigned. The Instructor stated that she shared with the Complainant during the March XX, 2012 telephone call that she had no idea what accommodations could be made for students once a course had ended and grades were ready to post. She stated that she would forward any doctor's note and information to the Chair of her Department.

On March XX, 2012, the Instructor sent the Complainant another e-mail outlining in detail the basis for her failing grade for the class. She broke down the points by assignment as outlined in the syllabus. The Instructor confirmed that the Complainant had provided a medical note² to the Division Office on March XX, 2012, but noted that it was too late for an accommodation by DSPS because the class had already been completed and the grade had been issued. The Instructor stated that when she and the Complainant first discussed her lack of participation and sleeping in class in January, the Instructor recommended that the Complainant contact the DSPS office and seek support. The Instructor wrote that they had a similar conversation during February classes when the sleeping and lack of participation continued. The Instructor indicated that it was her understanding that the Complainant was going to seek services from DSPS immediately after the February XX, 2012 class session. However, she did not do so. In conclusion, the Instructor informed the Complainant of the bases upon which a student was allowed to grieve a grade under the grade grievance process (mistake, fraud, bad faith, or

² This documentation was a letter dated October 31, 2011 from Kaiser Permanente to the Complainant stating that she had obstructive sleep apnea. It contained no information about the severity of the sleep apnea, any functional limitation that it may cause, or any classroom accommodations that would be necessary to address these functional limitations.

incompetency), and referred her to the Dean of Instruction (Dean) if she wanted to pursue a grade grievance.

On March XX, 2012, the Complainant met with the Dean of Student Development and Enrollment (Dean SDE) and told him that she wished to file a grievance concerning her grade in XXX XXX. The Dean SDE referred the Complainant to the Dean to attempt to informally resolve the issue. On April X, 2012, the Complainant met with the Dean. The Dean sent the Complainant to the DSPS office as an initial effort to informally resolve the grievance. On April XX, 2012 the Complainant applied for DSPS services. On the same date DSPS generated a letter outlining accommodations that had been approved for the complainant. They included: occasional breaks during class; extended time and distraction reduced setting for examinations; priority registration; disability related counseling; liaison to campus services and the community; and referral to campus tutoring services.

The Dean obtained documentation from the Instructor regarding the basis for the Complainant's final grade in XXX XXX, including a written statement outlining her reasoning. The Dean sent an e-mail to the Complainant on April XX, 2012 and provided copies of the documentation which described the factual basis for the number of points the Complainant earned in the areas of written assignments, attendance, and class participation. The documentation showed that the Complainant did not earn full points in various areas due to the following: being late to class; sleeping during class; being disruptive or unprepared; and submitting late or incomplete written assignments. Based on her review of this information, the Dean concluded that the grade assigned was based on the Complainant's performance, and was not the result of mistake, fraud, bad faith, or incompetency. She informed the Complainant that the informal grievance resolution process was complete.

The Complainant filed a formal grade grievance with the Dean SDE on April XX, 2012. She stated that she did not believe that her grade was properly and fairly calculated, based on the grading criteria. The Complainant included copies of the March 2012 e-mail exchange between her and the Instructor regarding her grade, documentation of her sleep apnea, and documentation of the accommodations approved by DSPS. The Dean SDE informed the Complainant by letter dated April XX, 2012 that he was rejecting her formal grade grievance because he saw no indication that the assigned grade was based on mistake, fraud, bad faith, or incompetency, which was the standard set out in the California Education Code. The Dean SDE noted that the medical information and DSPS paperwork the Complainant submitted indicated that she did not follow College procedures to arrange for any formal accommodations prior to the conclusion of the class.

After her formal grade grievance was rejected in April 2012, the Complainant contacted the College Vice President on May X, 2012, alleging that she had been discriminated against because of her disability with respect to the failing grade in her XXX XXX class. The College follows the Los Rios Community College District policies and procedures with respect to unlawful discrimination complaints. District Regulation 2423 is the discrimination complaint procedure. It provides that "the complaint shall be filed by a student or employee who alleges that he or she has personally suffered unlawful discrimination or by an individual who has learned of such unlawful discrimination in his or her official capacity."

The Regulation states that the complainant shall notify the appropriate Equity Officer of the allegations as soon as possible after the alleged incident. If the complaint is accepted, the complainant is provided a copy of the Regulation, and is offered the opportunity to participate in an informal resolution process. The informal resolution process, which is voluntary, should generally be completed within 90 days. If the complaint is not resolved satisfactorily of the informal stage or if the complainant chooses not to use the informal process, the complainant may file a written statement of the problem and the proposed remedy. The statement must be filed “on the form prescribed by the Chancellor's Office.” For non-employment complaints, the formal complaint must be filed no later than one year from the date on which the complainant knew or should have known about the facts underlying the allegation.

The Regulation provides for a prompt, thorough, and impartial fact-finding investigation, including meeting with the accused and interviewing any witnesses to the alleged conduct and any other person who may be mentioned during the course of the investigation as possibly having relevant information. The investigation must be completed within 90 days of receipt of the formal complaint. The Regulation states that the results of the investigation shall be put in a written report which must include at least the following: a description of the circumstances giving rise to the complaint; a summary of the testimony provided by each witness; an analysis of any relevant data or other evidence collected; a specific finding as to whether discrimination/harassment did or did not occur with respect to each allegation; and any other information deemed appropriate by the district.

The Regulation requires written notice to the complainant of the outcome of the investigation. The notice must include the following: a determination of whether discrimination/harassment did or did not occur with respect to each allegation; a description of actions taken, if any, to prevent similar problems from occurring in the future; the proposed resolution of the complaint; and the complainant's right to appeal to the District Board. Notice of the outcome is also provided to the accused. If an appeal is filed, the Regulation provides that the Board will issue a decision within 45 days after receipt. In non-employment cases, the complainant will also be notified of the right to appeal the decision to the Chancellor's Office.

The District also has Complaint Investigation Guidelines that describe the discrimination complaint resolution process in further detail. The Guidelines include reference to the definition of a complainant and the required complaint form.

The Complainant met with the Vice President on May XX, 2012 and told him that she had informed the Instructor early on in the class that she had a sleep disorder that caused her to fall asleep in class, and confirmed that the Instructor requested medical verification. The Complainant stated that she subsequently provided the medical verification. She also verified that there had been no informal agreement made with the Instructor to accommodate her medical condition. The Vice President provided the Complainant with a copy of the Regulation and a complaint form.

The Complainant called the Vice President's office on May XX and XX, 2012, inquiring as to how long she had to file a discrimination complaint. In September 2012 the Complainant called the office again, and asked to schedule an appointment with the Vice President. The Complainant met with the Vice

President on October X, 2012. The Complainant submitted a complaint form to the Vice President. The Vice President discussed with the Complainant the need for additional supporting evidence and noted that without additional evidence her complaint could not be substantiated. The Complainant felt that because she had informed the Instructor that she had a medical condition and had provided a copy of a doctor's letter, she should not have been penalized for falling asleep in class. The Vice President reminded the Complainant that she had not provided any medical information until the class had concluded and the grade had been assigned. The Complainant indicated that she was going to provide copies of e-mails that would substantiate her complaint.

On October X, 2012, the Complainant left a telephone message for the Vice President, stating that she wanted to revise her discrimination complaint form, and that she would provide an updated statement. The Vice President did not hear from her again until the Complainant called her office on March X and XX, 2013, indicating that she would sign and notarize paperwork and fax it to the Vice President. On March XX, 2013 the Complainant spoke with the Vice President by telephone and asked if she had received the Complainant's paperwork. The Vice President replied that she had not received any new complaint documents. The Complainant then clarified that she was referring to the original complaint that she had submitted in fall of 2012. The Vice President referred to her file and confirmed that she did have the original complaint form, but again shared with the Complainant that her complaint could not be substantiated based upon the information she had already provided.

On March XX, 2013 the Complainant again called the Vice President and indicated that she wished to pursue a complaint and that she would provide additional documentation. Given that the Complainant apparently was no longer interested in providing a revised statement, the Vice President began an investigation based on the information provided on October X, 2012. The Vice President met with the Complainant on March XX, 2013 for more than one hour. During that meeting, the Complainant submitted a copy of the e-mail interchange between her and the Instructor that took place on March XX, 2012 (referred to above). The Complainant repeated her perspective that because she had informed the Instructor that she had sleep apnea and had provided medical documentation she should not have been penalized for sleeping in class. The Vice President again noted that the Complainant had not provided medical documentation or evidence of DSPS-approved accommodations prior to the end of the class, and explained that accommodations could not be applied retroactively.

As a part of her investigation the Vice President also reviewed the discrimination complaint form and any other documentation that had been submitted by the Complainant, as well as the course syllabus and the prior grade grievance file. The Vice President also attempted to speak with the Instructor, but received no response to her e-mail request because she had an incorrect e-mail address for the Instructor, who was an adjunct professor and therefore was not on campus. The Vice President ultimately concluded that the information already obtained was sufficient to reach a conclusion without an interview of the Instructor.

The Vice President reported her findings to the College President, who issued a decision by letter to the Complainant dated April XX, 2013. The President summarized the evidence considered and determinations reached through the investigation. He noted that the Instructor had informed the

Complainant on several occasions during the course that her sleeping and lack of participation was affecting her grade. The President concluded that the Complainant's failing grade was based upon the fact that she had been late to class, had slept repeatedly in class, had been disruptive, and had turned some assignments in late. The President stated that final grades for the class were posted on March XX, 2012, and the Complainant did not provide medical information to the College or contact DSPS until after the failing grade was posted. The President informed the Complainant that there was no evidence to substantiate her allegation of unlawful discrimination.

The complainant filed an appeal to the Board on May X, 2013, merely stating that she disagreed with the decision that there was no evidence to substantiate her claim of unlawful discrimination.

The Vice President was able to contact and interview the Instructor on June XX, 2013. The Instructor confirmed that she spoke with the Complainant several times during the class about providing documentation to and seeking possible accommodations through DSPS. However, she stated that the class was over before the Complainant took that action.

The Board heard the complainant's appeal in closed session at its June XX, 2013 meeting. By letter dated June XX, 2013, General Counsel informed the Complainant that the Board had reviewed the complaint, the investigative report/letter of findings, and the Complainant's appeal letter. It voted unanimously to deny the appeal. By letter dated July XX, 2013, the Complainant appealed the Board's denial to the Chancellor's Office. The College reported to OCR that the following documents were submitted to the Chancellor's Office: the October X, 2012 discrimination complaint form; the letter from Kaiser Permanente regarding the sleep apnea diagnosis; the April XX, 2013 administrative decision on her complaint; her May X, 2013 appeal to the Board; and the Board's decision. The Chancellor's Office upheld the College's final decision and denied the appeal.

Based on the preponderance of the evidence summarized above, OCR concluded that the College did not fail to respond adequately to the Complainant's October X, 2012 internal complaint alleging that the Instructor discriminated against her based on disability by assigning her a failing grade. The Complainant first challenged her grade through the College's general grade grievance procedure. The College provided both an informal and formal review of her grade grievance. When this process did not result in a grade change, the Complainant then filed her October X discrimination complaint under the Regulation. Again, the College attempted informal resolution and conducted a formal investigation with written findings. The Complainant was also provided two levels of appeal under the Regulation.

OCR determined that, through these processes, the College provided an adequate response to the Complainant's discrimination complaint. The College gathered and considered relevant information provided by the Complainant and the Instructor. Based on the evidence gathered, the College reached a reasoned conclusion that the Complainant's failing grade in XXX XXX was calculated accurately, with points deducted due to her disruption, lack of participation, lack of preparation, lateness to class, and submission of late and/or incomplete assignments.

The Complainant maintained that she should not have been penalized in grading for disruption or lack of participation resulting from sleeping in class due to her diagnosis of sleep apnea. Rather, she felt that

she should have been accommodated in this regard even though she did not submit documentation of her medical condition or contact DSPS until after the class concluded and the grade had been issued. Under the requirements of Section 504 and Title II, a student with a disability is obligated to notify the college or university of the nature of the disability and the need for a modification, adjustment, aid or service. Only after a college or university receives such notice does it have an obligation to engage the student in an interactive process concerning the student's disability and related needs and to subsequently provide necessary supports. As part of this process, the college or university may request that the student provide documentation of the impairment and resulting functional limitation(s). In this instance, the College correctly concluded that it was not obligated to apply accommodations retroactively after the grade had been earned and issued. Further, OCR noted that even the accommodations subsequently approved by DSPS would not have allowed the Complainant to sleep during class, which was the disability-related behavior that led to the point deductions.

The Complainant also told OCR that she felt that the College's response to her discrimination complaint was inadequate because there was a delay in the investigation and because the College did not forward her March 2012 e-mail exchange with the Instructor to the Chancellor's Office upon appeal. The evidence indicates that there was a delay in the College initiating a formal investigation of the October X, 2012 discrimination complaint. However, this delay resulted from the Complainant communicating to the Vice President's office several times that she either wanted to amend her complaint or submit additional information. Once she clarified that she wished the complaint to go forward based upon information contained in her October X, 2012 complaint submission, the investigation was initiated and concluded promptly. With respect to the documentation the College provided to the Chancellor's Office, OCR determined that there was no factual information included in the March 2012 e-mail exchange between the Complainant and the Instructor which would have resulted in a different decision regarding whether discrimination in grading occurred.

With respect to the College/District's discrimination complaint procedures OCR determined that, as written, the Regulation met many of the basic requirements for a prompt and equitable grievance procedure under Section 504 and Title II. The Regulation 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, the Regulation contains two elements that resulted in a determination that it does not meet the Section 504/Title II regulations' requirement that procedures be "equitable." First, the Regulation provides that complaints may be filed only by "a student or employee who alleges that he or she has personally suffered unlawful discrimination or by an individual who has learned of such unlawful discrimination in his or her official capacity." In addition, the Regulation states that a complaint must be filed on a particular form prescribed by the Chancellor's Office in order to trigger a formal investigation.

The Section 504 and Title II 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 Regulation unduly limits the ability of individuals who do not fall within the two named categories to file complaints of discrimination on behalf of other persons or a class of persons. In addition, the requirement that a formal complaint process will not be triggered unless the complaint is filed on a specific form, if enforced, could unduly limit the ability of students and other individuals to file complaints of discrimination in other written formats.

In summary, OCR concluded that the College did not fail to respond adequately to the Complainant’s internal complaint alleging discrimination. However, OCR identified compliance concerns with respect to the College/District’s discrimination complaint procedures. The College/District agreed to address the outstanding compliance concerns through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the College/District to modify the Regulation and related Investigation Guidelines in various ways, to distribute the modified Regulation, and to provide notice of the modified Regulation online and in student publications.

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/District’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 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: JP Sherry, General Counsel
Los Rios Community College District