



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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

REGION IX
CALIFORNIA

July 3, 2014

Joyce Newman Giger, Ed.D.
President
American University of Health Sciences
1600 E. Hill Street
Signal Hill, California 90755

(In reply, please refer to case no. 09-14-2065.)

Dear President Giger:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against American University of Health Sciences (University). The complaint alleged that the Complainant¹ had been discriminated against on the basis of disability. OCR investigated whether:

- the University's School of Nursing (SON) for the Summer 2013 Quarter failed to provide the Complainant with the necessary academic adjustments to ensure that she could participate equally in the education program by failing to provide her with extra time on exams;
- the SON dismissed the Complainant from the SON based on her disability; and
- the University failed to respond promptly and equitably to internal complaints that the Complainant made on September 11 and 18, 2013, stating that she had been harassed and discriminated against based on disability.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in education programs and activities operated by recipients of Federal financial assistance. The University receives Department funds and is subject to the requirements of Section 504.

OCR gathered evidence through interviews of the Complainant and University staff and through review of documents submitted by the Complainant and the University. Based on its assessment of this information, OCR concluded that there was insufficient evidence to support a conclusion of noncompliance with Section 504 and its implementing regulation with regard to the University's provision of necessary academic adjustments or its dismissal of the Complainant. However, OCR found that the

¹ OCR informed the University of the Complainant's identity in our prior letter, and we are withholding the Complainant's name from this letter in order to protect personal privacy.

evidence supported a conclusion of noncompliance with Section 504 and its implementing regulation with regard to the University's failure to promptly and equitably respond to an internal complaint of disability discrimination.

OCR also determined that the University's discrimination complaint procedures, as written, did not meet Section 504 requirements. The University has signed a Resolution Agreement to address these areas of noncompliance.

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

Issues 1 and 2: Whether the SON, for the Summer 2013 Quarter, failed to provide the Complainant with extra time on exams, and dismissed the Complainant from the SON based on her disability.

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.

Under the requirements of Section 504, 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. Once a college or university receives such notice it has an obligation to engage the student in an interactive process concerning the student's disability and related needs.

The Section 504 regulations, at 34 C.F.R. §104.44(c), require recipient colleges and universities to provide such methods for evaluating the achievement of a student with a disability that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represent the student's academic achievement in the course rather than reflecting the student's impaired skills (except where such skills are the factors that the test purports to measure).

Background

The University is a Christian based, minority serving university which educates students for careers in the healthcare profession. The Complainant began the University SON's Bachelor of Science in Nursing, 12-quarter, 3-year program on January 3, 2012, and she was administratively withdrawn from that program by the SON on September 20, 2013.

OCR's investigation revealed the following:

- Under the University's procedures for student with disabilities, the Director of Student Affairs/Student Services (DSS) reviews and approves or denies student

accommodation requests. The DSS does not herself administer the accommodations or oversee their implementation.

- The University approved the Complainant, beginning with her first quarter in the SON program, to receive accommodations for a disability. For the Summer quarter of 2013, the Complainant was eligible to receive extra time on testing, assistance in note taking, and tutoring in math and science classes. While the amount of “extra time” the Complainant was to be provided was not specifically defined, it was undisputed that the Complainant was to receive time and a half for her exams as “extra time.”
- The Complainant enrolled in Intermediate Care Nursing during the summer 2013 quarter. At the start of the quarter, the DSS emailed the course professor to notify her of the Complainant’s approved accommodations.
- Students’ progress in Intermediate Care Nursing was assessed through weekly unit examinations and a final exam. The Complainant alleged to OCR that the professor of her Intermediate Care Nursing course (Professor) failed to provide her with time and a half for the first three unit exams and for the course final exam. For the final exam, she also stated that her test taking was disrupted by having to move from one classroom to a room across from the Professor’s office before she was allowed to finish the final exam.

Unit Exams – July 1, 8, and 15, 2013

- University administrators told OCR that, when SON students are provided extra time for examinations, they take their exams in the library. During the period at issue here, the Librarian received professors’ proctoring requests and scheduled exam proctors, who typically were either the Librarian or the Assistant Librarian.
- Unit exams were generally given to nondisabled students in the class during the first hour of class each Monday, before the class lecture began. OCR interviewed several students in the class, who reported that the class lecture began at about 1:00 pm. While witness recollections varied, the preponderance of the evidence supports the Complainant’s understanding that students without disabilities were provided between 25 and 30 minutes to complete unit exams.
- The Complainant took the first three unit exams between noon and 1:00 pm in the library. She informed OCR that the Professor brought the exams to the library and handed them to the proctor. She stated that the Professor consistently arrived at the library with the exam ten to fifteen minutes after the period began.
- The Complainant provided OCR with inconsistent information about the problems she encountered in receiving proctoring for her unit exams. At one point, she stated that the Assistant Librarian was not available to proctor the first two exams, and that she and the Professor needed to look for a location for the exam and a proctor.

However, she subsequently informed OCR that a proctor (either the Librarian or the Assistant Librarian) was always in the library when the Professor arrived.

- OCR obtained inconclusive evidence as to the time when the Complainant was allowed to begin each of her first three unit exams. The Complainant told OCR that either the Librarian or the Assistant Librarian proctored her exams. The Librarian is no longer at the University and was unavailable to be interviewed, and the Assistant Librarian did not remember the Complainant. The Professor did not recall the specific time when she gave the exams to the Complainant.
- The Librarian informed the Professor by email on the date of the Complainant's first unit exam, July 1, 2013, that the Assistant Librarian could proctor the exam from noon until 1:00 p.m. After the first exam, the Assistant Librarian emailed the Professor and the Librarian, stating that the Complainant started the exam at 12:10 p.m. and finished at 12:45 p.m. No comparable contemporaneous emails were available concerning the second and third unit exams.
- The Complainant informed OCR that the time available to her to complete the unit exams was cut short by her need to get to class in time for the lecture. Several students interviewed by OCR stated that Intermediate Care Nursing course was offered in the same building as the library, and that it would take an estimated two to three minutes to walk from the library to the classroom.
- On the day of the third unit exam, the Complainant met with the SON Dean, apparently to express concerns about the Professor and the Intermediate Nursing course. The Dean did not recall the meeting. The Complainant stated that the meeting resulted in an agreement that the Assistant Librarian would proctor the Professor's remaining unit exams, and that she received adequate accommodations on those exams.
- Both the Professor and the DSS stated to OCR that the Complainant never complained to them about not receiving accommodations in Intermediate Care Nursing.

OCR's attempts to ascertain when and where accommodations were provided for the unit exams were hampered by the unavailability of the Librarian, the inability of other staff to remember the circumstances of the Complainant's case, and the Complainant's own differing accounts. It is clear that accommodated exams, including the Intermediate Nursing Unit exams, were expected to be administered in the library. The preponderance of the available evidence indicates that the Complainant took her first three unit exams in the library, and that they were proctored by either the Librarian or the Assistant Librarian.

The evidence is less clear as to the amount of time allotted to the Complainant to take each of her unit exams. Because nondisabled student were expected to take each exam in 25 to 30 minutes, the Complainant should have been given 45 minutes to complete each unit exam. The Complainant alleged that she needed to leave the library in time to get to the class lecture, which, according to other students in the class, began at approximately 1:00. Thus, in order to receive 45 minutes to complete the exams, she should have been allowed to begin each one by about 12:15.

When OCR interviewed University staff several months after the fact, none of them was able to remember the specifics of the administration of the unit exams. The Complainant alleged that the Professor did not consistently arrive at the library on time, and instead arrived with the exams to give them to the proctor between 12:10 and 12:15 p.m. The Assistant Librarian sent an email about the Complainant to the Professor and the Librarian within half an hour after the Complainant's first exam, stating that the Complainant began that exam at 12:10 p.m. and finished at 12:45 p.m. OCR did not find evidence to establish that the start of any of the unit exams was delayed beyond 12:15. The preponderance of the evidence thus shows that the Complainant was given from at least 12:15 until 1:00 -- or at least 45 minutes -- to complete her exams.

OCR recognizes that delays and inconsistencies in administration of accommodated exams can be frustrating for students, and understands that a schedule that identified the proctor for each exam and established a specific starting time would have assisted the Complainant. However, the preponderance of the evidence in this case does not establish that any delays in administering the exams had the effect of denying the Complainant the opportunity to take her unit exams with the required extra time. OCR therefore concluded that there was insufficient evidence to establish that the Complainant was denied a required academic accommodation, in violation of Section 504 and the regulation.

As a matter of technical assistance, OCR encourages the University to create and implement clear guidelines for the provision of academic accommodations, for ensuring that students receive consistent information as to how and where to take accommodated tests, and for assigning proctors as necessary for such tests. OCR is available to provide the University with assistance in developing such guidelines.

Final Exam on September 4, 2013 and retaking the final exam on September 16, 2013

- The Complainant stated to OCR that the final exam started at or very shortly after 2:00 p.m., and that the Professor gave other students two-and-a-half hours to complete the final exam. She alleged that the Professor told her to complete the final exam by 5:00 p.m., which she stated to OCR would not have included time and a half. She stated that the Professor stopped her exam at 5:00 p.m., and informed her she would have an additional 30 minutes to complete the final exam after moving to an office across from the Professor's office.

- The Complainant stated that once she arrived in the office across from the Professor's office where she was taken by the Professor to finish the final exam, other students interrupted her by opening the door to the office where she was now taking the exam, and asking her questions about why she was there. With these distractions, the Complainant stated that she was not able to read or comprehend the remaining exam questions, and she randomly filled in the last few pages of answers.
- When the Professor electronically posted the Complainant's final course grade, the Complainant did not pass. The Complainant complained by email to the SON Dean that she was not provided time and a half on the final exam.
- The SON Dean informed and the University President informed the Complainant that she would be allowed to retake the final exam in order to make certain that she was allowed the appropriate time. The Complainant took a different version of the final exam on September 16, 2013.² The Complainant was provided at least time and a half to retake the final exam, and in one setting.
- The Professor informed the Complainant on September 17, 2013 that her score on the repeated final exam was 65% and that this score, combined with other course grades, resulted in a final course grade of 68.36%, or a "D+."
- According to SON policy in the *Bachelor of Science in Nursing Student Handbook, 2012-2013*, a student who earns below a grade of "C+" for any nursing course fails that course. Also, if a SON student has previously failed any nursing course, and subsequently fails another nursing course, the student may not continue in the SON program.
- During the Spring 2012 Quarter, the Complainant had failed one nursing course. After the Complainant failed Intermediate Care Nursing N330, the University notified the Complainant by letter dated September 20, 2013 that she was administratively withdrawn from the SON program.

Based on a preponderance of the available evidence, OCR concluded that even if the Complainant was given time and a half to complete the first final exam, students without disabilities were allowed to complete the exam in one sitting, without the disruption of moving to a different room. Because the Complainant was required to move exam locations during the exam, and because she also experienced distraction from her peers entering the exam room, OCR found that the Complainant was given an unequal

² After she retook the final exam, the Complainant complained to the University President and to the SON Dean that she had concerns about having retaken a final exam that had different questions than the original final exam, and the President replied that she was given a different form of the same final examination. In this instance, while it played no role in OCR's determination of the issue under investigation, OCR deferred to the University's considerations of academic integrity with regard to how it formulated the questions for the second final exam taken by the Complainant.

testing environment for the final exam, and was thus treated differently from other students on the basis of her disability.

However, OCR also found that because the University allowed the Complainant to retake the final with University approved testing accommodations (and without any reported distractions), the Complainant's concerns about not receiving time and a half on the original final exam were reasonably resolved by the actions of the University. The available evidence supports a conclusion that the University's dismissal of the Complainant from the SON program was due to her failure in two nursing courses and not on the basis of her disability.

Issue 3: Whether the University failed to respond promptly and equitably to internal complaints that the Complainant made on September 11, and 18, 2013, stating that she had been harassed and discriminated against based on disability.

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 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.

OCR's investigation revealed the following:

- On September 11, 2013, the Complainant emailed the SON Dean, SON Assistant Dean, and the University President. In this email, the Complainant raised her concerns about the following issues:
 - not receiving time and a half on her final exam,
 - the disruption during her final exam,
 - not receiving her unit exam accommodations earlier in the class, and
 - negative comments the Professor had made about her accommodations.
- On September 19, 2013, the Complainant emailed the SON Dean a *Request for Appeal* (Appeal). The Appeal repeated, with more details, all of the concerns the Complainant raised in her September 11, 2013, email. The Complainant described behaviors of the Professor toward her, including statements that she "did not believe

my accommodations were valid,” and “was too busy for the extra effort the accommodations required,” that Complainant “really didn’t need the extra time [on exams],” and that Complainant’s accommodations were only available “at the teacher’s discretion.” She wrote that after she met with the SON Dean about her problems getting accommodations from the Professor, the Professor, in front of the class, said that she had discussed the situation with the SON Dean, who had told the Professor everything that the Complainant said about her. The Complainant wrote that after this, several students in class had asked her not to go to the University administrators again because they believed that the Professor was “taking it out on the class.”

- On September 20, 2013, the SON Dean informed the Complainant that the *Bachelor of Science in Nursing Student Handbook* only allows students to appeal or grieve incidents from the current or most recent past quarter, and that other issues (if there had already been an attempt to resolve them) may not be subject to a grievance. The SON Dean stated that by allowing the Complainant to retake the final exam and giving the Complainant adequate time, the SON had attempted to cure or resolve the issue.
- The University’s *Bachelor of Science in Nursing Student Handbook* states that students with concerns or issues are to follow the steps in the *University Catalog*, and it refers students to the Catalog for procedures. The procedure for student complaints and grievances in the *University Catalog* does not contain any language restricting a student’s grievance if there had already been an attempt to resolve an issue.
- The University President informed OCR that between her receipt of the September 11, 2013, Complainant email, and September 20, 2013, she interviewed the Professor, who denied making the comments alleged by the Complainant. She stated she visited a classroom, and talked with students who she believed were part of the Complainant’s cohort to ask them if anything “untoward” took place in the Professor’s class, and that the students reported nothing took place. She stated that she did not specifically ask the students whether they heard the Professor make the alleged comments about the Complainant. She could not recall the names of the students, the name of the professor of the class she visited, the exact date she visited the class, and said she kept no notes or other documents from this classroom visit.
- The President stated that she reached her decision that the Complainant was not subjected to harassment based on her discussions with the Dean, the Assistant Dean, and the Professor. The President, in a September 20, 2013 email to the Complainant, stated the Complainant’s Appeal contained a number of factual accusations, that were not true, and that her failure in the Intermediate Care Nursing course, combined with her failure in a prior nursing course, excluded her from the SON program. The President’s email did not contain a reference to the steps she took regarding the Complainant’s complaint, nor did it notify the Complainant that

she had made a determination regarding the complaint. It also did not mention the Complainant's concerns about the failure to provide accommodations during the early unit exams.

- OCR conducted its own investigation of the Complainant's allegations about the Professor's negative comments to and about her in interviews with the Professor, the Assistant Librarian (who was allegedly present when some of the comments were made), and several students from the Intermediate Nursing class. The Professor denied making the comments, and the Assistant Librarian did not recall any of her interactions with the Complainant. The students interviewed by OCR recognized the Dean's name, but none of them recalled overhearing the Professor make the comment in class about the Professor meeting with the Dean about the Complainant. The Complainant told OCR that she could not provide names because the students feared retribution. Based on this evidence, OCR concluded that there was insufficient evidence to establish that the comments were made.
- The University Catalog includes a procedure for Student Complaints/Grievances, which the University Present identified as the appropriate procedure for resolving complaints of disability discrimination. The procedures do not refer to discrimination, nor do they inform students that they are applicable to complaints about discrimination. They require students to submit grievances within thirty days of an occurrence, but do not include timelines for all phases of the complaint resolution process. They provide for a hearing panel, but do not require the University to conduct its own investigation of the complaint and provide notice to the complainant of its findings and the basis for them.

The Section 504 regulation requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints of discrimination on the basis of disability. Pursuant to this requirement, and their overall obligation to provide students with a nondiscriminatory educational environment, universities must respond promptly and equitably to complaints of discrimination, including those raising issues concerning the provision of necessary academic adjustments, different treatment on the basis of disability, and of disability harassment.

The Complainant put the University on notice of a complaint of disability discrimination in her September 11, 2013, email to the SON Dean, and augmented that notice in her written September 18, 2013, appeal. Both documents contained details about the Professor's alleged comments about the Complainant's exam accommodations, as well as information that the Professor made comments about the Complainant in front of the class of students. They also included allegations about her difficulties obtaining adequate accommodations for her first three unit exams. Pursuant to the Section 504 regulations, the University had a duty to respond promptly and equitably to these allegations.

OCR found that the President took initial steps to determine whether the Professor's alleged comments were made by gathering information about the issue from the

Professor. However, she failed to ask sufficiently specific questions of other students in the Complainant's class to enable her to determine whether they heard the comments. As a result she did not adequately investigate that issue before she reached her conclusion that the comments were not made. OCR also found that the President's September 20, 2013, email to the Complainant failed to provide her with any information about her investigation or its outcome. The President also failed to respond at all to the Complainant's allegations regarding the accommodations for her unit exams.

Accordingly, OCR concluded based on the preponderance of the evidence summarized above, that the University failed to respond promptly and equitably to the Complainant's September 11 and 18, 2013, internal complaints alleging that the Instructor discriminated against her based on disability by failing to provide accommodations, and by making comments to her and in front of a class of other students about her testing accommodations, and thus the University did not comply with the requirements of Section 504 and its regulation regarding this issue.

OCR also concluded that the University had not adopted grievance procedures that provided for the prompt and equitable resolution of complaints of discrimination on the basis of disability. The University catalog includes procedures for responding to complaints of "prohibited harassment," but does not provide students notice of where to file other complaints of discrimination, or how those complaints will be addressed.³ The University President informed OCR that the general procedure for Student Complaint/Grievances should be used for complaints of discrimination, but neither the catalog nor the procedures themselves provide students with adequate notice that they are applicable to such complaints. Moreover, the procedure does not require the University to conduct an investigation, through which it makes an adequate, reliable, and impartial determination as to whether discrimination occurred. The procedure has inconsistent and unrealistically short designated time frames, and fails to provide a process for extending timelines. Finally, while certain steps in the procedure include written decisions, the procedure does not require notice of the President's decision, if the complaint is taken to the President as the final University decision maker.⁴

³ OCR identified aspects of the University's Student Harassment Policy that, when applied to complaints of disability harassment, would contribute to a prompt and equitable resolution. For example, the Policy includes notice to students and employees of where to file a complaint, and provides for an investigation. The Policy clearly states it applies to complaints alleging disability harassment carried out by employees, other students, and visitors. However, OCR found that the Student Harassment Policy does not identify any University staff member by title who is responsible for conducting the investigation. OCR also found that the Policy does not include designated and reasonably prompt timeframes for the major stages of the grievance process. It is also inadequate because it does not provide for written notice to the parties of the outcome of the complaint, and because the Policy does not provide adequate assurances that the University will take steps to prevent recurrence of harassment and to correct its discriminatory effects on the complainant.

⁴ The University's policy for providing accommodations for students with disabilities informs students who believes they have been denied a University approved accommodation to contact the Student Affairs/Student Services Office. However the University's policy provides no notice of any procedure that will be used to resolve such student complaints.

The University agreed to address this outstanding compliance concern through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the University to clarify how it will address students with concerns about not receiving University approved accommodations, and to modify its existing *Student Harassment Policy*. It will either modify and publish its *Student Complaints procedure*, or adopt and publish a separate grievance procedure to ensure that it will promptly and equitably resolve complaints of disability discrimination. It will also distribute the modified and/or new policy and procedures, and provide notice of them online and in publications. It will conduct sufficient training of appropriate staff to ensure they are aware of the revised, and/or new procedures and of their appropriate implementation.

Ordinarily, OCR would require the University to complete an investigation of the issues raised by the Complainant. In this case, however, OCR's investigation included the issues raised by the Complainant, and OCR reached a conclusion that there was insufficient evidence to support a conclusion of noncompliance. For this reason, OCR will not ask the University to investigate the issues further.

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 University's implementation of the Resolution Agreement. This concludes OCR's investigation of the complaint and should not be interpreted to address the University'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 have a right to 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 University 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.

If you have any questions about this letter or OCR's investigation, please contact Stan Toledo, Equal Opportunity Specialist, at (415) 486-5562 or via email at Stan.Toledo@ed.gov, or me at (415) 486-5537.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

CC: Kathleen M. Hartman
University Counsel