



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

August 19, 2015

Dr. Deborah Budd
President
Berkeley City College
2050 Center Street
Berkeley, California 94704

(In reply, please refer to OCR case no. 09-15-2037.)

Dear President Budd:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Berkeley City College (College). The complaint alleged discrimination based on disability. The Complainant¹ alleged that Berkeley City College, during the Fall 2014 semester, failed to provide her with the auxiliary aids and services necessary to participate in the education program in a nondiscriminatory manner by 1) not providing her with class notes from a notetaker in one class, History, on a regular and on-going basis; 2) not ensuring that video clips were provided with closed-captioning in Art, English, and History classes; and 3) not ensuring that American Sign Language interpreters (SLIs) were available, and when available, provided accurate interpretation in one class, on one occasion. For the Spring, 2015 semester, the Complainant also described a notetaking problem in one class, and one example of an inaccurately captioned video shown in another class.

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 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 (Title II), 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 emails and documents from the Complainant and interviews, emails, and documents from College staff and administrators. 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 issue of

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.

notetakers and closed-captioned videos. Regarding SLIs, OCR found insufficient evidence to support a conclusion of noncompliance with Section 504 and Title II.

The facts gathered during the investigation, the applicable legal standards, and the reasons for our determinations are summarized below.

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 Title II regulations at 28 C.F.R. §35.130(a), contains a similar prohibition applicable to public postsecondary educational institutions.

The Section 504 regulations, at 34 C.F.R. §104.44(d)(1), require recipient colleges and universities to take steps to ensure that no disabled student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. Section 104.44(d)(2) provides that auxiliary aids may include taped texts, readers in libraries for students with visual impairments, and other similar services and actions. Recipient colleges and universities, however, need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

The Section 504 regulations, at 34 C.F.R. §104.4(b)(2), provides that aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for disabled and non-disabled persons, but must afford disabled persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Under the Title II regulations, at 28 C.F.R. §35.130(b)(1)(ii) and (iii), public colleges and universities may not afford a qualified individual with a disability opportunities that are not equal to those afforded others, and may not provide aids, benefits or services that are not effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

Under 28 C.F.R. §35.130(b)(7), public colleges and universities must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program or activity. Under 28 C.F.R. §35.135, public colleges and universities are not required to provide disabled individuals with personal devices, individually prescribed devices, readers for personal use or study, or services of a personal nature. Section 35.103(a) provides that the Title II regulations shall not be construed to permit a lesser standard than is established by the Section 504 regulations. Therefore, OCR interprets the Title II regulations to require public colleges

and universities to provide necessary auxiliary aids to the same extent as is required under the Section 504 regulations.

The Title II regulations, at 28 C.F.R. §35.160(a), require a public college or university to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. The regulations at 28 C.F.R. §35.160(b)(1) further requires a public college or university to furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity. In determining what type of auxiliary aid and service is necessary, 28 C.F.R. §35.160(b)(2) requires that the college or university give primary consideration to the requests of the individual with disabilities.

“Communication” is construed broadly to mean the transfer of information. In determining whether communication is as effective as that provided to non-disabled persons, OCR looks at the timeliness of the delivery, the accuracy of the communication, and whether the manner and medium used are appropriate to the significance of the message and the abilities of the disabled individual. A qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.

Background

The Complainant, who is Deaf, enrolled on-and-off at the College since 2011. She enrolled in four classes in the Fall, 2014 semester: Art, Counseling, English, and History. She requested, and was approved by the College’s Program and Services for Students with Disabilities (PSSD) office to receive, accommodations including priority registration, 1.5 extra time for exams/quizzes in a distraction reduced environment, shared notes/notetaker, and SLIs. The Complainant passed all of her Fall, 2014 semester classes.

The College, part of Peralta Community College District, provides to its students with disabilities who use SLIs the services of a coordinator (Interpreter Coordinator or Coordinator).

The Complainant enrolled in five classes for the Spring, 2015 semester: Anthropology, Art, Geology, Humanities, and Political Science, but dropped the Political Science and Anthropology classes. The Complainant’s accommodations approved by PSSD for Spring, 2015 did not vary from Fall, 2014.

The OCR complaint generally reflected the Complainant’s concerns about not being provided notes from notetakers, about in-class internet-based and other videos not being closed captioned, and a few examples of an SLI not being provided, and an example of an SLI not providing the quality of interpretation that met her needs on one occasion.

OCR's investigation showed the following:

Notetakers

- The Complainant stated to OCR that she expected to receive class notes from a notetaker after class each class day, and she often expressed and repeated this expectation in email with the PSSD staff and with the notetakers. For Fall, 2014, the Complainant reported no difficulty receiving notes in her classes, with the exception of her History class. She reported only receiving History class notes after a month of classes, in one packet, and then another packet after two months of classes. After that, it would appear that she received class notes, with one or two other sporadic, one-day examples when the Complainant did not get class notes in History.
- For the Spring, 2015 semester, the Complainant identified one example of a problem she had with the class notes she received in Anthropology class, which she described as being unclear. The Complainant emailed the Interpreter Coordinator after 8 weeks of class that the notes she was getting for Anthropology class were not clearly printed, and she was having trouble reading them.
- The Dean of Student Support Services and PSSD Director (Dean) stated to OCR the PSSD program's expectation for the length of time between the end of class and when notes are to be made available for students should be within 24 hours. Students who volunteer in classes to be notetakers are able to learn about the requirements of being a notetaker in a mini-orientation session offered by PSSD, but the degree to which this 24-hour period requirement for notes is being adequately communicated to student volunteer notetakers is unknown.
- The Dean was not aware of any written PSSD policies or forms where the 24-hour expectation is written, and it was unclear to OCR whether instructors, PSSD students, and even all PSSD staff were consistently made aware of this expectation. For example, the Complainant emailed her PSSD Counselor (who is also the PSSD Program Coordinator) and the District's Interpreter Coordinator in early October, 2014 about having just received for the second time a collection of several weeks of notes in her History class which began in August, 2014. The subsequent emails between PSSD staff about notes for the History class included one email from the PSSD Counselor to the PSSD Staff Assistant asking the PSSD Staff Assistant to check with the notetaker that the notes were being submitted on at least a weekly basis, but that email did not mention the 24-hour expectation for the delivery of notes to PSSD students.
- The evidence also showed that when questions were raised about the quality of the History notes in early October, 2014, the PSSD Counselor responded positively by asking the District Interpreter Coordinator to ask the Complainant what was missing from the notes in an attempt to address any of the Complainant's concerns about the class notes.

- When the issue of missing notes in History class recurred in late October, 2014, PSSD staff emails showed that the PSSD was still attempting to find a way in which to address the Complainant's notetaking needs. Email complaints from the Complainant to PSSD staff in November, 2014 also show that the Complainant was not receiving History class notes, and that once, the notes she received that had been scanned were not legible.
- The Dean and the Counselor both stated to OCR that the consistency of the notetaking service provided to the Complainant was disrupted when a notetaker stopped volunteering to take class notes for the Complainant.
- The Dean and the Counselor both stated to OCR that the Complainant was absent from class frequently Fall, 2014 and Spring, 2015, and that PSSD does not provide the Complainant with class notes from days that she did not attend class. The Dean and the Counselor attributed a large part of the Complainant's problems receiving PSSD services to the Complainant's absences and tardiness.
- The Interpreter Coordinator stated to OCR that she tracks a PSSD student's attendance only once they have been more than 30 minutes late to a class, or missed three classes. According to the Coordinator's log, the Complainant was either late to, or absent from, class or lab sessions 43 times during the 2014 semester, and 84 times during the 2015 semester, although some of the absences were excused.

Video closed captioning

- For Fall, 2014, the Complainant identified examples of videos being shown in class with no captioning in three classes. Once, in her Art class when this occurred, the PSSD Counselor told OCR that when the Complainant brought this to her attention, she contacted the Art instructor who apologized, and contacted the PSSD's Alternative Media Services office that is responsible for providing assistance with video captioning requests. The Complainant also described to OCR an example from October, 2014, when internet-based video clips were used in English and History class, but were not captioned. While emails from the PSSD Counselor showed that she responded to this situation by emailing the English and History instructors with directions for them on how to work with the Alternative Media Services office regarding DVDs that might need to be captioned, there is no clear information that the internet videos problem was directly addressed, or permanently resolved.
- The Complainant stated that she encountered a problem with inaccurate closed captioning of a video once during the Spring 2015 semester, in early March, 2015, in the Complainant's Anthropology class. The PSSD Counselor stated to OCR that when she learned of the problem with this video, she contacted the instructor, and the instructor stopped showing what everyone seemed to have agreed was a poorly captioned video. The PSSD Counselor also explained to OCR that she sent an

email to all College Department chairs in response to the issue of poorly captioned videos, but was not able to explain to OCR why this email only discussed the issue of SLIs, and gave tips about how to successfully work with SLIs, but failed to address video captioning.

- Emails between one of the Complainant's part-time and one full-time faculty from the Fall, 2014 semester, and PSSD staff, on the topic of video captioning for the Complainant revealed that faculty were unclear about the need for and the process to request captioned videos, and that they actively sought in-service training or staff development workshops. The emails revealed initial confusion about whether the individual academic departments bore the responsibility and costs to get videos captioned, or whether the PSSD had the responsibility. But, even after this confusion was resolved, there remained unresolved flaws in the PSSD's process, and ample confusion among important PSSD stakeholders about the process for obtaining captioned videos.
- The Specialist in the College's Alternative Media Services office wrote in an email in October, 2014, to instructors and PSSD staff that a successful video captioning project required planning and communication. He suggested that instructors who plan to show uncaptioned videos need to communicate with the PSSD Alternative Media Services office in advance to determine if the video can be captioned. The PSSD notifies instructors, by using its Educational Accommodations form, about PSSD students who need videos captioned but the PSSD Counselor told OCR that the PSSD relies on instructors to come to them if they have video captioning needs, unlike other services provided by PSSD to disabled students which involve the PSSD reaching out to instructors to notify them of accommodations, for example. Adding to the confusion is the fact that the accommodation of video captioning is listed in a separate box on the PSSD accommodation form with other accommodations, like SLIs, real-time captioners, and assistive listening devices, which are provided by the PSSD office to the disabled student, which demonstrates the confusing nature of the PSSD's practice of relying on instructors to contact the PSSD office to request video captioning assistance.
- The PSSD Counselor asserted to OCR that the Alternative Media Services office was adequately funded to provide captions for videos, but this assertion that funding for captioning was adequate is contradicted by a description in an email from the Alternative Media Specialist, who is the PSSD staff member responsible for video captioning, in which he suggested to the PSSD and to the Complainant's English and History instructors that funding for video captioning could be a problem. He mentioned in this email that no department or program at the College had funds set aside for video captioning, and that he was copying his email to College vice presidents to ask that funding be added for video captioning so that the PSSD does not get caught off guard by captioning requests.

SLIs

- The Interpreting Coordinator met with the Complainant July X, 2014, before the Fall, 2014 semester began and discussed with her transportation problems she was having that caused her to be tardy to classes. PSSD policy requires a SLI to wait 30 minutes after class begins if a student approved to receive SLIs does not arrive at the beginning of the class. Even though the Interpreting Coordinator encouraged the Complainant to take advantage of priority registration to also meet early with PSSD to set up accommodations early—which might have helped the Interpreting Coordinator to secure the SLIs that the Complainant preferred to have as her interpreters—the PSSD Counselor told OCR that the Complainant did not use the extra time to her advantage, and instead came to PSSD the week before classes began. The Interpreting Coordinator and the PSSD staff told OCR that the Complainant was more particular in her needs for interpreters than most other deaf students when it came to which SLIs she would work with, and that she demanded to interview every SLI before she would agree to have the SLI interpret for a class. No other deaf students have made such a request. The Coordinator and staff reported to OCR that the College did not receive complaints from any other deaf or hard of hearing students who used SLIs provided by the College regarding either SLIs missing classes, or the quality of the SLI interpretation.
- The Complainant raised the issue of absent SLIs, and gave OCR one Fall, 2014 example that occurred on August XX, 2014 in Art class. The District Interpreting Coordinator, who has been coordinating SLIs for the Complainant since 2011, confirmed this one example during the Fall, 2014 semester, of the College not providing an SLI for the Complainant.
- The Coordinator's documents showed that in December, 2014, a scheduled SLI (one of a team of two) became unable to interpret for the Complainant's History class final exam review session as the result of an injury, and at the last moment told the Interpreting Coordinator she was unavailable. The Coordinator rearranged other SLIs from other classes to free up an SLI, who substituted for one of the two scheduled interpreters for this class. The Complainant raised concerns with OCR about the quality of this SLI's interpretation in this one class session because the substitute SLI made one error while translating the Complainant's question to the instructor.
- The Coordinator stated to OCR that the last-minute substitute SLI, who had been interpreting professionally since 2011 and was an effective and accurate interpreter, did not have the benefit of having been present for prior class sessions to accumulate context for the words and vocabulary being used in the class. She noted that after the substitute SLI made the error, it was immediately corrected by the other SLI in the room as part of the SLI team assigned to interpret in the Complainant's class. The Coordinator stated that a fully certified SLI with many more years of experience could have easily made the same "voicing" error when working as a last-minute substitute.

- The Coordinator stated to OCR that when the Complainant raised this concern with her by text message at 12:14 a.m., the Coordinator responded and told the Complainant that if she had a concern over the quality of the interpretation, the Coordinator would set up a meeting with the Instructor, which the Complainant declined.
- The Interpreter Coordinator identified to OCR one example during the Spring, 2015 semester when no SLI was available for one of the Complainant's 75-minute class sessions, that was caused by the illness of the scheduled SLI when no other SLIs were available as a substitute.
- The Dean and the Counselor stated to OCR that any student who raised a concern with them, which was rare, about SLIs (either availability or quality) would have been referred to the Interpreter Coordinator. The Coordinator stated that she responds to students' concerns about interpreting quality by actions such as meeting with SLIs to test their grasp of the course material and providing them additional support if the course content is not familiar, re-assigning a SLI, and meeting with students to talk about how to work effectively with SLIs.

OCR found that, with regard to notetaking services, the College failed to meet Section 504 and Title II requirements concerning the provision of this auxiliary service for the Complainant in Fall 2014. The receipt of class notes in a timely fashion as an accommodation, which the PSSD considered to be within 24 hours after the end of class, enables students approved to receive this service to access important educational content for study, review, and preparation for future classes. When using a system of delivery of class notes like the one used by the PSSD that relies on students as volunteers to take class notes, OCR is aware that it would not be uncommon for there to be, over the course of a semester, circumstances which cause or contribute to occasional and slight delays in the delivery of class notes, such as the sudden illness of a notetaker, or the failure of a scheduled notetaker to attend class.

OCR found that while similar circumstances of the type described above might have played a limited role in the PSSD's failure to ensure that the Complainant received History notes consistently in a timely fashion, the PSSD's process for the provision of notetakers was inadequate because PSSD failed to adequately and clearly communicate its 24-hour standard to students, notetakers, faculty, and PSSD staff—all important stakeholders in the notetaking system—and to resolve concerns about notes (both missing notes, and the legibility of the notes) that were brought to the attention of the PSSD Office. It is acceptable in most cases for student volunteers to serve as class note takers, but the system that provides the notes must ensure a note taker is provided and the notes are timely provided to the student with a disability.

The evidence showed that the Complainant did not consistently receive History notes within 24 hours after the end of History class, and often waited significantly longer periods between History classes to receive notes. OCR found that this failure denied the Complainant the service the PSSD had determined the Complainant needed in

order to participate in the education program in a nondiscriminatory manner in violation of Section 504 and Title II. Clearer communication among the stakeholders in the system for providing class notes is needed to improve the PSSD's provision of this service to students with disabilities.

Regarding closed captioned videos, OCR found that the College failed to meet Section 504 and Title II requirements concerning the provision of this auxiliary service for the Complainant in the Fall, 2014 semester regarding videos shown in English, History, and Art classes on one occasion in each class, and on one occasion in the Spring, 2015 semester in Anthropology class. OCR found that the evidence showed that faculty were uncertain about who was responsible to provide this service, and what steps to take to acquire this service for videos they planned to show in class. OCR found no evidence that the College met its obligation to provide this auxiliary service by, for example, having a detailed, step-by-step procedure with timeframes in place to process the requests for captioned videos. The evidence showed that instructors (part-time and full-time) were unaware of what to do, even though PSSD expects instructors to contact PSSD for video captioning requests and services. Videos without captions shown to deaf and hard of hearing students who have been approved to receive video captioning service lack significant content, the absence of which discriminates against deaf and hard of hearing students.

OCR also found that the College failed on one occasion to provide auxiliary services to the Complainant by not having qualified SLIs available for one class session of her Art and Geology classes. However, OCR determined that these isolated incidents were not sufficient to violate the requirements of Section 504 and Title II.

Interpretation from a qualified interpreter must effectively, accurately, and impartially convey communication, both receptively and expressively, using any necessary specialized vocabulary. The evidence showed that on one occasion and in one class, a substitute SLI made an error, which was immediately corrected by another SLI. The Complainant provided to OCR no other examples of inaccurate sign language interpretation during the Fall, 2014 or Spring, 2015 semesters at the College. OCR found that because the error was immediately corrected by another SLI in the classroom, the Complainant received effective communication. The Interpreting Coordinator, after she learned of the situation involving the error, took appropriate steps, including offering to arrange a meeting between the Complainant and the History instructor, which the Complainant refused.

OCR was aware of the Complainant's concerns related to the quality of SLIs provided at the College, including that the one voicing error in class drew unwanted attention to the Complainant while the other SLI corrected the mistake. OCR did not find that the one example of a voicing error, in the context of all of the SLI services provided the Complainant for all of her classes, raised concerns sufficient to suggest that she was denied effective communication. Based on these circumstances, OCR concluded that with regard to SLIs, there was insufficient evidence to show the College violated Section 504 or Title II as alleged.

In summary, OCR concluded that the College failed to ensure that the Complainant received class notes from a notetaker in a timely enough fashion and to ensure videos shown in classes were captioned so that the Complainant could participate in the College's education program in a nondiscriminatory manner.

The College agreed to address these areas of non-compliance through signing a Resolution Agreement, a copy of which is attached. The Resolution Agreement requires the College to review and, as necessary, revise its policies, procedures, and practices to ensure the timely provision to students with disabilities of notes from notetakers, and to clarify the Disabled Student Services Office's 24-hour notes delivery expectation to all stakeholders. The College will also identify an employee who is responsible for resolving disabled students' concerns about notes from notetakers. The College will review and, as necessary, revise its policies, procedures, and practices to ensure the timely provision to students with disabilities of captioned videos, and to conduct an internal audit of the Alternate Media Office to assess its ability to provide captioned videos in a timely manner and in good quality, including a resource study to determine whether its current staffing levels and other resources are appropriate to ensure that the College provides students with disabilities with equal access to captioned videos. Regarding individual remedies for the Complainant, the College will credit the Complainant's College account for the Fall, 2014 History class under circumstances described in more detail in the Resolution Agreement.

Based on the commitments made in the attached Resolution Agreement, OCR is closing the investigation of this complaint as of the date of this letter. OCR will monitor the College's implementation of the Resolution Agreement. This concludes OCR's investigation of the complaint and should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is informing the Complainant of the complaint resolution by concurrent letter. The Complainant may file a private suit in Federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request we will seek to protect, to the extent provided by law, personally

identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR appreciates the courtesy and cooperation extended by you and your staff 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

Enclosure