



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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

REGION IX  
CALIFORNIA

August 15, 2016

Carole S. Goldsmith  
President  
Fresno City College  
1101 East University Avenue  
Fresno, California 93741

(In reply, please refer to OCR case no. 09-15-2504.)

Dear President Goldsmith:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Fresno City College (College). The OCR complaint was filed by the Complainant on behalf of his client, the Student.<sup>1</sup> OCR investigated the following two issues:

1. Whether the College discriminated against the Student based on disability by failing to engage in an interactive process regarding her disability that would have allowed the Student to participate in the College's nursing program in a non-discriminatory manner; and
2. Whether the College treated the Student differently than another student based on race/national origin; specifically, whether the College did not permit the Student to take a class in the nursing program a third time but permitted a White student to do so.

OCR investigated the complaint under the authority of Section 504 of the Rehabilitation Act of 1973 (Section 504), Title VI of the Civil Rights Act of 1964 (Title VI), and their implementing regulations. Section 504 prohibits discrimination on the basis of disability and Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended (Title II), 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 VI, and Title II.

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<sup>1</sup> OCR notified the College of the identities of the Student and the Complainant at the start of the investigation. We are withholding their names from this letter in order to protect their privacy.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

To investigate this complaint, OCR interviewed the Complainant and reviewed documents and other information provided by the Complainant and the College. The College expressed interest in resolving the concerns identified by OCR prior to the conclusion of its investigation of the allegations. The College entered into the attached resolution agreement (Agreement) that, when fully implemented, is intended to address all of OCR's compliance concerns.

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

**Issue 1:** *Whether the College discriminated against the Student based on disability by failing to engage in an interactive process regarding her disability that would have allowed the Student to participate in the College's nursing program in a non-discriminatory manner.*

### Legal Standards

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), contain a similar prohibition applicable to public postsecondary educational institutions.

The Section 504 regulations, at 34 C.F.R. §104.44(a), require recipient colleges and universities to make modifications to their academic requirements that are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating, against qualified individuals with disabilities. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific required courses, and adaptation of the manner in which courses are conducted. However, academic requirements that recipient colleges and universities can demonstrate are essential to the program of instruction being pursued or to any directly related licensing requirement will not be regarded as discriminatory.

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 as 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. 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 academic adjustments to the same extent as is required under the Section 504 regulations.

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. 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. As part of this process, the college or university may request that the student provide documentation, such as medical, psychological or educational assessments, of the impairment and functional limitation.

The Section 504 regulations, at 34 C.F.R. §104.8(a) and (b), require a recipient employing 15 or more persons to take appropriate and continuing steps to notify program participants, beneficiaries, applicants, employees, and unions or professional organizations that it does not discriminate on the basis of disability. The notification must also identify the responsible employee designated under 34 C.F.R. §104.7(a) to coordinate its efforts to comply with the regulations.

The Title II regulations, at 28 C.F.R. §35.106, similarly require a public entity to inform applicants, participants, beneficiaries, and other interested persons about the protections against disability discrimination assured by Title II and the regulations. Under 28 C.F.R. §35.107(a), public entities employing 50 or more persons must also notify all interested individuals of the name, address, and telephone number of the designated Title II compliance coordinator.

The Section 504 regulations, at 34 C.F.R. §104.7(a), require a recipient that employs 15 or more persons to designate at least one person to coordinate its efforts to comply with and carry out its responsibilities under Section 504. The Title II regulations, at 28 C.F.R. §35.107(a), contain a similar requirement for public entities that employ 50 or more persons to designate a compliance coordinator. The public entity shall make available to all interested persons the name, office address, and telephone number of the employee(s) designated as the compliance coordinator.

The Section 504 regulations, at 34 C.F.R. §104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. §35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR 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.

Findings of Fact

- The College belongs to the State Center Community College District (College District), which includes several other community colleges. The Board of Trustees for the College District adopts board policies and administrative regulations, which apply to all colleges in the College District.
- The Student started taking courses in the College's nursing program in Spring 2014. She attended a mandatory orientation and signed an acknowledgement form that she had received and reviewed the student program handbook (Student Handbook) for the nursing program.
- The Student Handbook for the Spring 2014 term contained a section entitled, "Disabled Students Program and Services" (DSP&S). It informed students:

If you have a physical, mental, sensate or learning disability, or think you might have one, please go to the office for disabled students services for counseling and evaluation....This process may take a few weeks to complete. The nursing department will make every effort to accommodate the recommendations made by the DSP&S office. Students are expected to notify the faculty of their DSP&S assessed needs before the class session. Accommodations cannot be made after testing.

The section included a phone number for DSP&S. A later section in the Student Handbook described psychological services available to students through the College's Counseling and Health Services.

- Regarding whether a student could repeat a failed course, the Student Handbook stated, "Regardless of the circumstances, those courses in which a student receives a "W", "D" or an "F" grade may be repeated once only." (Emphasis in the original document).
- The Student completed all required courses in the nursing program except for RN 61, "Care of the Critically Ill or Injured Adult." She enrolled in RN 61 for the first time in Summer 2014. The course syllabus contained a section entitled, "DSP&S Testing." It stated:

If you have a verified need for an academic accommodation or materials in alternate media...per the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, please contact me as soon as possible. You must notify the instructor with written notice

from the DSP&S counselor as soon as possible in order for the instructor to plan the accommodations.

- The Student received a grade of “D” in RN 61 and failed the course. At the time, the Student was not registered with the College as a student with a disability.
- According to the Complainant, the Student spoke with the Director of Nursing (Director) to delay retaking the course until the Spring 2015 term so that she could address her personal situation and depression, but her request was denied. The Student retook the course in Fall 2014 with a different instructor. The course syllabus again contained a section informing students about DSP&S services.
- The Student struggled in the course again. According to the Complainant, the Student spoke with one of the counselors in the nursing program, who advised her to speak to the Director; the Student spoke to the Director on at least three occasions and also spoke to the course instructor to obtain assistance, but none was provided to her and nobody referred her to DSP&S.
- The College acknowledged to OCR that the Student met with the Director on one occasion. On October XX, 2014, the Student told the Director that she was struggling in the course and was dealing with problems at home. According to the College, the Student did not elaborate on her specific challenges, and the Director referred the Student to various resources to assist her academically (tutoring and nursing department’s skills lab) and to the College’s psychological services.
- The Student did not complete the course. She dropped the course in October 2014 and was academically disqualified from the nursing program.<sup>2</sup> The Student was not registered with the College as a student with a disability when she dropped the course.
- The Student registered with DSP&S and requested academic adjustments for the first time on July XX, 2015, when she was no longer a student at the College. She listed her disability as depression.
- The Student Handbook does not contain a statement of nondiscrimination on the basis of disability or identify the Section 504/Title II compliance coordinator.
- The 2015-16 College catalogue, which the College stated is available on the College’s website and at various kiosks on campus at no charge, includes a section called “Statement of Nondiscriminatory Policy and Obligations” contains the College’s nondiscrimination statement on the basis of disability and directs students to contact the Vice President of Student Services (phone number and

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<sup>2</sup> The Student’s transcript shows a grade of “F” for RN 61 for Fall 2014.

campus address provided) for questions regarding equal opportunity policies, for filing of grievances, and for a copy of the grievance procedure covering discrimination complaints. A separate section called "Grievance Policy for Students" states: "Students who reasonably believe a college decision or action has adversely affected his or her status, rights, or privileges may file a student grievance form" with the Office of the Vice President of Student Services. "Students are expected to make a reasonable effort to resolve matters informally with either the person whom the student has a grievance and then that person's supervisor or a college administrator, if necessary."

- The Student Handbook contained a copy of an outdated grievance procedure. The current grievance procedure is contained in AR 3435, "Discrimination and Harassment Complaints," which is available on the College District's website:
  - AR 3435 requires the College to "promptly investigate every complaint of harassment or discrimination" and appoints the Vice President of Student Services to receive, investigate, or delegate the investigation of complaints. Complaints must be filed within one year of the date of the alleged discrimination or the date on which the complainant knew or should have known the facts underlying the complaint.
  - AR 3435 expressly applies to complaints of discrimination filed by students, employees and applicants (does not mention third party complaints) and requires that complaints be filed on a particular form available on the State Chancellor's website. The College's attorney explained to OCR that, in practice, the College accepts complaints of discrimination filed by third parties and the College accepts complaints that are submitted orally, by email, or on a different form than the one specified in AR 3435.
  - AR 3435 requires the Vice President of Student to ensure a "thorough, prompt, and impartial" investigation that includes interviews with the complainant, the accused, and witnesses. Investigations must be completed within 90 days, with an investigative report issued to both parties that includes the evidence gathered, an analysis of the facts, and a specific finding as to whether discrimination did or did not occur.
  - AR 3435 requires the College to take appropriate remedial action if discrimination is found to have occurred that is calculated to end the discriminatory conduct and to protect the complainant from further discrimination and any retaliation, including disciplinary action against the perpetrator.
  - AR 3435 provides for an appeal process for the complainant, who may file a written appeal within 10 days to the college district's chancellor, who then has 10 days to render a written decision on the appeal. If not satisfied by the chancellor's response, the complainant may file a written appeal to the college district's Board of Trustees within 15 days, who has 45 days to render a decision. The College's attorney told COR that the accused party who is found to have engaged in discrimination has "robust appeal

rights” through other grievance process for challenging sanctions (such as the student disciplinary process).

*Analysis & Conclusions of Law*

At the postsecondary level, it is the student’s responsibility to follow the recipient’s procedures for registering with disabled student services and for requesting academic adjustments. Here, the Student failed to do so. The Student Handbook for the nursing program informed students to contact DSP&S and arrange for academic adjustments if students have, or believe they may have, a disability. The Student signed a form acknowledging that she had received and read the Student Handbook. In addition, in both academic terms in which the Student was enrolled in RN 61, the course syllabus informed students to contact DSP&S to arrange for accommodations for a disability.

OCR found insufficient evidence that the College violated Section 504 and Title II and their regulations by failing to engage in an interactive process with the Student. According to the Complainant, several College employees, including the Director and the course instructor, failed to refer the Student to DSP&S when she revealed to them that she was experiencing personal hardship and had symptoms of depression. Without interviewing these College employees, it is unclear how much information the Student revealed to them and whether she provided sufficient information to indicate that she may have had a disability. According to the College, when the Student met with the Director, the Student did not identify the specific challenges she was experiencing and the Director acted appropriately, based on the information that the Student shared with her, in referring the Student for academic tutoring/support and psychological services. OCR notes that even if the Student had revealed her disability to these College employees, this did not absolve or negate the Student’s responsibility to follow the College’s procedures for registering with disabled student services and for requesting academic adjustments in a timely manner.

In the course of our investigation, OCR reviewed the entire Student Handbook in effect in Spring 2014 when the Student began taking courses in the College’s nursing program. The Student Handbook contained an outdated grievance procedure. OCR reviewed the current grievance procedure (AR 3435) and identified concerns with the timeline for investigation of complaints (90 days), the failure to include a statement that third party complaints will be investigated, and the requirement that complaints be submitted on a particular form.

In all other respects, OCR found that the grievance procedure was in compliance with Section 504 and Title II and their implementing regulations. In this regard, the grievance procedure provides notice of the procedures, including that complaints should be filed with the Vice President of Student Services; requires the College to conduct an adequate, reliable and impartial investigation, including interviews with the complainant, the accused, and witnesses; provides timeframes for major stages of the complaint process, including for investigation and appeal; requires notice to the parties of the outcome of the complaint; and requires the College to take reasonable steps to prevent

the recurrence of any discrimination found to have occurred and appropriate remedial steps. The College told OCR that while the grievance procedure does not include coverage of third parties and requires that complaints be filed on a particular form, in practice, the College accepts complaints filed by third parties, and without regard to whether complaints are in writing or on a particular form.

OCR's review of the Student Handbook revealed that it did not contain a nondiscrimination statement on the basis of disability or identify the Section 504 and Title II compliance officer. The attorney for the College informed OCR that this information can be found in the annual College catalogue, which is available on the College website and at kiosks on campus for free. OCR confirmed that the 2015-16 College catalogue contains a nondiscrimination statement on the basis of disability and directs students to contact the Vice President of Student Services (phone number and campus address provided) for questions about equal opportunity policies and filing of grievances.

OCR, however, has two concerns regarding the notice provided to students in the College catalogue. First, OCR is concerned about the adequacy of the notice in the College catalogue for students in a highly specialized program, such as the nursing program. These students may be less likely to access the College catalogue than the student handbook specific to their program. Second, the College catalogue contains a section entitled "Grievance Policy for Students," that fails to inform students that they may file a grievance if they believe they have experienced unlawful discrimination, that they have a right to file a grievance alleging discrimination whether or not they have attempted to resolve the matter informally, that all complaints will be investigated, and that assistance with filing a grievance is available.

To resolve the compliance concerns identified above, the College, without admitting to any violation of law, entered into the enclosed Agreement pursuant to Section 302 of OCR's *Case Processing Manual*. The Agreement requires the College to: (1) revise the Student Handbook to either (a) provide notice of nondiscrimination on the basis of disability, Section 504/Title II compliance coordinator, and Section 504/Title II grievance procedure (AR 3435), or (b) provide a link or description of where this information can be found and ensure that it meets the requirements of 34 C.F.R. § 104.8 and 28 C.F.R. § 35.106 and is distributed as required by the same; (2) revise the section, "Grievance Policy for Students," in the annual College catalogue to inform students and applicants that the grievance policy applies to complaints of discrimination and harassment and that they have a right to file a grievance alleging discrimination and harassment whether or not they have attempted to resolve the matter informally with the accused party, that all complaints are investigated, and information about where students and applicant can obtain assistance with filing a grievance; and (3) to prepare a guidance memorandum for staff receiving and investigating oral or written complaints of discrimination and harassment, which includes the preceding information, including a summary of the key provisions of AR 3435, and state that the College's goal is to investigate and resolve complaints within 60 days of filing.

**Issue 2:** *Whether the College treated the Student differently than another student based on race/national origin; specifically, whether College did not permit the Student to take a class in the nursing program a third time but permitted a White student to do so.*

Legal Standards

Under the Title VI regulations, at 34 C.F.R. §100.3(a) and (b), a college may not treat individuals differently on the basis of race, color, or national origin with regard to any aspect of services, benefits, or opportunities it provides. Section (b)(1) states that a college may not, directly or through contractual or other arrangements, on the basis of race, color or national origin, treat an individual differently in determining whether he or she satisfies any admission, enrollment, eligibility or other requirement which must be met to receive any service, financial aid, or other benefit.

To determine whether a student has been discriminated against on the basis of race, color, or national origin under Title VI, OCR looks at whether there is evidence that the student was treated differently than student of other races, colors, and national origins under similar circumstances, and whether the treatment has resulted the denial or limitation of services, benefits, or opportunities. If there is such evidence, OCR examines whether the college provided a nondiscriminatory reason for its actions and whether there is evidence that the stated reason is a pretext for discrimination. For OCR to find a violation, the preponderance of the evidence must establish that the college's actions were based on the student's race, color, or national origin.

Findings of Fact

- The Student Handbook stated that students could retake a failed course only once, with no exceptions.
- The Student completed all of the required courses for the nursing degree except for one course, RN 61. She took this course for the first time in Summer 2014 and failed. She took the course again in Fall 2014 and dropped the course due to academic difficulties; as a result, she was dropped from the nursing program. Since then, the College has denied the Student's multiple requests to take RN 61 for a third time.
- The Complainant alleged to OCR that the College allowed a White student to take RN 61 for a third time, while denying this opportunity to the Student, who is Latino.
- The College explained to OCR that it allowed the White student to take RN 61 for a third time because the College had failed to implement the student's approved academic adjustments when she was taking the course for a second time; the student failed the course. As a remedy for the College's failure to provide her with the approved academic adjustments, the College allowed the student to take RN 61 for a third time.

- Pursuant to OCR's request, the College provided OCR with a list of students who were granted a waiver of the retake policy and allowed to take a course more than two times. The list did not include the students' race or ethnicity or the College's reasons for granting the waivers, but included students with surnames that are typically considered Latino. The College explained to OCR that it waived the retake policy when a student timely raised a valid concern while enrolled in the program. The reasons for waiver were varied, but have included instructor error, withdrawal for health concerns or pregnancy, and family issues, such as a death in the family. The College told OCR that, in contrast to the students who were granted a waiver, the Student dropped the course a second time prior to asking for a waiver of the retake policy.
- The College acknowledged to OCR that the Student Handbook did not inform students that a waiver of the retake policy was possible and the procedures for requesting a waiver, including that a waiver must be requested prior to withdrawing from class.

### Analysis & Conclusions of Law

The issue is whether the College discriminated against the Student on the basis of race or national origin when it did not allow the Student to take RN 61 for a third time while allowing a White student to do so. There is no dispute that a White student was allowed to retake RN 61 for a third time. Assuming that the Student was similarly situated to this White student, the College offered a legitimate reason for providing an exception to the two-time rule for the White student—namely, the White student was a student with a disability and the College had failed to provide her with the approved academic adjustments when she was taking the course for a second time, which contributed to her failing the course. As a remedy for the College's failure, the College allowed the student to take the course for a third time. OCR did not obtain any evidence to show that the College's proffered reason was a pretext for discrimination.

The Student Handbook stated that students could retake a failed class only once, with no exceptions. In practice, however, the College has granted exceptions to students who, according to the College, requested a waiver and provided a valid reason prior to failing or dropping the course the second time. The College provided OCR with a list of students who were granted such a waiver. The list did not include students' race or ethnicity or the College's reasons for granting the waivers, but included several students with surnames that are typically considered Latino.

Prior to completing OCR's investigation, which would have involved, among other things, determining whether other similarly situated students of a different race/national origin were provided with an opportunity to take the course a third time, the College expressed an interest in resolving this allegation through an Agreement pursuant to Section 302 of OCR's *Case Processing Manual*. OCR determined that it was appropriate to resolve this allegation through this section and kept the Complainant informed during the resolution process. Without admitting to any violation of law, the

College signed the enclosed Agreement that, when fully implemented, is intended to address OCR's compliance concerns. Pursuant to the Agreement, the College will (1) revise the Student Handbook for the nursing program to inform students that a waiver of the retake policy is possible and the procedures for requesting such a waiver; and (2) readmit the Student to the College's nursing program and allow the Student to enroll in RN 61 for a third time in Spring 2017.

### Conclusion

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 closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

When fully implemented, the Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Agreement until the College is in compliance with Section 504, Title VI, and Title II, and the implementing regulations, at issue in this case.

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

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

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it 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 regarding this letter, please contact Jenny Moon, civil rights attorney, at 415-486-5538 or [jenny.moon@ed.gov](mailto:jenny.moon@ed.gov).

Sincerely,

/s/

Mary Beth McLeod  
Team Leader

Attachment: Resolution Agreement

Cc: Gregory Taylor, General Counsel, State Center Community College District