



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS  
50 UNITED NATIONS PLAZA  
MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

REGION IX  
CALIFORNIA

April 19, 2017

Dr. Roland Kraft, Ph.D.  
Superintendent and President  
Napa Valley Community College District  
2277 Napa-Vallejo Highway  
Napa, CA 94558

(In reply, please refer to case no. 09-16-2383)

Dear Dr. Kraft:

This letter is to notify you that the U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of a complaint filed against Napa Valley Community College District (District). The Complainant, who is a student in the District,<sup>1</sup> alleged that District retaliated against her for filing her previous OCR complaint by refusing to grant her instructor's request to change the Complainant's grade in her Philosophy XXX class, for which the Complainant submitted additional work in June 2016.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education entity, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR gathered evidence by interviewing the Complainant and reviewing documents provided by the District and the Complainant. Before the investigation was concluded, the District expressed an interest in resolving the allegations, and OCR determined that it was appropriate to resolve them with a Resolution Agreement (Agreement) reached during the course of an investigation.<sup>2</sup> Accordingly, OCR did not make a compliance determination. This letter summarizes the applicable legal standards, relevant facts obtained during the investigation to date, and resolution of the complaint.

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<sup>1</sup> OCR informed the District of the Complainant's identity at the beginning of the investigation. The Complainant's identity is being withheld in this letter in order to protect her privacy.

<sup>2</sup> See Section 302 of OCR's Case Processing Manual (CPM). The CPM is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

### Legal Standards

The Section 504 regulations, at 34 C.F.R. §104.61, incorporate 34 C.F.R. §100.7(e) of the regulations implementing Title VI of the Civil Rights Act of 1964 and prohibit Districts from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Section 504. The Title II regulations, at 28 C.F.R. §35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II. 28 C.F.R. §35.134(a) provides that:

No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

When OCR investigates an allegation of retaliation, it examines whether the alleged victim engaged in a protected activity and was subsequently subjected to adverse action by the District, under circumstances that suggest a connection between the protected activity and the adverse action. If a preliminary connection is found, OCR asks whether the District can provide a nondiscriminatory reason for the adverse action. OCR then determines whether the reason provided is merely a pretext and whether the preponderance of the evidence establishes that the adverse action was in fact retaliation.

### Facts Gathered To Date

- The Complainant is a qualified individual with a disability who complained to OCR in February 2016 (09-16-2149) that she did not receive her approved accommodations during the academic year 2015-2016. The Complainant also alleged in complaint 09-16-2149 that she was not provided with certain accommodations for her disability during the previous academic years, including the 2013-2014 year.
- The Complainant took Philosophy XXX during the Spring 2014 semester and received a “C.”
- The District’s academic calendar shows that the Spring 2014 semester ended on June 2, 2014.<sup>3</sup>
- The Complainant told OCR that sometime after she completed Philosophy XXX, she shared information about her disability with the instructor including that she needed but had not received academic accommodations for Philosophy XXX.
- The Complainant told OCR that in January 2016 the Philosophy XXX instructor offered her the opportunity to complete a special project as additional work, and that the instructor also told her that upon successful completion of the special project the instructor would request that the Complainant’s Philosophy XXX grade be changed. The Complainant told OCR that she completed the special project and submitted it to her instructor in May 2016.
- The Complainant provided OCR with a copy of an email from the instructor to her on June X, 2016 in which the instructor praised the Complainant’s project and noted that she submitted a request for a

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<sup>3</sup> <http://www.napavalley.edu/academics/Instruction/Documents/Calendar%202013-14%20BOT.pdf>

change of grade to an "A". She also noted in her email that the Division Chair's Secretary had a copy of that request for the Complainant's records and encouraged the Complainant to check Admissions and Records to obtain written evidence that the grade had in fact been changed to an "A".

- The Complainant told OCR that her instructor informed her that she had never had a grade change request denied.
- The District provided OCR with a copy of the instructor's Request for Change of Grade. The form is date-stamped indicating that it was received in the District's Office of Instruction on June X, 2016. The form includes a box labeled "Date of Change" in which the instructor has written "June X, 2016." It is not clear if this box indicates the date the instructor completed and submitted the form, or the date she wished the change to be effective.
- On the grade change form, the instructor noted that she and the Complainant were aware that the request was beyond the deadline, but that due to mitigating circumstances involving the Complainant's health conditions from Spring 2014 to the present, the instructor strongly advocated for the grade change. She also noted that the Complainant submitted an impressive project showing her understanding of the subject matter.
- According to the Complainant, on June XX, 2016 she went to the Office of Instruction to check on the status of the grade change and was informed by the Admissions and Records Specialist that the office had "no record" of the instructor's request. According to the Complainant, she then contacted the Vice President of Instruction's Office to follow up and was told that they also had not received the grade change request. The Complainant said she then contacted the Division Chair's Secretary, who said that she had a copy of the original grade change request and offered to copy it and bring it to the Vice President of Instruction's Office to be processed. The Complainant told OCR she accepted this offer.
- According to the Complainant, on June XX, 2016 she went to the Vice President of Instruction's Office to check on the status of the grade change request and the Administrative Assistant to the Vice President of Instruction informed her that the grade change petition had been denied by the Vice President of Instruction earlier in the month, before he left the District for other employment.
- The District's current Vice President of Instruction told OCR that the previous Vice President of Instruction had reviewed the grade change petition and determined that it did not meet the District's criteria for a change of grade, and therefore had denied the request on June XX, 2016 and informed the instructor of the decision via email on that date.
- The District's current Vice President of Instruction stated to OCR that the reason for the denial was that the request did not comply with the District's Board Policy 4231 and Administrative Regulation 4232 ("Grade Changes"), which state that grade changes must 1) be submitted within two years of the award of the grade; and 2) meet the criteria in California Code of Regulations Title 5, Section 55025.

- The relevant regulation states that an instructor's determination of a grade "shall be final in the absence of mistake, fraud, bad faith, or incompetency." The regulation does not address whether a Complainant may request an accommodation to the grade change policies based on substantiated discrimination on the basis of disability (or other protected status).
- The District's current Vice President of Instruction told OCR that the instructor's request for a grade change was based on two justifications: 1) Two years after the award of the grade, the instructor was informed of problems with the Complainant's health that warranted changing her grade, and 2) that the Complainant submitted an impressive project showing her understanding of the subject matter. The current Vice President of Instruction stated to OCR that these justifications did not meet the criteria for changing the Complainant's grade as set forth in the California regulation.
- The College did not provide OCR with a copy of its Board Policy and Administrative Regulation pertaining to grade changes, and it was not available online.
- OCR could only locate this statement of the District's grade change policy, on page 45 of the 2016-2017 course catalog:

A grade may only be changed within two calendar years of its being awarded. A grade assigned by an instructor is not a grievable matter, except ... 'when grades are given for any course of instruction taught in a community college district, the grade given to each Complainant shall be the grade determined by the instructor of the course and the determination of the Complainant's grade by the instructor in the absence of mistake, fraud, bad faith, or incompetence, shall be final.'

### Analysis

OCR determined that the Complainant engaged in a protected activity by filing a complaint with OCR alleging discrimination on the basis of disability. OCR also found that the Complainant was subjected to an adverse action when the District denied her instructor's request to change the Complainant's grade, as a reasonable person would likely be dissuaded from making a complaint of discrimination or exercising a right or privilege secured under the statutes or regulations enforced by OCR if they feared their grade would not be changed when a change was allegedly warranted. OCR determined that the District had knowledge of the protected activity when it was notified of the Complainant's OCR complaint on March 16, 2016. OCR found that there was a temporal nexus in time between the two actions: the Complainant filed her complaint with OCR on February 16, 2016 and her instructor's request to change the Complainant's grade was marked as received on June X, 2016 and denied on June XX, 2016, approximately four months later.

OCR also found that the District articulated a legitimate, non-retaliatory reason for denying the instructor's request to change the Complainant's grade: the request did not meet the two requirements of the District's grade change policy because it was not submitted within two years of the award of the grade, and because the rationale for the change did not meet the District's criteria because it was for a reason other than fraud, error, or mistake.

The evidence gathered to date raises a prima facie case of retaliation. OCR identified a deficiency with respect to the reason for the denial as stated, because the District's policy appears to permit a grade change upon an instructor's request notwithstanding the other requirements. In this regard, the District's own policy provides that the instructor's determination of a grade shall be the final determination. According to the Complainant, the instructor informed the Complainant that she expected that the grade would be changed in accordance with her request in spite of not meeting the deadline by, at most, 5 days.

During the course of the investigation, OCR reviewed the District's website and narrative response about the requirements of its grade change policy and process. As described by the District, OCR had a concern because neither the policy nor process includes the ability to change a student's grade if a student has been discriminated against on the basis of disability, including not receiving approved accommodations/modifications, and the District determines that grade change is needed to remedy the discrimination.

The District indicated an interest in voluntary resolution on December 16, 2016, and OCR determined that a voluntary resolution prior to completion of the investigation was appropriate in this case. To complete the investigation, OCR would need to conduct interviews and obtain additional documentation to determine if there is sufficient evidence of pretext to show that retaliation was the motivating factor for the denial.

### Conclusion

On April 17, 2017, the District entered into the enclosed Agreement with OCR, which is aligned with the allegations investigated, and the information obtained by OCR during the investigation. The Agreement requires the District to review the Complainant's grade change request; revise its policy and procedures related to grade changes; and provide all staff and faculty with a guidance memo reminding them of the prohibition against retaliation. When fully implemented, the resolution agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Agreement until the District is in compliance with the statutes and regulations which were at issue in this case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District'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. 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. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, retaliate, 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 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.

OCR would like to thank the District for its assistance in resolving this complaint. If you have any questions please contact OCR attorney Matthew Wood at 415-486-5591 or [matthew.wood@ed.gov](mailto:matthew.wood@ed.gov).

Sincerely,

/s/

Laura Faer  
Regional Director

Enclosure