



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200; ROOM 1545
SAN FRANCISCO, CA 94102

January 24, 2018

VIA ELECTRONIC MAIL

Dr. Dennis Harkins
President
Orange Coast College
2701 Fairview Road
Costa Mesa, California 92626

(In reply, please refer to case no. 09-17-2403.)

Dear Dr. Harkins:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Orange Coast College (College) alleging discrimination on the basis disability. The complaint alleged that:

1. The College failed to respond to an internal complaint made on or about November XX, 2016, stating that the Student¹ 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), 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 in programs and activities operated by Colleges 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 system, the College is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews with the complainants, College staff and administrators. OCR also reviewed documents and other information provided by the complainants and the College.

¹ OCR previously provided the College with the identity of the complainants (the Student and his mother), in its May 9, 2017 letter and is not stating it again in this letter in the interest of 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.

While OCR found insufficient evidence of a violation of Section 504 or Title II with regard to the issues raised by the complainants, OCR determined that the College's grievance procedures were not in compliance with Section 504, Title II and their implementing regulations. The applicable legal standards, the facts obtained during the investigation, and the reasons for the determinations are summarized below.

Factual Findings

At the time of the incident with the XXXXXXXXXXXX Instructor in the fall of 2016, the Student was on suspension due to two previous complaints of harassment filed by students and staff in the spring of 2016.² The Student's conduct leading up to the spring of 2016 suspension, as well as the fall of 2016 incidents at issue here, were assessed through the College's Behavioral Assessment Team (BAT).³

According to the College, on October XX, 2016, the Dean of Student Services received a BAT complaint from the Student's XXXXXXXXXXXX Instructor. The Instructor stated that the Student sent her a "hostile email" that claimed that she had "attacked him unjustly" and "attacked President Trump" in class. The Student's e-mail was 30 single spaced lines with that included personalized name calling, including "[y]ou're an idiot and have no idea what the hell you're talking about," and "[t]o hell with your nonsensical baseless personal attack directed at me, totally false, full of bs." She wrote in the BAT complaint to the Dean of Students that she did not recall any such incident and that she had not made such statements. She stated that she was not aware of the Student's political perspectives as he had never participated in class. She stated that she e-mailed the Student back stating that she did not know what incident he was referring to, to which the Student responded that it was a "misunderstanding." The XXXXXXXXXXXX Instructor concluded stating that she was "concerned about his anger."

On November X, 2016, the Dean of Student Services sent the Student a letter describing the XXXXXXXXXXXX Instructor's complaint and the potential violations of the College's Student Code of Conduct for harassment. The letter reminded the Student that he was on disciplinary probation through May XX, 2017. It noted that with the XXXXXXXXXXXX Instructor's complaint, the Student had now received a second report alleging a violation of the Student Code of Conduct, and that he could be subject to additional sanctions, including but not limited to suspension or expulsion.

² The Student was determined to have engaged in two harassment incidents that resulted in him being disciplined by the College. On April XX, 2016, the College and the Student entered into an agreement that placed the Student on academic probation through MayXX1, 2016 and required him to meet weekly with the College's Director of Mental Health Services. There were additional requirements that addressed the Student's involvement with other students, faculty and staff including "civil communications." The agreement also noted that if the Student were to violate the terms, his suspension would be extended further.

³ BAT is composed of the College's Director of Mental Health, Dean of the College, Dean of Student Services, and the Associate Dean of Student Health Services, amongst other College administrators.

On November XX, 2016, the XXXXXXXXXXXX Instructor filed a second BAT complaint for “concerning behavior” against the Student, after he sent her a second e-mail indicating that he was angry that she had complained about him in October. The Student’s second e-mail complained that she had filed a complaint about his behavior stating, “[W]hat I don’t understand is why you had to report me.” He accused her of “political correctness,” and provided a post presidential election video link of members of the Democratic party and wrote, “this is what the face of LOSERS look like.” The XXXXXXXXXXXX Instructor stated in the second BAT complaint that she had previously filed the first BAT complaint because she was concerned about the “anger and hostility” in his e-mail to her, and that based on the second e-mail, it was apparent that the Student was angry because she reported him. She indicated that she was concerned.

On November XX, 2016, the XXXXXXXXXXXX Instructor sent an e-mail to the Director of Mental Health, who was coordinating the BAT complaints, and whom she knew to be meeting with the Student for counseling, stating that she was feeling threatened and afraid, and did not want him in her class.

On the same day, the Student and his mother met with the Director of Mental Health with whom the Student had been meeting on a weekly basis due to his previous discipline proceedings. The Student’s mother verbally complained about the XXXXXXXXXXXX Instructor to the Director of Mental Health.

Records provided by the College indicate that the Director of Mental Health offered to contact the XXXXXXXXXXXX Instructor’s supervisor, the Dean of the College, in alignment with the College’s *Service Complaint Process*,⁴ but both the Student and his mother chose not to pursue the service complaint at the time.

On November XX, 2017, the Student’s mother, father, and the Student’s tutor (Tutor) sent the Dean of the College a hand-written letter complaining that the XXXXXXXXXXXX Instructor was “bullying and discriminating” against the Student due to unspecified “political” statements she made which triggered the Student due to his conservative political views. They stated that they had told the College previously that the Student had a disability (autism) and the suspension for his responses to the XXXXXXXXXXXX Instructor’s “political” comments failed to recognize his disability, and thus was discriminatory. They further stated that they were “deeply distressed” that the Student was disciplined given his “disabilities (autism).” They added that in particular, they felt that the Student’s e-mails to the Professor were due to her “bullying and discriminating”

⁴ The College’s Service Complaint procedures provide that individuals dissatisfied with a campus policy or the conduct of a college employee can bring a complaint, a written or verbal notice of dissatisfaction, to the attention of the appropriate faculty, staff, or administrator at any time. If a problem is identified, applicable remedies will be put in place as soon as possible. Before filing a complaint, individuals should make every effort to resolve their dissatisfaction informally with the college personnel immediately involved. If addressing an issue informally does not lead to satisfactory resolution, the individual may register a complaint with the appropriate supervisor or administrator. See, http://www.orangecoastcollege.edu/student_services/Pages/Complaint-Process.aspx.

against students. The Student's mother complained to OCR that they never received a response from the College to this complaint.

On November XX, 2016, the Student sent a letter to the Director of Student Life, Interim Dean of Students, and the Director of Mental Health to apologize to the XXXXXXXXXXXX Instructor and the other students.

The College stated to OCR that it did not receive a formal discrimination complaint from the Student regarding the XXXXXXXXXXXX Instructor and noted the November XX, 2016 apology letter regarding the XXXXXXXXXXXX class incident. On the same day, the College also received a letter from the Student's mother, father, and Tutor stating that the Student is autistic and did not respond appropriately to social cues, noting that the Student "sincerely regrets" his e-mail response to the XXXXXXXXXXXX Instructor.

On November XX, 2016, the Director of Student Life, Interim Dean of Student Services, and the Director of Mental Health, met with the Student to discuss the incident with the XXXXXXXXXXXX Instructor. The Student admitted to sending the e-mails to the XXXXXXXXXXXX Instructor, and stated that while he was unsure whether the XXXXXXXXXXXX Instructor's alleged political comments were directed towards him, he wanted to "trigger the professor" and "trigger the social justice warriors in the class." He also informed them that he did not in fact write the apology letter, that his mother had woken him up and told him to sign it, which he did without reading the letter, in order to go back to sleep.

The Student told OCR that he does not believe that he has a disability. He also stated that he did not file the allegation that the College failed to investigate the disability harassment allegation and that he was not interested in it. He said it was his parents who had sent the November XX, 2016 letter to the College, complaining about the XXXXXXXXXXXX Instructor. He also said that it was his mother who filed the complaint with OCR.

In May 2017, the College reported to OCR that at the time of the XXXXXXXXXXXX Instructor incident, the Student was not registered with the College's Disabled Students Programs and Services office and has not done so since that time.

The College told OCR that it did not consider the parents' and Tutor's November XXXX letter as a formal discrimination complaint and thus did not investigate it. The College provided two primary reasons why it did not investigate the discrimination complaint. First, the discrimination complaint letter was sent during the disciplinary proceedings against the Student regarding interactions with the XXXXXXXXXXXX Instructor, for which the Student apologized. Second, the parents and the Student were already engaged in an informal resolution process with the College to address the Student's harassing conduct.

OCR reviewed the College's non-discrimination complaint process located on the College's web site.⁵ The web site states that the College does not discriminate on the basis of "race, color, sex, gender identity, gender expression, religion, age, national origin, ancestry, sexual orientation, marital status, medical condition, physical or mental disability, military or veteran status, or genetic information" and that anyone who believes they are being harassed or discriminated and any faculty or staff who have awareness of harassment or discrimination may file a complaint.

The College is a member of the Coast Community Colleges District (College District). The College provides a link to the College District's anti-discrimination complaint policies and procedures. The College District's policy, AP 3435 "Discrimination and Harassment," mirrors the College's anti-discrimination complaint link language stating: "[t]he complaint shall be filed by one who alleges that he/she has personally suffered unlawful discrimination or by one who has learned of such unlawful discrimination in his/her official capacity as a faculty member or administrator."⁶

Issue: Whether the College failed to respond to an internal complaint made on or about November XX, 2016, stating that the Student had been harassed and discriminated against based on disability.

Legal Standards

The regulations implementing Section 504, at 34 C.F.R. § 104.4(a) and (b), prohibit discrimination based on disability by colleges of Federal financial assistance. The Title II regulations, at 28 C.F.R. § 35.130(a) and (b), create the same prohibition against disability-based discrimination by public entities. Public colleges are responsible under Section 504 and Title II for providing students with a nondiscriminatory educational environment. Harassment of a student based on disability can result in the denial or limitation of the student's ability to participate in or receive education benefits, services, or opportunities.

Colleges provide program benefits, services, and opportunities to students through the responsibilities given to employees. If an employee who is acting, or reasonably appears to be acting, in the context of carrying out these responsibilities engages in disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program, the college is responsible for the discriminatory conduct whether or not it has notice.

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the college is responsible for determining what occurred and

⁵ See, http://www.orangecoastcollege.edu/student_services/Pages/Complaint-Process.aspx

⁶ See, http://www.orangecoastcollege.edu/about_occ/AcademicSenate/Agendas%20and%20Minutes/AP%203435%20Discrimination%20and%20Harassment%20Investigations%20Rev.%204-2-13%20at%20250%20pm.pdf

responding appropriately. OCR evaluates the appropriateness of the responsive action by assessing whether it was prompt and equitable. What constitutes a reasonable response to harassment will differ depending upon the circumstances. However, in all cases the college must conduct a prompt, adequate and impartial inquiry designed to reliably determine what occurred. If harassment is found, it should take reasonable, timely, age-appropriate, and effective corrective action, including steps tailored to the specific situation. The response must be designed to stop the harassment, eliminate the hostile environment if one has been created, and remedy the effects of the harassment on the student who was harassed. The college must also take steps to prevent the harassment from recurring, including disciplining the harasser where appropriate. A series of escalating consequences may be necessary if the initial steps are ineffective in stopping the harassment. Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the college does not tolerate harassment and will be responsive to any student reports of harassment. The college also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

In addition, the Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination, including harassment. These requirements include issuance of notice that disability discrimination is prohibited (34 C.F.R. § 104.8 and 28 C.F.R. § 35.106) and adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. § 104.7[b] and 28 C.F.R. § 35.107[b]).

Analysis

In this case, the Student's mother alleges that the College did not respond to a disability-based discrimination complaint sent on November XX, 2017, by the Student's parents and Tutor alleging that the College discriminated against the Student when it suspended him for his responses to the XXXXXXXXXXXX Instructor's politically motivated lecture comments.

Failure to respond

Under Section 504, Title II, and the regulations, if a student is harassed based on disability by an employee, the College is responsible for determining what occurred and responding appropriately. The College's response must be prompt and equitable. The facts gathered indicate that the College had notice on November XX, 2017, from the Student's parents and Tutor that the Student had been allegedly harassed based on disability. The College stated that it did not consider the November XX, 2017 letter to be a discrimination complaint and did not respond to the allegation because the College was already engaged in a resolution process with the Student regarding his conduct, wherein the Student and the parents subsequently sent two letters containing apologies

for his actions. In addition, the College stated that it was in a disciplinary process with the Student regarding the incident with the XXXXXXXXXXXX Instructor, and through that process it requested further information about what occurred. In this regard, it is undisputed that the Student stated that he was unsure whether the XXXXXXXXXXXX Instructor's alleged political comments were directed towards him and he wanted to "trigger the professor" and "trigger the social justice warriors in the class." He did not identify any discrimination or harassment on the part of the Professor. Thus, the College believed that it responded to the allegation and the evidence before it at the time could reasonably be determined to show that the Student was not complaining of discrimination from his XXXXXXXXXXXX Instructor. Additionally, the College identified that it did not proceed with the complaint filed by the parents and the Tutor, based on other inquiries it was making in the context of the disciplinary proceeding and because they had subsequently submitted apology letters to the College for the Student's behavior.

No disability based harassment

OCR also reviewed the evidence presented to the College and concludes that there is insufficient evidence to show beyond a preponderance of the evidence that the Student was subjected to disability based harassment. Here, in the November XX, 2016 letter, the Student's parents and Tutor make two allegations of disability discrimination by the College: first, that the XXXXXXXXXXXX Instructor harassed the Student based on disability when she made political comments that "triggered" the Student to respond; second, that the Student's responses to the comments led the College to discipline the Student, which was disability discrimination because the College failed to recognize that the Student's comments were a result of his disability, which they had informed the College of previously.

With regards to the disability harassment by the XXXXXXXXXXXX Instructor, the evidence shows that at the time the XXXXXXXXXXXX Instructor made the alleged political comments, she was not aware of the Student's disability or his political perspective. Nor was she aware that she had "triggered" him based on her alleged comments. The XXXXXXXXXXXX Instructor noted in her first BAT complaint that she was not aware of the Student's political perspectives as he had not participated in class discussions that would have revealed his political viewpoints. Thus, without knowledge of either his disability or his political opinion, the XXXXXXXXXXXX Instructor could not have known that she was "triggering" him and thus, harassing him based on his disability. In fact, according to the Student, he did not identify himself as a student with a disability and stated that he was not certain if the XXXXXXXXXXXX Instructor's comments were directed towards him. Furthermore, he sent the first e-mail to her because he wanted to "trigger the professor" and to "trigger the social justice warriors in the class." Therefore, there is insufficient evidence that the Student was subjected to disability based harassment by the XXXXXXXXXXXX Instructor.

With regards to whether the College's disciplinary actions toward the Student were disability discrimination, there is insufficient evidence to show that the College's

suspension of the Student was based on the Student's disability. Here, the Student used aggressive language in two e-mails to the XXXXXXXXXX Instructor, who reported the e-mails to the College due to a concern for her safety. Based on the report, the College's policies required a response. The College's disciplinary actions towards the Student were not due to the Student's disability, but rather in accordance with a previous agreement between the Student and the College about his behavior towards others. Furthermore, in addition to denying that he is a student with a disability, the Student was not and has not been registered with the College as a student with a disability. Therefore, OCR found insufficient evidence that the College's suspension of the Student was based on disability. For these reasons, OCR found that the College did not violate Section 504 or Title II by failing to respond to an internal complaint made by the Student's parents and Tutor in November 2015.

College's Grievance Procedures

In the course of the investigation, however, OCR identified that the College's grievance procedures are not in compliance with the regulations. Specifically, while the College had a non-discrimination policy and discrimination complaint procedures under AP 3435, the policy only permits individuals who personally experience discrimination or faculty or staff who are aware of the same, to file a discrimination complaint with the College; third parties are not permitted to file discrimination complaints. The regulation "provide[s] for the prompt and equitable resolution of complaints alleging any action prohibited by this part" and does not limit the reporting of such allegations in order to ensure access to the grievance process for any individual who has a valid complaint. As such, OCR finds that the College's grievance procedures are not in compliance with the regulation.

The College entered into a Resolution Agreement (Agreement) with OCR that, when fully implemented, is intended to address the allegations in this investigation. The Agreement includes provisions for revisions of the College's discrimination grievance procedures to state that the disability non-discrimination provisions apply to any person, including third parties, who believe that discrimination may have occurred, regardless of whether they personally experienced such harm, and that any person may file complaints of discriminatory harm with the College. In addition, the Agreement requires that a memorandum be sent to all administrators, department heads, full-time faculty, counselors, and other staff or administrators who interact with students and prospective students, emphasizing the College's non-discrimination policies and clarifying the College's discrimination grievance procedure.

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 complainants 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 complainants may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the College 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 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 regarding this letter, please contact OCR attorney Michael Chang at (415) 486-5388.

Sincerely,

/s/

Kana Yang
Acting Team Leader

Enclosure

cc: XXXXXXXX XXXXXXXX, Associate Dean (by e-mail only)