UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

November 5, 2018

Dr. Jane Close Conoley
President
California State University, Long Beach
Brotman Hall BH–300
1250 Bellflower Blvd.
Long Beach, CA 90840–0115

(In reply, please refer to OCR Docket Number 09-18-2065.)

Dear Dr. Conoley:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the California State University, Long Beach (University). The complainant, a student at the University,[1] alleged that the University discriminated against her (Student) on the basis of disability. OCR investigated whether the University failed to respond adequately to ten internal complaints made by the Student on October XX, 2016 and April XX, 2017, stating that she had been discriminated against on the basis of disability when she was denied approved accommodations for her visual disability.

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 in programs and activities operated 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 entity, the University is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR interviewed the Student and reviewed documents and other information provided by her and the University. Prior to OCR completing its investigation, the University voluntarily agreed to address the areas of concern identified by OCR with respect to the issues investigated. Accordingly, OCR did not reach a compliance determination. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the University.

[1] OCR previously provided the University with the identity of the Student. We are withholding her name from this letter to protect her privacy.

Legal Standards

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.

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.

Factual Findings

Background

In May of 2016, the Student began a XXXXXXXX XXXXX physical therapy (PT) program at the University. The Student has refractive amblyopia, a visual disability that impairs her vision in her right eye. The Student registered as a student with a disability at the University, and was also registered at XXX XXXXXXXXXXXXX XXXXXXXXXXX (another CSU).

In October of 2016, the Student filed eight complaints against faculty members in the PT program for failing to implement academic accommodations and adjustments that she states were necessary for her to access the academic program. According to the Student, she requested to file a complaint against the PT Department for failing to implement her accommodations, but was informed that she needed to file separate complaints against each faculty member. As part of this process, the Director of Disabled Student Services (DSS Director) served as her advisor. In March of 2017, the University shared initial findings and documentation with respect to the eight complaints against faculty members. On April XX, 2017, the Student filed two additional complaints, one against the DSS director and the other against the Assistant Director of Alternative Media (AIM services). The University completed its investigation of the original eight complaints on July XX, 2017 and resolved the final two on November XX, 2017 (225 days after the Student filed her complaint). The University found insufficient evidence that the Student was subjected to discrimination on the basis of disability, including that she was denied approved academic adjustments.

The Student states that the University's investigations were inadequate because the University failed to consider evidence that she had provided about denial of accommodations, specifically that she was routinely denied enlarged lecture notes and slides provided before each class and her instructors failed to respond to her complaints, or adjust her accommodation. She states that this accommodation request was the most important one that she put forth, and formed the "cornerstone" of her complaint in terms of what the individual faculty members failed to provide her.

The Student was academically dismissed from the PT program in January 2017 based on her failure to maintain a minimum grade point average of 3.0. As part of her complaint to the University, she alleged that her grades resulted in large part from the University's failure to provide her with appropriate accommodations.

The University provided OCR with ten investigative reports. The reports confirm that the University conducted interviews with the Student and her father and all of the faculty members, and the two administrators, identified as respondents. In addition, the reports show that the University interviewed other relevant witnesses, including other disabled students in the PT program, the Student's tutor, and staff in the DSS center. The investigative file also contains copies of e-mail correspondence to faculty and the complainant, copies of lecture notes and powerpoint slides, and notes and documents from the Student's DSS student file. For the first eight complaints, the investigator collected evidence and made findings on 22 specific allegations. For the final two, the investigator considered 20 additional allegations.

Requested Accommodations

Both the Student and the University confirm that the Student did not discuss specifically her requests for accommodations until her second day of classes in the PT program, on or around May XX, 2016, when she met for the first time with the DSS Director. According to documentation attached to the University's complaint investigations, the Student e-mailed the DSS Director on March XX, 2016, informing him that she had been accepted into the physical therapy XXXXXXXX XXXXXXX and that she was a student with a disability. On the same day, the DSS Director responded, and requested that she provide a specific list of requested accommodations. The Student did not respond to this e-mail communication or otherwise contact the DSS office prior to the start of the PT program. The Student initially told OCR that she did not submit written documentation of her requested accommodations in the meeting on May XX, 2016. However subsequently, the Student provided OCR with a copy of undated handwritten notes that she said she brought with her during her first meeting with the DSS Director to go over her requested accommodations. She told OCR that she presented these requests to the University investigator in a typed format in support of her complaint. These notes include the following: "enlarged notes 1 slide per page; overhead projector overlays enlarged (prior to class); designated desk and chair in classrooms." These notes are not referenced in the investigative file.

The Student informed the University investigator that she met with DSS, the chair of the PT department, and another professor on August XX, 2016, and was "very clear" about her need for twelve accommodations, including "Enlarged notes, one slide per page" and "Overhead projector overlays enlarged prior to class starting." The department chair told the investigator that the Student did not present a list of accommodations at this meeting.

The Student informed OCR that she requested enlarged notes of class presentations, in advance of class, on several additional occasions. She stated that these requests were verbal, and that she had not documented them. The investigation reports show that she emailed DSS and faculty members on occasion, especially during the fall 2016 semester, to state that she was unable to see specific handouts or materials projected in class, but these emails do not include more general written requests for enlarged notes and powerpoints.

The evidence considered during the University's investigations indicates that DSS did not create a formal document that listed the accommodations requested by the Student or approved by DSS. Instead, the DSS director maintained handwritten notes on a DSS contact log form entitled "DSS checklist" and sent emailed lists of accommodations to some of the Student's professors and to the PT Department chair. DSS notes from the Student's first DSS meeting, state that, for her summer session XXXXXXX class, the Student "will need overhead color and depth;" "fuzzy needs to things close [sic]", "take pictures with phone (overlays);" "print out of notes -- very helpful before class," and "needs the material prior to class takes long to review things." The contact log also indicates that the DSS director met with the Student to discuss "her needs," "accommodations," or "concerns" on August X and XX, 2016, September X and X, 2016, and October X, 2016. None of these notations describe the specific accommodations determined to be appropriate for her. The Student told OCR that these notes did not accurately reflect what she requested. She denied ever requesting or accepting that taking pictures of class slides would

meet her needs. She stated that she orally requested enlarged notes of class presentations, prior to class, at her first meeting with the DSS director and at several meetings thereafter.

Failure to Implement Accommodation Regarding Lecture Notes and Slides

The Student told OCR that for the summer session, and later on during the fall semester, she was not regularly provided her accommodations, specifically enlarged copies of lecture notes and slides (including powerpoint slides and transparencies) prior to each lecture, and that the University's investigation inadequately looked into this issue. The University's position is that until August XX, 2016, there was no notice from the Student that it needed to revisit her accommodations, that any of her accommodations were not adequate, that she was not receiving enlarged class notes ahead of time, or that she had not been allowed to take pictures of overheads used in class.

OCR determined that the Student alleged denial of an adequate accommodation with respect to enlarged lecture notes (including powerpoint slides and other overheads) in six of her complaints against professors, as well as broadly in the complaint against the DSS Director. For example, she alleged that for the first two months of one class, one professor's provision of lecture notes was too small to view adequately because there were three powerpoint slides per page. She made a similar allegation with respect to a second professor, but stated when she informed the professor of the need to view the powerpoint slides in a one slide per page format, the professor refused. In two additional complaints, she alleged that she was denied adequate access to overhead transparencies to be used in class and was told that she could view them only after lecture or that she had to take pictures of the transparencies with her phone to be viewed later. She stated that use of her phone was not adequate because of glare and because she could not adequately enlarge the resulting images to view them properly, given the limitations of her disability. In two other complaints, she alleged that one professor made a last minute change to lecture notes already provided to her on one occasion and one other professor did not provide her lecture slides used during a lab portion of a class. As for the complaint against the DSS Director, the Student alleged that he (and the DSS office staff he managed) failed to properly document her requests for accommodation and the information she provided, indicating that accommodations were not working and that he did not relay this information back to professors.

The University created a separate investigation report in response to the Student's complaints against each faculty member and the DSS Director, including an analysis for each separate allegation. The investigation of each complaint focused on the information available to the individual respondent, his/her specific responsibilities and whether that individual took reasonable steps to accommodate the Student. For example, the investigator concluded that several faculty members had not discriminated against the Student because they provided accommodations as soon as they were informed by the Student or DSS that they were needed, or because the faculty members were not themselves responsible for making materials accessible. Similarly, the complaint investigation concerning the DSS Director noted that the Director "was not the staff member responsible for enlarging the notes and there is no evidence that he directed his staff to not accommodate Complainant or to provide her disparate treatment." The investigator concluded "it does not appear that any failure to provide notes in a timely fashion was due to discrimination on the part of the [DSS Director] or DSS staff, but rather a number of factors including [the Student's] timeliness when she requested the notes, when some professors

provided the notes to DSS, and the complexity of enlarging material that was not simple text but diagrams or photos." Overall, several of the investigations determined that, although there were times when the Student may not have received the accommodation she considered necessary, the denial was based on the Student's failure to notify the University before arriving on campus, specifically indicate her needs (such as having one slide per page in lecture notes), or communicate in a timely fashion when an accommodation was not working adequately.

In reaching conclusions as to each complaint, the investigator analyzed how the faculty member's or DSS director's actions would have impacted the Student by applying a legal standard that focused on "adverse action" on the basis of the complainant's disability. For example, in reference to the Student's argument that the method of enlarging materials was inadequate (taking pictures of slides with her phone), the investigator wrote that the Student "simply disagreeing with the delivery method or reasonableness of an accommodation does not constitute adverse [treatment]." In another conclusion, the investigator reasoned that an allegedly discriminatory incident was not based on the Student's disability because there was no evidence that the incident "was motivated by discrimination, but rather was likely human error."

It took the University 290 days to complete its investigation of the eight complaints against faculty members. On March XX, 2017, (157 days after the complaints were filed), the University provided the Student with a preliminary notification of the status of the investigation, including access to all interview notes and documents collected. The Student provided the University with a large volume of additional data to consider. The University states that the additional data required an extension of its investigation. Further, on April XX, 2017, the Student submitted two additional complaints for investigation, one of which raised seventeen allegations against the DSS regarding denial of support in accessing accommodations and failures to intervene on her behalf with professors. She further alleged that the Assistant Director of AIM services subjected her to disparaging comments based on her disability. The University states that all of the allegations against administrators and faculty required that they follow union protocols in conducting interviews, and ensuring adequate notification and representation, which contributed to the length of time required to access documentation (such as e-mails) and arrange interviews.

Academic Dismissal

On January X, 2017, the University's Physical Therapy Department informed the Student by letter that the DSS exam proctor had identified that she had several documents open on her laptop computer during the exam for XXX XXX (XXXXX XXXXXXXX XXX XXXXXXX), and that she was uncooperative in allowing the proctor to fully inspect her computer. The letter indicates that the Department assigned her an "F" grade in the class, based on her being assigned zero points on the final as a consequence of the cheating. She was informed of her right to appeal the grade. On the same day, the University's Physical Therapy Department informed the Student by separate letter that her overall grade point average remained below 3.0 for a second semester and she therefore was subject to academic dismissal. The letter references two other letters sent to the Student, one on July XX, 2016 informing her that she was at risk for being placed on academic probation because of her grades and a second on August XX, 2016, notifying her that she was on probation because her grade point average was under 3.0. The Student was provided with an appeal process for the dismissal.

On January XX, 2017, the University Physical Therapy Department sent her a second letter, indicating that the University's Academic Integrity Committee had reviewed the Department's allegation of cheating, and sustained the Department's finding that the cheating had occurred. The letter stated that, as a consequence, the Student's "F" grade would not be changed, and her academic dismissal would stand.

The University's position to OCR is that the Student had been dismissed from the program because of "academic dishonesty."

Under University policy, if a faculty member suspects that a student cheated, he/she or the student may forward the matter to the "Academic Integrity Committee" for consideration and recommendation. The final decision about consequences for cheatings rests with the faculty member. Under the policy, the Committee reviews the charge and advises the student and faculty member whether it believes cheating or plagiarism has occurred. The policy allows the faculty member to choose among the following responses to cheating or plagiarism: review - no action; an oral reprimand with emphasis on counseling toward prevention of further occurrences; a requirement that the work be repeated; an assignment of a score of zero for the specific demonstration of competence, resulting in the proportional reduction of final course grade; an assignment of a failing final grade; or referral to the Office of Student Conduct and Ethical Development for possible probation, suspension, or expulsion.

The Academic Integrity Committee met on January XX, 2017, and determined that the Student had cheated on her exam. By letter dated January XX, 2017, the Physical Therapy Department informed the Student that, as a result of the Committee's decision, her 'F' course grade, and her disqualification from the program would remain in place, based on her failure to maintain a 3.0 grade point average.

The Student's transcript shows that, as a result of the "F" grade, the Student completed the fall 2016 semester with a 2.90 GPA. OCR reviewed her grades and determined that, if she had received higher grades in other courses, the 'F' grade would not have lowered her cumulative GPA below 3.0, resulting in her academic dismissal. Although the University maintained to OCR that the Complainant was dismissed for "academic dishonesty," the notifications provided to her on January XX, 2017 state that she was dismissed based on her failure to maintain a 3.0 GPA by the end of her second semester in the PT program.

Analysis and Conclusion

In investigating whether a university has responded adequately to a complaint of discrimination on the basis of disability, OCR examines whether the university provided a resolution process that was prompt and equitable and that incorporates standards of due process. As part of this examination, OCR considers whether the university applied a legal standard that is consistent with the requirements of Section 504, Title II, and the regulation. OCR also considers whether the university's complaint procedures include designated and reasonably prompt timeframes for major stages of the complaint process, and whether the investigation at issue complied with those timeframes.

OCR reviewed the full investigative record from the University of all ten complaints filed by the Student. For each allegation, the investigator considered relevant witness testimony and evidence in determining whether there was evidence of denial of accommodation (and, where applicable, disability harassment). However, OCR found that the University's separate investigations and reports may not have applied Section 504/Title II standards with respect to provision of academic adjustments and accommodations, instead only focusing on adverse treatment.

When OCR investigates a complaint concerning the alleged denial of academic adjustments and accommodations for a student with disabilities, it considers whether the student provided the university with notice of his/her disability and need for accommodations; whether the university engaged the student in an interactive process concerning the student's disability and related needs and identified the specific accommodations that would be provided; and whether those services were in fact provided. Such an investigation generally requires an examination of 1) the process used to identify needed accommodations to ensure that the student's disability-related needs were adequately addressed, 2) the accommodations and services that were ultimately approved, 3) whether the accommodations were provided in the student's classes, and 4) whether the interactive process continued if the accommodations that were provided proved inadequate or if the process for obtaining them was unduly burdensome (including whether the student provided the university with notice that the accommodations were inadequate). Because the obligation to provide accommodations ultimately rests with the university, OCR's investigation focuses on whether the student received the services to which he/she was entitled under Section 504 and Title II, rather than whether any specific individual or department performed its separate responsibilities, or whether the complainant was subjected to intentional adverse actions on the basis of disability. When a student submits an internal complaint to a university alleging that he/she has been denied academic adjustments and accommodations, a prompt and equitable investigation would include similar considerations.

With respect to the concern raised by the Student, OCR specifically considered how the University investigated the Student's allegation that she was denied an approved accommodation with respect to advance access to enlarged slides and lectures notes. OCR recognizes that there is a dispute as to when the Student requested these services and whether they were approved. However, OCR has a compliance concern as to the process used to investigate the Student's complaints and the legal standards applied. The reports do not show that the investigator determined when the relevant accommodations were requested, if the University considered what was requested, and whether the University approved the requests and determined what steps would be needed to provide them, or engaged in an interactive process to identify alternative accommodations that would be as effective as those requested. Because of the focus on whether the Student was subjected to adverse actions on the basis of her disability, the reports do not consistently conclude whether she in fact did not receive an approved accommodation (e.g., enlarged lecture notes), and on how many occasions. In addition, the investigators' analysis as to whether some faculty members and the DSS director were individually responsible for providing the accommodations may have resulted in a failure to consider the University's overall obligation to ensure that accommodations are provided in a manner that ensures an equal opportunity to access an education benefit or service.

With respect to promptness, OCR found that the University's resolution of the initial eight complainants, which took 220 days, is well in excess of the 60 working days required by the University's own procedures. The University states that there were mitigating factors that contributed to delays, specifically the complexity of simultaneously investigating eight complaints against faculty members in the same Department, with the addition of two additional and related complaints (one of which had seventeen additional allegations) and multiple submissions of data by the Student. Documentation of the investigations demonstrate that the University made regular progress, notified the Student of any delays and provided her an opportunity to provide more evidence, which then necessitated more time to review her submission. The evidence obtained to date raises a concern that the University's requirement that the Student file multiple complaints unnecessarily complicated the investigation, contributing to the lack of promptness, and further suggesting that the investigation did not apply appropriate legal standards.

Summary and Resolution

Prior to OCR concluding its investigation, and to address the issues alleged in the complaint, the University, without admitting to any violation of law, entered into the enclosed resolution agreement, which is aligned with the complaint allegation and the information obtained by OCR during its investigation. Under the agreement, the University agreed to engage an independent reviewer to review the investigation of the disability complaint and make a determination, using Section 504 and Title II legal standards, regarding whether the Student provided notice to DSS that she sought enlarged copies of slides and lecture notes prior to classes, whether the University engaged in an interactive process regarding that request, whether DSS provided adequate information to the Student's professors as to her DSS-approved accommodations, whether the approved accommodations were timely provided in each of the Student's courses, and whether the University responded appropriately to notice that the approved accommodations were inadequate or ineffective. If the Reviewer finds that the Student was denied an accommodation and that denial had an adverse impact on her course grade, the Student will be allowed to retake the course in question without cost and with accommodations. If, after retaking any such courses, the Student's cumulative GPA exceeds 3.0, she will be permitted to reenroll in the DPT program. The agreement also includes a requirement that University staff responsible for conducting investigations receive training on completing prompt and thorough investigations of allegations regarding academic adjustments or auxiliary aids, including the legal standards relevant to such investigations.

Conclusion

Based on the commitments made in the enclosed resolution agreement, dated November 5, 2018, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. 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 resolution agreement until the University is in compliance with the statute(s) and regulations, which were at issue in the case.

This concludes the investigation of this complaint. OCR's determination in this matter should not be interpreted to address the University's compliance with any other regulatory provision or

to address any issues other than those addressed in this letter. The Student may have the right to file a private suit in federal court whether or not OCR finds a violation. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the University may not harass, coerce, intimidate, 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 Student 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 the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Katherine Riggs, Attorney, at (415) 486-XXXX or me at (415) 486-XXXX.

Sincerely,

/s/

Ava De Almeida Law
Acting Team Leader

Encl.