



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

August 1, 2018

Dr. Leroy M. Morishita
President
California State University East Bay
25800 Carlos Bee Blvd.
Hayward, California 94542

(In reply, please refer to case no. 09-18-2245.)

Dear President Morishita:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against California State University East Bay (University). The Complainant alleged that the University discriminated against her on the basis of sex and disability.¹ Specifically, OCR accepted for investigation the following issue:

Whether, after the Complainant was hospitalized due to complications related to her pregnancy in fall 2017, the University discriminated against the Complainant based on disability and sex when it: failed to provide her the opportunity to receive academic adjustments or auxiliary aids necessary to ensure that she could participate in the education program in a nondiscriminatory manner during her period of absence; and failed to allow her to return to her program in the same academic status as before her pregnancy and birth-related absence began, including the opportunity to make up work missed.

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. Further, OCR enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving federal financial assistance. As a recipient of federal financial assistance and as a public university, the University is subject to Section 504, Title II, Title IX and the implementing regulations.

OCR began its investigation by reviewing documents provided by the Complainant and the University, and by interviewing the Complainant. Prior to OCR completing its investigation, the University voluntarily agreed to address compliance concerns identified by OCR with respect to the issue accepted for investigation. This letter summarizes the applicable legal standards, the relevant facts obtained thus far, the identified compliance concerns, and the terms of the resolution reached with the University.

¹ OCR previously identified the Complainant to the University. We are withholding her name from this letter to protect her privacy.

Legal Standard

Under the Title IX regulations, at 34 C.F.R. § 106.31(a) and (b), a recipient college or university may not treat individuals differently on the basis of sex with regard to any aspect of services, benefits, or opportunities it provides. Section 106.31 (b) states that a college or university may not, on the basis of sex, treat a person differently in determining whether he or she satisfies any requirement or condition for the provision of an aid, benefit, or service.

Under 34 C.F.R. § 106.40(a), a college or university shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex. Section 106.40(b)(1) states that colleges or universities are prohibited from discriminating against a student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions. Section 106.40(b)(5) provides as follows: if a college or university does not maintain a leave policy for its students, or in the case of the student who does not otherwise qualify for leave under such a policy, a college or university shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

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. These protections extend to individuals with pregnancy or birth-related disabling conditions.

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.

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

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

Facts

In fall 2017 the Complainant, while pregnant, was enrolled in two classes in the Pre-Professional Health Academic Certificate Program (PHAP) at the University; both classes had a lecture and a lab component. The Complainant was unexpectedly hospitalized on October XX, 2017 due to pregnancy-related complications and was required to remain there on bedrest for a number of weeks until the birth of her baby. The same evening she emailed each of her professors and a PHAP administrator to inform them of her status. The Complainant told OCR that the semester was about one third of the way over when she was hospitalized and at the time she had A grades in both classes.

On October XX, 2017, the Complainant sent an email to the University's Title IX Coordinator (Coordinator). She explained her situation and said that she was trying to determine what her options were regarding accommodations. Since her classes were participation and lab-based, the Complainant said that she was not sure how she would be able to complete them during the fall quarter. She understood that the withdrawal deadline was November X, 2017, but wanted to speak to the Coordinator to determine if that was the only option. The Coordinator left a voicemail message for the Complainant, referring her to the Director of Community Welfare and Coverage, Risk Management (Director).

On October XX, 2017, the Complainant sent an email to the PHAP office, stating that she had been hospitalized due to complications with her pregnancy and had notified her professors and the PHAP administrator. She stated that she was exploring options for withdrawal or medical leave and inquired about the process and forms. The Complainant said that she had been in brief contact with the Coordinator who referred her to the Director to gain a better understanding of medical leave or accommodations that were available for pregnancy.

On October XX, 2017, the PHAP administrator sent an email in response to the Complainant's October XX, 2017 email, stating that he would confer with his college to see what could be done. He said that he hoped the Director would be of assistance since he was not sure of the appropriate protocol. The Director also left a voicemail message for the Complainant on October XX, 2017.

On October XX, 2017, the Complainant sent another email to her professors and copied the PHAP administrator. She told them that she was still at the hospital and the goal was to have her stay there until mid-November. The Complainant said that she was working with the PHAP administrator to determine what accommodations, if any, were available for her and made sense for fall quarter. She said that there was also the possibility that she would need to withdraw and return at a later date.

Also on October XX, 2017, the Director sent an email to the Complainant, copying the Coordinator. She said that the Coordinator had advised her that the Complainant was currently unable to attend classes due to complications with her pregnancy. The Director stated that the University's Accessibility Services could assist the Complainant and offer guidance regarding fall quarter's classes. She provided the phone number and email for that office. The Complainant sent an email back that same evening saying that she would call Accessibility Services the next day.

On October XX, 2017, an Accessibility Services Counselor contacted the Complainant to discuss possible academic accommodations for her courses and related labs. The University reported that the Counselor followed up with the PHAP administrator to discuss reasonable accommodations in the classroom, late drop deadlines, or medical withdrawal deadlines. The Complainant told OCR that she spoke to the Accessibility Services Counselor about OCR's guidance regarding pregnant students,² and the Accessibility Services Counselor reviewed the guidance.

On October XX, 2017, the Complainant sent an email to the Director, copying the Coordinator. She stated that she spoke with the Accessibility Services Counselor the day before and provided her with information regarding her medical leave and the email communication she had had with her professors. She said that she also let the Counselor know that she had reached out to both the Director and the Coordinator based on her preliminary research and belief that there were certain rights and accommodations afforded to pregnant students under Title IX. The Complainant stated that the Accessibility Services Counselor said she would reach out to the professors to get an understanding of what accommodations they were able to make for her.

On October XX, 2017, the PHAP administrator sent the Complainant an email, stating that the College of Science recommended that they look over the Planned Educational Leave protocol, and provided her with a link to that protocol and the form. The Complainant replied that night, asking several questions about Planned Educational Leave and Late Drop procedures and forms. She also said that on October XX, 2017 she spoke with the Accessibility Services Counselor who offered to reach out to the Complainant's professors to see if they could make any accommodations for her. The PHAP administrator responded on October XX, 2017, thanking the Complainant for her patience and stating that PHAP could reach out to the professors to see what they feel would be most appropriate.

On October XX, 2017, the Director emailed the Complainant and copied the Coordinator and the Accessibility Services Counselor. She told the Complainant that the Counselor would work with her to determine what reasonable accommodations might be available for her situation. The Director said that withdrawal from her classes might be the right course of action if a reasonable accommodation could not be found through the interactive process. In response to the Complainant's inquiry about rights of pregnant students under Title IX, the Director noted that Title IX protected individuals who qualified under a protected class against discrimination and listed various protected groups which did not include pregnant students. She also stated that under the University's Executive Order 1097³ the Complainant had a right to file a claim for discrimination but said that the information she had provided did not adequately fall within EO 1097.

² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>

³ Executive Order 1097 is the University's discrimination complaint procedure for students.

On October XX, 2017, the Complainant sent an email to the Accessibility Services Counselor, asking if she had been able to contact any of the professors regarding accommodations to finish the quarter. She stated that she was in the process of filling out leave paperwork but wanted to check in with the Counselor to see if there was anything of which she should be aware. The Complainant said that she knew that completing labs remotely was highly unlikely, but she wanted to confirm her options before she submitted the leave paperwork. The Counselor replied within the hour, stating that she was waiting to hear back from someone to see if there was a possible way to accommodate the Complainant.

The Complainant told OCR that at the time she wanted to continue the lecture portions of her courses and complete as much work as she was able to. For example, one of her classes had an online lecture module that was available to everyone; she was hoping that she could use this to watch the lectures and complete her work. For the other class, she suggested to the Accessibility Services Counselor that she could obtain notes from her classmates and complete the work. The Complainant understood that there may have been impracticability issues with respect to completing the lab components for both classes but she wanted to know if the lab components could be completed at a later date or if there was written work that she could complete instead.

The Complainant told OCR that she was filling out the withdrawal application at the same time she was trying to work with the Accessibility Services Counselor to obtain accommodations. She stated that she was getting worried because the deadline to withdraw from classes was fast approaching. The Complainant said that the Counselor was trying to look into all accommodations that would allow the Complainant to stay in her courses but she had trouble getting in contact with the professors. The Complainant stated that she ultimately decided to file withdrawal and leave paperwork because no accommodations were offered to her and she did not want to miss the deadline to withdraw from her classes.

On October XX, 2017, the Complainant emailed the PHAP administrator with questions about the withdrawal and leave forms and process. She asked if the PHAP office could help her obtain signatures from her professors. The administrator forwarded the email to the PHAP office and it sent the Complainant instructions on November X, 2017, via email. It advised the Complainant that she would need written confirmation or an email from her professors approving her drop or withdrawal request; she should then send all of the documentation to the PHAP office for processing.

On November X, 2017, the Complainant sent an email to her two professors, stating that she had made the decision to withdraw/drop from her fall 2017 classes. She asked for their approval; they both approved. On November X, 2017, the Complainant sent the PHAP office Late Drop and Withdrawal/Planned Educational Leave requests. The Director reported to OCR that the Petition for Late Drop/Withdrawal was submitted by the PHAP office to the Registrar on November X, 2017. On November X, 2017, the Complainant was notified that her petition was denied because it was missing signatures. The Petition was thereafter signed and resubmitted to the Registrar; the request was approved on November XX, 2017. The Complainant's transcript reflects a W for both classes.

The Complainant was released from the hospital in mid-November 2017, after giving birth. She did not return to the University. The Complainant told OCR that PHAP classes were sequenced. Because she did not finish the first two classes in the sequence in fall 2017 she would not have been allowed to enroll in the second two classes in spring 2018. If the Complainant returned to PHAP she would have to wait until fall 2018 and repeat the entirety of both fall 2017 classes. The Complainant told OCR on July X, 2018 that she did not plan to return to PHAP or the University.

Analysis

To ensure a pregnant student, or a student recovering from childbirth, has access to the University's educational program, under Title IX the University must accommodate such students, including: excusing absences because of pregnancy or childbirth; providing reasonable adjustments to ensure a pregnant student's access to the educational program; allowing students to make up work missed due to pregnancy or birth-related conditions; and returning students to the same academic and extracurricular status as before any pregnancy or birth-related medical leave began.

The University is also required under Section 504 and Title II to make reasonable modifications to policies, practices or procedures, provide academic adjustments, and provide auxiliary aids and services necessary to avoid discriminating against students with disabling conditions resulting from pregnancy or recovery from childbirth unless the needed modification, adjustment, or auxiliary aid or service would constitute a fundamental alteration to the nature of the program or an undue financial or administrative burden.

Based on the facts gathered to date, OCR has identified several compliance concerns. After the Complainant was hospitalized on October XX, 2017, she promptly notified her professors and PHAP administrators and expressed interest in obtaining information about accommodation options that may allow her to complete her classes. On October XX, 2017, the Complainant contacted the Coordinator to discuss her rights as a pregnant student, but was referred instead to the Director. OCR is concerned that the Coordinator, the individual specifically designated to coordinate the University's efforts to comply with Title IX, did not coordinate the University's response to the Complainant's request for accommodations.

On October XX, 2017, the PHAP administrator advised the Complainant that he would confer with his college to see what would be done regarding her accommodation request, but was unaware of the appropriate protocol in such situations. OCR is concerned that the administrator was not aware of the University's process of accommodating pregnant students or of accommodating students with disabilities arising from pregnancy.

On October XX, 2017, the Complainant emailed her professors, copying the PHAP administrator, again requesting information about available accommodations. On the same day the Director referred the Complainant to Accessibility Services for assistance and guidance regarding her options with respect to completing her fall 2017 classes. OCR is concerned that the Complainant was required, while hospitalized, to voice her accommodation request to her professors, PHAP administrators, the Coordinator, and the Director before ultimately being referred to the University's designated department for responding to such requests. This also resulted in a delay in the University's response.

As of October XX, 2017, the Complainant began working with the Accessibility Services Counselor who attempted to contact the Complainant's professors and ascertain what accommodations may have been available to the Complainant. The Complainant followed up with the PHAP administrator on October XX, 2017 and with the Accessibility Services Counselor on October XX, 2017, and, having received no concrete information about accommodations that possibly would have allowed her to complete her classes, subsequently submitted a Petition for Late Drop/Withdrawal prior to the November X, 2017 deadline. OCR is concerned that the University did not in a timely manner offer the Complainant any accommodations that may have allowed her to complete her fall 2017 classes and avoid withdrawing from them and having to wait a full academic year to repeat them. OCR is also concerned that, even

though the Complainant submitted the required paperwork from her hospital bed, the University Registrar initially denied her withdrawal request for lack of signatures despite the fact that she had received written email approval from both of her professors.

Finally, the Director's email to the Complainant dated October XX, 2017 stated, in part, that the Complainant's assertion of rights of pregnant students under Title IX did not constitute a protected class and, as such, did not fall within Executive Order 1097, the University's discrimination complaint procedure for students. OCR is concerned because the Title IX regulations specifically prohibit discrimination against pregnant students as a protected class and such allegations fall squarely within the purview of EO 1097.

OCR did not complete its investigation, and therefore has not reached a conclusion as to whether the University violated Title IX, Section 504, or Title II as alleged. However, as explained above, the facts OCR has gathered thus far raise compliance concerns with respect to the allegation in this case. In order to complete its investigation and reach a compliance determination, OCR would need to review additional data and conduct interviews of University personnel.

Resolution

Prior to the completion of OCR's investigation, the University requested to enter into a Resolution Agreement pursuant to Section 302 of OCR's Complaint Processing Manual. OCR determined that a Section 302 Agreement was appropriate in this case. The University, without admitting to any violation of law, signed the attached Resolution Agreement (Agreement) which is aligned with the complaint issue and the information obtained by OCR thus far during its investigation.

Under the Agreement, the University agreed to reimburse the Complainant for the cost of her fall 2017 courses and remove from her transcript all reference to her withdrawal from these classes. The University also committed to issuing written guidance to its faculty, administrators, and Accessibility Services personnel, and website and email notice to its students, regarding the rights of pregnant students, including those with pregnancy-related disabilities, under Title IX, Section 504, and Title II.

Conclusion

Based on the commitments made in the attached Agreement, OCR is closing the investigation of the complaint as of the date of this letter and is notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegation. OCR will monitor the implementation of Agreement until the University is in compliance with the terms of the Agreement. Upon completion of the obligations under the Agreement, OCR will close the complaint.

This concludes OCR's investigation of the complaint and should not be interpreted to address the University's compliance with any other regulatory provision or to address any issue other than that addressed in this letter. The Complainant 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 individual may file a complaint with OCR alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information which, 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 me at (415) 486-5555.

Sincerely,

/s/

Rhonda Ngom
Acting Team Leader

Attachment

Cc: XXXX XXXXXXXX
Director of Community Welfare and Coverage Risk Management