



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA, SUITE 1543
SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

August 14, 2018

Via Electronic Mail Only

Mr. Brent Calvin
Superintendent/President
College of the Sequoias
915 South Mooney Blvd.
Visalia, California 93277

(In reply, please refer to case no. 09-18-2261.)

Dear Superintendent/President Calvin:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the College of the Sequoias (College).¹ The complainant alleged that the College discriminated against her on the basis of disability.² Specifically, OCR investigated whether the College failed to respond adequately to an internal complaint the complainant made on December XX, 2017 stating that the College failed to provide her with access to her curriculum due to an instructor failing to provide approved accommodations.

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 college, the College is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the complainant and the College. After careful review of the information gathered to date, OCR identified a concern that the College may have failed to provide the complainant with an adequate response to her internal complaint.

¹ The College is a part of the College of the Sequoias Community College District (District). OCR opened this complaint against the College, however during this investigation, the District (in conjunction with the College) assumed responsibility for working with OCR to resolve the complaint.

² OCR previously provided the College the identity of the complainant and we are withholding her name to protect her privacy.

However, prior to completing its investigation and making a compliance determination, the College expressed an interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual (CPM),³ and OCR determined it was appropriate to do so. The legal standards, facts gathered, and resolution of this matter are summarized below.

Issue: Whether the College failed to respond adequately to an internal complaint the complainant made on December XX, 2017 stating that the College failed to provide her with access to her curriculum due to an instructor failing to provide approved accommodations.

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.

OCR examines a number of factors in evaluating whether a college's grievance procedures are prompt and equitable, such as whether the procedures provide for the following: notice of the procedure to students and employees, including where to file complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

OCR evaluates the appropriateness of the responsive action to alleged discrimination on the basis of disability by assessing whether it was prompt and equitable. What constitutes a reasonable response to discrimination will differ depending upon the circumstances. However, in all cases the college must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, and remedy the effects of the discrimination on the student who was discriminated against. The college must also take steps reasonably calculated to prevent the discrimination from recurring.

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 discrimination and will be responsive to any student

³ See, <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

reports of discrimination. The college also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Factual Findings

The following facts are relevant to OCR's analysis:

College's policies and procedures

The College is a member of the District. The District has policies and procedures that apply to all its member colleges. The District has a non-discrimination policy, Board Policy (BP) 3410. BP 3410 states that the District is committed to equal opportunity in educational programs, employment, and all access to instructional programs and activities. The District shall provide access to its services, classes, and programs without regard to national origin, race, color, sex, and physical or mental disability.

The District also has Board Policy (BP) 3430 (entitled "Prohibition of Harassment"). The policy states that the District shall be free of unlawful discrimination and harassment on the bases of physical and mental disability. BP 3430 states that any student who believes that she/he has been harassed or retaliated against in violation of the policy should report such incidents by reporting the incidents as described under Administrative Procedure (AP) 3430.

AP 3430 (entitled "Prohibition of Harassment and Discrimination and Harassment Complaint Procedures") defines unlawful discrimination and harassment as discrimination or harassment on the basis of physical or mental disability (among other categories). AP 3430 also sets forth a procedure for investigating and resolving complaints of discrimination and harassment by or against any staff or faculty member or student within the District. According to the procedure, the College Complaint Officer advises a complainant about the formal and informal resolution processes that are available to the complainant. The AP also describes how a complaint can be filed, the investigation process (including witness interviews), analysis of the information gathered, written report, notice to the parties involved, and the appeal process. Throughout the AP, the procedure references "harassment" and a detailed description of what constitutes "sexual harassment." Other than the definition of the "unlawful discrimination," there are limited references in the AP to the applicability of the procedure to acts of "unlawful discrimination" and the College's response to such an allegation. For example, AP 3430 requires that during the investigation process, the Complaint Officer "shall notify an accused that a harassment complaint" has been filed; there is no reference to the accused as someone alleged to have committed an unlawful act of discrimination. Similarly, while AP 3430 states that a written report "shall include an analysis of any relevant data or other evidence as to whether the harassment occurred"; there is no discussion of whether there is a written report for an act of discrimination and whether the act of discrimination occurred. AP 3430 also does not discuss the legal standard of review when reviewing and analyzing the facts of a harassment or discrimination complaint.

The District also has Administrative Procedure 5530 (entitled “Students Rights and Grievances”). This procedure provides a prompt and equitable means of resolving student grievances against the District. The procedure is available to any student who reasonably believes that a District decision or action has “adversely affected his or her status, rights or privileges as a student.” This AP states that it does not apply to acts of discrimination, which is covered under APs 3410 and 3430. AP 5530 describes the due process procedures, and requires that an informal resolution process be used first to resolve grievances. This informal process has three steps in which the student must reasonably engage in to resolve the matter. Once the steps are exhausted, the student then may initiate the “formal resolution” process by requesting a formal grievance hearing by submitting to the grievance officer, who starts the process. The AP lists the hearing procedures and states that the burden of proof rests with the student who brings the grievance against the College. The AP also states that the hearing committee shall make findings of fact relative to the charges by majority vote and requires that within 10 days of the hearing, the committee shall prepare and send the Superintendent/President a written decision that includes a specific recommendation regarding relief for the grievant, if any. The AP states that within 10 days, the Superintendent/President shall send to all parties his or her written decision, together with the Hearing Committee’s decision and recommendations. The Superintendent/President may accept or reject the findings, decisions, and recommendations of the Hearing Committee. The Superintendent/President’s decision is final; no further appeals are allowed.

Complainant’s internal grievance

At the time of the OCR complaint, the complainant was a student at the College during the 2017-2018 school year. She was approved for the following academic adjustments through the College’s Access and Ability Center (ACC): preferential seating, distraction-reduced environment for testing (testing to take place at the ACC), double time on exams, recorder, leaving class suddenly, and notetaking paper.

According to the complainant, after she informed the instructor of her approved accommodations at the start of the fall 2017 semester, he deliberately chose not to comply with her accommodations. The complainant stated that the instructor would not inform her of when the exams would be so that she could provide the information two days in advance to the ACC, as required by ACC policy. Due to the difficulties the complainant experienced in getting the instructor to provide her with her accommodations, she informed ACC staff and asked them for support. While the instructor ultimately provided the exams to the ACC and the complainant was able to take the exams in the ACC Testing Center, the lack of responsiveness from the instructor added additional stress and anxiety for the complainant. Thus, on or about December XX, 2017, the complainant met with the Director of Activities and Affairs (Director) to discuss how to file a grievance against the Instructor. The Director provided her with information on the grievance process.

According to the complainant, when she inquired about filing a complaint, she was referred to the grievance process; she was not told about the College's discrimination/harassment grievance policy and procedure (BP and AP 3430).

The complainant completed a Statement of Grievance form (Form) and provided it to the Grievance officer. The complainant stated on the Form that as an ACC student, she was discriminated against by the instructor. She stated that she filed the grievance to educate the instructor on how a person with disabilities can feel ashamed and how it is hard to have enough confidence to ask for a test at the ACC because no one with disabilities wants to feel oppressed. She stated that the instructor also did not respond to her request for preferential seating in the classroom. She alleged that her grades were affected by this.

In early January 2018, the Grievance officer notified the complainant, the instructor, and the Grievance Committee members of the grievance hearing. The notice referenced AP 5530 and stated that the burden of proof was with the student who brings forth the grievance against the College.

On February XX, 2018, the hearing took place. The Grievance Committee members, the Grievance officer, the Dean of Science, the complainant, and the instructor were all present. The complainant submitted as documentary evidence her approved accommodations, the course syllabus for fall 2017, and an outline for exams. The complainant and the instructor both made oral presentations to the Grievance Committee.

The Grievance Committee considered the evidence presented and the testimony provided, and concluded that there was significant miscommunication between the complainant and the instructor regarding testing procedures for ACC students; the miscommunication escalated the frustration and anxiety for the complainant; the instructor was difficult to reach by telephone or email when the complainant and various other staff tried to contact him; the complainant and the instructor both provided credible testimony; and there was no evidence to warrant a grade change.

The Grievance Committee forwarded its findings to the College President. The President affirmed the Committee's findings and concluded that there was miscommunication between the complainant and the instructor, and that the complainant had not presented enough information to justify a grade change. The complainant was informed of the President's decision via email.

Legal Analysis

The complainant alleges that the College failed to respond adequately to her internal complaint that the College failed to provide her with access to the curriculum due to the Instructor failing to provide approved accommodations. Here, the complainant filed a grievance under AP 5530.

Based on the facts gathered to date, OCR identified a compliance concern that the College pursued the complainant's grievance, which involved allegations of disability-

based discrimination, under a grievance process that does not provide for the College to follow a prompt and equitable investigation into notice of possible discrimination. Specifically, the College used the AP 5530 grievance process to respond to the complainant's disability discrimination complaint. Because of this, OCR identified two additional concerns. First, the process used by the College to address the complainant's discrimination allegation is one in which the burden is placed on the complainant to prove whether or not discrimination occurred. This does not recognize the College's obligation under Section 504 and Title II to respond promptly and equitably to notice of possible discrimination by conducting an adequate, impartial, and reliable investigation into the alleged discrimination. Second, the evidence does not show that the College made a determination as to whether the actions of the instructor constituted disability-based discrimination, and if such a determination was made, whether it was communicated to the complainant.

On June 27, 2018, prior to the conclusion of the OCR's investigation, the College expressed an interest in an agreement to resolve the matter during the course of the investigation, and OCR determined that it was appropriate to do so per Section 302 of OCR's CPM.

Overall Conclusion

This concludes the investigation of this complaint. To address the issues alleged in the complaint, the College, on August 13, 2018, without admitting to any violation of law, entered into the enclosed Resolution Agreement (Agreement) which is aligned with the complaint allegation and the information obtained by OCR during its investigation. Specifically, the College will work with the District to revise BP 3430 and AP 3430 to provide additional notice of the prohibition of unlawful discrimination, and the applicability of this policy and procedure to complaints of harassment and discrimination. The College will provide training to all administrators in the Activities and Affairs office and Access and Ability Center on how to recognize complaints of disability based discrimination. The College will issue written guidance to all professors and instructors in the Department of Science concerning their role and responsibilities in providing approved academic adjustments and auxiliary aids and services to students with disabilities, and the steps they should take if a student raises concerns about the adequacy or delivery of an approved academic adjustment or auxiliary aid and services. The College will also notify the complainant in writing that it will investigate her complaint of under the College's Non-discrimination and Prohibition of Harassment policy and procedure and provide written notice of the results of its investigation.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the College is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the Agreement, OCR will close the case.

OCR's determination in this matter 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. 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 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, 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.

OCR would like to thank you and Mr. John Bratsch for your cooperation and assistance in resolving this case. If you have any questions regarding this letter, please contact OCR attorney, Kana Yang, at kana.yang@ed.gov.

Sincerely,

/s/

Naghmeh Ordikhani
Acting Team Leader

cc: John Bratsch, Dean, Human Resources/Legal Affairs