



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 UNITED NATIONS PLAZA
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SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

November 19, 2019

VIA ELECTRONIC MAIL

Regina Stanback Stroud, Ed.D.
Chancellor
Peralta Community College District
333 East 8th Street
Oakland, CA 94606

Marie-Elaine Burns, Ed.D.
President
Meritt College
12500 Campus Drive
Oakland, CA 94619

(In reply, please refer to case no. 09-19-2167)

Dear Dr. Stroud and Dr. Burns:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed against Merritt College (College) and the Peralta Community College District (District) that alleged discrimination on the basis of disability. Specifically, OCR investigated whether:

- 1) In fall 2018, an XXXXXXXX instructor failed to provide the complainant¹ with testing accommodations necessary to ensure that she could participate in the education program in a nondiscriminatory manner.
- 2) The District/College failed to respond adequately to an internal complaint the complainant made on December XX, 2018, stating that she had been denied 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 education system, the College and District are subject to Section 504, Title II, and their implementing regulations.

¹ OCR previously notified the College and District of the name of the complainant and is not stating it again in the interest of privacy.

As part of its investigation, OCR reviewed documentation from the District and the complainant. After reviewing all of the documentation and information, OCR has concluded that it is sufficient to support a finding of noncompliance as alleged with respect to both allegations. The facts determined, legal standards, and application of the legal standards to the facts that formed OCR's determinations in this matter are explained below.

FACTUAL DETERMINATIONS

The College is a member institution of the District. The District has adopted and implemented several administrative procedures (APs) to address various aspects of its educational program and how it operates. "Administrative Procedure 3435 Discrimination and Harassment Complaints and Investigations" is the District's procedure that governs the submission, investigation, and resolution of complaints alleging discrimination on the basis of disability. It designates the College's President and Vice President of Student Services (VPSS) as the individuals authorized to accept complaints at the college level of the District.

"Administrative Procedure 5140 Disabled Students Programs and Services" addresses, among other things, the provision of accommodations for students with disabilities and it provides a process and procedure by which disputes regarding accommodations may be resolved. It also provides that each member institution of the District will have a program for students with disabilities that will be responsible for ensuring the provision and receipt of approved accommodations to its students. It designates the VPSS as the only individual authorized to accept formal complaints about disputes in the receipt of accommodations.

"Administrative Procedure 5530 Student Rights and Grievance Procedure" provides a procedure by which students may submit complaints alleging, among other things, a violation of the law. It also designates the VPSS as the only individual authorized to accept complaints at the college level of the District.

At all times pertinent to this complaint, the complainant was enrolled in the undergraduate program at the College. She registered with the College's Student Accessibility Services (SAS) at the beginning of 2018. During the fall 2018 semester, she was enrolled in a XXXXXXXX course and she was approved to receive several classroom accommodations, including: "testing in an area with reduced distractions" and extra time for testing of 1.5x.

Throughout the XXXXXXXX course, the complainant had worked with the instructor to receive her approved accommodations and the two had arranged for the complainant to receive her accommodations for a September XX, 2018 lab practical. However, two days prior to the lab practical, on September XX, 2018, a scheduling conflict was brought to the attention of the instructor by another student during class and the instructor determined that she would need to rearrange the class location, time, or both to address the conflict. This meant that she would not be able to act as the agreed proctor for the complainant during the lab practical for the complainant to receive 1.5x time for it. When the class took a break thereafter, the complainant approached the instructor to inquire how she was to now receive her approved accommodations for the lab practical.

The complainant and instructor disagree on what happened during the conversation. They both agreed that the instructor suggested that the complainant could miss the lecture on the day of the lab practical in order to receive 1.5x time and that the complainant stated such a proposal was not acceptable. They both also stated that the instructor told the complainant that she needed to find a proctor from SAS and that it was not the instructor's responsibility to act as her proctor. The discussion did not result in any solution.

After leaving the class, the complainant went to SAS and discussed with one of the counselors what had just occurred. The counselor and the complainant then telephoned the chair of the biology department to advise her of what had occurred and attempt to find a means for the complainant to receive her accommodations for the lab practical. After the conversation, also on September XX, 2018, the counselor sent an email message to the instructor and the department chair that summarized the conversation and stated, in pertinent part:

[The complainant's] current issue is the need for extra time in the XXXXXXXX X lab midterm, which is XXXXXXXX, September XX. There were plans made 2 weeks ago with the Instructor, but that has changed, requiring [the complainant] to now miss the XXXXXXXX X lecture in order to get extra time for the lab. Given her processing deficit for multiple disabilities, she cannot afford to miss lecture.

In our conversation with [the department chair], we could not come up with a solution, but [the department chair] will speak with [the instructor] about any insights she might have.

If there are no Disability Accommodated solutions, [the complainant] may decide to take the lab midterm with the class and use noise cancelling head phones. She is hoping that a possible accommodation would be answering less questions per lab station, if that is possible.

For the future, I will be contacting other colleges to see how accommodations are provided for Science Lab tests.

The above email message resulted in a series of email messages between the complainant, chair, instructor, and SAS that did not resolve the matter.

On September XX, 2018, the complainant sent an email message to the dean of the instructor's department that explained her situation and requested his intervention and assistance in the matter.

Thereafter, also on September XX, 2018, the instructor sent an email message to the complainant and others that stated the complainant will receive the extra time accommodation since she will have 45 minutes of time while taking the exam with the rest of the class and then an additional 25 minutes after the rest of the class has left.

The complainant responded the same day stating that the instructor's proposal does not provide her with her full accommodations and was contrary to their prior agreement that the complainant

would take the exam after the rest of the class took it and not at the same time. The complainant explained that the instructor's new proposal meant that she was not taking the exam in an area with reduced distractions as required by her accommodations. Nonetheless, she stated that she felt compelled to take the exam under these circumstances because it was scheduled for the next day and no other alternatives to ensure that she received her full accommodations existed or were being offered. The complainant also stated that she expected the College to develop and inform her of a solution for all her future exams and that the instructor was creating a "hostile environment" for her.

In the late afternoon of September XX, 2018, the dean responded to the complainant's email message and stated that he desired to schedule a meeting with her, the instructor, the chair, and the director of SAS to resolve the accommodation issues and indicated that the meeting could take place during the week of October X. The complainant responded later on the same day and stated that she did not want to have a meeting in order to try to find solutions to receiving her accommodations as that was something that the College had to determine without requiring her to spend additional time doing so. She additionally advised the dean that: she was compelled to take her exam the next day without receiving her full accommodations and that she would, as a result, likely perform poorly on the exam; she may need to withdraw from the course because of the instructor's interactions with her and the "hostile environment" that she has created; and, she expected the College to expunge any negative or adverse marks on her academic record related to the course if she is forced to withdraw from it.

On September XX and XX, 2018, the complainant's SAS counselor forwarded to the department chair several responses that he had received from various colleges across the State regarding how they dealt with the issue of providing accommodations in a science laboratory setting.

On September XX, 2018, the complainant took the exam as provided for by the instructor (with and in the same classroom as the rest of the class). The complainant was given noise cancelling headphones as a means of providing her with a testing area that had reduced distractions.

On September XX, 2018, the complainant sent an email message to her SAS counselor in which she stated that she took the exam the prior day and was convinced that she failed it because the noise cancelling headphones only worked while they played music. She also stated that she was not able to use the extra time she was entitled to receive for the exam because to do so would have required she be alone with the instructor for that period of time and she believed the instructor to still be hostile to her and she did not feel safe or comfortable being alone with the instructor. She also requested to know when she could expect to have a solution to her issues.

In a September XX, 2018 email message, the counselor responded to the complainant and stated, in pertinent part:

We have met with the Chair of Science. . .and we gave her several solutions to lab tests with accommodations from throughout the State at Community Colleges. She is considering these with her Science Department Instructors. Also [the dean] has called an immediate meeting with us [SAS], and this instructor, and [the chair]. The

date is not set yet. I would encourage you to send a brief “Reminder” email to [the dean].

On October X, 2018, the complainant sent an email message to the dean in which she stated that she has not received any communication from anyone about the resolution of her issues and that the following day would be 10 business days since she first brought the matter to his attention. She cited to and provided a link for the District’s Administrative Procedure 5140.

On October X, 2018, the dean responded to the complainant’s email message and stated that he was working with SAS, the Vice President of Instruction, and the chair to “come up with solutions to address potential issues arising around accommodations for lab exams moving forward.” He also stated that he was aware that the complainant dropped the course but desired to meet with her in person to discuss her concerns. He invited her to work with his assistant to schedule a future appointment.

On October X, 2018, a meeting was held between the dean, the SAS coordinator, the complainant’s SAS counselor, the Vice President of Instruction, the department chair, and the instructor. According to a written summary, they agreed that SAS would proctor exams that would normally be in the science lab by using photo slides of the lab stations that are in the XXXXXX lab. The College did not inform the complainant about the October X meeting or the determinations reached at it.

In an October XX, 2018 email message to the dean,² the complainant wrote that she had been busy with school and had not had the time to follow-up with scheduling a meeting but she had also not received any communication from the dean’s assistant to schedule a meeting. She then provided a list of her concerns and issues to ensure that they were fully known and advised that she would like the president of the associated students of the College to also be included in any meeting between the dean and her. She closed her message by reiterating that her primary concern was receiving a solution to her issues and concerns so that she does not face similar problems in any of her future courses.

OCR did not receive anything from either the complainant or the District that showed that there was any substantive response to the complainant’s October XX email message to the dean or that the complainant received any communication from anyone related to any steps that were taken to address her concerns and issues.

On December XX, 2018, the complainant electronically submitted a formal internal grievance regarding her issues and concerns with the receipt of her full accommodations to the VPSS, as provided for in and pursuant to the District’s Administrative Procedure 5530. On the same date, and in response to her submission, the complainant received an automated message from the VPSS’s email address that stated the VPSS was out of the office and would return on December XX, 2018.

² The complainant copied the email message to the SAS director, her SAS counselor, the instructor, the chair, the dean’s assistant, her counselor, and the student body president.

On January XX, 2019, the complainant sent an email message to her SAS counselor in which she stated that she had received no response to her internal grievance and she requested assistance from the counselor in attempting to find out what, if any, response she would receive.

On January XX, 2019, the complainant's SAS counselor sent an email message to the VPSS and her assistant requesting a response to the complainant's emailed complaint.

The District acknowledged to OCR that the complainant never received a response to her internal formal grievance.

LEGAL STANDARDS

The Section 504 regulations 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.³ The Title II regulations contain a similar prohibition applicable to public postsecondary educational institutions.⁴

The Section 504 regulations 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.⁵ 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, 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.⁶ 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.⁷ 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.

³ 34 C.F.R. § 104.43(a).

⁴ 28 C.F.R. § 35.130(a).

⁵ 34 C.F.R. § 104.44(a).

⁶ 28 C.F.R. § 35.130(b)(1)(ii) and (iii).

⁷ 28 C.F.R. § 35.130(b)(7).

The Section 504 regulations 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.⁸ The Title II regulations similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.⁹

ANALYSIS AND CONCLUSION

Allegation #1: Whether, in fall 2018, an XXXXXX instructor failed to provide the complainant with testing accommodations necessary to ensure that she could participate in the education program in a nondiscriminatory manner.

Section 504 and Title II require that post-secondary institutions fully provide to their students those accommodations for which they have received approval and to take meaningful and prompt action to address and resolve those instances where approved accommodations have been improperly denied, limited, or restricted in some manner. As indicated above, the complainant was approved to receive various accommodations in her XXXXXXXX course, including extra time on examinations and an area in which to take exams that had reduced distractions. However, two days prior to a scheduled examination, the complainant learned that she would not receive the accommodations for the exam as originally arranged. In response, she had a discussion with the instructor and, thereafter, brought the issue to the attention of her SAS counselor.

Upon learning of the complainant's issues, SAS contacted the instructor and the department chair to discuss the issues and seek resolution. However, as indicated in the email message sent by the complainant's counselor that memorialized the conversation with the instructor and chair, no resolution to the complainant's issues was achieved. The next day, the complainant informed several individuals at the College that she could not receive her accommodations under the instructor's proposed means of administering the exam and that, as a result, she would undoubtedly fail the exam. Nonetheless, the complainant felt compelled to take the exam with the instructor's proposal because it was scheduled for the next day and no alternative options were made available to her.

Providing the complainant with noise cancelling headphones was ineffective since the headphones, as reported by the complainant, did not function as intended because they required the playing of music. Additionally, the headphones would have had no impact on any visual distractions. The failure to accommodate the complainant resulted in her having to withdraw from the course.

While a meeting was convened on October X, 2018, with both the SAS director and the complainant's SAS counselor attending, in order to address and resolve the issue of the complainant not receiving full accommodations in the lab, notice of the meeting and the resolution agreed upon at it were not communicated to the complainant. Even after the

⁸ 34 C.F.R. § 104.7(b).

⁹ 28 C.F.R. § 35.107(b).

complainant later emailed the dean and copied SAS expressing her frustration with having not received any resolution to her accommodations issue, there was no response to her that informed her of the purported solution that was agreed upon at the October X meeting.

Despite numerous individuals being informed of the complainant's situation and her inability to receive her full accommodations, no immediate effective action was taken and, as a result, the complainant performed poorly on her examination and, ultimately, withdrew from the instructor's class. Further, there was a failure to take effective remedial action to address the situation, to ensure that the complainant received her full accommodations in the future, and to ensure that the complainant was informed of any effective remedial action that may have been taken.

Based on the above, there is sufficient information to support a finding of noncompliance by the District with respect to the first allegation of the complaint.

Allegation #2: Whether the District/College failed to respond adequately to an internal complaint the complainant made on December XX, 2018, stating that she had been denied accommodations.

As previously stated, Section 504 and Title II require the College/District to have internal complaint procedures in place that provide a prompt and equitable response to student complaints of disability-based discrimination and harassment. In this matter, the previously described AP 3435 is the internal complaint procedure that has been adopted and implemented by the District to satisfy the requirements of Section 504 and Title II.

Failing or refusing to provide a student with her approved accommodations is an act of discrimination based on the student's disability and something that is the proper subject of the required internal complaint procedures. When the complainant did not receive her full accommodations and did not receive a satisfactory resolution to the issues leading to her nonreceipt of her full accommodations, she chose to file an internal grievance with the College in order to have the College address and resolve the situation.

Although the complainant stated a proper basis for an internal grievance asserting discrimination based on disability, OCR noted that the complainant used AP 5530 instead of AP 3435 when she filed her internal grievance. Nonetheless, the District was made aware of a disability-based complaint and had an obligation under Section 504 and Title II to provide a prompt and equitable response to it regardless of any internal label or characterization that was applied to it.

There is no dispute that the VPSS received the complainant's internal grievance when it was initially submitted on December XX, 2018 and when it was resubmitted on her behalf by her counselor on January XX, 2019. The District acknowledged that the VPSS failed to perform her obligations with respect to the complainant's internal grievance. However, there were multiple individuals employed by the College who were also aware of the complainant's internal grievance, its content, and the failure to provide any response to it. Despite this knowledge and awareness, none of them did anything to escalate the grievance to the next level in the College's administrative hierarchy or report the lack of response to it to an administrator who supervised

the VPSS or had the authority to act to ensure that a proper investigation was done and that an adequate response to it was provided.

Additionally, based on the information submitted to OCR by the District, it does not appear that the College had in place any effective means of officially recording the receipt of the internal grievance and tracking it to ensure that it was appropriately progressing through the various necessary steps of investigation and resolution.

While the District acknowledged to OCR that the VPSS failed to respond to the complainant's internal grievance, regardless of the individual who might have been at fault, it was the College/District that was required and that failed to provide to the complainant a prompt and equitable response to her internal grievance as required by Section 504 and Title II.

Based on the above, OCR has concluded that there is sufficient information to support a finding of noncompliance in this matter with respect to the second allegation of the complaint.

Based on the commitments made in the enclosed resolution 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 resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of it. Upon completion of the obligations under the resolution agreement, OCR will close the case.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the complainant concurrently. 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 District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you for your cooperation and assistance in resolving this matter. If you have any questions about this letter or the closure of this matter, please contact Alan Konig, Civil Rights Attorney, at (415) 486-XXXX or Alan.Konig@ed.gov.

Sincerely,

/s/

Naghmeh Ordikhani
Team Leader

cc: Nitasha Sawhney, Esq.