



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

November 5, 2019

VIA ELECTRONIC MAIL

Jamillah Moore, Ed.D.
President
Cañada College
4200 Farm Hill Blvd.
Redwood City, CA 94061

(In reply, please refer to case no. 09-19-2294)

Dear Dr. Moore:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Cañada College (College). The complainant¹ alleged that the College discriminated against her based on disability. Specifically, OCR investigated whether the College discriminated against her when her XXXXXXXXXXXXXXXX course professor dropped her from his class for excessive absences when her College disability accommodations stated that absences related to her disability would be excused.

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

During its investigation, OCR received information and documentation from the complainant and the College and both also provided responses to OCR's requests for additional information. Prior to the conclusion of the investigation, the College expressed an interest in voluntary resolution of the matter pursuant to section 302 of OCR's *Case Processing Manual* (CPM)² and OCR determined that it was appropriate to do so. The applicable legal standards, facts obtained to date, and resolution of this matter are summarized below.

¹ OCR stated the name of the complainant in its notification letter to the College and is not restating it here in the interest of privacy.

² A copy of the CPM is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

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

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.

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.

Facts Obtained to Date

The College is a member institution of the San Mateo County Community College District (District). The complainant registered with the College's Disability Resource Center (DRC) in

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).

January 2017. In the fall 2018 semester, the complainant enrolled in a communications class at the college and, on October X, 2018, she was given an accommodations memorandum from the DRC that listed the following approved accommodations and adjustments: advocacy/liaison with college faculty and staff; priority registration; classroom notetaker; breaks during class; preferential seating; extended time on examinations; low distraction environment for testing; Dragon Naturally Speaking software for essay/short answer examinations; and, breaks during testing.

On October XX, 2018, the complainant sent a message to her instructor that asked about her current grades and how she could improve over the rest of the course. On October XX, 2018, the instructor responded and told the complainant that he was grading a couple of her assignments and would post updated grades to the class webpage. Additionally, he stated that it was important not to miss too many classes, referred her to the course syllabus section discussing attendance, and advised her to seek out resources if she was having difficulty with class assignments or attendance.

On October XX, 2018, the complainant responded to the instructor and questioned why he raised alleged issues about attendance and assignments since she had only inquired about her current grade. She also reminded him that she had discussed with him her chronic illness and the impact it had on her ability to attend class and asked him what was meant by his advisement that it was important not to miss too many classes.

On November X, 2018, the instructor sent a progress report of students in his course who enrolled through the College for Working Adults (CWA) Program, including the complainant, to the CWA. In the report, the instructor noted that the complainant had excessive absences (six total), had a C- level of participation, and a current grade of D. He also asked whether a support plan could be created for the complainant and indicated that he was open to “chatting” about her status. The progress report was not sent to the complainant.

On November XX, 2018, the instructor sent an electronic message to the complainant stating that he was coordinating with the CWA, his dean, and the DRC about grades, participation, and attendance and whether the complainant should be dropped from the course due to excessive absences and the resultant lack of participation and mandatory hours of instruction.

On November XX, 2018, the complainant responded to the instructor’s message by reminding him of her disabilities and that she had informed him of her absences. She stated that she currently had a grade of XX% in the course and that there were several assignments that remained ungraded. She additionally stated that she believed the instructor’s position was discriminating against her because her absences were due to disability.

The communications between the complainant and instructor about dropping the complainant from the course were also sent to the DRC. In a November XX, 2018 email message to the instructor, the DRC stated, in pertinent part:

This student is registered with our DRC but does not have accommodations that allow her to miss more classes than is in your course policy. Therefore, from our DRC perspective, it is your decision whether to drop this student due to lack of attendance.

In a November XX, 2018 email message to the complainant, the instructor wrote, in pertinent part:

. . .Cañada College policy requires a specific amount of classroom attendance, per the attached college policy on Attendance.

“Excessive absence” is defined as those exceeding twice the number of hours a class meets weekly. In the case of XXXX XXX, that would be more than two absences.

As a result of your excessive absences, I dropped you from XXXX XXX to avoid the assessing of a D/F grade overall.

Attached to the instructor’s email message was an excerpt from the College catalog titled “Attendance Regulations.” The excerpt stated, in pertinent part:

Total hours of absence which exceed twice the number of hours a class meets in a week define “excessive absence” as used by many instructors in dropping students for nonattendance. Instructors may, however, utilize stricter attendance requirements.

On November XX, 2018, the complainant responded to the instructor’s message and copied her response to the DRC. In her response, the complainant stated that she believed she was being discriminated against and that she should have been contacted earlier if her disability was a major concern. On the same date, the interim director of the DRC forwarded the complainant’s response to the instructor’s dean and wrote:

As you know, this student will likely be contacting you and probably the DRC regarding her being dropped. I just wanted you to be clear about the DRC piece of this. [The complainant] is registered with the DRC and has several accommodations due to her medical condition. However, none of these accommodations allow for her to have excessive absences. She did not apply for what we call “exacerbated symptoms” accommodation. This is used when someone has severe medical issues with symptoms that can increase at times. Even if she had this accommodation, she would have to speak directly with all instructors and work out issues such as attendance, late work etc. In these cases, the instructor can deny these options if it seems to interfere with the course requirements.

The interim director did not include the complainant as a recipient of the above email message and nothing given to OCR shows that she was ever shown a copy of it or otherwise told of it.

The DRC has created and published for instructors the following information about the exacerbated symptoms accommodation (ESA):

A student in your class has a chronic health condition or a disability that is prone to periodic or unexpected exacerbation of symptoms. This student has been authorized by the Disability Resource Center (DRC) for an “[ESA]”

requesting flexibility with attendance, completion of assignments by due dates, or both (please see the attached accommodation memo).

An [ESA] in some cases may result in a fundamental alteration to the course and in those instances cannot be authorized by the professor. An example may be assignments in a class that are sequential and build off of each other- like a writing assignment that requires an outline or a rough draft before the final draft can be submitted. If the assignment is fundamental to the course and failing to complete the assignment prevents subsequent assignments from being completed, the request for an extension may be denied. Another example may be a field trip or in class presentation. If the information presented was fundamental to the course and cannot be recreated by any other means then the request for an excused absence due to exacerbated symptoms may be denied.

Additionally, if the exacerbated symptoms result in a significant portion of classwork or class time to be missed and it would not be reasonable for that missing work to be completed in the remainder of the semester the request for accommodation may be denied. In these cases an "Incomplete" or "Withdrawal" may be more appropriate.

We request that you please meet with the student and together review the essential course requirements and grading policy for your class as listed on the course syllabus. The goal of this process is to evaluate the reasonableness of requesting exception to the attendance policy and meeting assignment deadlines of a particular class if and when the student experiences an exacerbation of disability-symptoms and to come up with a plan for how the student will communicate their needs for an accommodation during the semester. DRC staff can be available during this meeting upon request.

Between November 2018 and February 2019, the complainant pursued many options at the College in an attempt to have addressed her concerns with being dropped from the course including appealing the determination and communicating and meeting with the College's Interim Vice President of Student Services. However, no action was ever taken to rescind the decision to drop her from the course and the complainant eventually became frustrated with the process and advised the College of her intent to end her affiliation with it and transfer to a new educational institution.

The complainant advised OCR that she had no intent or desire to have any further interaction with the instructor, return to the College, or enroll in any school within the District.

OCR was not presented with any information showing that the DRC engaged the complainant in an interactive process to determine if there were any reasonable accommodations or adjustments that could be implemented for her to address the absences in the course and prevent her from being dropped from it. Likewise, OCR was not provided with any information to show that the College engaged in a proper process or analysis to determine that the complainant's absences created a fundamental alteration of the course and that there were no reasonable means available to accommodate the complainant such that a fundamental alteration could be avoided.

Analysis

As stated above, Section 504 and Title II require post-secondary institutions to make modifications and adjustments to their policies and course requirements when necessary to afford an opportunity to students with disabilities that is equal to that of students without disabilities unless doing so would create a fundamental alteration of a course or program. Post-secondary institutions determine what reasonable accommodations and adjustments are necessary to achieve this objective by engaging the student with a disability in an interactive process. One such reasonable accommodation is an adjustment to an attendance or absence policy/requirement for a course such that some disability related absences do not detrimentally impact a student's ability to complete a course and, thus, afford the student the same opportunity for completion as his or her peers who do not have a disability.

In this matter, the complainant received numerous accommodations and adjustments for her XXXXXXXXXXXXXXXX course but they did not include one directly related to attendance. Because the complainant did not request and, therefore, was not approved for the ESA, the instructor and DRC believed that it was permissible to disenroll the complainant from the course due to excessive absences even though the complainant asserted that the absences were directly related to her disability.

Although students are obligated to initiate the accommodations process and advise their college or university that they would like to receive accommodations, the information in this matter indicates that the complainant's communications to her instructor about her absences being caused by her disability were also communicated to the DRC. OCR is concerned that the DRC did not engage the complainant in an interactive process to determine whether the ESA could and should be included in her accommodations or, if not, whether there were other reasonable means of accommodating her absences so that she could continue in and complete the course.

However, as previously noted, prior to the conclusion of OCR's investigation, the College expressed interest in voluntarily addressing the issues raised in the complaint under Section 302 of the CPM and OCR determined that it was appropriate to do so. On October 29, 2019, the College, without admitting to any violation of law, entered into the enclosed Resolution Agreement (Agreement)⁸ which is aligned with the complaint allegations and the information obtained by OCR during its investigation. The Agreement addresses the compliance concerns identified above with respect to providing accommodations in compliance with Section 504 and Title II.

Conclusion

This concludes the investigation of this complaint.

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

⁸ Although the complaint in this matter was against the College, the District informed OCR that it would accept responsibility for resolving the matter on behalf of the College and OCR agreed to the District's acceptance of responsibility. Thus, the Agreement mandates that the District perform specified actions on behalf of the College and the Agreement is signed by the District instead of the College.

fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the College's implementation of the Agreement until the College is in compliance with the terms of the Agreement. OCR will close this matter upon the College's completion of the obligations under the Agreement.

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. It 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 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 law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Thank you and counsel for the District, Mellissa E. Gallegos, for your cooperation in resolving this matter. If you have any questions about this letter or the resolution 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

encl.

cc: Mellissa E. Gallegos, Esq.