



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

October 16, 2019

Sonya Christian, Ph.D
President
Bakersfield College
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president@bakersfieldcollege.edu

(In reply, please refer to OCR Docket Number 09-19-2302.)

Dear President Christian:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint, received on May XX, 2019, against Bakersfield College (College). The Complainant alleged that the College discriminated against her on the basis of disability.¹ Specifically, OCR investigated the following issues:

- 1) Whether during the Spring 2019 semester the College failed to provide the Complainant with approved extra time and allow her an equal opportunity to take the same test, in the same format, as her non-disabled peers in a XXXXXX course; and
- 2) Whether during the 2018-2019 school year, the College failed to decide whether to grant the Complainant's request for a math waiver.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving 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. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The College is a public entity that receives funds from the Department and is therefore 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 in the investigation, OCR found sufficient evidence that the College is out of compliance

¹ OCR previously provided the College with the identity of the Complainant. We are withholding the Complainant's name from this letter to protect privacy.

with Section 504 and Title II and their implementing regulations with respect to Allegation 1. With respect to Allegation 2, based on the facts gathered to date, OCR identified compliance concerns regarding whether the College engaged in or delayed a process to determine whether to grant the Complainant's request for a math waiver. Prior to OCR completing its investigation of Allegation 2 and making a compliance determination, the College expressed an interest in voluntary resolution pursuant to section 302 of OCR's Case Processing Manual (CPM), and OCR determined it was appropriate to do so. The applicable legal standards, factual findings related to Allegation 1 and facts gathered to date related to Allegation 2, and resolution of this matter are summarized below.

Legal Standards

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, at 34 C.F.R. §104.43(a), provide that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any postsecondary education program of a recipient. The Title II regulations, at 28 C.F.R. §35.130(a), contain a similar prohibition applicable to public postsecondary educational institutions.

The Section 504 regulations, at 34 C.F.R. §104.44(a), require recipient colleges and universities to make modifications to their academic requirements that are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating, against qualified individuals with disabilities. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific required courses, and adaptation of the manner in which courses are conducted. However, academic requirements that recipient colleges and universities can demonstrate are essential to the program of instruction being pursued or to any directly related licensing requirement will not be regarded as discriminatory.

Under the Title II regulations, at 28 C.F.R. §35.130(b)(1)(ii) and (iii), public colleges and universities may not afford a qualified individual with a disability opportunities that are not equal to those afforded others, and may not provide aids, benefits or services that are not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. Under 28 C.F.R. §35.130(b)(7), public colleges and universities must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program or activity. Section 35.103(a) provides that the Title II regulations shall not be construed to permit a lesser standard than is established by the Section 504 regulations. Therefore, OCR interprets the Title II regulations to require public colleges and universities to provide necessary academic adjustments to the same extent as is required under the Section 504 regulations.

Allegation 1: During the Spring 2019 semester the College failed to provide the Complainant with approved extra time and allow her an equal opportunity to take the same test, in the same format, as her non-disabled peers in a XXXXXX course.

Factual Findings

The Complainant's "Accommodations Checklist" for the 2018-2019 school year (dated September XX, 2018) included, among other accommodations, extended (double) time on exams. During the Spring 2019 term, the Complainant was enrolled in an online XXXXXX course. She provided her XXXXXX professor (the Professor) notice of her accommodations at the beginning of the term. The Spring 2019 term ran from January 12 through May 10, with final exams occurring May 4 through 10.

Partway through the semester, on February XX, 2019, the Complainant called a Disabled Students Programs and Services (DSPS) counselor (the Counselor) and explained that the Professor hadn't provided her with extra time on her XXXXXX exam. The Counselor responded that she would reach out to the Professor, which she did, copying the Complainant on her email. The Professor did not respond.

On March XX, 2019, the Complainant emailed the Counselor regarding an issue with Exam 3, explaining that she took an exam titled "Exam 3 Ch 3 8-9", which did not include extended time. She explained to OCR that while she was in the middle of taking the exam, the Professor emailed her with a code to access "Instructor Access Only Exam 3" which contained extended time. The Complainant told OCR that the Professor provided no instructions on how to find the "Instructor Access Only Exam 3", but after she finished the exam, she looked online and was able to find it, use the code, and then took it again with the extended time.

On May X, 2019, the Complainant called and emailed the DSPS director (the Director) expressing that she wasn't given extended time on her XXXXXX exams. The Director called the Professor. Subsequently, on May X, 2019, the Complainant emailed the Professor that she had not received extended time on the first two exams of the term, and that she took the third exam twice because it wasn't clear which online exam she was supposed to take. The Complainant also called the Counselor on May X, 2019 regarding concerns with the Professor, and the Counselor spoke with the Professor that day. The Professor described to the Counselor that as it related to the third exam, the Complainant took the wrong exam initially, which did not include the extended time, and then retook it with her extended time. The Counselor then followed up with the Complainant, relaying what she learned from the Professor, and suggested that the Complainant wait until her final scores were posted for the class before proceeding.

On May X, 2019, the Director emailed the Complainant, explaining that she spoke with the Professor who admitted that she didn't provide extended time on Exam 1, but that the Complainant finished the exam with time to spare. The Director wrote explaining that because the Complainant didn't use all of the allotted time, it was hard to see how not receiving her accommodation impacted her. The Director noted that the Complainant could not receive credit for her second attempt at Exam 3 since the Complainant had already experienced all of the questions the first time, and so it would have given

her an unfair advantage if the Professor accepted the score from the second time she took the exam. The Director told the Complainant to wait until she received her final grade and that they could meet if she had any additional questions or concerns. Later that day, the Professor called the Director, informing her that the Complainant received a C in the class.

OCR reviewed a memo the Director sent to the College's Vice President of Student Affairs, on July X, 2019, after conducting a review of the Complainant's XXXXXX exams, including the time allotted, the time utilized, and the Complainant's performance. The memo reflects that the Complainant received a score of between 20 to 36 out of 50 on each exam (with the exception of the exam she took the second time). It also reflects that when she wasn't provided with her accommodation, she used about 60 minutes out of 90 minutes allotted to her, and when she was provided with her accommodation, she utilized at least some (and on one occasion all) of the extended time allotted to her. The memo also noted that the Complainant was not provided with extended time for her first two exams, that it was difficult for the Complainant to access Exam 3 with extended time, and that the Professor may have not known how to properly provide a student with extended time on an online exam.

Analysis

Based on the above, OCR concluded that the College failed to provide the Complainant with her testing accommodation of extended time for Exam 1, Exam 2, and Exam 3 in her XXXXXX course. First, based on the College's review of her exams and OCR's review of correspondence, the Complainant was not provided with extended time for Exam 1 and Exam 2. While the Complainant may not have used all of the allotted 90 minutes, it is unknown how much time she would have used had she been provided extended time. In fact, when she was ultimately provided her extended time on Exam 4, Exam 5, and the final exam, she used at least some of the extended time. For Exam 3, while the Professor did attempt to provide extended time, based on the College's own review, it was difficult for the Complainant to access, and so she ended up taking the exam without extended time. Once she realized there was a version with extended time, she took that one as well. Rather than accept the Complainant's score on her second Exam 3 or offer her the opportunity to take an alternative exam with the appropriate extended time, the College determined that it would be unfair to accept her exam score. The Complainant was therefore effectively denied her testing accommodation for Exam 3 because it was difficult to access, the College did not allow her to use that score, and the College did not attempt to remedy this. For the above reasons, OCR concluded there is sufficient evidence that the College discriminated against the Complainant on the basis of disability when it did not provide her with her testing accommodations.

Allegation 2: During the 2018-2019 school year, the College failed to decide whether to grant the Complainant's request for a math waiver.

Facts Gathered to Date

The Complainant explained to OCR that she had begun discussing a math waiver with the Counselor during the 2017-2018 academic year. Records reflect the Complainant sought and received a medical withdrawal from a Spring 2018 math course. Documentation the Complainant submitted requesting the medical withdrawal reflects that she had struggled with math since elementary school, and that

she was unable to pass the math course because “of something more than me getting extra time on test, going to study groups, going to tutoring, and still failing test.”

OCR reviewed August XX, 2018 documentation reflecting that the Complainant met with another DSPS counselor (Counselor 2) related to a possible learning disability in math. It reflects that the Complainant sought a math waiver and that despite multiple attempts at math courses, the Complainant either failed or withdrew. It also reflects that she wanted to transfer to a four-year university. Recommendations listed in the documentation included: the submission of a math prerequisite waiver; limiting course work to only math if math is required for a transfer; the use of math study guides and online videos; and, various accommodations including extended time on tests, a note taker, and recorded lectures. According to the Complainant, sometime after this meeting, she was told that the math requirement would be waived and that the DSPS was waiting for Counselor 2 to finalize paperwork that would make this decision official.²

On September XX, 2018, according to a DSPS communication log, the Complainant met with the Counselor and was working with Counselor 2 regarding learning disability testing for math. On November X, 2018, the Complainant met again with the Counselor regarding her spring classes and determined that she still needed to complete Math XXX in order to complete her degree path. According to the DSPS communication log, the Counselor told the Complainant that waiving math would likely cause a problem when applying to a university.

On April XX, 2019, the Complainant told the Counselor “that math will be waived so she can graduate.” The Counselor suggested that the Complainant communicate with Counselor 2 since she had worked with her regarding the learning disability testing. That day, the Complainant emailed Counselor 2, and wrote that it had been a while since she heard from Counselor 2, had been trying to get in touch with her, and that the last time they met, she was about to sign up for her final three classes “because we were able to waive math.” The Complainant asked for Counselor 2 to call her, and Counselor 2 replied that she’d follow up the next day. On April XX, 2019, the Complainant wrote again to Counselor 2 that she was planning to graduate with her associate degree.

On April XX, 2019, according to the DSPS communication log, Counselor 2 called the Complainant regarding the math waiver process, and the Complainant explained that both universities she was considering would require transferable math coursework. Counselor 2 noted in the log that she explained that while a math waiver would apply for “math competency”, the Complainant would still have to complete a transferable math course, to which the Complainant replied that she was not planning to transfer to a university and would graduate with an associate degree. Counselor 2 noted that she explained that the Complainant’s current major nevertheless required a transferable math course, and that they discussed some additional options.

Later that day, the Complainant spoke with another DSPS counselor (Counselor 3) regarding the math waiver, which the Complainant believed to be pending, said she was no longer interested in transferring to a university, and they reviewed the courses taken towards her degree. As the Complainant had completed the majority of her courses at XXXXXXXXX College, Counselor 3

² The College policies that OCR reviewed do not directly speak to waivers.

advised her to file for graduation at XXXXXXXX College, and to contact XXXXXXXX College Disability Resource Center (XX DRC). Around this same time, the Complainant began corresponding with XX DRC.

On April XX, 2019, the Complainant emailed the DSPS, asking why paperwork wasn't finalized immediately. She indicated that she wished DSPS would have communicated this information to her the year before, and that math "must" be waived because of her disability. That day, the Director responded, indicating that she had spoken with XX DRC staff and Counselor 2. She wrote that the Complainant may have misunderstood where she was in the math waiver process. The Director outlined three options for the Complainant: (1) helping her skip XXXX and take whatever math she needs to get into XXXXXX XXXX University, which would allow her to complete her degree at the College; (2) helping her skip XXXX and take XXXX XX to complete her degree at the College; or (3) allow her to complete a non-transfer degree from XXXXXX College, going through their process for math waiver. She noted that in 2018, the Complainant met with Counselor 2 to discuss the possibility of an assessment for a math-related learning disability and that she never took any assessments. She noted that it was only on April XX, 2019 that the Complainant told DSPS staff that she no longer wanted to transfer to a university. On May X, 2019, the Complainant told the Director that she would complete her degree at XXXXXX College.

Based on the facts gathered to date, OCR identified possible compliance concerns with respect to whether the College (1) engaged in any process to assess the Complainant's request for a math waiver or (2) specifically informed the Complainant of the steps she needed to take to make the request. In order to complete the investigation and therefore reach a conclusion as to the College's compliance, OCR would need to review additional correspondence between the Complainant and DSPS staff from the 2018-2019 academic year as well as prior years, interview DSPS staff, and understand how waiver requests are supposed to be addressed and whether there is any process in place for such requests. As mentioned above, prior to OCR completing its investigation, the College requested to resolve the complaint.

Overall Conclusion

This concludes the investigation of this complaint. To address the issues alleged in the complaint, the College, without admitting to any violation of law, entered into the enclosed resolution agreement which is aligned with the complaint allegations and the information obtained by OCR during its investigation. Pursuant to the resolution agreement, the College will: offer the Complainant the opportunity to retake Exam 1, Exam 2, and Exam 3 (or equivalents of those exams) with her full testing accommodations; develop a memo to be circulated to instructors of online courses and DSPS staff on best practices for implementing testing accommodations for online courses; create a guidance document for DSPS addressing how requests for course waivers are to be processed and handled in a timely manner; and, provide the Complainant with the opportunity to have her request for a math waiver reviewed under the new guidance document.

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 College is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution 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.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Shana Heller, Attorney, at (415) 486-XXXX or at Shana.Heller@ed.gov.

Sincerely,

/s/

James Wood
Team Leader

Enclosure

cc: Christopher W. Hine
General Counsel, Kern Community College District