



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

July 19, 2022

VIA ELECTRONIC MAIL

William H. Duncan
President
Sierra College
5100 Sierra College Blvd.
Rocklin, CA 95677
XXXXXXXX

Re: OCR Complaint No. 09-22-2016

Dear President Duncan:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has resolved the above-referenced complaint against Sierra College (College). The Complainant alleged that the College discriminated against her on the basis of disability.¹ Specifically, OCR investigated the following issue:

- Whether the College failed to provide the Complainant with effective communication after it failed to give primary consideration to her preferred assistive listening system, and instead offered one that was incompatible with her hearing aids, caused distortion, and failed to protect her privacy and independence.

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. As a public entity and a recipient of Federal financial assistance from the Department, the College is subject to Section 504, Title II, and their regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the College. Prior to OCR completing its

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

investigation and making a compliance determination, the College expressed an interest in voluntarily resolving this matter, pursuant to section 302 of OCR's Case Processing Manual (CPM), to address the compliance concerns identified by OCR, and OCR determined it was appropriate to do so.² As such, the College entered into the attached Resolution Agreement (Agreement) to resolve this matter.

Legal Standards

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(d)(1), require a recipient college to take steps to ensure that no student with a disability 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.

Under the Title II regulations, at 28 C.F.R. § 35.130(b)(1)(ii) and (iii), a public college 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 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), a public college 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 35.160(b) provides that a public college shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity and that the type of auxiliary aid or services necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

² Case Processing Manual (July 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

However, pursuant to the regulations, at 28 C.F.R. § 35.135 and 34 C.F.R. § 104.44(d)(2), a college is not required to provide individuals with disabilities with personal devices, individually prescribed devices, readers for personal use or study, or services of a personal nature. In addition, a public college is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens; however, it must make a written showing of such burden or alteration, after considering all resources available for use in the funding and operation of the services, program or activity in question. 28 C.F.R. § 35.164.

Communication is construed broadly to mean the transfer of information. In determining whether communication is as effective as that provided to persons without disabilities, OCR considers the timeliness of the delivery, the preferred method of communication of the individual with the disability, the nature, length, and complexity of the communication involved, the context in which the communication is taking place, whether the communication is in an accessible format, and whether the communication is provided in such a way as to protect the privacy and independence of the individual. 28 C.F.R. § 35.160(b)(2). For specific types of communication methods, OCR also considers the requirements in the implementing regulations, at 28 C.F.R. §§ 35.160 and 35.161.

Facts

The Complainant is XXXXXX years old and started wearing bilateral hearing aids when she was XXXXX years old. As a child, she was diagnosed as hard of hearing and has a speech language impairment. The Complainant told OCR that starting in the XXXX grade, she began using an FM System at school to help her hear what her teacher was saying in class. According to the Complainant, the FM System she used had a microphone to amplify and transmit her teacher's voice to a receiver that was connected to her hearing aids. When the Complainant entered into high school, the school district she attended provided her with an FM System that included a touchscreen transmitter, two receivers, and a pair of audio shoes that connected to the Complainant's hearing aids. The Complainant told OCR that this FM System works well for her and is her preferred hearing assistive technology for school.

For the 2021-22 school year, the Complainant enrolled at the College for her XXXXXXXX year. Before the school year started, the Complainant registered with Disabled Students Programs and Services (DSPS) to request accommodations for her disabilities. The DSPS Counselor assigned to the Complainant wrote in his notes that on August X, 2021, the Complainant notified the College that she uses an FM System. The notes also state that the Complainant is working with the Department of Rehabilitation (DOR) to obtain the FM System she needs for her classes. The College informed OCR that it believed DOR was working on getting the Complainant her requested FM System at that time.

The Complainant told OCR that when she initially requested the FM System from the College, she was told by the College that DOR was responsible for providing the device to her. As a result, the Complainant requested her preferred FM System from DOR, but was later told by her DOR

Counselor that it was the College's responsibility to provide her with this accommodation because it was going to be used at school. On August XX, 2021, the Complainant notified the College's Assistive Technology (AT) Specialist that DOR would not purchase the device for her and that she needed to obtain it from the College. The AT Specialist followed up with the Complainant by scheduling an in-person meeting with her on the first day of school to provide her with an FM System.

On August XX, 2021, the AT Specialist met with the Complainant and gave her a FM Wireless System that included a headset for her hearing assistive technology. The College informed OCR that this FM System uses a microphone which transmits the lecturer's speech wirelessly to a receiver which amplifies the audio signal and outputs the signal to a wired headset. According to the College, a person wearing hearing aids does not necessarily preclude them from using this system. The College reported that the factors to consider when assessing the suitability of this FM System for a user with hearing aids include: the extent and type of hearing loss, the setting where the device will be used, the type and compatibility of the user's hearing aids, and the user's personal needs and preferences. The College contends that the Complainant did not provide the College with any information that would render this particular device incompatible with her hearing aids. The College also informed OCR that the Complainant failed to participate in the interactive process by not making any attempts to use the device prior to declining it and did not inform the AT Specialist if she had previously used this device and had difficulties with it or if she did not want to use it because it was not her preferred device.

The Complainant told OCR that she specifically told the AT Specialist that she could not use the FM System he gave her because the device uses a headset that is not compatible with her hearing aids. The Complainant stated that when she wears a headset over her hearing aids, the headset rubs against her hearing aids and causes sounds that are painful to her ears. She also stated that the sound she hears through a headset is distorted and difficult to understand.

The Complainant's Advocate from NorCal Services for Deaf and Hard of Hearing (Advocate) told OCR that the FM System the College offered the Complainant is not appropriate for her and that she needs a system that connects directly to her hearing aids.

OCR notes that during the course of its investigation, it collected an email sent (on August XX, 2021) from the AT Specialist to the Complainant's Counselor at DOR in which the AT Specialist reported that the Complainant had told the AT Specialist that she had difficulties using the offered FM System with the headset. The email specifically states that the Complainant reported to the AT Specialist that she tried using an FM System with the headset and the device's amplified audio conflicted with the output from her hearing aids and was uncomfortably noisy. The AT Specialist also stated in his email that the Complainant reported to him that she has the best results with a listening device that integrates physically with her hearing aids and that she may need such an integrable device for full inclusion and success in her courses at the College. In addition, the AT Specialist wrote in his email that because this is a specialized listening device, it would probably be a personalized solution for her personal equipment and the College might not be able to provide this level of individualized support to her. Later that same day, the AT Specialist

sent a second email to the DOR Counselor requesting a virtual meeting with him and the Complainant to discuss her concerns regarding the offered FM System. This meeting was scheduled for August XX, 2021 at 1:30 PM.

On August XX, 2021, the AT Specialist and the DOR Counselor virtually met, but the Complainant did not attend, as she mistakenly thought the meeting started at 2:30 PM. After the meeting, the Complainant emailed the AT Specialist and informed him that she did not need to have another meeting scheduled because it was her understanding that the College would be providing her with the FM System that integrated with her hearing aids.

On August XX, 2021, the AT Specialist responded to the Complainant's email and notified her that the College had not decided if it would purchase her preferred device. On the same day, the AT Specialist emailed the DOR Counselor stating that he spoke to the Dean of Student Services, who is the manager for DSPS, and confirmed that the College had not committed to purchasing the FM System the Complainant requested. The AT Specialist also wrote in his email that there was a question as to whether this FM System is a supplement to the Complainant's personal device that is not necessarily required to be provided in the post-secondary setting under Section 504 and Title II. The AT Specialist also asked the DOR Counselor if his agency could provide support in purchasing the \$2,800 FM System for the Complainant.

On September X, 2021, the DOR Counselor responded by email to the AT Specialist asking why DOR needed to purchase the FM System for the Complainant if her former high school already gave her the touchscreen transmitter, two receivers, and the audio shoes. The AT Specialist responded to the DOR Counselor's email stating that the Complainant returned the FM System when she graduated from high school and no longer has it. The AT Specialist also wrote in his email that because the Complainant has a history of success with this FM System and will benefit from its use after she finishes at the College, it was expected that DOR would provide her with the device.

On September X, 2021, the AT Specialist sent the Dean of Student Services a quote for the FM System requested by the Complainant, which totaled approximately \$2,507.

On September X, 2021, the Dean of Student Services asked the AT Specialist for the contact information for the supervisor of the Complainant's DOR Counselor so that he could follow-up to see if DOR could provide the Complainant with the FM System she had in high school because the College would not obtain it for her.

On September XX, 2021, the Complainant emailed the AT Specialist asking for the reason why the College was not responsible for providing her with her preferred FM System. On the same day, the AT Specialist emailed the Complainant stating that he forwarded the Complainant's question to the Dean of Student Services and that the College would respond to her soon.

The Complainant told OCR that she sent the September XX, 2021 email to the College because her XXXXXX, XXXXXX XXXXXXXXXXXX, XXX, and XXXXXXXXXXXX classes had started and she still did not

have her hearing assistive technology. The Complainant also stated that her XXXXXX and XXXXXXX XXXXXXXXXX courses were held online and that if she had her preferred FM System, she could have plugged her computer into the device so that she could hear what the instructors were saying. Since she did not have the FM System, her instructors agreed to accommodate her by providing close captioning so that she could keep up with the class. The XXX and XXXXXXXXXX classes, however, were in person classes and the Complainant could not hear all of the words her instructors were saying despite sitting in front of the class. The Complainant also stated to OCR that she got headaches trying to understand what was being said in class, especially during her XXXXXXXXXX class because she was unable to read her instructor's lips because he wore a mask due to COVID.

On September XX, 2021, a virtual meeting was held with the AT Specialist, DSPS Counselor, DOR Counselor, Complainant, Complainant's Advocate, and the Advocate's Supervisor. The College informed OCR that the intent of the meeting was not to approve or disapprove the purchasing request, but to better understand the Complainant's concerns, gather additional information, and review the College's policies regarding assistive listening devices. The College also contends that DSPS did not commit to purchase the FM System the Complainant requested and told her that a final determination would be made by College management. The DOR Counselor's position was that the College should be purchasing the device for Complainant.

The Complainant's Advocate told OCR that during the September XX, 2021 meeting, the College mistakenly believed that the FM System the Complainant requested was considered an individualized prescribed device because it connects to the Complainant's hearing aids. As a result, the College did not think that they were required to provide it to her as an accommodation under Section 504 and Title II. The Advocate also stated that she and the DOR Counselor clarified to the College that the Complainant's hearing aids are the individualized prescribed device and that the FM System she requested is a standard accommodation that is provided to hearing impaired students at postsecondary institutions. According to the Advocate and the Complainant, the AT Specialist and the DSPS Counselor seemed to understand this and stated that the Dean of Student Services would make the final decision as to whether the College would purchase her preferred FM System. The Complainant also told OCR that she told everyone at the meeting that she could not understand what her XXXXXXXXXX instructor was saying in class and requested that she be allowed to record the lecture as an accommodation so that she could listen to it later. According to the Complainant, the College never got back to her regarding her accommodation request.

After the meeting, the AT Specialist emailed the Dean of Student Services to update him on what took place during meeting. The email states that the Complainant requested hearing aid technology that falls in the "grey-zone" of what is specifically explained in the regulations as appropriate for DOR or the College to fund and support. The email also acknowledged that the AT Specialist and the DSPS Counselor agreed about the seriousness to evaluate and implement the Complainant's academic accommodations.

On September XX, 2021, the Dean of Student Services sent an email to the DSPS Counselor and the AT Specialist stating that the College will not purchase the FM System for the Complainant because the College has technology in place that meets her needs.

On September XX, 2021, the DSPS Counselor sent an email to the Complainant to notify her that DSPS did not approved her request “due to the auxiliary aids and services our Assistive Technology department already provides, meeting the standards and providing equal access to the FM listening devices we have purchased and have accessible for our students--meeting the criteria in providing auxiliary aid services.”

On October X, 2021, the Complainant sent an email to the Dean of Student Services to tell him that she disagreed with the College’s decision to not provide her with an FM System that is compatible with her hearing aids. She also requested that the College’s 504/ADA Compliance Officer review her case because the assistive listening equipment that was offered to her was not compatible with her hearing aids, created disruptive interference in transmission, and was uncomfortable for her to wear because of her hearing aids. The Complainant further wrote in her email that she continues to struggle in her classes because the College failed to provide her requested accommodations for seven weeks.

The Complainant’s Advocate told OCR that the Dean of Student Services did not respond to the Complainant’s October X, 2021 email and the matter was not referred to the 504/ADA Compliance Officer.

For the Spring 2022 semester, the Complainant enrolled in XXXXXX X, XXX X, XXXX, and XXX XXXXXX. The XXXX class was held in person on campus. The Complainant informed OCR that she had having difficulty hearing what was being said in class, because the XXXX instructor wore a mask. The Complainant also stated that she received closed captioning for XXXXXX X, XXX, and XXX XXXXXX, which were online classes, but that she would have liked to have had her preferred FM System so that she could hear her instructors by plugging the device into her computer.

In June of 2022, the Complainant informed OCR that she received the transmitter for her preferred FM System from DOR. According to the Complainant, DOR will not provide her the with the receivers/audio shoes for the transmitter because DOR maintains it is the College’s responsibility to provide her with her hearing assistive technology. OCR also confirmed with the Complainant that her tuition for the 2021-22 school year was covered by the community college fee waiver grant program.

Analysis

Based on the facts gathered to date, OCR found that the Complainant notified the College at the beginning of the fall semester that her preferred hearing aid technology is the FM System that integrates with her hearing aids. The Complainant also informed the College that the FM System that was offered to her did not provide her with an effective means of communication because the headset that came with the system was not compatible with her hearing aids.

Under Section 504 regulations at 34 C.F.R. § 104.44(d)(1) and 104.44(d)(2), colleges and universities receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. OCR is concerned that the College believed that DOR was responsible for providing the Complainant with her preferred device because it was an individually prescribed device instead of an assistive listening device that is considered an auxiliary aid and, thereby, the College's responsibility to provide.

The Title II regulation at 28 C.F.R. § 35.130(b)(7) also states that post-secondary institution should give primary consideration to the student's request for auxiliary aids and services. In this case, the Complainant informed the College that she needs an FM System that is physically integrated to her hearing aids. OCR is concerned that the College did not give primary consideration to the Complainant's request and determined that the FM System, which utilizes a headset, is sufficient to provide the Complainant with an effective means of communication. Although the College uses this particular device for their other students, the Complainant stated that this particular model was not compatible with the Complainant's hearing aids. OCR is further concerned that the College denied the Complainant's preferred device without determining if this specific device would result in a fundamental alteration in the nature of a service, program or activity or an undue financial and administrative burden to the College. Lastly, OCR is concerned that the College did not refer the Complainant's matter to the 504/ADA Compliance Officer after she requested that the College do so in writing on October X, 2021.

In order to complete the investigation, OCR would need to conduct interviews of numerous College administrators and relevant staff members. Prior to completing the investigation, however, the College voluntarily expressed an interest in resolving this matter, and OCR agreed that it was appropriate to do so. As such, the College, without admitting to any violation of law, entered into the enclosed Agreement per CPM section 302 to address the complaint allegations and OCR's concerns identified in the investigation.

As part of the resolution, the College agreed to: conduct a new evaluation of the Complainant's requested accommodation for an FM System; draft a guidance memorandum describing the College's responsibilities under Section 504 and Title II to provide disabled students with auxiliary aid or services necessary to ensure an effective means of communication; and include in the guidance memorandum a reminder that the DSPS Coordinator will refer the matter to the 504/ADA Coordinator if a student continues to be unsatisfied with a disposition of an accommodation.

Overall Conclusion

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 Agreement until the College is in compliance with the terms

of the 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, discriminate, or otherwise retaliate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual subjected to such retaliatory treatment may file another complaint alleging retaliation.

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, personally identifiable 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 Minako Sakurai at Minako.Sakurai@ed.gov.

Sincerely,

/s/

Naghmeh Ordikhani
Team Leader

cc: Michelle L. Cannon
Lozano Smith