



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
SANTA ANA COLLEGE

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SANTA ANA, CALIF. 92705

December 20, 2012

Erlinda J. Martinez, Ed.D.
President
Santa Ana College
1530 W. 17th Street
Santa Ana, CA 92706

(In reply, please refer to case no. 09-12-2114.)

Dear President Martínez:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the complaint referred to above against Santa Ana College (College). The complainant alleged that the College discriminated against her, the named Student¹ (Student) on the basis of disability. The issues investigated by OCR were:

1. Did the College apply the correct standard of review in determining whether the communications with the Student were as effective as communications provided to others in her (b)(7)(C) class in spring 2012?
2. Did the College promptly and equitably respond to an internal complaint that the Student made on (b)(7)(C) 2012, stating that she had been denied appropriate communication auxiliary aids and services?

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of Federal financial assistance. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990, as amended, (Title II) and its implementing regulation over complaints alleging discrimination on the basis of disability that are filed against certain public entities. The District receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

To investigate the complaint, OCR interviewed the Student and reviewed documents provided by both the Student and the College.

As to Issue 1, OCR concluded that the College did not apply the correct standard when it determined that the Student received communication from an interpreter that was as effective as communication with others in her (b)(7)(C) class because it relied primarily on its objective view that an interpreter was providing effective communication to the Student, without taking into adequate consideration the Student's subjective experience with the interpreter in the class. Regarding Issue 2, OCR determined that the

¹ OCR notified the Recipient of the identity of the Student when the investigation began. We are withholding her to protect her privacy. To promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

College responded promptly but not equitably in light of our finding regarding Issue 1. However, the College without admitting to any violation of law, agreed to enter into and implement a remedial agreement, which when fully implemented, will remedy OCR's compliance concerns.

The following is a summary of the evidence gathered, the applicable legal standard, and OCR's conclusions.

Issue 1

Did the College apply the correct standard of review in determining whether the communications the Student received were as effective as communications provided to others in her (b)(7)(C) class in spring 2012?

Applicable Regulation

The Section 504 regulations, at 34 C.F.R. §104.44(d)(1), require recipient colleges and universities to take steps to ensure that no disabled student 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 interpreters or other effective methods of making orally delivered materials to students who are deaf or hard of hearing.

The Section 504 regulations, at 34 C.F.R §104.4(b) (2), provides that aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for disabled and non-disabled persons, but must afford disabled persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

The Title II regulations, at 28 C.F.R. §35.160(a), require a public college or university to take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

The Title II regulations at 28 C.F.R. §35.160(b)(1) further requires a public college or university to furnish appropriate auxiliary aids and services where necessary to afford 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. In determining what type of auxiliary aid and service is necessary, 28 C.F.R. §35.160(b)(2) requires that the type of auxiliary aid or service 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. A college or university shall give primary consideration to the requests of the individual 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.

Communication is construed broadly to mean the transfer of information. In determining whether communication is as effective as that provided to non-disabled persons, OCR looks at:

- the timeliness of the delivery,
- the accuracy of the communication, and
- whether the manner and medium used are appropriate to the significance of the message and the abilities of the disabled individual.

Few areas of accommodation for students at the post-secondary level call for as much individualized consideration of the effect of a student's disability on their access to educational content than does the area of hearing impaired and deaf students. In this instance, the Student considers herself "deaf," but not culturally Deaf. Her parents are hearing, individuals. Other persons in her immediate family are also deaf. American Sign Language (ASL) was used for communication in her family home between family members. The Student's "first language" is ASL. She prefers to use ASL qualified interpreters in important communication with hearing persons and to understand aurally delivered lectures in an educational setting.

Summary of Facts

The Student told OCR she prefers ASL over English-based sign systems because the English-based sign language adaptations take more time and a fluent ASL signer provides her with a better understanding of abstract concepts.

The Student is currently enrolled in the College and has an educational goal of becoming (b)(7)(C). For the certificate, the Student needs to take (b)(7)(C). The Student took (b)(7)(C) in fall 2011, but was unable to finish the class. The Student enrolled in (b)(7)(C) again for spring 2012.

The Student asked for and received a team of two interpreters for the class; "Interpreter 1" and "Interpreter 2". After several class sessions, the Student told OCR she felt Interpreter 1 was not an effective interpreter for her because; Interpreter 1 used Pidgin Sign English (PSE) mixed with signed Exact English (SEE), but not ASL. According to the Student, Interpreter 1 finger spelled many words and made up her own signs. When Interpreter 1 was "on" she was asking Interpreter 2 for signs and this resulted in an incomplete interpretation, as well as a less detailed rendition of the (b)(7)(C) teacher's lecture. According to the Student, interpreter 1 did not use ASL classifiers (which show movement, size, location, and appearance) to clarify abstract and complex concepts.

The Student told OCR that she previously took and passed (b)(7)(C) (b)(7)(C) courses at the College. The College provided interpreters for

two of the classes and her (b)(7)(C) class. She stated to OCR that the only interpreter she had problems with was Interpreter 1.

In a statement to OCR, the College explained that the Student visited the Deaf and Hard of Hearing Program (DHHP) office on (b)(7)(C) 2012 to meet with the Senior Interpreter about her interpreters in her (b)(7)(C) class. (The statement does not describe the Coordinator of the Deaf and Hard of Hearing Program [Coordinator] being at the meeting.) The College stated that the Student asked that the interpreters for (b)(7)(C) be replaced. The Student requested the same interpreters she had for the (b)(7)(C) class she withdrew from in the fall. The Senior Interpreter told the Student they were not available, and asked the Student if she could understand her current interpreters in the (b)(7)(C) class. According to the College, the Student told the Senior Interpreter that she could not pay attention to the interpreters "... because they were boring to watch." The College also stated that the Senior Interpreter asked the Student if she told the (b)(7)(C) interpreters to be clearer for her or whether the Student explained to them what her needs were. According to the College, the Student said she did not. The College stated that the Senior Interpreter told the Student she would need to observe the class to see if "...the interpreters were delivering the message accurately and appropriately."

The Student stated to OCR that on (b)(7)(C) 2012, she met with the Coordinator and the Senior Interpreter. The Student stated that she told them she could not understand Interpreter 1 as an interpreter and told them that she wanted another interpreter. The Student stated that she was told no other interpreter was available. The Student stated that she asked whether a qualified interpreter outside the College could be located, and was told one could not.

Data submitted to OCR from the College included two pages of handwritten notes, dated (b)(7)(C) 2012, from a note book. Observations in the notes include:

- "Student was observed not watching instead writing notes back-n-forth w/ another student".
- (Interpreter 1) Start= too English recommendation: reduce F.S.(fingerspelling) more ASL/conceptual accuracy
- Observed the Student not feeding signs when asked looked away @ book
- Interpreters:
- F.S. (fingerspelling) is clear & accurate
- (Interpreter 2) concepts are clear message is accurate
- (Interpreter 1) needs more ASL, but message is clear & accurate
- Both uses team appropriately for clarity and understanding
- Student does not watch either interpreter for any length or more than the other

On (b)(7)(C) 2012, the Coordinator sent an e-mail to the Student that stated, based on the classroom observation, that she and the Senior Interpreter had decided that the interpreters “were fully qualified and appropriately placed” in the Student’s (b)(7)(C) class.

On (b)(7)(C) 2012 the Student sent an e-mail to her (b)(7)(C) instructor that stated she was having trouble understanding and being understood by Interpreter 2, one of her interpreters in the class; Interpreter 1. The email stated the Student was angry with the DHH program for denying her request for a new interpreter. The instructor forwarded the Student’s e-mail to the Coordinator.

On (b)(7)(C) 2012, the Coordinator e-mailed the (b)(7)(C) instructor and characterized the Student’s concerns as involving both of her interpreters, not just Interpreter 1. The Coordinator’s email informed the instructor that the Coordinator responded to the Student’s concerns by sending the Senior Interpreter to observe the instructor’s (b)(7)(C) class. She concluded that, “...they (the interpreters) are conveying your message accurately and completely...” The Coordinator’s email also stated that “. . . [the Student] has indicated to me that she does understand her interpreters, but they do not keep her interest-she feels bored watching them.” The Program Coordinator’s email also refers to observations of the Student’s behavior made during the (b)(7)(C) class.

The Student’s complaint was received by OCR on February 17, 2012

The DHP contact log entries provided to OCR by the College show the Student informed her CTE advisor in a meeting with on (b)(7)(C) 2012 that she was having difficulty with the voicing skills of one of her interpreters, but she did not have a problem with Interpreter 2.

The Student completed (b)(7)(C) and received (b)(7)(C) grade.

Analysis

OCR recognizes that measuring and assessing “effective communication” provided by an interpreter to a particular deaf college student will involve consideration of both objective and subjective components. In most instances, an interpreter coordinator will be more qualified than OCR to reach a determination about the effectiveness of the services provided by a particular interpreter. Indeed, in cases where OCR can reach a compliance determination without substituting its judgment for that of a college or university’s qualified staff, it likely will do so. For these reasons, in this matter, OCR considered instead whether the College applied the right standard in determining effective communication for this Student based on the facts gathered during OCR’s investigation. After a careful review of those facts, OCR concludes that the College did not apply the correct standard.

We begin our analysis by noting that the regulatory and court made law is not structured, as it often is in other areas of the post-secondary educational field, to provide the College and its staff with considerable academic deference when its determinations are based on

a college's adherence to the legal requirements of Section 504 and Title II. *Wong v. Regents of Univ. of Cal* 192 F.3d 807, 818). Instead, the law here provides deference to the preferences of the student with a disability.² According the regulation implementing the communications provision of Title II in determining what types of auxiliary aids and services are necessary, a public entity (college or university) shall give "primary consideration" to the requests of students³. This is because the individual with a communication-related disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective. (ADA Title II Technical Assistance Manual, II-7.1100 Primary consideration)

The evidence collected by OCR shows that the Student raised her concerns about the adequacy of her auxiliary aid (interpreting services) with DHHP in (b)(7)(C) 2012 after the first week of classes, and again with the instructor in the first week of (b)(7)(C) and yet again with DHHP on (b)(7)(C) 2012. Although, the College characterized the Student's concerns as dissatisfaction with both interpreters; asserting she found them to be boring and not entertaining enough, the record of communication from the Student to the College is focused on one interpreter and related to the adequacy of the interpreting services, specifically the effective receptive and expressive communication skills of the one interpreter.

This written record is consistent with OCR's communication with the Student and her articulation of specific examples of ineffective communication by the interpreter, centered on a lack of proficiency in ASL, the use of classifiers, reliance on fingerspelling and ASL signs. The initial observation of the class by the Senior Interpreter, though giving these deficiencies a significantly different weight than that given by the Student, did confirm the presence of these impediments to effective communications for this student. This was the first element in OCR's concerns with the standard applied by the College.

The College's adoption of a "team-based" measure of adequacy was the second element in OCR concerns. The opinion of the Senior Interpreter that the interpreter "team," as a whole, assigned to the Student conveyed the instructor's message accurately and completely should not have been dispositive of whether or not the Student received "effective communication" from Interpreter 1 in her (b)(7)(C) class. Likewise, it did not demonstrate that the more English-based interpreting style of Interpreter 1 plus Interpreter 2 was an equally effective alternative to the Student's request, a team of qualified ASL interpreters.

The third element in OCR's concerns was that the College viewed the fact that the Student passed the (b)(7)(C) class the second time was definitive proof that the College provided the Student effective communication. Of course, at the time of the observations, the Student's grade was unknown. Accordingly, the College's view is an after-the-fact

² We further note that, in its January 16, 2012 brief filed in *Argenyi v. Creighton University* (on appeal to the Eighth Circuit Court of Appeals) the United States stated that, whether a requested auxiliary aid or service is necessary to ensure that a deaf or hard of hearing student can communicate effectively is not a decision entitled to traditional academic deference.)

³ "Primary consideration" means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens." (ADA Title II Technical Assistance Manual, II-7.1100 Primary consideration)

determination. Moreover, the position of the United States is that passing a class or an academic requirement in College is not determinative of the issue of whether a Student has been receiving effective communication. (see Brief for the United States; *Argenyi v Creighton University* (on appeal to the 8th Cir at page 30).

Even assuming without deciding that the Student could have brought greater focus to the discussion about what was taking place in (b)(7)(C) class, there is a preponderance of evidence that she was not dissatisfied with both interpreters, only one, and that she did not hold either interpreter up to an unrealistic standard of perfection. Rather, OCR finds that the Student made the reasonable point that for communication at this level of college education, an interpreter's heavy reliance on finger spelling, made up signs, and frequent reliance on a co-interpreter did not render the communication effective for her in this particular biology class. Though the College found less fault with the weaker interpreter than did the Student, the first observation did validate some critical concerns of the Student.

Taking into account the totality of OCR's concerns about the standards the College applied in response to the Student's complaint, we conclude that the focus of the assessments did not give "primary consideration" to the requests of the Student, nor did it sufficiently ascertain whether the manner and medium used to convey aurally delivered information presented in the (b)(7)(C) class by the Instructor, by other students, and the Student, were appropriate to the significance of the message and the individual abilities of the Student. These are the standards found in the Title II regulation, which were not in this case followed by the College.⁴

⁴ OCR was also concerned that the Student was told that with "only" six weeks remaining in the semester the only way for her to have a new interpreter would be to swap with another deaf student — something not fair to the other student. We agree that "robbing Peter to pay Paul" is not a good solution to a shortage of interpreters, however, assuming that Interpreter 1 was "qualified", another deaf student whose communication style and abilities were less ASL-orientated may well have benefited from the switch. Moreover, the College argued Interpreter 1 had taken and passed this (b)(7)(C) course previously. Her enhanced knowledge of (b)(7)(C) may certainly have been valuable, but only if she could share her knowledge in a manner useful to the Student.

Finding a new interpreter or using video-remote interpreting, were not possibilities placed into consideration by the College. We assume the reason here was primarily budgetary. OCR is well aware that all California community colleges have received severe cuts in funding and in many instances these cuts have fallen in a disproportionate manner on services for students with disabilities. Moreover, services for deaf students can have a heavy impact on the total DSS budget. Further, in some parts of California, well qualified interpreters, up to the rigors of a college science class may be scarce. Consequently, particularly in these times, it is only logical and reasonable that not every deaf student's expression of dissatisfaction can or should result in the assignment of a new interpreter. On the other hand, under Title II of the ADA, students who are deaf are entitled to equally effective communication and deference to their preferred form of accommodation. Colleges cannot fail to deliver services up the ADA-mandated level for DSPS services or auxiliary aids even if a DSPS has not been allocated sufficient categorical funding to pay for them since *it is the college as a whole* that is obligated to provide these services to maintain compliance with Section 504 and Title II of the ADA. Consequently, additional expenses to achieve compliance may have to come out of a college's non-categorical budget. (Letter to Student Services Officers from Chancellor Jack Scott dated September 14, 2012; Institutional Responsibility to Provide Reasonable Accommodations and Services for Students with Disabilities)

Issue 2

Did the Recipient to promptly and equitably respond to an internal complaint that the Student made on (b)(7)(C) 2012 stating that she had been denied appropriate communications auxiliary aids and services?

Applicable Regulation

The Section 504 and Title II regulations establish procedural requirements that are important for the prevention and correction of disability discrimination. These requirements include adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints of disability discrimination (34 C.F.R. §104.7(b) and 28 C.F.R. §35.107(b)).

Analysis

Based on the facts recited above CCR concludes that the Student did receive a prompt grievance, as the Senior Interpreter quickly and directly observed the Student's class following the Student's expression of dissatisfaction. However, as we found that the College applied the wrong standard of review in observing the adequacy of the interpretation services, we find that the internal investigation ("grievance") was not equitable.

Conclusion

OCR informed the District of its tentative findings and the District, without admitting to any violation of law and attributing the Student's difficulties to sources other than deficiencies in interpreting services, nonetheless clearly expressed a willingness to try to resolve OCR's concerns. Subsequently, the District has agreed to resolve this matter as set forth in the attached Resolution Agreement (RA) signed by the College.

The College agreed to offer the Student to take an additional (b)(7)(C) class in the spring 2013, at no cost, with appropriate auxiliary aids and services. In addition, the Recipient will develop a written plan to either change an interpreter or provide an independent evaluation to determine whether a particular interpreter is providing effective communication if a student complains about the substantive communication skills of an interpreter⁵. A copy of the Resolution agreement is attached.

This letter is a letter of findings issued by OCR to address an individual OCR case. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they 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.

⁵ OCR recommends that in developing such a plan, the College utilize the resources and suggestions mentioned in the "Deaf and Hard of Hearing Resource Guide" issued by the California Community Colleges Chancellor's Office on June 12, 2012. In particular, "Assessment of DHH Students" at page 17 and "Quality Assurance: Student Feedback" at page 19.

OCR is closing this complaint as of the date of this letter. The Student is being notified concurrently. The Student may file a private suit pursuant to section 203 of the Americans with Disabilities Act, whether or not OCR finds a violation of Title II.

OCR wishes to thank the College administrators and staff for their genuine assistance in resolving this complaint. If you have any questions, please contact David LaDue, Civil Rights Attorney, at (415) 486-5528.

Sincerely,



Sara Berman
Team Leader

Cc: (b)(7)(C)

Enclosure

RESOLUTION AGREEMENT

Santa Ana College

OCR Docket # 09-12-2114

The Santa Ana College (College) in the Rancho Santiago Community College District agrees to implement the following Resolution Agreement, without admitting to any violation of the law, in order to resolve the issues investigated by the U.S. Department of Education, Office for Civil Rights (OCR), under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), in the above referenced docket number.

A. Provisions

1) Individual Remedial Measures

By November 30, 2012, College shall make a written offer to the student to take the (b)(7)(C) class in spring 2013, with appropriate communications auxiliary aids and services, at no cost to the Student.

2) Timely Implementation of Communications Auxiliary Aids and Services.

a. The College will develop and implement a written plan to either change an interpreter or provide an independent evaluation to determine whether a particular interpreter is providing effective communication if a student complains about the substantive communication skills of an interpreter.

b. This plan will include, if appropriate, proposed changes to College District Policies and Procedures, and action steps consistent with assessment and monitoring to ensure the plan is implemented in such a way as to ensure that the necessary supports are in place within two weeks of receiving notice from the student that the auxiliary aid/service is not effective.

B. Reporting

- 1) The College will provide a copy of the letter to OCR within one week of sending it to the Student.
- 2) The College will submit to OCR a plan for responding to complaints by users concerning the effectiveness of communication auxiliary aids and

services and a timetable for implementing the plan per Item 2 by December 31, 2012.

The College understands that OCR will not close the monitoring of this agreement until OCR determines that it has fulfilled the terms of this agreement and is in compliance with the regulation implementing Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, which were at issue in this complaint.

The District understands that by signing this agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this agreement. Further, the District understands that during the monitoring of this agreement, if necessary, OCR may visit the District, interview staff and students, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this agreement and is in compliance with Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.



President or Designee

Date: 11-8-12