



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

50 BEALE ST., SUITE 7200
SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

February 18, 2014

Elnora Tena Webb, Ph.D.
President
Laney College
900 Fallon Street
Oakland, California 94607

(In reply, please refer to case no. 09-12-2317.)

Dear Dr. Webb:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Laney College (College). The complainant alleged that the College discriminated against her on the basis of disability.¹ Specifically, OCR investigated whether during the Spring 2012 and Fall 2012 semesters, the College failed to provide the complainant with academic adjustments necessary to ensure that she could participate in the College's XXXXXXXX Program in a nondiscriminatory manner.

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 College receives Department funds, is a public education system, and is subject to the requirements of Section 504 and Title II.

OCR gathered evidence through interviews with the complainant and College employees and through a review of documents provided by the complainant and the College.

Based on the evidence, OCR determined that there is sufficient evidence to support a conclusion of noncompliance with Section 504 and Title II. Without admitting to any violation of law, the College voluntarily entered into a Resolution Agreement (enclosed) that, when fully implemented, will remedy OCR's compliance concerns.

The applicable legal standard, the facts gathered during the investigation, and the reasons for our determination are explained below.

¹ OCR informed the College of the complainant's identity when the investigation began. We are holding the complainant's name from this letter to protect her privacy.

Legal Standard

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 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.

Facts Gathered

OCR's investigation revealed the following facts:

- The complainant is an individual with multiple disabilities. During the Spring 2012 and Fall 2012 semesters, she was enrolled in the College's XXXXXXXX Program and was registered with the College's Disabled Student Programs and Services (DSPS).
- In Spring 2012, the complainant was enrolled in four XXXXXXXX classes, in which she received three "A's" and one "D." In Fall 2012, the complainant was enrolled in three XXXXXXXX classes, in which she received two "A's" and one "W" (withdrawal).

- She was approved to receive numerous testing and in-classroom academic adjustments (“accommodations”), which were documented in DSPS’s “Academic Accommodations Authorization Letter” (“Letter”). The complainant alleged that she did not receive the following four accommodations during the Spring 2012 semester.

1. Extended Time on Written Assignments

- According to the Letter, the complainant was approved to receive “[e]xtended time on written assignments (Generally one extra class session).” The complainant alleged to OCR that one of her instructors (Instructor A) did not give her extended time to turn in a class project, which resulted in the complainant getting a “D” for the course.
- OCR learned that the complainant was suspended from the College for a few weeks in Spring 2012 for reasons unrelated to the complainant’s disability. When she returned to school from the suspension, Instructor A did not allow the complainant to make up work that she had missed during the suspension, which included a class project. Instructor A told OCR that she has a policy of not accepting late work, which applies to all students. She explained that the complainant was given a one-week extension to turn in her class project as an approved accommodation, but the complainant was on suspension when the class project was due (with the extension) and did not turn it in within the one-week extension. The complainant’s grade dropped from an “A” to a “D” as a result of missing work during the suspension. The complainant filed a grade appeal with the College, which resulted in a meeting with the Dean, Instructor A, and the complainant. The complainant’s grade appeal was unsuccessful.

2. Notes for tests/quizzes

- According to the Letter, the complainant was approved to use “notes for tests and quizzes per instructor approval.” The complainant told OCR that none of the instructors allowed her to use notes for exams.
- OCR interviewed all four of the complainant’s instructors for Spring 2012. While they were able to remember some of the accommodations that had been approved for the complainant, none of them could remember whether using notes for tests had been one of them. They did not indicate that they had provided this accommodation to her. They told OCR that she did not complain to them about not receiving this accommodation during the semester, and that the complainant did very well in their classes, receiving an “A” in all courses except for Instructor A’s course where the complainant received a “D” because of the missed work during the suspension.

- OCR interviewed the DSPS counselor/interim coordinator (Counselor) who wrote the complainant's accommodation Letter. She stated that using notes for exams was subject to "instructor approval" because DSPS could not require instructors to make their exams "open book" and that this accommodation should be discussed and arranged between the student and the instructor. The Counselor told OCR that she had regular contact with the complainant throughout the Spring 2012 semester, and the complainant did not inform her that instructors were not allowing her to use notes for exams.

3. Dictionary for tests

- The Letter stated the complainant's approved accommodation as follows: "May use dictionary, spellchecker, fact sheet, [and] formula sheet" for tests. The complainant alleged that Instructor A did not allow the complainant to use a dictionary for exams.
- In an interview with OCR, Instructor A could not recall whether using a dictionary had been one of the complainant's approved accommodations. She told OCR that she was unaware that the complainant wanted to use a dictionary for exams until the following semester (Fall 2012), when the complainant brought up this issue for the first time during a grade appeal meeting. Instructor A explained to OCR that students were required to learn new vocabulary, including XXXXXX XXXXXXXXX terms, and that using a dictionary would have been unfair. She also explained that she never took off points for spelling, so there was no need to use a dictionary. According to Instructor A, the complainant never complained to her during the Spring 2012 semester that she was not being provided with this accommodation.

4. Adaptive computer for tests

- According to the Letter, the complainant was approved to take tests on an adaptive computer in a distraction reduced setting. Generally, the complainant took her exams on a computer in the College's alternate media center.

The complainant told OCR that in two of her courses, students took a certification exam in May 2012 designed by the XXXXXXXX XXXXXXXXXX Association. The complainant wanted to take the certification exams on a computer in the alternate media center instead of in the classroom, which meant that her instructors had to submit paperwork to the XXXXXXXX XXXXXXXXXX Association in order to have the tests administered separately. The complainant told OCR that Instructor B did not submit the paperwork in time, and the complainant had to wait until summer 2012 to take the exam, while Instructor C did not

complete the paperwork at all and the complainant was still waiting to take the state exam.

- OCR interviewed Instructor B. He explained to OCR that exams by the XXXXXXXX XXXXXXXXXX Association must be administered by a proctor approved by the organization. He is an approved proctor, and when he found out that the complainant wanted to take the exam in a separate location, he promptly submitted paperwork to the XXXXXXXX XXXXXXXXXX Association, which was denied. This was his first experience obtaining approval from the XXXXXXXX XXXXXXXXXX Association to proctor the test in a separate location, and he was not aware of the necessary paperwork. He resubmitted the paperwork and it was approved the second time. There was a little delay from having to resubmit the paperwork. He stated that the complainant took the exam in June 2012, while rest of the students took the exam in May 2012, but he explained that there was no disadvantage to the complainant from the delay.
 - OCR interviewed Instructor C. She explained that this was her first experience with a student who wanted to take the exam in an alternate setting. She was not aware that she had to submit paperwork to the XXXXXXXX XXXXXXXXXX Association in order to obtain approval to make a different testing arrangement. Instructor C told OCR that she contacted the XXXXXXXX XXXXXXXXXX Association and obtained the necessary paperwork, which she emailed to DSPS. She believed DSPS would submit the paperwork to the XXXXXXXX XXXXXXXXXX Association and proctor the test, and did not know what was causing the delay.
 - OCR interviewed the Counselor. She stated that she was not involved in this issue and the complainant had not talked to her about this problem. She explained that DSPS must receive the certification test from the instructor in order for DSPS to administer it.
 - The College informed OCR during the negotiation of the Resolution Agreement that the complainant did finally take the certification exam for Instructor C's class.
- The complainant told OCR that she continued to have problems with her accommodations in the Fall 2012 semester. The complainant's accommodation Letter for the Fall 2012 was substantially the same as in the prior semester. She was enrolled in three classes taught by the same instructor, Instructor D. She stated that Instructor D would not let her use notes for exams. In addition, he would not allow her to use a tape recorder in class, even though her accommodation plan shows that she was approved to use a tape recorder.

- OCR interviewed Instructor D. He stated that most of the exams in his courses were open book or take home, so the complainant, along with the other students in the course, was allowed to use notes for these exams. He acknowledged that some exams were closed book and that he may not have allowed the complainant to use her notes or book for the closed book exams. Regarding tape recording, he told OCR that he did not forbid the complainant from using a tape recorder in class. Instead, prior to recording him, he asked the complainant to please “ask for my permission to record me.” He told OCR that while the complainant complained about various things throughout the semester, she did not complain to him that she was not allowed to use notes for exams or that she was prohibited from using a tape recorder. He stated that she did very well in his courses—she received an “A” in two courses and withdrew from the third course.
- Several of the instructors whom OCR interviewed indicated that they did not receive much training on providing accommodations and would benefit from additional training.
- OCR learned from the College during the negotiation of the Resolution Agreement that the complainant is no longer enrolled in the XXXXXXXX Program.
- OCR reviewed the College’s website, as well as the website for the college District of which the College is a member. While the District website contains information about the District’s Section 504 policies and procedures, OCR could not find similar information on the College’s website. The College website does not provide a link or refer to the District’s Section 504 information. The College’s DSPTS web pages contain some information about the type of accommodations provided, but does not provide other information pertinent to students with disabilities, such as what kinds of documentation are needed to support a request for accommodation, the interactive process that the College will engage in to determine the student’s accommodation, how the College will coordinate with faculty to implement approved accommodations, how the College will address and resolve questions of whether an accommodation will result in a fundamental alteration of the course, and how students can appeal decisions regarding accommodations and/or file a disability discrimination complaint. There is no link to common terms such as “Section 504,” “discrimination,” “disability,” or “DSPTS” on the College’s site index. A search for terms “Section 504,” “discrimination,” and “disability” using the College’s search engine produced no results. In an interview with OCR, the Counselor stated that the student disability handbook was being updated; there is no link to the student disability handbook on the College’s website.

Analysis

The complainant alleged that she did not receive some of her approved accommodations in Spring 2012 and Fall 2012 semesters.

Specifically, the complainant alleged that Instructor A did not give her extended time to submit a class project in Spring 2012. The evidence did not show that the College failed to provide this accommodation. The instructor gave the complainant an extra week to turn in the class project consistent with her accommodation, but the complainant failed to turn in the class project because she was suspended from school. The failure to timely submit the class project was not the result of the complainant not receiving the accommodation, but instead, was the result of the complainant's suspension from school which was unrelated to her disability.

The complainant also alleged that her instructors did not allow her to use notes for exams in Spring 2012 and Fall 2012. None of her instructors recalled this being an approved accommodation for her; none indicated that they allowed her to use notes for closed-book tests. Because DSPS approved this accommodation subject to "instructor approval," the College did not technically violate Section 504 when the instructors did not provide this accommodation.

OCR provides the following technical assistance to the College. OCR strongly cautions the College against continuing this practice of approving accommodations subject to instructor approval. It is DSPS's function to approve accommodations with certainty, based on documentation submitted by the student. When DSPS conditions an accommodation "per instructor approval," it places the student in a difficult and unfair position of having to negotiate his/her accommodation with individual instructors, who are ultimately in the position of evaluating and rating the student's academic performance. An important function of DSPS is to serve as an intermediary between the student and faculty so that students do not have to be in the uncomfortable position of having to reveal the nature or extent of their disability and to discuss/negotiate their accommodations with their instructors.

The complainant also alleged that Instructor A did not allow her to use a dictionary for exams in Spring 2012. In an interview with OCR, Instructor A indicated that using a dictionary was not necessary because no points were deducted for spelling, and she also implied that a dictionary would have fundamentally altered an essential course content, which involved testing the student's knowledge of XXXXXXXX vocabulary. OCR notes that instructors may not unilaterally decide to not provide an approved accommodation because they believe that a student does not need it or that it would result in a fundamental alteration of essential course content. The College should have procedures in place for how instructors can raise concerns about an approved accommodation and how it will address the instructors' concerns.

The complainant also alleged problems with taking the certification exams in an alternate setting for two of her courses in Spring 2012. Instructors for both courses told OCR that they had never encountered a situation of having to administer the certification test in an alternate setting, and therefore, were unaware of the process for obtaining permission from the XXXXXXXX XXXXXXXXXX Association. For Instructor B's class, the complainant was delayed approximately one month in taking the test in an alternate setting because Instructor B had to re-submit the required paperwork to the

XXXXXXXXX XXXXXXXXXXXX Association. The facts did not indicate that the complainant was harmed by the delay. For Instructor C's class, there appears to have been a breakdown in communication between Instructor C and DSPS on who was responsible for submitting the necessary paperwork to the XXXXXXXXXXXX XXXXXXXXXXXX Association, with each believing that it was the other's responsibility. OCR later learned from the College that the complainant did finally take the certification exam for Instructor B's class.

Finally, the complainant alleged that Instructor D did not allow her to use a tape recorder in class in Fall 2012. Instructor D denied that he prohibited her from using a tape recorder. He told OCR that he requested her to ask for his "permission" to record him. OCR notes that once an accommodation has been approved by DSPS, the student does not have to ask for permission of the faculty to exercise the accommodation. In this case, the complainant should not have needed Instructor D's permission to use a tape recorder.

In summary, the facts show that the College did not perfectly implement the complainant's accommodations. The facts show that the complainant was delayed in taking two certification exams in an alternate setting, as well as with her approved accommodations of using a dictionary and a tape recorder. Because her accommodation was worded "per instructor approval," she may also have had difficulty using notes for closed book exams. Despite these problems, the enclosed Resolution Agreement does not provide for individual remedies for the complainant for a couple of reasons. First, the facts did not show that the complainant was harmed by the problems. The complainant received all A's in her courses, with the exception of Instructor A's course where she received a lower grade due to missed work during her suspension, which was unrelated to her disability. Second, OCR learned from the College that the complainant is no longer enrolled in the XXXXXXXXXXXX program.

OCR's review of the College's website in conjunction with the facts gathered in this case indicates that the College needs a more robust Section 504 plan that clearly spells out, and provides notice to students, of the DSPS process for how to request accommodations, how the College will coordinate with faculty to implement approved accommodations, how students can challenge or appeal the College's decisions regarding accommodations, and how the College will resolve concerns about whether an accommodation would result in a fundamental alteration of a course content.

Finally, OCR's investigation revealed that more training is needed for instructors on their responsibilities for implementing approved accommodations for students with disabilities. Instructors with whom OCR interviewed indicated a need for more training on how to implement approved accommodations and how to resolve questions or concerns regarding approved accommodations.

In the enclosed Resolution Agreement, the College agreed, without admitting to any wrongdoing or violation of law, to review and revise its Section 504 plan that will articulate how students may request and obtain accommodations, how the College will

ensure that instructors will implement approved accommodations, and how the College will determine whether an accommodation may result in a fundamental alteration of a program; to review and revise the student disability handbook to be consistent with the College's Section 504 plan; to provide notice to the College community about the Section 504 plan and the student disability handbook; and to provide Section 504 training to faculty and staff. OCR has determined that the implementation of the Resolution Agreement will resolve the compliance issues identified in this complaint.

This concludes OCR's investigation of the complaint and 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.

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, we 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 privacy.

If you have any questions about this letter, please contact Jenny Moon, Civil Rights Attorney, at 415-486-5538.

Sincerely,

/s/

Mary Beth McLeod
Team Leader

Enclosure

cc: Dr. XXXX XXXXXXXXXXXXX, Dean of Academic and Student Affairs (same address)