

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTSREGION IX
Old Federal Building
59 United Nations Plaza, Room 219
San Francisco, California 94102

December 30, 1999

Augustine F. Gallego
Chancellor
San Diego Community College District
3375 Camino Del Rio South
San Diego, California 92108

(In reply, please refer to Docket Number 09-98-2154.)

Dear Chancellor Gallego:

On July 31, 1998, the U.S. Department of Education (Department), San Francisco Office for Civil Rights (OCR) notified you that it had received a complaint from an individual (Complainant) alleging that the San Diego Community College District (District) discriminated against her on the basis of her psychiatric disability. Specifically, the Complainant alleged that the District had discriminated against her by subjecting her to disciplinary action and suspending her for a statement she made on May 6, 1998. She claimed that the administration interpreted her statement in a biased manner because it was aware of her disability. She also alleged that she was not given due process at her disciplinary hearing because she was prevented from reading some of the witness statements presented to the disciplinary committee.

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 (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.

OCR investigated the following issues: whether the District discriminated against the Complainant in the disciplinary process and whether the District failed to protect confidential information regarding the Complainant's disability. In investigating this complaint, OCR reviewed evidence provided by both the District and the Complainant and conducted interviews with the Complainant, District staff, and individuals knowledgeable about the facts of the case. In addition to reviewing documentation from the District, OCR listened to tapes of an Associated Student Body (ASB) meeting [which

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the Complainant allegedly disrupted], and the Complainant's disciplinary hearing and reviewed written statements presented as evidence at the hearing.

In this matter, circumstances existed which provided the District with a legitimate basis for inquiring into the ability of the Complainant to meet the non-academic expectations of the District. However, OCR determined, by the preponderance of the evidence that, the particular process that was applied to the Complainant excluded her from the educational program of the College District based on her status as an individual with a disability in violation of Section 504 and Title II of the ADA.

Without admitting to any violations of law, the District has agreed to take the remedial actions set forth in the attached Voluntary Resolution Plan (VRP), which, when fully implemented will bring the District into compliance with Section 504 and Title II with regard to the concerns raised by this complaint. The following is a summary of the legal standards, factual bases, and legal analysis supporting the OCR determinations.

Legal Standard

The Regulation implementing Section 504 is found at 34 C.F.R. Part 104. The Regulation implementing Title II is found at 28 C.F.R. Part 35.

Under 34 C.F.R. § 104.3(j)(1) and 28 C.F.R. § 35.104, an individual with a disability is any person who has a physical or mental impairment, which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Under 34 C.F.R. § 104.3(j)(2)(i)(b) and 28 C.F.R. § 35.104, a physical or mental impairment includes any mental or psychological disorder, such as mental illness.

Under 34 C.F.R. § 104.3(k)(3) a qualified individual with a disability, with respect to post-secondary education, is one who meets the academic and technical standards requisite to participation in the recipient's education program.

Under 34 C.F.R. § 104.4(a) and b(1)(i) and 28 C.F.R. § 35.130, no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

The term direct threat does not appear in the Section 504 Regulation. However, the concept was first articulated by the United States Supreme Court in a case construing Section 504, *School Board of Nassau City v. Arline*, 480 U.S. 273, 107 S.Ct. 1123 (1987). A "direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" should

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entail an individualized assessment. This assessment should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or best available objective evidence. See, *Bragdon v. Abbott*, 524 U.S. 624 (1998), and EEOC Enforcement Guidance on Americans with Disabilities Act and Psychiatric Disabilities (EEOC Notice Number 915,002, April 25, 1997).

Factual Summary

This is a matter that entailed a complex set of circumstances. A few summary points are set forth below:

The Complainant met the academic standards of the institution at all times. Before May 6, 1998, when certain critical events took place, the Complainant had no record of disciplinary or conduct problems at the University.

Prior to May 6, 1998, the District staff had heard rumors about the Complainant's mental health status, including an attempted suicide and that she had been hospitalized following killing a cat. The sources of these rumors in some instances had reputations for gossiping and in other instances were known to dislike the Complainant for reasons not related to her mental health status. Some individuals complained about the Complainant's conduct but no individual cited an instance where the Complainant had threatened them.

On May 6, 1998, the Complainant attended a student government (ASB) meeting on the Campus. A tape recording of that meeting shows that throughout the meeting the Complainant was persistent in her inquiries regarding the whereabouts of money that had been raised by the ASB, a concern that, according to the ASB Advisor, had come up before and been a cause of concern to others. The Complainant was out of order 4 or 5 times during the meeting and at one point raised her voice when it did not appear that her concern would be addressed. During a subsequent disciplinary hearing, the ASB Advisor referred to the Complainant's inquiries as being a legitimate concern raised at an inappropriate time and characterized her conduct as a "bit" disruptive. According to the ASB advisor, all of the ASB members were in the process of learning the rules of order, and the tapes reflect that other students beside the Complainant were also out of order during the meeting, although not as frequently. The tape of the meeting makes clear that the Complainant did not tie up or obstruct the meeting. The meeting progressed through the normal course of the agenda and the Complainant participated in a constructive manner when other subjects were discussed.

The ASB Advisor did notice that the Complainant was behaving in a manner which was unlike her, that her face looked different, she was looking into space, her zipper was down, and she was mumbling and agitated. As a result, he thought she might be drunk. When the meeting was over and he was certain that the other students had left the room, ASB Advisor approached the Complainant. The ASB Advisor asked the

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Complainant if she was drunk. She replied that she was not drunk, but that she was upset. The ASB Advisor provided two slightly different versions of what occurred next. In his report to the District administration, the ASB Advisor stated that when he asked the Complainant why she was acting strangely, she responded by saying she was so upset she might kill herself or someone else. In his witness statement for the disciplinary hearing, he states that, he came up to the Complainant and asked her why she had said she might kill herself or someone else but makes no mention of her saying this directly to him. The Complainant disputed having made this statement and stated that while she was collecting her books she muttered under her breath that she would "kill someone if she didn't find out what happened to that money," and that ASB Advisor overheard this. It is undisputed that the Complainant's statement did not name any specific individual nor did she threaten the advisor.

The ASB Advisor told the Complainant that he would have to report the alleged statement but agreed that she could attend her next class. After accompanying the Complainant to her class, the ASB Advisor informed the Instructor of the class, Instructor A, of the Complainant's statement. Thereafter, college faculty and administrators did not agree on what to do with the Complainant. The Instructor wanted the student removed but felt that an Assistant Dean was responsible for removing her. The Assistant Dean, after consulting with another administrator, concluded that he lacked the authority to remove her but felt the Instructor had the authority. During this period the Complainant had done nothing to disrupt the Instructor's class.

Once removed to his office, the Assistant Dean asked the Complainant if she had stated that she wanted to kill herself or others. The Complainant denied making the statement. The Assistant Dean called ASB Advisor in, asked him to repeat what he thought the Complainant had said and asked the Complainant again if she had said that. The Complainant was silent. Both the Assistant Dean and ASB Advisor interpreted her silence as an admission that she had made the statement. According to the Assistant Dean, the Complainant went on to tell him that she was "insane," and that she had killed a cat, although during his interview with OCR, the Assistant Dean seemed unsure as to how he had received the information regarding the cat. The Assistant Dean sent the Complainant home after this meeting and instructed her not to return for a couple of days. He subsequently spoke with Instructor A about his conversation with the Complainant.

Once the Complainant had been sent home, the Assistant Dean submitted a report to other members of the administration via e-mail regarding what had occurred. In response to the Assistant Dean's report, Dean Ortega St. John (the Dean) sent an e-mail requesting that further action be taken concerning the Complainant. The Dean emphasized the fact that the Complainant had described herself publicly as insane, and that both faculty and other students knew this information. The Dean wrote that he did not believe that the Complainant had been excluded from school for a sufficient amount of time considering the repercussions of her remarks as well as her classroom behavior.

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He noted that the instructors did not feel comfortable returning to campus knowing that the Complainant was a self-identified "insane" person who had spent the last three years in and out of a mental hospital and who had attempted to commit suicide three weeks earlier.

When asked for the basis for his recommendation, the Dean informed OCR that on May 6, 1999, about 4 or 5 students came to his office stating that they were frightened because the Complainant had threatened to kill herself or others, and because she had said that she had killed a cat. The Dean could not remember who the students were but believed that two of them might have been Ms. Red and Ms. Blue. When asked, none of the students recalled coming to him as a group, although they did speak to him individually. Ms. Red informed OCR that when she went to speak with the Dean, it was out of concern that the Complainant was not being treated fairly. Additionally, none of the students had knowledge of the Complainant's alleged threat to kill herself or others. The Dean also believed that the Complainant was abusive during the ASB meeting.

The Dean informed OCR that he felt that he had a "management problem" on his hands. The Dean told OCR that his primary concern was not the Complainant's actions. Rather, he was concerned about the disruptive impact knowledge of her statements about her mental health were having on the educational atmosphere of the District. Based on these factors, the Dean decided that the Complainant needed to be excluded from campus for a longer period of time.

The Dean then referred the incident to Fred Martin, the Disciplinary Officer at that time. The Disciplinary Officer informed OCR that in determining what charges should be brought against the Complainant, he interviewed practically everyone involved. However, with the exception of Ms. Blue, none of the individuals involved recalled to OCR being interviewed by the Disciplinary Officer. The Disciplinary Officer did not take notes or keep records of any interviews he may have conducted. The Disciplinary Officer did not speak with the Complainant or obtain a witness statement from her. Ms. Red claims that when she attempted to speak with the Disciplinary Officer, he would not take her statement.

In a letter dated May 13, 1999, the Disciplinary Officer informed the Complainant that she was being charged with violation of District Policy 3100, section 3.4, which is essentially causing a physical or verbal disruption of instructional or student services activities, administrative procedures, public service functions, authorized curricular or co-curricular activities. The letter indicated that the charges were specifically based on the Complainant's conduct during the May 6, 1998 ASB meeting. The letter also indicated that an additional factor was the fact that the Complainant had created an uncomfortable atmosphere with her fellow students by informing them, ASB Advisor and the Assistant Dean that she had killed a cat, might kill herself or someone else, and that she was "insane." Lastly, the Disciplinary Officer informed the Complainant that the recommended sanction was suspension from all programs and premises of the District until the end of the Summer Semester, September 3, 1998.

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The disciplinary hearing was held on May 20, 1998. The College presented several witnesses and written statements from all of the witnesses, including three who did not testify at the hearing. At no time was the Complainant given an opportunity to read the statements of those witnesses who did not appear, although the Disciplinary Officer submitted these as evidence at the end of the hearing.

After the hearing, the Disciplinary Committee met and prepared findings for the President. The committee unanimously agreed that there was insufficient evidence to show that the Complainant had disrupted the ASB meeting. The committee did recommend that a psychiatric evaluation be requested from the Complainant because she admitted that she was "certifiably insane" and an alcoholic. The committee felt that the Complainant shared the blame for creating an uncomfortable atmosphere on campus. In a letter dated May 26, 1998, the President informed the Complainant that she was suspended until she could submit a psychological evaluation indicating that she was not a threat to others. According to his letter, the President's decision was based on the Complainant's alleged statement she was going to kill someone and the fact that she stated that she was "certifiably insane."

Analysis

Student conduct issues are in no ways limited to persons with psychiatric disabilities. In the main, administrative practices that are well designed to address the conduct of non-disabled students will address the issues that arise for students with psychiatric disabilities. The regulations prescribe particular set of practices and OCR has not issued guidance suggesting that one best way exists. Nonetheless, common themes are presented in the substantial amount of commentary that has been issued by post-secondary educators, administrators, and professional organizations. Much of the literature suggests that well prepared institutions have planned in advance the following:

- An assessment of resources available on and off campus to deal with conduct matters.
- A plan for intra-institutional jurisdiction, including when it may be necessary to go outside the Institution for assistance.
- A team of individuals trained to deal with conduct matters.
- A clear code of conduct: one which is comprehensive, includes progressive discipline, due process for the student, and is sensitive to the First Amendment rights of the person alleged to violate the code.
- Where alleged "direct threat" circumstances arise, the assessment of an individual with a disability must be individualized and free from stereotypes.

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The events surrounding the treatment of the Complainant were very problematic for a number of reasons. These problems underscore the value of a well-prepared institution-wide plan.

- As events unfolded, multiple District employees appeared to be unclear about roles or responsibilities. Sensitive personal information was traded. Yet, no administrator interviewed by OCR raised confidentiality concerns.
- None of the administrators initially involved in this matter had any training in assessing the degree of danger represented by the Complainant or a plan for where to obtain such information.
- Many difficulties arose because the Complainant's threat did not fall under the code of conduct at SCCD:
 - The Complainant did not commit a violent act with regard to any person, on or off campus. In her statement to the ASB advisor, she named no specific individuals other than herself as the objective of her alleged threat. She was placed into the disciplinary process only as a result of a response to an inquiry by a faculty member. She, arguably, threatened self-injury and made a generalized threat of violence. No disciplinary charge was brought for either of these statements. The charges were seriously misaligned with the facts the District had before it. OCR recognizes the deference that is owed institutions in what they chose to find disruptive. But in this instance, neither the ASB advisor who witnessed the Complainant's conduct, nor the tape within the possession of the District suggested that the Complainant had in fact disrupted the ASB meeting. The disciplinary committee ultimately reached the same conclusion
 - The charge of disrupting the educational process by making others "uncomfortable" is also not in the code. It should not be. No college would suggest that it ban students of a particular race, color, national origin, or gender solely because the presence of such persons makes others uncomfortable. Nor can a college suspend a student because his/her disability has traditionally carried with it negative stereotypes pertaining to health or safety. This is not to say that the District should have ignored and left uninvestigated or unverified the statements attributed to the Complainant by others, the Complainant's own statements, or her observed behavior, but this information should have been used to assess whether and the degree to which she represented a threat to herself or others, not the degree of her acceptance in the higher educational community.
- The Complainant did not receive due process in a number of ways:

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- Many interim decisions were reached about the Complainant based on rumors. These rumors pertained entirely to events that took place off-campus and were not directly witnessed by a member of the SCCD administration or SCCD students. The investigation of these rumors appears to be less than thorough. The Complainant was not interviewed by the investigator. Persons allegedly interviewed by the District stated to OCR that they had not been interviewed. Persons alleged to have supported a conclusion that students feared for their safety stated to OCR that they had come forward in the Complainant's defense.
- The District appears not to have followed its own processes. The Complainant was not given a meeting with the President prior to her suspension as required by the California Education Code Section 66017.
- In the hearing, she was not allowed to review, either in full or redacted form, some determinative written evidence used against her in the hearing.

Misconduct is not a typical problem of individuals with psychiatric disabilities. When it does arise, as a general proposition, a college or university may discipline a student with a disability who has violated the student code of conduct, the same as another student. When a student has been referred to the discipline process, the focus should be on whether or not that student has committed a particular act or set of acts which violate the institution's conduct code.

Usually, a student's disability should not play a role in the disciplinary process except in two limited mitigating circumstances: (1) where the student's inability to comply with the conduct code is the result of the institution's failure to provide a requested lawful reasonable accommodation or (2) where, as part of the regular disciplinary process, the college or university takes into account mitigating situational factors. For example, some post-secondary institutions take into account as a mitigating factor the fact that a misbehaving student just lost a parent or was in the middle of a difficult divorce. Where such factors are taken into account, a student's disability should be included among mitigating factors considered by a college or university.

There may be instances, however, where a student engages in behavior which, though not a violation of the student conduct code, causes college administrators to be concerned about the health and safety of the student or others on campus. Such a situation existed in the current case. In such instances, a college or university may lawfully exclude a student from participation in its program for safety reasons if the school can show that the student's participation in the program would pose a "direct threat". Under the ADA and Section 504 case law, "direct threat," means a significant risk of substantial harm to the health or safety of the individual that cannot be eliminated or reduced by reasonable accommodation. A "significant" risk is a risk that poses a high probability of harm. A speculative or remote risk is insufficient.

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Whether or not the student has a psychiatric disability may play a role in this determination. For this reason, the determination that an individual poses a direct threat must be based on an individualized and objective assessment of the student's present ability to safely participate in the program of the college or university, considering a reasonable medical judgement relying on the most current medical knowledge and/or the best available objective evidence. The school must identify the specific behavior that would pose a direct threat. An individual does not pose a direct threat simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability. The institution's analysis should include an assessment of the likelihood, imminence, and nature of future harmful conduct.

It is apparent from the evidence in this case, that students and staff had received information about the Complainant that made them fear for their safety. It is also apparent from the evidence that, this concern, and not the fact that she had violated the conduct code, motivated District administration to take disciplinary action against the Complainant. The District used the disciplinary process to exclude the Complainant from its educational program for an extended period of time, not because she had violated the code of conduct, but to address fears about whether the Complainant was a threat to others. This particular process did not entail making an individualized and objective assessment of the Complainant's ability to safely participate in the District's program based on a reasonable medical judgement relying on the most current medical knowledge and/or the best available objective evidence. Nor did the District identify the specific behavior that would pose a direct threat. Ultimately, the disciplinary committee concluded that it was necessary to focus on these safety related, medical questions, but only after the Complainant was put through a process of addressing alleged code violations that were not relevant to this process and which proved unfounded when heard.

Conclusion

OCR determined, by the preponderance of the evidence that, the particular process that was applied to the Complainant excluded her from the educational program of the College District based on her status as an individual with a disability in violation of Section 504 and Title II of the ADA. The District without admitting to any violation of law has entered into a voluntary resolution plan that addresses OCR's concerns in this matter.

OCR thanks the District for its cooperation in reaching a voluntary resolution of this matter.

This letter concludes OCR's investigation of this matter. This letter is not a determination of the compliance status of the District with respect to any issues other than those specifically and explicitly addressed herein.

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Under the Freedom of Information Act, it may be necessary to release this document and related documents upon request. If OCR receives such a request, it will seek to protect, the extent possible by law, personal information, which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Further communications with OCR concerning implementation of the remedial agreement should be directed to Paul Grossman at 415-556-4275.

Sincerely,



Stefan Rosenzweig
Regional Director
San Francisco Enforcement Office
Western Division

Enclosure: VRP

VOLUNTARY RESOLUTION PLAN
San Diego Community College District
Docket Number 09-98-2154

In order to resolve the OCR complaint docketed above, the San Diego Community College District (District) agrees to implement the following voluntary resolution plan. In agreeing to this plan, the District is not admitting to or conceding any violation of Federal law.

- (1) Representatives of OCR will provide training to staff and administration of the Continuing Education Division regarding mental and emotional disabilities.
- (2) Representatives of OCR will provide training to all staff involved in the disciplining of students, including the Disciplinary Officer(s), Deans, Assistant Deans, the President of Continuing Education, and the Assistant Chancellor of Student Services, regarding the discipline of students with mental and emotional disabilities.
- (3) The District will establish and issue a memorandum regarding the confidentiality of medical information and information regarding the perceived or actual disabilities of students, regardless of how this information is obtained. This memorandum should include, but not be limited to, guidelines for the dissemination of such information in emergency situations. A draft of this memorandum will be submitted for review and approval to OCR within 30 days of the date of this resolution plan.
- (4) The District will develop, with the assistance of OCR, a mechanism, other than a disciplinary hearing, for evaluating whether a student's conduct, which is a manifestation of an actual or perceived disability and is not a violation of the student code of conduct, but does cause reasonable concern to the District, warrants further action, such as a psychological evaluation, counseling, suspension, probation, etc. A draft plan will be submitted for review and approval to OCR within 45 days of the date of this resolution plan.
- (5) The District will add to District Policy 3100 language to ensure that a student's conduct, which is a violation of the student code of conduct, is evaluated without prejudice to the student's actual or perceived disability. A draft version of this language will be submitted for review and approval to OCR within 45 days of the date of this resolution plan.
- (6) As consistent with District policy when a student has been suspended pending a disciplinary hearing, the notice to students regarding the pending charges and the date and time of the disciplinary hearing will include

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notification of a scheduled meeting between the President, or his designee, and the student if such meeting did not occur before the interim suspension.

- (7) The District will expunge from (b)(6),(b)(7)(C) (complainant) student record any mention of the suspension, the Disciplinary hearing and the Psychological Evaluation. The District will notify OCR in writing of this action within 15 working days of signing this agreement.
- (8) The District will establish required procedures for the Disciplinary Officer to investigate complaints. This includes the establishment of explicit required procedures to conduct an investigation and the establishment of a record keeping system of the Disciplinary Officer's investigation, showing when and who was interviewed and how the recommended actions were determined. A draft copy of these procedures will be submitted for review and approval to OCR within 30 days of the date of this resolution plan. The District will provide to OCR a list of all disciplinary actions that result in investigations by the Disciplinary Officer within six months of the adoption of these procedures. OCR will randomly review case files to ensure compliance.
- (9) The Disciplinary Officer of Continuing Education will be given in depth training by representatives of OCR on how to conduct and document investigations.
- (10) The District will establish a method to provide meaningful access to witness statements when they are to be used during a disciplinary hearing. A copy of the proposed plan will be provided to OCR within 30 days from the signing of this VRP.
- (11) The District will issue memorandums to Dean Ortega, Assistant Dean Sy Lyons, Phylis Wolfe, Fred Will, Fred Martin, Sara Strand and Assistant Chancellor Lynn Neault stating they were involved in a disciplinary action that led to an OCR complaint being filed against the District. Included in the memorandum will be copies of District policies regarding privacy and hostile environment. A draft of the memorandum and the policies will be sent to OCR for approval within 30 days from the signing of this VRP.
- (12) The District will provide Rachel Freitas and Sylvia Alkehem with the District's policies regarding hostile environment and harassment.


Augustine P. Gallego, Chancellor

7-22-99
Date