



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

**FEB 28 2006**

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San Francisco, California 94102  
www.ed.gov

Robert J. Henry  
School and College Legal Services of California  
5350 Skylane Boulevard  
Santa Rosa, California 95403

(In reply, please refer to case number 09-06-2011.)

Dear Mr. Henry:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint filed by a Student<sup>1</sup> against Napa Valley College alleging discrimination based on disability.

The Student alleged that the College's Disabled Students Programs and Services (DSPS) department failed to provide her with the lumbar support chairs she requested due to a back injury. She further alleged that, when she either located chairs herself or was provided chairs through DSPS, those chairs were either unavailable when she needed them or inappropriate for her use. She alleged that the nursing program faculty did not cooperate with the implementation of this accommodation.

Additionally, the Student alleged that the Nursing program faculty prohibited her from completing the program's clinical component because they considered the physical limitations presented by her disability to create a liability. She has also alleged that she was forced out of the program because she was drawing attention to herself through her requests for a special chair.

OCR investigated these issues under the authority of Section 504 of the Rehabilitation Act of 1973 and its implementing regulation, which prohibits discrimination on the basis of disability in federally assisted programs and activities. OCR also has jurisdiction as a designated agency under Title II of the Americans with Disabilities Act of 1990 and its implementing regulation over complaints alleging discrimination on the basis of disability 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 Student and relevant College faculty members and administrators. OCR also reviewed numerous documents submitted by the Student and the College. OCR concluded that the College's actions

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<sup>1</sup> OCR notified the College of the identity of the complainant in letters dated October 24 and November 14, 2005. We are withholding her name from this letter to protect her privacy.

were in compliance with Section 504, Title II, and their implementing regulations. OCR's findings and reasons for this conclusion are outlined below.

### **Findings**

#### **Issue 1: Accommodation**

- The Student enrolled in the College's nursing associate degree program in Fall 2005, which began on August 15. At the start of the program, she informed the nursing faculty that she had a back injury.
- The Student met with a DSPS counselor at the College on August 17 to disclose her back injury and to request a lumbar support chair. At the time, she did not provide sufficient evidence to establish that her back impairment was a disability. However, on August 25, she submitted additional information. This information satisfied the DSPS counselor that the Student was eligible for DSPS services.
- A DSPS specialist stated that the Student initially told her that there was a chair in the classroom that was appropriate for her use. The DSPS specialist gave the Student a sign to put on the chair, reserving it for DSPS use. The DSPS specialist stated that she gave the Student the sign before receiving her verification, contrary to policy, because of the Student's insistence. The Student later complained about the sign, and it was changed to state simply that the chair was reserved.
- The Student told the nursing faculty that she also needed a special chair in the laboratory. A lab assistant had a lumbar support chair in the lab that she was not using, and offered it to the Student, but she refused to use it. On or about August 25, a nursing representative called DSPS to ask for a second chair to be placed in the lab. DSPS representatives stated that they were not aware, until that time, of the Student's request to have a chair in the lab.
- The DSPS specialist obtained "padded" supportive chairs from the College's facilities department of a type they routinely use for students with back injuries. She put one in the lab for the Student shortly after receiving the request.
- The Student contacted DSPS on or about September 1 to report that the chair she was using in the classroom was not consistently available. The DSPS Specialist had trouble accessing the classroom, but left a second chair outside the room on September 7. She called the Student to inform her that the chair was there for her.
- At that time, the Student reported to DSPS specialist that the "padded" chair in the lab was not comfortable for her. The DSPS specialist then received permission from the Dean of DSPS to order two new lumbar support chairs for the Student's use in lecture and lab. The new chairs were ordered the week of September 12, and were

in DSPS by September 19. After a couple of days of assembly and some difficulties accessing the classrooms, both new chairs were in place on September 22.

- o The Student alleged in her complaint that the College did not provide a chair in the lab because it was not in the budget. Later, the Student stated that the nursing faculty told her that a special chair would not fit through the door between the two lab rooms, and that is why she could not have a special chair in the lab.
- o Nursing professors, the Dean of the nursing program, and the Dean of Health Occupations all stated that the Student had supportive chairs available for her use in the classroom and in the lab after the first week of classes. They stated that on a numerous occasions, although the Student was aware of the chairs, she chose not to use them, instead sitting on a regular chair, a file cabinet, or the floor.
- e A nursing professor stated that she remembers two times when other students were sitting in the Student's chair. Both times, the professor asked the students to move. The professor offered to make an announcement to the class directing them not to sit in the chairs, but the Student refused. The professor stated that, in those instances, the Student's chair was occupied because the Student was late to class. A nursing professor stated that when she asked the Student why she was not using the chair, the Student said that people were jealous of her chair. The Student herself wrote that "other students were feeling resentful that they didn't have a special chair for themselves."
- The Dean of DSPS, DSPS representatives, the Dean of the nursing program, and the nursing faculty all stated that neither the Student's back disability, nor the Student's alleged difficulties with the chairs, contributed to her academic difficulties (discussed below). The Dean further stated that the Student came to her with many issues and concerns, but never brought the chairs to her attention. The Student herself does not allege that problems with the chairs caused her to perform poorly in the program.

## Issue 2: Dismissal

- o During the first half of the fall semester, nursing students participate in one course. This course, Nursing 141, has lecture, seminar, and clinical components. The first six weeks of the clinical component are completed in the on-campus lab, where students obtain the knowledge and skills necessary to perform their clinical placements in local hospitals.
- During these first six weeks, student preparedness for clinical participation is evaluated through various measures including participation in the nursing skills labs, successful completion of various skills tests (such as a vital signs test and a medical dosage calculation exam), and completion of videotaped skills.

- 8 On September 22, before the hospital clinical began, a nursing professor dismissed the Student from the nursing program by initiating an "instructor drop."<sup>2</sup>
- 8 The nursing professors deny that they dismissed the Student because of her disability, or any manifestations of her disability. The Dean stated that because she considers nursing to be an intellectual profession, she does not endorse any physical capability requirements for nurses, nor does the program have any.
- Instead, the professors stated that the Student was dismissed from the program because she had not met the course objectives, and lacked the judgment and skills to enter the clinical setting. They further stated that she did not attend the required laboratory sessions, and did not have the required knowledge in the areas of patient safety and comfort, safe standard procedures, hygiene, and infection control.
- o The Nursing Program Student Handbook (the Handbook) provides that "nursing faculty may recommend the withdrawal of any student whose health, conduct, or academic performance makes it inadvisable for the student to continue in the nursing program."
- The Handbook further states that "faculty may remove students from the clinical area and recommend dismissal of students from the nursing program for unsafe, unprofessional, dishonest and/or disruptive conduct." Unsafe nursing practice includes "any action or inaction that threatens a patient's safety and physical health."

### Qualifications

- The Student did not demonstrate sufficient competency in a video skill, a primary way that faculty assess preparedness for the hospital clinical.
- e The video skills are taped in the laboratory and graded by the faculty. Each student must successfully demonstrate one randomly assigned skill (out of six) in each of three levels by the ninth week of the semester. Students typically must complete a level 1 and a level 2 skill before beginning clinical participation.
- " Students who fail a video skill are allowed to retake it. The student must redo the same skill he or she failed first, and then do another randomly assigned skill at the same level, before proceeding to a skill at the next level.

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<sup>2</sup> Although the Student claims that she withdrew from the nursing program herself, the College provided documentation, including registrar database printouts, indicating that the Student was dismissed from the course through an "instructor drop."

- The Student taped her first video skill ("Bathing a Client") on September 16. Professors noted that the Student waited until only a few days before the beginning of the clinical to complete her first skill, and that most, if not all, of the other students had completed their first (if not second) video skill by this time.
- A professor graded the video skill on September 17 and 18, and documented that "it was obvious that [the Student] had not practiced this procedure according to this criteria," concluding that the Student made "many critical errors regarding safety, infection control, and patient comfort." The faculty and the Dean stated that the video demonstrated severe safety concerns both for the patient and the Student. The Student failed the video skill.
- The Student alleges that the bed she used during the video skill was broken, and would not lower. She stated that this contributed to her poor performance on the skill. Immediately after the Student's video, however, the lab assistant confirmed that the bed was functioning properly.
- The Student stated that she had scheduled a time to redo the level 1 video skill on September 20, the day before the clinical orientation was to be held. She stated that she was not able to go to the lab at the time she scheduled, because the nursing professors held a meeting with her at that time. She alleges that she therefore did not have the same opportunity to make up the video that other students had. (OCR notes that in her written complaint the Student alternatively alleges that the September 20 meeting caused her to miss a doctor's appointment.)
- The faculty acknowledge meeting with the Student on September 20, but state that they were not aware that the Student had a lab appointment, and did not deter her from making up her video skill. Instead, they state that the meeting addressed creating a plan to make up the Student's deficiencies and extensive absences.
- In any event, the faculty stated that, based on the Student's video performance and their observations of her in the lab, they would have had concerns regarding her ability to conduct skills in the clinic safely without intensive additional practice, even if she was able to pass the first required video skills.
  - The faculty described another nursing student enrolled in the program during the same semester. Although that student passed the level 1 video, they had safety concerns related to her participation in the clinic as well, primarily because she had a difficult time following directions. This student was also dismissed from the program before the clinical began. She did not have a disability.
- The faculty also noted that, to their knowledge, the Student did not pass the Vital Signs skills test required to begin the clinical, and had not passed the medical dosage calculation exam required to pass the course.

#### Attendance

- The nursing faculty stated that the Student's poor attendance and participation during the first six weeks of the program was another reason for her dismissal.
- The College attendance rules state that the instructor "may drop the student from the class" if the student "is absent for as many times as a class meets each week."
- Further, the Handbook states: "Nursing students are preparing to work . . . for employers who require [them] to be dependable and reliable as well as safe in giving patient care. Therefore, it is expected that students will be present and on time for all classes, including lectures, tests, seminars, college laboratory sessions as well as clinical and community experiences. Students are responsible for notifying their instructor before any expected absence or tardiness." To pass nursing courses, students "meet all attendance requirements." The Handbook also states that failure to make up laboratory hours can result in a failure for the course.
- Professors documented the Student's absence from a critical thinking seminar, a six-hour body mechanics lab session, a lab session on how to do the video skills testing, and a six-hour presentation on medication administration. One professor noted that the Student had missed a total of 21.5 instructional hours during the first six weeks.
- Although the Student alleges that some of her absences were indirectly related to her disability (she alleges that she had medical appointments related to her back condition) the faculty stated that the Student did not contact them before these missed sessions. Further, the faculty noted that the Student's reasons for missing sessions were often inconsistent, and were often not medical. For example, due to the Student's concern about having to appear in court, a professor wrote a letter for the Student explaining that her attendance each day was mandatory.
- The faculty also documented numerous instances in which the Student was late to class and to lab sessions. She did not contact the faculty before these tardy arrivals. Further, they stated that on various occasions, while the Student attended lab, she did not engage with other students as required.
- The Student alleges that she made up a significant portion of the lab work that she missed. The faculty, however, described the ways in which the Student's attempts to make up the missed work were insufficient, and submitted documentation supporting their conclusions.
- The Student further alleges that she was not given a sufficient or fair opportunity to make up her absences. She stated that on September 20, her professors told her

that she should withdraw from the program because any attempt she made to catch up would result in failure. She stated that she was told not to bother to attend the clinical orientation on September 21. (OCR notes that, in her written complaint, the Student states that she was told to go to the orientation.)

- Professors state that the September 20 meeting was held to inform the Student that she would have to withdraw from the program *unless* she undertook an aggressive makeup plan. They told her that if she wanted to continue in the program, she must attend the clinical orientation, and should meet with them on September 22 to create a plan to increase her skill level and complete the laboratory work she missed.
- The Student did not attend the September 21 clinical orientation (and failed to contact the instructor), did not meet with the faculty on September 22, and did not attend class on September 22. She was then dismissed from the program.

The Student discussed her dismissal with the Dean of Health Occupations. He upheld the faculty's decision to withdraw her from the program. The Student was given the opportunity to reenroll in the program consistent with the College's policy.

## Analysis

The regulation implementing Section 504, at 34 CFR Section 104.43(a), provides that qualified persons with disabilities may not be excluded from participation in, or be denied the benefits of, any of the College's educational aids, benefits or services on the basis of disability. The College, specifically, may not exclude any qualified student from a course or any other part of its education program or activity. 34 CFR § 104.43(c). A corresponding requirement exists under Title II of the ADA at 28 CFR Section 35.130(a). Additionally, the regulation requires that the College provide reasonable, requested auxiliary aids and services as necessary in order to facilitate students' participation in the College's program. 34 CFR § 104.43(d). A similar duty to provide reasonable modifications under Title II of the ADA is found at 28 CFR Section 35.130(b)(7).

## Issue 1: Accommodation

OCR found that the College was in compliance with the applicable law with respect to the provision of auxiliary aids and services for the Student. The College's DSPTS office accepted the Student's description of her disability and her request for a lumbar support chair. Initially, the Student indicated that there was a chair in the classroom she could use (which was thus reserved for her use), and did not request a chair in the lab. Within a few days of receiving the request for a chair in the lab, DSPTS delivered a padded, supportive chair for the Student's use. Within six days of learning that the classroom chair was not consistently available, DSPTS delivered a second padded chair for the Student. Furthermore, DSPTS readily ordered new chairs for the Student upon learning

from her that the padded chairs were not adequate. In two weeks' time, DSPS ordered, received, assembled and placed the new chairs for the Student's use.

OCR determined that DSPS implemented the Student's requested auxiliary aids within a reasonable timeframe. Further, OCR found that the individuals in DSPS and in the nursing program consistently attempted to address the Student's issues with the chairs, by purchasing and providing alternative chairs, ensuring the chairs were available for the Student's use, encouraging the Student to use the chairs, and counseling the Student over concerns she had about the use of the chairs. Finally, OCR found that any inconsistency in the chairs' availability did not contribute to the Student's academic difficulties.

## Issue 2: Dismissal

OCR also found that the College was in compliance with the applicable law with respect to the dismissal of the Student from the program.

Dismissing a student with a disability from a program is not discriminatory if the student is not "otherwise qualified" to participate in the program. Under the regulations implementing Section 504 and Title II of the ADA, a "qualified" postsecondary student is one who meets the essential academic and technical standards of the institution with or without reasonable accommodation. See 34 CFR § 104.3(1)(3); 28 CFR § 35.104. Academic requirements may include that a student maintain a certain grade point average. Technical requirement may include attendance rules. Demonstrating mastery of certain skills might fall into either or both of these categories. Of course, an individual with a disability who has documented her or her disability and has followed reasonable rules for establishing eligibility for academic adjustments and auxiliary aides (accommodations) is entitled to be held to the academic and technical standards with the benefit of reasonable accommodations.

In this case, the Student contends that she was not dismissed for failing to meet academic and technical standards. Rather, she alleges that the faculty believed that someone with her disability could not safely perform as a nurse, and that the faculty resented her for her disability and her accommodation request.

The reason articulated by the faculty for dismissing the Student was that she was not qualified to advance to the clinical stage of the nursing program, not because of her disability, but because of her lack of preparedness and the safety issues that it posed. The preponderance of the evidence collected by OCR affirmed this explanation.

As discussed above, OCR found no evidence that delays or inconsistencies in the receipt of an auxiliary aid (a lumbar support chair) adversely impacted the Student's ability to meet the College's academic and technical standards. There is mixed evidence that her attendance problems were related to her disability, but no evidence that her disability hindered her ability to report her absences as required by the



College's established rules. Similarly, there is no evidence that she requested, as an accommodation for her disability, a modification to the College's existing attendance rules. Thus, OCR would conclude that the Student had been discriminated against based upon her disability only if it found that she had actually met the College's academic and technical standards but was nonetheless dismissed for failing to meet them, or if she was dismissed for failing to meet standards that were different than those enforced upon non-disabled individuals.

OCR found that the Student was held to the same standards as all other students in the nursing program, and that the College reasonably concluded that she was not qualified to continue in the program due to her failure to master required skills and her numerous unexcused absences.

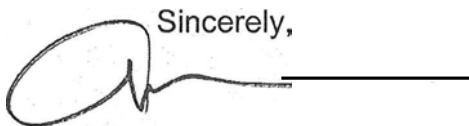
The Handbook gives the faculty the authority to dismiss any student whose conduct or academic performance makes it inadvisable for the student to continue in the program, and further provides that students may be prohibited from participating in the clinical and dismissed from the program for unsafe or unprofessional conduct. The nursing faculty's conclusion that the Student lacked the judgment and skills to enter the clinical setting, and did not have a sufficient level of knowledge about patient safety, is supported by the Student's performance on her video skill and her lack of completion of required lab experiences. OCR reviewed the video skill tape of the student. Without more, OCR would not be qualified to make a determination of nursing skill. However, nothing OCR viewed on the tape revealed an obvious or logical contradiction to the determination made by the nursing faculty, and nothing in the tape suggested that the faculty's conclusion was a pretext for disability discrimination.

OCR found that the Student was given an equal opportunity to complete the video skills successfully, and was given extra opportunities to attempt to make up her absences and develop the necessary skill level. Although the Student alleges that the faculty told her that she would have to withdraw or she would fail, OCR found that the faculty instead set out specific expectations the Student would have to meet (i.e., attend the clinical orientation, attend class regularly, meet with the professors on a specified date to create a makeup plan) in order to continue in the program. The Student failed to meet these expectations. Another nursing student, who had no disabilities, was dismissed during the same semester on performance standards similar to those imposed on the Student. Both students were given the opportunity to reenroll in the program consistent with the College's policy.

In sum, OCR found that the faculty reasonably concluded that the Student failed to meet the essential academic and technical standards of the nursing program. This failure cannot be explained by an absence of an approved accommodation or by the application of different or higher standards than those applied to non-disabled students. Accordingly, the Student was not a qualified individual with a disability and her dismissal did not violate Section 504 or Title II of the ADA. OCR finds the College in compliance with Title II, Section 504, and their implementing regulations with respect to the issue investigated in this complaint. OCR is closing this complaint as of the date of this letter.

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OCR would like to thank the College for its cooperation in the investigation of this matter. If you have any questions about this letter, please contact James Wood at (415) 556-4247.

Sincerely,  


Charles R. Love  
Program Manager

Cc: Dr. Christopher McCarthy, President